THE BOOK WAS DRENCHED

TEXT LIGHT WITHIN THE BOOK ONLY

UNIVERSAL
LIBRARY
OU_162804
UNIVERSAL
LIBRARY

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL,** the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON,** the Courts of the Judicial Commissioners of **CENTRAL PROVINCES, OUDH, PESHAWAR** and **SIND**

REPORTED IN

The following 30 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Lahore** (1) Indian Law Reports, (2) Law Journal (3) Punjab Law Reporter, (4) Punjab Weekly Reporter; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Times, (4) Law Weekly, (5) Weekly Notes; **Nagpur** (1) Law Journal, (2) Law Reports; **Oudh** (1) Cases, (2) Law Journal, (3) Oudh and Agra Law Reporter; **Patna** (1) Cases (2) Indian Law Reports, (3) Law Reporter, (4) Law Times; **Rangoon** (1) Indian Law Reports, (2) Burma Law Journal; **Sind** Law Reporter; Criminal Law Journal and All India Reporter,

WITH

A large number of extra Rulings not reported elsewhere.

VOLUME 71, 1923.

EDITOR:

S. D. CHAUDHRI, B.A., LL. B.,

VAKIL, HIGH COURT, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER, AT THE "LAW PUBLISHING PRESS" LAHORE.

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.

45 I. L. R., ALLAHABAD SERIES, FOR JANUARY-FEBRUARY, 1923.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
1	Radha Dulaiya v. Rashik Lal ..	75 14	58	Emperor v. Dulla ..	74 1054
			59	Chhote Lal v. Chandra Bhan ..	*To be printed.*
5	Kuber Das v. Ram Din Kalwar ..	*To be printed.*	66	Sadiq Ali v. Anwar Ali ..	70 805
7	Narendra Bahadur Pal v Bagati ..	68 985	72	Mohindra Man Singh v. Maharaj Singh ..	70 132
11	Emperor v. Kohna Ram ..	68 32	77	Raghubans Upadhya v. Indarjit Singh ..	69 683
13	Bahadur S ngh v. Mohini Kunwar	68 989	79	Kallu Tiwari v. Rajindra Prasad	70 124
17	Emperor v. Shiboo ..	74 1046	81	Balkishan v. Raghubar Dayal ..	74 991
18	Fakhirullah Khan v. Ram Sarup	68 978	84	Sheo Cha an v. Panna Lal ..	70 917
21	Jai Ram Das v. Raj Narain ..	70 553	90	Kishen Singh v. Chhajju S ngh ..	*To be printed.*
25	Emperor v. Ashiq Husain Khan	74 1049			
27	Shib Dayal v. Meharban ..	69 981	96	Munna Lal v. The Collector of Shahjahanpur ..	74 995
43	Jugal Kishore v. The Great Indian Peninsula Railway ..	68 981	99	Prosotam Das Kolapuri v. Lachmi Narain ..	69 688
46	Mohan Lal v. Prasadi Lal ..	74 999	107	Amir-ud-Din v. Muzaffar-ul-Hasan ..	69 641
49	Partab Sing v. Bohra Nathu Ram	*To be printed.*	109	Emperor v. Angnu Singh ..	71 805
53	Iqbal Haidar Khan v. Wasi Fatima Bibi ..	74 1004	115	Lallu Singh v. Gur Narain ..	68 798
56	Great Indian Peninsula Railway Company v. Bhola Nath, Debi Das ..	70 854			

21 ALLAHABAD LAW JOURNAL, FOR JANUARY-FEBRUARY, 1923.

1	Solehman Qadir v. Salimullah Bahadur ..	69 138	32	Moti Ram v. E. H. Rodwell ..	*To be printed.*
9	Banku Behari Dhur v. J. C. Galstam ..	69 163	33	Ram Prasad v Sumer Nath Pande ..	*To be printed.*
13	Badri Narain Singh v. Thakurain Harnam Kuar ..	68 1000	36	Durga Prosad v. Emperor ..	*To be printed.*
18	Ramsumran Prasad v. Shyam Kumar ..	69 71	37	Raj Narain Mal v. Santi Lal ..	*To be printed.*
23	Radha Krishna v. Bisheshar Sahay ..	67 914	39	Khunnu Mal v. Indarpal Singh	71 278
27	Amulya Chandra Banerjea v. The Corporation of Calcutta ..	69 114	42	Emperor v. Har Prasad Bhargava ..	*To be printed.*

21 ALLAHABAD LAW JOURNAL, FOR JANUARY-FEBRUARY, 1923—concld.

50	Suraj Mal v. Nathwa ..	*To be printed.*
53	Badri Singh v. Tulshi Ram ..	*To be printed.*
57	Syed Kasam v. Jorawar Singh ..	68 573
60	Bansi v. Ram Baran ..	*Not reportable.*
61	Abdul Karim Khan v. Qasim Ali Khan ..	70 951
63	Ajodhia Prasad v. Gobind Prasad ..	71 1034
65	Surwan Prasad Tewari v. Basdeo Narain Singh ..	74 124
72	Allu v. Emperor ..	74 260
73	Lakshmi Chand v. Anandi ..	71 574
77	Harihar Prasad v. Udai Nath Sah	74 113
81	Jhinku Singh v. Sital Singh ..	74 133
84	Raghunandan Singh v. Mulak Raj Singh ..	*Not reportable.*
86	Nand Ram v. Hira Dei ..	73 495
88	Dina Nath v. Nek Ram ..	74 75
89	Chander Sen v. Emperor ..	73 576
90	Sri Krishna Sonar v. Emperor ..	71 368
91	Ambika Prasad v. Jhinak Singh	71 321
95	Jhinak Singh v. Ram Baran Singh	71 424
97	Mahadeo Prosad v. Hamidan ..	71 457
99	Shib Dei v. Kaniz Fatima ..	73 536
100	Ram Chandar v. Emperor ..	73 604
101	Jhunwa v. Municipal Board, Dhampur ..	71 291
102	Ram Sahai v. Benode Behari Ghosh ..	71 402
105	Bam Bilas v. Nitya Nand ..	69 990
109	Sadiq Ali v. Abdul Baqi Khan ..	71 460
114	Chet Ram v. Ram Singh ..	67 569
118	Pramatha Nath Roy v. William Arthur Lee ..	68 900
120	Kumar Sainthwar v. Bishun Mohan Sahai ..	73 651
122	Sakat Mal v. Katori ..	71 376
125	Jai Indra Bahadur Singh v. Bijai Raj Kunwar ..	*Not reportable.*
135	Bharat Indu v. Asghar Ali Khan	73 453
137	Nur Muhammad Khan v. Emperor ..	71 525
140	Bahadur Singh v. Ram Bahadur	71 405
143	Khetal v. Emperor ..	73 62
148	Sheo Ramji v. Sri Ridhnath Mahadeoji ..	71 486
149	Hori Lal v. Emperor ..	*To be printed*
153	Hazari Lal Changa Mal v. Kesho Das Ram Gopal ..	*To be printed*
159	Ram Charitra v. Mohan Dei ..	71 488
161	Abdul Wahid v. Municipal Board	71 1032
162	Abul Nasar Rashid-ud-Din Ahmad Khan v. Lalta Prasad..	71 1018
168	Lala Ram Raghubir Lal v. Dip Narain Singh ..	71 749
173	Badlu Singh v. Panthu Singh ..	71 474
175	Tulshi v. Bishnath Rai ..	71 623
176	Sheo Ram Koeri v. Ikramunissa Bibi ..	71 631
179	Mahadeo Prasad v. Emperor ..	*To be printed.*
184	Rahima v. Razzaq Ali ..	71 562

47 I. L. R., BOMBAY SERIES, FOR JANUARY-FEBRUARY 1923.

1	Someshwar v. Someshwar ..	67 658
4	Narayan Ramchandra v. Pandurang Balkrishna ..	*To be printed.*
11	Bachubai v. Ibrahim ..	69 169
15	Dinshaw Edolji v. Jehangir Cowasji ..	69 94
18	East Indian Railway Company v. Dayabhai ..	67 852
28	Purshotam Vithaldas v. Ravji Hari ..	67 754
31	Emperor v. Shankar Balkrishna ..	*To be printed.*
35	Sitabai v. Parvatibai ..	69 172
37	Yeknath Narayan v. Laxmibai..	*To be printed*
44	Maruti Balaji v. Martand Narayan ..	69 175
48	Rajappa v. Gangappa ..	*To be printed*
56	Rangaswami v. Sheshappa ..	68 506
65	Bai Dhondubai v. Laxmanrao ..	68 504
71	Maruti Babaji, *In re* ..	69 96
74	Emperor v. Ahilya ..	*To be printed*
76	Satyabodha Ramchandra, *In re*	69 84
89	Kariyappa, *In re* ..	68 619
92	Lakshmibai v. Yeshvanti Vithal ..	*To be printed*
95	Mahadu v. Krishna ..	68 746
102	Budiuddin, *In re* ..	68 416
104	Amboji v. Hanmantrao ..	69 207
106	Shankar Bharati v. Narsinha Bharati ..	69 80
110	Shivbasappa v. Nilava ..	*To be printed*
117	Government Pleader, High Court, Bombay v. Vinayak Balvant..	*To be printed.*
128	Satappa v. Annappa ..	*To be printed.*
137	Jagannath Narsingdas v. Ravji	*To be printed.*

25 BOMBAY LAW REPORTER, FOR JANUARY-FEBRUARY, 1923.

1	Sayed Kasam v. Jorawar Singh ..	68	573	27	Kathubai v. Mahomed Haji ..	72	202
				31	Shankar v. Secretary of State ..	69	307
7	Rampratab v. Gavrishankar ..	*To be printed.*		34	Gopal v. Manaji ..	*To be printed.*	
13	Nazarally v. Venkapiya ..	*To be printed*		44	Ganesh v. Dattatraya ..	72	249
				47	PaiMani v. Ranchodlal ..	72	256
15	Pickthall, *In re* ..	72	17	51	Vithal Rao v. Vithal Rao ..	72	242
26	Emperor v. Narayan ..	72	25	53	Hans Raj v. Bapu ..	72	275
43	Emperor v. Khoshoba ..	*To be printed.*		55	Menahim v. Solomon ..	*Not reportable.*	
45	Fattechand v. Umaji ..	72	118				
52	Sakha Ram v. Rajmal ..	*To be printed.*		57	Bhagubai v. Appaji ..	72	277
				61	Pana Chand v Dobson ..	72	261
58	Nathalal v. Nadiad Municipality ..	*To be printed.*		64	The Eagle Star &c. Insurance Company v Dina Nath ..	72	266
				73	Madhavji v. Ramnik Lal ..	70	474
63	Bai Parvati v. Nadiad Municipality ..	*To be printed.*		77	Muller Maclean and Co. v. Kaderbhoy ..	72	246
				89	Mulchand v. Rukshmani ..	72	282
68	Naru v. Tai ..	*To be printed.*		92	Maruti v. Dattu ..	72	304
				95	Gulab Rao v. Vinayak ..	72	285
74	Bapurao v. Sadhu ..	72	130	97	Gangadhar v. Ibrahim ..	72	307
76	Hira Chand v. Hansabai ..	72	62	99	Bai Balagavri v. Motilal ..	72	224
77	Appaya v. Lakhamgowda ..	72	127	203	Shrinivas Laxman v. Chanbasapagowda ..	72	290
79	Tribhuvan v. Bai Kushal ..	73	666				
84	Indian Hotels Co. v. Pheroz ..	*To be printed.*		207	Raghunath v. Turnanand ..	72	312
				211	Ramchandra Laxman v. Balbhim	72	315
95	Emperor v. Nasarwanji ..	72	70	214	Emperor v. Haji Sher Mahommed	*To be printed.*	
97	Emperor v. Pitoe ..	*To be printed.*		220	Kishan Narain v. Pala Mal ..	*To be printed.*	
107	Pickthall (No. 2), *In re* ..	72	73				
112	Superintendent of Stamps, Bombay v. Chiman Lal ..	73	718	224	Emperor v. Nasurbhai ..	72	349
				228	Dattaji NanaPatil v. Narayan Rao ..	*Not reportable.*	
116	Kara Deniz ..	70	156				
121	Khaw Sin Tek v. Chuah Gnoh Neoh ..	*Not reportable*		231	Emperor v. Hanmappa ..	*To be printed.*	

50 I. L. R., CALCUTTA SERIES, FOR JANUARY FEBRUARY, 1923.

1	Sassoon & Co. v. Ramdutt Ramkishen Das ..	70	777	84	Syed Kasam v. Jorawar Singh ..	68	573
				94	Radha Nath Karmakar v. Emperor ..	71	120
12	Jitmu l Girdhari Lal v. Ram Gopal Bohitram ..	74	273	100	Saradindu Nath Ray v. Sudhir Chandra Doss ..	69	48
23	Naba Kishore Tilakdas v. Paro Bewa ..	74	283	115	Makar Ali v. Sarfuddin ..	70	606
29	Morierr v. Raghumull ..	74	287	127	Emperor v. Ganesh Chandra Goldar ..	74	264
41	Emperor v. Profulla Kumar Mozumdar ..	74	267	135	Oziullah v. Beni Madhab ..	71	239
				141	Hari Narain Das, *In re* ..	74	244
49	Charu Chandra Pramanik v. NahushChandra Kundu ..	74	630	146	Rajendra Narain v. Abu Nasor Ahiya ..	71	327
68	Naorang Singh v. Meik ..	70	161	153	Butterfield v. Butterfield ..	74	250
79	Jatindra Nath v. Aziz-ur-Rahman Shana ..	71	307	159	Asutosh Das Gupta v. Purna Chandra Ghosh ..	71	670

37 CALCUTTA LAW JOURNAL, FOR JANUARY 15th, 1923.

1	Mohd. Abdul Ghani v. Fakhar Jahan Begam ..	68	254	30	Emperor v. Sristidhar ..	*Not reportable.*	
15	Ramalinga Annavi v. Narayana Annavi ..	68	451	34	Emperor v. Hari Das Mitra ..	73	770
				39	Arav Sardar v. Hara Sundar Majumdar ..	71	225
20	Triguna Sundari Dasi v. Radharani Dasi ..	*Not reportable.*		42	Amjad Ali v. Suresh Ranjan Pal ..	73	700
				48	Emperor v. Ranjani Kanta Ghosh	72	22

4 I. L. R., LAHORE SERIES, FOR JANUARY-FEBRUARY, 1923.

1	Donald v. Emperor ..	73	690	46	B. B. & and C. I. Railway v. ManoharLal Parwin Chand ..	71	459
7	Crown v. Mauj Din ..	71	77	49	Kanshi Ram v. Emperor ..	73	937
10	——— v. Puran Singh ..	73	699	52	Balia Ram v. Amir Chand ..	74	122
12	Hamiri v. Emperor ..	73	700	55	Devi Dyal v. Emperor ..	73	805
15	Muhammad Hamid v. Mian Mahmud ..	*To be printed.*		58	Khan Mohd. v. Emperor ..	71	596
32	Kishen Narain v. Pala Mal ..	72	187	61	Byrne v. Emperor ..	*To be printed.*	
38	Chuni Lal v. Ishar Das ..	73	702	66	Hakam v. Balia Ram ..	74	79
44	Nanak Chand v. Mohammad Zahurud Din ..	73	927	69	Maulu v. Emperor ..	*To be printed.*	
				72	Gulli v. Sawan ..	74	146

46 I. L. R., MADRAS SERIES, FOR JANUARY-FEBRUARY, 1923.

1	Ranganatha Rao v. Hanumantha Rao ..	65	727	83	Guruswami Naicker v. Mahommadhu Rowther ..	*To be printed.*	
10	Sun Life Assurance Company of Canada v. The Corporation of Madras ..	66	800	88	Gulam Mohideen v. Ahamadulla Begum Sahiba ..	71	49
30	Papa Naidu v. Munisamy Aiyar	65	720	90	Nataraja Pillai, *In re* ..	69	464
35	Rani of Tuni v. Korra Latchundhora ..	66	115	92	Somayajulu v. Seethayya ..	70	729
40	Sankara Variar v. Ummer ..	70	787	104	Subbiah v. Gundlapudi ..	71	374
47	Ramasamy Aiyar v. Subramania Aiyar ..	*To be printed*		108	Chalikani Venkatarayanim v. Zamindar of Tuni ..	71	1035
54	Official Assignee of Madras v. Ramachandra Ayyar ..	68	898	117	Umar Hajee v. Emperor ..	69	636
60	Arunachela Ayyar v. Subbaramiah	68	971	123	Ahmad Thambi Maracayar v. Basava Maracayar ..	72	902
64	Soma Rao v. Vannajee Vapuji ..	71	153	133	Devasakayam v. Devamony ..	69	994
				135	Muhammad Rowther v. Abdul Rahman Rowther ..	72	207
				148	Abdul Shaker Sahib v. Abdul Rahiman Sahib ..	72	868
				162	Arunachala Thevan, *In re* ..	71	514

14 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1923.

1	Ramaswami Goundan v. Muthu Velappa Gounder ..	71	1039	64	Sri Rajah Inuganti Rajagopala Rao v. Venkatasurya Rao ..	71	200
23	Kanakammal v. Baktavatsulu Naidu ..	70	321	66	Ghulam Moh deen v. Ahmadulla Begum Sahiba ..	71	49
27	Nara Appayya v. Darsi Venkatappayya ..	69	634	67	Chakrakodi Sham Shastri, *In re* ..	72	622
29	Pirthipal Singh v. Ganesh Din Singh ..	71	641	69	Ahmad Thambi Maraicair v. Basava Maracayar ..	72	902
32	Shankar Ganesh Dabir v. The Secretary of State for India in Council ..	69	307	74	Perumalla Venkatasubbiah, *In re*	69	440
35	Kathubai v. Mohammad Haji Abu ..	72	202	77	Lakshmana Pillai v. Appalwar Alwar ..	71	288
39	Deivanayagam Pillai v. Mohideen Rowther ..	70	780	80	Gangayya v. Venkataramayya ..	72	839
43	Subbiah v. Venktaramayya ..	71	374	84	Dervish Hussain, *In re* ..	71	212
45	Saraswatamma v. Paddayya ..	71	274	87	Ranganatha Rao v. Rama Pandither ..	70	440
53	Kandasami Mudali v. Guruswami Pillai ..	71	61	90	Golla Chakrapani v. Katneni Lakshmaperumaller ..	72	328
56	Arunachala Thevan v. Vellachami Thevan ..	71	514	91	Parthasarathy Aiyangar v. Daraiswami Naicker ..	72	826
60	Palchur Mahalakshmamma v. Veni Reddi Babu Reddi ..	69	529	100	British India Steam Navigation Co. v. Sharafally ..	70	888
62	Narasayya v. Venkatappa ..	71	298	107	Abdul Shakur Sahib v. Abdul Rahiman Sahib ..	72	868
				116	Rangaswamy Naidu v. Krishnaswami Iyer ..	71	463

44 MADRAS LAW JOURNAL, FOR JANUARY-FEBRUARY, 1923—concld.

119	Venkatarama Aiyar v. Sundaram Pillai ..	72	885	
122	Rukmani Ammal v. Ramachandra Thondaman Sahib ..	72	874	
123	Kishan Narain v. Pala Mal ..	72	187	
128	Dwarka Das v. Narasimhalu Naidu ..	*Not reportable*		
130	Kovaganti *alias* Nallagonda Appiah, *In re* ..	69	447	
132	Rathnamasari v. The Secretary of State ..	72	214	
138	Srinivasalu Reddiar v. Govinda Goundan ..	71	798	
141	Saharabi v. Ali ..	72	857	
146	Perumal Chetty v. Kandasamy Chetty ..	72	925	
149	Khawaja Muhammad Hamid v. Mian Mahmud ..	*To be printed.*		
161	Venkatarama Aiyar v. Janab V. Hamid Sultan Maracayar ..	70	987	
166	Eresa Kutty Moopan, *In re* ..	73	155	
171	Sami Aiyar v. Ramaswami Chettiar ..	72	194	
179	Kunhi Kutti Ali v. Kunhammad	73	139	
184	Kunhi Kutti Ali v Kunhammad	71	466	
187	Lakshmindra Thirtha Swamiar v. Vibhudapriya Thirthaswami	72	109	
201	Crown Prosecutor v. A. Doraisami ..	72	358	
202	Jagannatha Sastry v. Sarathambal Ammal ..	71	530	
206	Subramania Aiyar v. Chokkalinga Mudaliar ..	72	189	
212	Kottal Kunhalikutty Haji v. Kottal Kunhamayan ..	72	833	
217	Raja Rajeswara Sethupati v. Tiruneelakantam Servai ..	72	250	
220	Bappu v. Annamalai Chettiar ..	72	42	
231	Kuppusamy Naidu, *In re* ..	72	175	
234	Budda Reddi, *In re* ..	69	95	
236	Rama Pattar v. Raman Kutty Achan ..	72	139	
238	Uthuman Ammal v. Naina Mohammd Rowther ..	72	314	
240	Narasimhulu Chetty v. Noota ..	72	95	
243	Ramudu Aiyar, *In re* ..	72	538	
247	Koilpillai Samban v. Sappanimuthu Samban ..	72	220	
249	Mohanavelu Mudaliar v. Annamalai Mudaliar ..	72	63	
251	Official Receiver, Tanjore, v. Nataraja Sastrigal ..	72	225	
258	Sankaranarayana Pillai v. Ramaswami Pillai ..	72	149	
263	Chintalapudi Sanyasirao v. Chintalapudi Venkatrao ..	73	470	
271	Latifa Bi v. Mottai Ammal ..	72	141	
274	Kunhi Kutti v. Raman ..	72	145	
279	Sundaram Aiyar v Raja Rajeswara Muthuramalinga Sethupati ..	73	308	
282	Swaminatha Mudaliar v. Kumaraswami Chettiar ..	72	284	
284	Ramabadra Chetty v. Ramaswami Chetty ..	73	374	
285	Rajagopala Pandarathar v. Thirupathi Pillai ..	72	258	

17 LAW WEEKLY, FOR JANUARY, 1923.

1	Palchur Sankarareddi v. Palchur Mahalaksmama ..	70	919	
6	Rajah Gopala Rao Bahadur Garu v. Chelikani Venkatasurya Rao Garu ..	71	200	
8	Palchur Mahalakshmama v. Vemi Reddi Babu Reddi ..	69	529	
11	Karumuri Ramalakshmi v. Boda Nagaratnam ..	71	343	
14	Gujuluva Nagayyar v. Thudukuchi Govindayyar ..	70	286	
18	Dervish Hussain, *In re* ..	71	212	
21	Aydrooss, *In re* ..	72	300	
23	Narra Appayya v. Darsi Venkatappayya ..	69	634	
25	Allu Ramalingier v. Subramania Pillai ..	69	402	
26	Konammal v. Annadana Jadaya Goundan ..	70	586	
31	Gadicherla Venkatanarasimha Rao Garu v. Nyapatty Subba Rao Pantulu Garu ..	73	991	
62	Golla Chakrapani v. Lakshmaperumallu ..	72	328	
64	Thavasimuthu Nadar v. Balaguruswami Nadar ..	70	673	
67	Rukmani Ammal v. Ramachandra Thondaman ..	72	874	
69	Sikka Goundan, *In re* ..	72	351	
71	Chintalapudi Sanyasirao v. Chintalapudi Venkatrao ..	73	470	
77	Jambapuram Subbiah v. Gunda apudi ..	71	374	
79	Govindachariar v. Nattu Kisava Mudaliar ..	72	243	
90	Devasahayam v. Devamony ..	69	994	
92	Narasayya v. Venkatappa ..	71	298	
94	Uppalapati Suryanarayanaraju Garu v. Rajah of Tekkali ..	69	517	
100	Mandayapurath Eresa Kutty Moopan, *In re* ..	73	155	
104	Srinivasalu Reddiar v. Govinda Goundan ..	71	798	
107	Annadana Jadaya Goundar v. Konnammal ..	71	533	
147	Rangasami Nayudu v. Krishnasami Aiyar ..	71	463	
150	Chintamanini Venkatappayya v. Chintamanini Venkatappayya	71	450	
152	Muhammad Rowther v. Subba Naicker ..	72	46	

17 LAW WEEKLY FOR JANUARY, 1923—concld.

154	Nagathal v. Arumugam Pillai ..	*Not reportable*		159	Malayandi Goundan v. Bomman Poosari ..	71	204
155	Puniya Syamalo, *In re* ..	72	624	161	The Secretary Board of Revenue (Income-Tax) Madras v. The Madras Export Company, Madras ..	71	756
157	Dwarka Das v. Narasimhalu-Naidu ..	*Not reportable*					

(1923) MADRAS WEEKLY NOTES, FOR JANUARY-FEBRUARY.

1	Abdul Shaker Sahib v. Abdul Rahiman Sahib ..	72	868	78	Venkatarama Iyer v. Janab V. Hamid Sultan Maracayar ..	70	987
7	Chintalapudi Sanyasi Rao v. Chintalapudi Venkata Rao ..	73	470	81	Thuruthulakath v. Tharayil Pedikayil Kunhammad ..	71	466
11	Muniswami Naickan v. Muniswami Naicken ..	*Not reportable*		84	Rengasami Nayadu v. Krishnaswami Iyer ..	71	463
12	Narasayya v. Venkatappa ..	71	298	86	Kosalai Ramu Pillai v. Pulasthi .m Pillai ..	72	774
13	Jambapuram Subbiah v. Gundlapudi ..	71	374	87	Rarichan v. Elambila Kad Vazhayil Damayanti ..	72	638
14	Parthasarathy Naidu v. Mukundammal ..	68	856	89	Golla Chakrapani v. Katmeni Lakshmaperumallu ..	72	328
15	Annadana Jadaya Gounder v. Konammal Periathambi Durai	71	533	89	Mohana Velu Mudaliar v. Annamalai Mudaliar ..	72	63
42	Govindasami Padayachi v. Sami Padayachi ..	69	724	91	Subramania Iyer v. Chokalinga Mudaliar ..	72	189
49	Panduri Adiyya v. Jaladi Burrayya ..	71	305	94	Kunhamad Haji v. Emperor ..	72	509
51	Nandigam v. Maduppali Venkataramayya ..	72	839	04	Ganapathi Sarma v. Emperor ..	73	147
54	Katthisabi v. The Revenue Divisional Officer ..	70	82	11	Venkatanarsimha v. Narapathy Subba Rao ..	73	991
56	Krishna Pillai v. Emperor ..	68	824	33	Ramaswami Goundan v. Muthu Velappa Gounder ..	71	1039
57	Ramaswamy Chetty v. Muthuvelu Mudali ..	71	238	148	Parthasarathy Iyengar v. Doraisami Naicker ..	72	826
57	Vadamalai Pillai v. P. Subramania Chettiar ..	71	130	154	Sankaranarayana Pillai v. Ramaswami Pillai ..	72	149
70	Kanakammal v. Baktavatsulu ..	70	321	157	Jagannatha Sastry v. Sarathambal Ammal ..	71	530
73	Ramanujam Chetty v. Padanabham Pillai ..	70	784	159	Gopalaswami Iyer v. Ramachandra Iyer, Official Receiver Tanjore ..	72	137
74	Kothandarama Reddy v. Jagathambal Ammal ..	71	32	60	Perumal Chetty v. W. Kandasamy Chetty ..	72	925
75	Kuppuswami Mudaliar v. Sburamanian Chettiar ..	68	565	62	Dhanammal v. Veeraghavalu Naidu ..	72	335
76	Kunnummalthamasikum Nanthoth Ryru Nambiar v. Kappali Konara Kurup ..	70	20	64	Sundaram Iyer v. Raja Rajeswara Muthuramalinga Sethupathi	72	308
77	Kakarla China Chindrayya v. Maddukuri Subbarayudu ..	71	244	66	Dronamraju Rama Rao v. Kessapragada Vedayya ..	73	188

19 NAGPUR LAW REPORTS, FOR JANUARY-FEBRUARY, 1923.

1	Bhika v. Sheikh Amir ..	69	511	21	Vithoba v. Sitaram ..	65	324
4	Premlal v. Bhagchand ..	69	669	22	Vithoba v. Babulal ..	65	416
6	Ramprasad v. Bansilal ..	71	17	23	Madhorao v. Manohar Lal ..	65	674
8	Amba Das v. Laxman ..	71	401	24	Makundram v. Shrikrishna ..	73	142
10	Kunji Lal v. Panna Lal ..	71	325	26	Shioram v. Tikaram ..	71	129
11	Dongarsingh v. Vishwanath Singh	71	205	29	Mayaram v. Bhaironprasad ..	71	351
15	Govind v. Dheklu ..	56	550	32	Bansilal v. Rangrai ..	71	418
18	Sheoram v. Jamnabai ..	65	503				

26 OUDH CASES, FOR JANUARY 1923.

1	Sankata Prasad v. Jagan Nath	69	714	18	Ram Asre v. Emperor ..	73	49
4	Sarju Prasad v Emperor ..	71	58	24	Bhagwati Prasad v. Achhaibar Singh ..	74	214
10	Parzand Ali v. Ekadashi ..	73	591				

2 I. L. R. PATNA SERIES, FOR JANUARY-FEBRUARY, 1923.

1	Matuk Singh v. Tian Sahu ..	67	631	75	Abdur Rahman v. Wali Mohammad ..	68	601
7	Sajjad Husain v. Sakal Rai ..	72	637	84	Bibi Makbulunniss v. Bibi Umat-Munnissa ..	70	312
10	Jai Berhma v. Kedar Nath Marwari ..	69	278	92	Kesho Prasad Singh v. Ramjas Pande ..	*To be printed.*	
18	Khubi Mahton v. Mahanth Lachmi Das ..	67	642	94	Shebalak Singh v. Kamaruddin Mandal ..	68	149
38	Jagdeo Narain Singh v. Baldeo Singh ..	71	984	110	Sarban v. Phudo Sahu ..	69	947
52	Baijnath Singh v. Biraj Kuer ..	68	383	125	Ram Suman Prasad v. Gobind Da..	68	700
65	Ramdhuri Chaudhuri v. Deonandan Prasad Singh ..	*To be printed.*		134	King Emperor v. Abdul Hamid..	68	943
74	Lachmi Singh v. Emperor ..	68	623				

(1923) PATNA CASES, FOR JANUARY-FEBRUARY.

1	Basanta Kumari Dasi v. Balmakund Marwari ..	72	912	42	Madhava Singh, *In the matter of*	72	875
5	Dargahi Mian v. Mango Kuer..	67	869	45	Manazirul Huq, Mukhtear, *In the matter of* ..	71	703
6	Surju Lal v. Baijnath Prashad Singh ..	71	26	46	Kartar Rai v. Tuley Chowdhury	*To be printed.*	
8	Jai Sao v. Emperor ..	65	484	47	Gobind Swain v. Emperor ..	*To be printed.*	
17	The Midnapur Zemindary Co. Ltd. v. Madan Marwari ..	70	782	49	Brij Ratan v. Raghunandan Gir ..	71	944
19	RamdeoSingh v. Makhan Singh	*To be printed.*		54	Ram Lochan Baid v. Kumar Kamakhya Narain Singh ..	71	570
20	Hari Prasad v. Harihar Prasad	70	804	57	Jaideb Thakur v. Jamahir Misser	69	565
22	Dhirakshai Singh v. Trioki Prashad Singh ..	71	319	61	Ram Sumran Prasad v. Babu Rani Bahadur ..	71	741
23	Mohit Narayan Jha v. Kamal Nath Jha ..	*To be printed.*		65	Kesho Prasad Singh v. Parmeshri Prasad Singh ..	71	902
26	Chandrika Ram Kahar v. Emperor ..	71	353	76	William Maling Grant v. Suraj Mal Marwari ..	72	860
33	Jagernath Dass v. Jang Bahadur Rai ..	71	557	78	Sheonandan v. Debi Lal ..	71	484

1 I. L. R. RANGOON SERIES, FOR JANUARY-FEBRUARY, 1923.

1	Maung Tha Dun v. Ma Thein Yin ..	73	1044	42	Ma Ngwe Kin v. Ma Hme ..	74	100
15	U Gunaawa v. U Pyinnyadipa..	74	6	47	Ezekiel Moses v. The Russa Engineering Works, Ltd. ..	74	16
19	Maung Kyow Dun Zan v. Ma Sein ..	74	58	49	U Thudamawara v. Emperor ..	74	63
22	S. M. A. R. Chetty Firm v. Ko Teik Ka ..	74	82	53	Nga Po Tin v. Naga Po Saung ..	74	68
34	Ma Hmum v. Ma Ngwe Thin ..	74	104	56	Ahmed Ebrahim v. Hajee Gonny	74	74

1	Parmananda Agarwala v. Emperor	71	49
2	Ghulam Mohideen v. Ahamaddulla Begam ..	71	49
3	Gulzari Lal v. Emperor ..	71	51
4	Dyal Singh v. Emperor ..	71	52
5	Bepin Behari Ghose v. Hari Pada Ghose ..	71	53
6	Deo Datt v. Emporer .	71	54
8	Abdul Gafur v. Emperor ..	71	56
10	Sarju Prasad v. Emperor ..	71	58
13	Kandaswami Mudali v. Guruswami Pillai ..	71	61
14	Emperor v. Shankar Dayal ..	71	62
15	Mattan Shinna Viraiah, *In re* ..	71	63
17	Narantakath Avullah v. Parakkal Mammu ..	71	65
29	Emperor v. Mauj Din ..	71	77
31	Hiranand Ojha v. Emperor ..	71	79
33	Emperor v. Rajani Kanta Bose..	71	81
62	Chaturbhuj v. Emperor ..	71	110
64	Virappa Chettiar v. Kathayee Ammal ..	71	112
65	Ram Prasad Singh v. Emperor	71	113
67	Bechu Chaube v. Emperor ..	71	115
69	Jagdeo Singh v. Emperor ..	71	117
72	Radha Nath v Emperor ..	71	120
74	Mathura Prasad *In the matter of*	71	122
76	Abdul Gahur v. Emperor ..	71	124
78	Muniswami Mudaliar v. Rajaratnam Pillai ..	71	126
80	Palanianli Servai v. Sammandi Ammal ..	71	128
81	Banamali Das, *In the matter of*..	71	209
84	Dervish Hussain, *In re* ..	71	212
85	Gajraj Singh v. Emperor ..	71	213
86	Chetto Kalwar v. Emperor ..	71	214
87	Gajja Naud v. Emperor ..	71	215
88	In ha Ram v. Emperor ..	71	216
89	Mitter Moideen Hajee, *In re* ..	71	217
91	Niru Bhagat v. Emperor ..	71	219
94	Ram Saran Singh v. Chandra Mohun Saha ..	71	222
97	Arau Sardar v. Hara Sundar Majumdar ..	71	225
100	Thylayee Ammal v. Srirangaroya Goundan ..	71	228
104	Khetramani Dasi v. Emperor ..	71	232
106	Sipahi Singh v. Emperor ..	71	234
108	Bimala Prosad Mookerjee v. Tata Iron and Steel Co. Ld. ..	71	236
110	Ramasami Chettiar v. Muthuvelu Mudali ..	71	238
111	Mahammad Oziullah v. Beni Madhab Chowdhury ..	71	239
113	Abdul Latif Yusuff v. Abu Mohomed Kassim ..	71	241
114	Mathi Venkanna, *In re* ..	71	242
115	Narain Prasad v. Emperor ..	71	243
116	Kakarla Chinna Chendrayya v. Maddukkuri Subbarayudu ..	71	244
118	Buta Singh v. Emperor ..	71	246
118	Olayet Khan v. Emperor ..	71	246
119	Hajari Sonar v. Emperor ..	71	247
120	Lalji Singh v. Naurangi Lal ..	71	248
120	Harnam Dass v. Sain Dass ..	71	248
124	Maruda Mathu Vannian, *In re*	71	252
126	Harendra Krishna Bagchi v. Bal Kumar ..	71	254
128	Hira Lal v. Emperor ..	71	256
129	Chandrika Ram v. Emperor ..	71	353
135	Nanoo v. Emperor ..	71	359
136	Khwaja Hassan v. Emperor ..	71	360
141	Akshoy Kumar Bhattacharjee v. Brojeswar Ghatak ..	71	365
143	Superintendent and Remembrancer, Legal Affairs v. Shyam Sardar Bhumij ..	71	367
144	Sri Krishna Sonar v. Emperor..	71	368

Alphabetical List of Cases reported in Volume 71 of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.	Where reported	Page.
Abdul Gafur v. Emperor	35 C. L. J. 437; 26 C. W. N. 996; (1922) A. I. R. (C.) 192; 24 Cr. L. J. 8	56
Abdul Gahur v. Emperor	36 C. L. J. 152; 26 C. W. N. 972; (1922) A. I. R. (C.) 505; 24 Cr. L. J. 76	124
Abdul Ghafoor v. Qamar-ud-Din	21 A. L. J. 279; (1923) A. I. R. (A) 307	973
Abdul Ghafur v. Nuruddin Ahmad	20 A. L. J. 984; (1923) A. I. R. (A) 137; 45 A. 193	411
Abdul Haq v. Firm Shivji Ram-Khem Chand	(1922) A. I. R. (L.) 338	259
Abdul Haq v. Moti Lal	(1923) A. I. R. (A) 293	985
Abdul Latif Yusuff v. Abu Mohommed Kassim	26 C. W. N. 175; (1922) A. I. R. (C.) 46; 24 Cr. L. J. 113	241
Abdul Wahid v. Municipal Board, Allahabad	21 A. L. J. 161; 6 O. & A. L. R. (A) 327; (1923) A. I. R. (A) 267	1032
Abdul Wahid Khan v. Abdullah Khan	21 A. L. J. 211; 24 Cr. L. J. 197; (1923) A. I. R. 325	661
Abdulla v. Emperor	5 L. L. J. 271; 24 Cr. L. J. 278	998
Abdur Rahim v. Narayan Das Aurora	(1923) A. I. R. (P. C.) 44; 17 L. W. 509; 32 M. L. T. 153. 44 M. L. J. 624, 25 Bom. L. R. 670. (1923) M. W. N. 441 (P. C.)	646
Abdur Salam Sahib v. Kandaswami Chettiar	16 L. W. 473; (1922) M. W. N. 630; 43 M. L. J. 556, (1923) A. I. R. (M) 54	130
Abul Nasar Rashiduddin Ahmad v. Lalta Prasad	21 A. L. J. 162, (1923) A. I. R. (A) 315	1018
Agent, B. B. & C. I. Railway, Bombay v. Firm Manohar Lal-Parwin Chand	5 L. L. J. 3; (1923) A. I. R. (L) 84, 4 L. 46	459
Ainuddin v. Emperor	(1922) A. I. R. (C.) 97; 24 Cr. L. J. 230	694
Ajodhia Prasad v. Gobind Prasad	21 A. L. J. 65; (1923) A. I. R. (A) 250 45 A. 276	1034
Ajodhya Kuwar v. Durga Prasad	4 P. L. T. 115, (1923 Pat. 145; (1923) A. I. R. (Pat.) 351	383
Ajudhia Parshad v. Imam-ud-Din	(1923) A. I. R. (L.) 230	587
Akhi v. Hazratgul	*Peshawar Judicial Commissioner's Court	1009
Akhtari Begam v. Diljan Ali	(1923) A. I. R. (P. C.) 11; 32 M. L. T. 180; 45 M. L. J. 193 (P. C.)	621
Akshoy Kumar Bhattacharjee v. Brojeswar Ghatak	26 C. W. N. 1000; 24 Cr. L. J. 141, (1923) A. I. R. (C.) 305	365
Ali Ahmad v. Kishan Prasad	*Allahabad High Court	280
Allah Din v. Shankar Shah	*Lahore High Court	893
Amar Deo Pande v. Gaya Pande	(1923) A. I. R. (A) 468	393
Ambadas v. Kashibai	(1923) A. I. R. (N.) 27	979
Ambadas v. Laxman	19 N. L. R. 8	401
Ambika Prasad v. Jhinak Singh	21 A. L. J. 91, (1923) A. I. R. (A) 211; 45 A. 286	321
Amjad Ali Khan v. Mohammad Usman	*Allahabad High Court	963
Anand Ram Brahman v. Ramgulam Sahu	3 P. L. T. 820; (1922) Pat. 305; 1 P. L. R. 12; (1923) A. I. R. (Pat.) 150; 2 (Pat.) 204	420
Anandi v. Emperor	(1923) A. I. R. (A) 327; 45 A. 329, 24 Cr. L. J. 225	689
Anandrao v. Dada	*Nagpur Judicial Commissioner's Court	43
Anandrao v. Saraswatibai	(1923) A. I. R. (N) 125; 6 N. L. J. 115	532
Angnoo Singh v. Emperor	20 A. L. J. 881; (1923) A. I. R. (A.) 35; 45 A. 103, 24 Cr. L. J. 257	805
Anandana Jadaya Gounder v. Konammal	17 L. W. 107; (1923) M. W. N. 15; (1923) A. I. R. (M) 402	533
Anwar v. Kishen Singh	(1922) A. I. R. (L.) 205	175
Aran Sardar v. Hara Sundar Majumdar	27 C. W. N. 171; 37 C. L. J. 39; (1923) A. I. R. (C) 95, 24 Cr. L. J. 97	225

Arjun v. Narayan ..	19 N. L. R. 50; (1923) A. I. R. (N) 193 ..	445
Arunachala Thevan v. Vellachami Thevan ..	44 M. L. J. 56; 17 L. W. 462; 32 M. L. T. 104; 24 Cr. L. J. 162; (1923) A. I. R. (M) 324; 46 M 162 ..	514
Arunachalam Chettiar v. Rajeswara Setupati ..	(1921) M. W. N. 873; 15 L. W. 63; 30 M. L. T. 84; 42 M. L. J. 74; (1922) A. I. R. (M.) 55 ..	257
Asutosh Das Gupta v. Purna Chandra Ghose ..	36 C. L. J. 287; (1923) A. I. R. (C.) 113; 24 Cr. L. J. 206, 50 C 150 ..	670
Athar Hussain v. Emperor ..	(1922) Pat. 27; (1922) A. I. R. (Pat.) 51; 24 Cr. L. J. 234 ..	67 8
Atluru Saraswatamma v. Atluru Paddayya ..	44 M. L. J. 45. (1923) A I R (M) 297; 46 M 349 ..	27 4
Aya Ram v. Parshotam Lal ..	*Peshawar Judicial Commissioner's Court	145
Ayub v. Kirpal Singh ..	*Lahore High Court ..	827
Azim Khan v. Karim ..	*Lahore High Court ..	822
Badlu Singh v. Panthu Singh ..	21 A. L. J. 173; 9 O & A L R (A) 433; (1923) A I R (A) 270 ..	474
Badri Upadhia v. Dwarka Upadhia ..	*Allahabad High Court ..	559
Bahadur Singh v. Ram Bahadur ..	21 A. L. J. 140, (1923) A I R (A) 204; 45 A. 277 ..	405
Bakaram v. Ramchandra ..	(1923) A I R (N) 90 ..	39
Bakho v. Lal ..	*Lahore High Court ..	830
Bakhsh Ilahi v. Abdul Rahman ..	*Lahore High Court ..	817
Balaram v. Atmaram ..	(1923) A I R (N) 51 ..	48
Banamali Das, *In the matter of* ..	1 Pat. 689; (1922) A. I. R. (Pat.) 608; 4 P L T 235; 1 P L R 57; 24 Cr L J 81 ..	209
Bangali Mal v Firm Ganga Ram-Asharfi Lal ..	*Allahabad High Court ..	431
Bank of Multan Ltd. v. Hukam Chand ..	*Lahore High Court ..	899
Bansidhar v. Sham Lall ..	(1923) A I R (A) 292 ..	1012
Bansilal v. Ranglal ..	19 N. L. R. 32; (1923) A I R (N) 101; 6 N. L. J. 47 ..	418
Barcley v. Dhondai ..	4 P L T. 112 (1923) A. I. R. (Pat.) 322; (1923) Pat 195. ..	937
Bari Bahu v. Kundan Singh ..	(1922) A. I. R (N) 264 ..	31
Basra Begam v. Sheo Narain ..	(1923) A I R. (A) 203 ..	979
Bechu Chaube v. Emperor ..	20 A. L. J. 874, (1923) A. I. R A) 81; 24 Cr. L J 67; 45 A. 124 ..	115
Behari Lal v. Maqsood Ali ..	(1923) A. I R (A) 180 ..	283
Benowari Lal Ram v. Pronab Krishna Majumdar	35 C. L. J. 397; 26 C. W. N. 663; (1922) A. I. R. (C.) 569; 24 Cr. L. J. 164 ..	510
Bepin Behari Ghose v. Hari Pada Ghose ..	24 Cr L J. 5 ..	53
Bepin Krishna Roy v. Priyabrata Bose ..	(1923) A. I. R. (C) 387 ..	371
Bhag Singh v. Khushal Singh ..	*Lahore High Court ..	618
Bhagwan Das v. Mahadeo Prasad ..	21 A. L. J. 271, (1923) A. I. R. (A) 298; 45 A. 300 ..	959
Bhagwan Das v. Mangalia ..	20 A L J. 959, (1922) A. I. R. (A.) 940, 15 A. 190 ..	410
Bhairab Chandra Dutta v. Kali Kumar Dutta ..	*Calcutta High Court ..	453
Bhirgunath Rai v. Apnarain Rai ..	45 A 157; (1923) A. I. R. (A) 113 ..	455
Bhojraj v. Shankernath ..	(1922) A. I. R. (N) 205 ..	45
Bhola Nath v. Ram Sahai ..	*Allahabad High Court ..	472
Bhola Pandey v. Ram Bilas Pandey ..	*Patna High Court ..	395
Bimala Prosad Mookerjee v. Tata Iron and Steel Co. Ltd. ..	35 C. L. J. 456; (1922) A. I. R. (C.) 83, 24 Cr L J 108 ..	236
Birj Narain Rai v. Kedar Nath ..	20 A. L. J. 918; (1923) A. I. R. (A.) 57; 15 A. 180 ..	836
Bishambar Mal-Pala Mal v. Firm Ganga Sahai Nihal Chand ..	5 L. L. J. 5; (1923) A. I. R. (L.) 212 ..	734
Bishan Das v. Emperor ..	5 L. L. J. 272; 24 Cr. L. J. 230 ..	700
Brij Kumar v. Manna Lal Misra ..	(1922) A. I. R. (O.) 18, 25 O. C. 153; 9 O. L. J. 662; 24 Cr. L. J. 217; ..	681
Brij Ratan Das v. Raghunandan Gir ..	(1923) Pat. 49, 1 P. L. R. 225; 4 P. L. T. 457; (1923) A. I. R. (Pat.) 203 ..	944
Budha Mal v. Shib Dayal ..	*Lahore High Court ..	825
Buta Singh v. Emperor ..	5 L. L. J. 36; 24 Cr. L. J. 118 (1923) A. I. R. (L) 270 ..	246

Cawnpore Cotton Mills Co. Ltd. v. Great Indian Peninsula Railway ..	21 A. L. J. 223; (1923) A. I. R. (A) 301; 45 A. 353 ..	614
Chaganlal v. Kashiram ..	(1923) A. I. R. (N) 70 ..	33
Chalikani Venkataravanim Garu v. Venkatasubrayamma Jagapati ..	17 L. W. 283; (1923) A. I. R. (P. C.) 26; 32 M. L. T. 70; 44 M. L. J. 631; 25 Bom. L. R. 541; 46 M. 108; 38 C. L. J. 34 P. C.	1035
Chandra Kumar Basu v. Rani Sashimukhi Debi ..	*Calcutta High Court ..	324
Chandrika Ram v. Emperor ..	1 Pat. 401; 3 P. L. T. 771; (1922) A. I. R. (Pat.) 535; (1923) Pat. 26; 24 Cr. L. J. 129; 1 P. L. R. 77 (Cr.) ..	353
Chaturbhuj v. Emperor ..	20 A. L. J. 877; (1922) A. I. R. (A.) 529; 24 Cr. L. J. 62; 45 A. 137 ..	110
Chaturgun Bind v. Tilakdhari Singh ..	*Patna High Court ..	470
Chet Ram v. Kanshi Ram ..	*Peshawar Judicial Commissioner's Court	7
Chetto Kalwar v. Emperor ..	49 C. 555; (1922) A. I. R. (C.) 401; 24 Cr. L. J. 86 ..	214
Chintamaneni Venkatappayya v. Chintamaneni Venkatappayya ..	17 L. W. 150; (1923) A. I. R. (M) 352 ..	450
Chuha Mal v. Rahim Baksh ..	*Lahore High Court ..	568
Colony Flour Mills Co., Ltd., Lyallpur v. Firm Bhai Sant Singh-Bhagwan Singh ..	5 L. L. J. 140; (1923) A. I. R. (L) 414 ..	487
Dalpheroo Mian v. Bangali Mah ..	4 P. L. T. 397 ..	80
Damodar Prasad v. Ram Sarup ..	4 P. L. T. 102; (1923) Pat. 137, 1 P. L. R. 252, (1923) A. I. R. (Pat.) 327 ..	843
Darshan Lal v. Shibji Maharaj Birajman ..	20 A. L. J. 977; (1923) A. I. R. (A) 120; 45 A. 215 ..	420
Darshan Ram-Ganesh Das v. Khair-Din-Allah Bakhsh ..	*Lahore High Court ..	783
Dasi Chamar v. Ram Auttar Singh ..	*Patna High Court ..	475
Deo Datt v. Emperor ..	20 A. L. J. 915, (1923) A. I. R. (A) 90; 24 Cr. L. J. 6; 45 A. 166 ..	54
Deoki Dube v. Uma Dat ..	(1923) A. I. R. (A) 369 ..	292
Dervish Hussain, *In re* ..	17 L. W. 18; 44 M. L. J. 84, (1923) A. I. R. (M) 185; 32 M. L. T. 100; 24 Cr. L. J. 84; 46 M. 253 ..	212
Dewa Singh v. Emperor ..	(1923) A. I. R. (L) 194; 24 Cr. L. J. 251 ..	795
Dhan Kumari Devi v. Mahendra Singh ..	19 N. L. R. 45; (1923) A. I. R. (N) 199; 6 N. L. J. 111 ..	443
Dharnidhar v. Sakharam ..	*Nagpur Judicial Commissioner's Court ..	860
Dhirakshan Singh v. Triloki Prashad Singh ..	(1923) Pat. 22; (1923) A I R (Pat) 217 ..	318
Didar Ali v. Kusum Kumari ..	*Patna High Court ..	925
Dina Singh v. Devi Chand ..	(1923) A I R (A) 203 ..	529
Dongar Singh v. Vishwanath Singh ..	19 N L R 11; (1923) A I R (N) 86 ..	205
Dubri v. Emperor ..	8 O. L. J. 318 ..	691
Dukhit Ojha v. Janki Singh ..	1 P L T 377 ..	489
Durga Prasad v. Emperor ..	20 A. L. J. 981; (1923) A I R (A) 126; 24 Cr. L J 149; 45 A. 223 ..	501
Durga Singh v. Emperor ..	24 Cr L J 181 ..	597
Dyal Singh v. Emperor ..	24 Cr L J 4; 5 P L J 228 ..	52
Emperor v. Balaram Das ..	49 C. 358; (1922) A. I. R. (C) 382; 24 Cr. L. 221 ..	685
——— v. Biseswar De ..	26 C. W. N. 1010; 24 Cr. L. J. 145; (1923) A. I. R. (C.) 217 ..	497
——— v. Jangusingh ..	24 Cr. L. J. 205; 19 N. L. R. 48; (1923) A. I. R. (N.) 158; 6 N. L. J. 68 ..	669
——— v. Jivalal Bhoi ..	(1923) A. I. R. (N.) 158; 24 Cr. L. J. 251 ..	795
——— v. Mauj Din ..	24 Cr. L. J. 29; 4 L. 7 ..	77
——— v. Rajani Kanta Bose ..	35 C. L. J. 356; 26 C. W. N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 Cr. L. J. 33 ..	81
——— v. Satyendra Kumar Dutt Chowdhury ..	37 C. L. J. 173; 24 Cr. L. J. 193; (1923) A. I. R. (C.) 463 ..	657
——— v. Shankar Dayal ..	25 O. C. 111; (1922) A. I. R. (O.) 224; 9 O. L. J. 667; 24 Cr. L. J. 14 ..	62
Equitable Coal Company, Limited v. Bagala Sundari Debi ..	*Calcutta High Court ..	972
Faijaddin v. Agni Kumar Sarma ..	*Calcutta High Court ..	300

Fraser v. Krishnaswami Iyer	43 M. L. J. 211; 16 L. W. 322; 31 M. L. T. 290; (1922) M. W. N. 745; (1923) A. I. R. (M.) 144	293
Gadi v. Govinda	(1923) A. I. R. (N.) 141	207
Gajja Nand v. Emperor	(1922) A. I. R. (L.) 139; 24 Cr. L. J. 87	215
Gajraj Singh v. Emperor	20 A. L. J. 906; (1922) A. I. R. (A.) 528; 24 Cr. L. J. 85	213
Ganeshi Lal v. Emperor	20 A. L. J. 967; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 155	507
Ganpat v. Firm of Bissessarlal-Govindram	*Nagpur Judicial Commissioner's Court	491
Gela Ram v. Jhangi Ram	*Peshawar Judicial Commissioner's Court	303
Ghulam Mohideen v. Abamadulla Begam	16 L. W. 881; (1922) M. W. N. 810; 44 M. L. J. 66; (1923); A. I. R. (M.) 206; 32 M. L. T. 102; 24 Cr. L. J. 2; 46 M. 88	49
Girija Nanda Kali Mitter v. Emperor	26 C. W. N. 660; 24 Cr. L. J. 202	666
Gobind Singh v. Official Liquidator, Union Bank of India, Limited, Delhi	(1923) A. I. R. (L.) 85	724
Gokal v. Emperor	20 A. L. J. 921; (1923) A. I. R. (A.) 87; 24 Cr. L. J. 151; 45 A. 142	503
Gokaran Prasad Singh v. Waris Ali	1 P. L. R. 285	957
Gopal Singh v. Emperor	(1922) A. I. R. (L.) 221; 24 Cr. L. J. 185	601
Gosto Behary Basu v. Baistom Das Denre	26 C. W. N. 831; 37 C. L. J. 104; (1923) A. I. R. (C.) 105; 24 Cr. L. J. 157	509
Gour Mohan Dalui v. Bansidhar Byas	24 Cr. L. J. 238	702
Govind v. Anant	19 N. L. R. 54 (1923) A. I. R. (N.) 145; 6 N. L. J. 49	816
Govinda v. Abdul Kadir	(1923) A. I. R.) (N.) 150	558
Gulam Muhammad v. Crown	3 L. 401; (1923) A. I. R. (L.) 81; 24 Cr. L. J. 160	512
Gulzari Lal v. Emperor	9 C. 1075; 24 Cr. L. J. 3; (1923) A. I. R. (C.) 164	51
Guru Mahadeo Asram Prasad Sahi v. Jagatraj Kuer	*Patna High Court	929
Habib Khan v. Fida Husain Khan	*Allahabad High Court	1017
Hafiz Abdullah v. Alli	21 A. L. J. 204; (1923) A. I. R. (A.) 291	640
Hajari Sonar v. Emperor	26 C. W. N. 344; 24 Cr. L. J. 119	247
Hansraj v. Baldeo Singh	21 A. L. J. 289; (1923) A. I. R. (A.) 304	1028
Har Narain Prasad v. Emperor	(1923) A. I. R. (A.) 327; 24 Cr. L. J. 240	704
Hara Kumar De v. Jogendra Krishna Ray	*Calcutta High Court	336
Haraprasanna Bandopadhya v. Arab Ali	*Calcutta High Court	326
Hardeo Prasad v. Damodar Prasad	20 A. L. J. 980; (1923) A. I. R. (A.) 119	424
Harendra Krishna Bagchi v. Bal Kumar	3 P. L. T. 762; (1923) A. I. R. Pat. 57; 24 Cr. L. J. 126	254
Harichand Mancharam v. Covind Luxman	(1923) A. I. R. (P. C.) 47; 17 L. W. 572; 44 M. L. J. 608; 32 M. L. T. 175; 37 C. L. J. 446; 25 Bom. L. R. 531; 47 B. 335 (P. C.)	763
Haridas Ghose v. Gouri Charan Ghose	*Calcutta High Court	309
Harihar Das v. Raj Kumar Mukherjee	(1923) A. I. R. (C.) 405	1014
Harihar Prasad Singh v. Kesho Prasad Singh	*Patna High Court	911
Harnam Dass v. Sain Dass	24 Cr. L. J. 120	248
Harnarain Pandey v. Nandkeswar Pandey	1 P. L. R. 127	573
Harnath Kuar v. Indar Bahadur Singh	(1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 27 C. W. N. 949; 45 A. 179 P. C.	629
Hayat v. Ahmun	*Lahore High Court	201
Hayat Ali Shah v. Taj-ul-Nissa	(1923) A. I. R. (L.) 205	557
Hazari Lal v. Nimar	21 A. L. J. 277; (1923) A. I. R. (A.) 295; 45 A. 386	1038
Hira v. Emperor	24 Cr. L. J. 189; (1923) A. I. R. (A.) 194; 45 A. 250	605
Hira Lal v. Emperor	20 A. L. J. 911; (1922) A. I. R. (A.) 528; 24 Cr. L. J. 128	256
Hiranand Ojha v. Emperor	1 Pat. 621; (1922) A. I. R. (Pat.) 585; 4 P. L. T. 44; 24 Cr. L. J. 31	79
Hukam Chand v. Shahab Din	4 L. 90	495
Hulas Rai v. Sohan Lal	(1923) A. I. R. (A) 443	620
Huri v. Roshan Khudabux	(1923) A. I. R. (S) 5	161

Inayat Husain v. Faiz Muhammad	21 A. L. J. 191; (1923) A. I. R. (A.) 319; 45 A. 335	767
Incha Ram v. Emperor	44 A. 647; (1922) A. I. R. (A.) 272; 24 Cr. L. J. 88	216
Innganti Rajah Gopal Rao v. Chelikani Venkatasurya Rao	17 L. W. 6; 44 M. L. J. 64; (1923) A. I. R. (M.) 368	201
Ishan Chandra Sarkar v. Monmotha Nath Dutta	37 C. L. J. 298; (1923) A. I. R. (C) 339	610
Ishri v. Shib Ram	(1923) A. I. R. (L.) 239	743
Jagan Nath-Diwan Chand v. Jagan Nath-Moti Lal	*Lahore High Court	38
Jagannatha Sastry v. Sarathambal Ammal	44 M. L. J. 202; 17 L. W. 251; (1923) M. W. N. 157; (1923) A. I. R. (M.) 321 46 M. 574	530
Jagat Chandra Roy v. Kalimuddi Sardar	26 C. W. N. 880; 24 Cr. L. J. 229	693
Jagdeo Narain Singh v. Baldeo Singh	3 P. L. T. 605; (1922) A. I. R. (P. C) 272; 36 C. L. J. 499; 32 M. L. T. 1; (1923) M. W. N. 368; 2 Pat. 38; 27 C. W. N. 925 P. C.	984
Jagdeo Singh v. Emperor	1 Pat. 758; 4 P. L. T. 232; (1923) A. I. R. (Pat.) 62; 24 Cr. L. J. 69	117
Jagdeo Tiwari v. Kuber Nath Pandey	(1923) A. I. R. (A.) 312	755
Jagernath Das v. Jang Bahadur Rai	(1923) Pat. 33; 4 P. L. T. 285; (1923) A. I. R. (Pat.) 218	887
Jai Krishna v. Bibi Soghra	4 P. L. T. 418	881
Jai Prakash Singh v. Rupmanjari Dasi	4 P. L. T. 91; (1923) A. I. R. (Pat.) 199	940
Jain-ud-Din v. Keramatulla	24 Cr. L. J. 179	595
Jainarayen Bapu v. Vithoba	(1923) A. I. R. (N.) 143	556
Jamini Mohan Sarkar v. Debendra Narayan Singh	*Calcutta High Court	976
Janki Ram v. Misri Lal	(1923) A. I. R. (A.) 377	382
Jantapuram Subbiah v. Gundalapudi	17 L. W. 77; 44 M. L. J. 43; (1923) M. W. N. 13; (1923) A. I. R. (M.) 358; 46 M. 104	374
Jantra Koer v. Ali Jan Darji	*Patna High Court	478
Jasram v. Amar Nath	(1923) A. I. R. (A) 439	475
Jasua v. Emperor	21 A. L. J. 215; (1923) A. I. R. (A.) 332; 24 Cr. L. J. 232	696
Jatindra Mohan Chakravarti v. Bijoy Chand Mahatab	*Calcutta High Court	284
Jatindra Nath Choudhury v. Azizarrahaman Shana	(1923) A. I. R. (C) 433; 50 C. 79	307
Jayaramulu v. Emperor	(1922) M. W. N. 570; 16 L. W. 496; 31 M. L. T. 310; 43 M. L. J. 553; 45 M. 842; (1923) A. I. R. (M.) 50; 24 Cr. L. J. 152	504
Jharap Rai v. Jaint Rai	(1923) A. I. R. (A) 418	1033
Jhinak Singh v. Ambika Prasad	(1923) A. I. R. (A) 414	424
Jhumak Singh v. Mahindra Singh	*Patna High Court	560
Jhunwa v. Municipal Board, Dhampur	21 A. L. J. 101; (1923) A. I. R. (A.) 179; 45 A. 267	291
Jogesh Chandra Ghose v. Prosanna Kumar Talukdar	*Calcutta High Court	962
Jwala Singh v. Teja Singh	*Lahore High Court	801
Kakarla Chinna Chendrayya v. Maddukkuri Subbarayudu	17 L. W. 226; (1923) M. W. N. 77; 24 Cr. L. J. 116; (1923) A. I. R. (M.) 338	244
Kallan v. Jawahar Singh	5 L. L. J. 99	837
Kamal Khan v. Nizamuddin	20 A. L. J. 987; (1923) A. I. R. (A.) 123	412
Kamala Kanta v. Annanda Chandra Chakraburtty	*Calcutta High Court	1030
Kamla Prasad Singh v. Gobind Sahay	(1922) A. I. R. (Pat) 13; 3 P. L. T. 826; 24 Cr. L. J. 241	785
Kampta Prasad v. Sheo Prasad	21 A. L. J. 292; 45 A. 361; (1923) A. I. R. (A) 406	971
Kamulammal v. Visvanathaswami Naicker	17 L. W. 298; (1923) A. I. R. (P. C.) 8; 44 M. L. J. 465; 32 M. L. T. 48; 37 C. L. J. 363; 25 Bom. L. R. 577; 46 M. 167 (P. C.)	643
Kandaswami Mudali v. Guruswami Pillai	16 L. W. 883; 31 M. L. T. 475; 44 M. L. J. 53; (1923) A. I. R. (M.) 184; 24 Cr. L. J. 13	61
Kanhaiya Lal v. Gora	(1923) A. I. R. (A) 436	564

Kanshi Ram v. Shah Nawaz ..	(1923) A. I. R. (L.) 295 ..	811
Karam Chand v. Jinda Ram ..	*Lahore High Court ..	862
Karumuri Ramalakshmi v. Boda Nagaratnam ..	17 L. W. 11; (1923) M. W. N. 172; 44 M. L. J. 677; (1923) A. I. R. (M.) 335 ..	343
Kesho Prasad Singh v. Isser Dubey ..	1 P. L. R. 32 ..	15
Kesho Prasad Singh v. Parmeshri Prasad Singh ..	4 P. L. T. 135; (1923) Pat. 65; 1 P. L. R. 111 (1923) A. I. R. (Pat.) 276; 2 Pat 414 ..	902
Kesho Ram v. Pearc Lal ..	21 A. L. J. 209; (1923) A. I. R. (A) 443 ..	761
Kewal Ram v. Abdul Hai ..	(1923) A. I. R. (L.) 409 ..	779
Khagendra Nath Mukherjee v. Khetra Nath Pal ..	36 C. L. J. 21; (1923) A. I. R. (C.) 21; 50 C. 171 ..	314
Khan Muhammad v. Emperor ..	24 Cr. L. J. 180; 4 L. 58 ..	596
Khanun v. Emperor ..	(1922) A. I. R. (L.) 75; 24 Cr. L. J. 201 ..	665
Kharida Kapra Company v. Rukmanand Ramdeo ..	20 A. L. J. 975; (1923) A. I. R. (A.) 139	144
Khem Chand v. Emperor ..	24 Cr. L. J. 245 ..	789
Khetramani Dasi v. Emperor ..	35 C. L. J. 451; (1922) A. I. R. (C.) 539; 24 Cr. L. J. 104 ..	232
Khunnu Mal v. Indarpal Singh ..	21 A. L. J. 39; (1923) A. I. R. (A.) 183; 45 A. 273 ..	278
Khushal Devi v. Sukh Dial ..	*Lahore High Court ..	572
Khwaja Hassan v. Emperor ..	24 Cr. L. J. 136 ..	360
Kishan Lal v. Abdulla ..	(1923) A. I. R. (N.) 88 ..	421
Kothadarama Reddy v Jagathambal Ammal ..	16 L. W. 924; (1923) M. W. N. 74; (1923) A. I. R. (M.) 220 ..	32
Krishna Bai v. Debi Singh ..	(1923) A. I. R. (N) 195 ..	409
Kuldip Chaube v. Jagnandan Chaube ..	(1923) A. I. R. (A.) 363 ..	299
Kundan v. Sobhan Ram ..	(1923) A. I. R. (A.) 375 ..	655
Kunhikuttiali v. T. P. Kunhammad ..	44 M. L. J. 184; 17 L. W. 243; (1923) M. W. N. 81; (1923) A. I. R. (M.) 278 ..	466
Kunj Behari Lal v. Narain ..	(1923) A. I. R. (A) 425 ..	1026
Kunjilal v. Pannalal ..	19 N. L. R. 10; (1923) A. I. R. (N.) 91 ..	325
Kunwar Pal v. Madan Mohan ..	21 A. L. J. 213; (1923) A. I. R. (A) 428 ..	645
Kurukundi Sama Rao v. Firm of Marwadi Vannapi Vajinji ..	(1922) M. W. N. 708; 43 M. L. J. 745; (1923) A. I. R. (M) 36; 32 M. L. T. 9; 17 L. W. 661; 46 M. 64 ..	153
Labh Singh v. Ganpat ..	(1923) A. I. R. (L) 162 ..	35
Lachhmi Chand v. Anandi ..	21 A. L. J. 73; (1923) A. I. R. (A.) 109; 45 A. 245 ..	574
Lachman Das v. Mulchand ..	(1923) A. I. R. (A) 411 ..	441
Lakhu v. Lal Singh ..	(1923) A. I. R. (A) 399 ..	265
Lakshmana Pillai v. Appalwar Aiyengar ..	31 M. L. T. 451; 44 M. L. J. 77; 17 L. W. 632; (1923) A. I. R. (M) 246 ..	288
Lal Bihari Singh v. Gur Prasad Singh ..	4 P. L. T. 108 (1923) Pat. 118; 1 P. L. R. 238; (1923) A. I. R. (Pat.) 290; 2 Pat. 435	948
Lal Chand v. Begam ..	3 L. 433; (1923) A. I. R. (L) 262; 5 L. L. J. 193 ..	746
Lala Singh v. Basdeo ..	(1923) A. I. R. (A) 429 ..	768
Lalji Singh v. Naurangi Lal ..	(1922) Pat. 304; 3 P. L. T. 764; 4 U. P. L. R. (Pat.) 112; (1922) A. I. R. (Pat.) 618 24 Cr. L. J. 120 ..	248
Lalta Prasad v. Kharga ..	21 A. L. J. 189; (1923) A. I. R. (A.) 313; 45 A. 336 ..	773
Laxman v. Bisram Birju ..	(1923) A. I. R. (N.) 94 ..	42
Lazarus Megh Nath v. Emperor ..	24 Cr. L. J. 253 ..	797
Lok Nath v. Thakar Das ..	*Peshawar Judicial Commissioner's Court	20
Madhorao v. Nago ..	(1923) A. I. R. (N.) 80 ..	37
Magdoom Mahamad v. Bansi Lal ..	(1922) M. W. N. 824 (1923) A. I. R. (M.) 248 ..	855
Mahadeo Dutt v. J. N. Sarkar ..	(1922) Pat. 122; (1922) A. I. R. (Pat.) 340; 24 Cr. L. J. 263 ..	871
Mahadeo Prasad v. Hamidan ..	21 A. L. J. 97 (1923) A. I. R. (A.) 271; 45 A. 304 ..	457
Mahammad Oziullah v. Beni Madhab Chowdhury ..	26 C. W. N. 878; 36 C. L. J. 180; (1922) A. I. R. (C.) 298; 24 Cr. L. J. 111; 50 C. 135	239
Maharaj Bahadur Singh v. Hukum Chand ..	4 P. L. T. 48; 1923 A. I. R. (Pat.) 209 ..	11

Maharashtraya Jnan Kosh Mandal Ltd. v. Bijjulal	19 N. L. R. 36; (1923) A. I. R. (N.) 182; 6 N. L. J. 100 ..	436
Mahesha v. Rameshar ..	*Oudh Judicial Commissioner's Court ..	563
Malan v. Kishore Chand ..	(1923) A. I. R. (L.) 17 ..	833
Malawa Ram v. Sunaran ..	*Lahore High Court ..	820
Malayandi Goundan v. Boman Poosari ..	17 L. W. 159; (1923) A. I. R (M.) 331 ..	204
Manazir-ul-Haq v. Emperor ..	4 P. L. T. 97; (1923) Pat. 45; (1923) A. I. R. (Pat.) 185; 24 Cr. L. J. 239 ..	703
Marruda Mathu Vannian, *In re* ..	16 L. W. 420; 43 M. L. J. 402; (1922) M. W. N. 601; 44 M. 820; (1922) A. I. R. (M.) 512; 24 Cr. L. J. 124 ..	252
Mathi Venkanna, *In re* ..	17 L. W. 451; 24 Cr. L. J. 114; 46 M. 257 ..	242
Mathura Prasad, *In the matter of* ..	1 Pat. 684; (1922) A. I. R. (Pat.) 604 24 Cr. L. J. 74; 4 P. L. T. 303 ..	122
Mattam Shinna Viraiah, *In re* ..	16 L. W. 534; (1923) A. I. R. (M.) 87; 24 Cr. L. J. 15 ..	63
Maula Dad v. Wadhawa Singh ..	*Lahore High Court ..	46
Mayaram v. Bhairon Prasad ..	19 N. L. R. 20; (1923) A. I. R. (N.) 115 ..	351
Mazahar Ali v. Emperor ..	36 C. L. J. 417; 27 C. W. N. 99; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 190; 50 Cr. 223 ..	652
Mela Ram v. Prem Kaur ..	(1923) A. I. R. (L.) 143 ..	42
Misri Khan v. Shahji ..	*Lahore High Court ..	823
Mittor Moideen Hajee, *In re*	43 M. L. J. 561; 16 L. W. 764; (1923) A. I. R. (M.) 95, 24 Cr. L. J. 89 ..	217
Mohammad Ahmad v. Babu ..	(1923) A. I. R. (A.) 442 ..	762
Mohammad Asghar Ali Khan v. Rammon ..	(1923) A. I. R. (A) 378 ..	432
Mohammad Ismail v. Barkat Ali ..	26 C. W. N. 904; (1922) A. I. R. (C.) 483; 24 Cr. L. J. 154 ..	506
Mohammad Karim Khan v. Sadiq Hussain ..	*Oudh Judicial Commissioner's Court ..	339
Mohan Lal v. Ganga Prasad ..	(1923) A. I. R. (A.) 298; 45 A. 395 ..	975
Mohendra Lal Roy, *In the matter of* ..	27 C. W. N. 88; (1922) A. I. R. (C.) 550; 24 Cr. L. J. 209 ..	673
Monohar Peshakar v. Haran Chandra Karmakar ..	*Calcutta High Court ..	290
Mool Chand v. Mool Chand ..	(1923) A. I. R. (L.) 197 ..	951
Mosafir Lal Das v. Ganesh Jha ..	(1922) Pat. 347; (1922) A. I. R. (Pat.) 656; 4 P. L. T. 134 ..	473
Muazam Sher v. Fazal Rahman ..	*Peshawar Judicial Commissioner's Court ..	312
Muhammad Afzal v. Emperor ..	24 Cr. L. J. 271 ..	879
Muhammad Altaf Ali Khan v. Phool Kunwari ..	(1923) A. I. R. (A.) 367 ..	400
Muhammad Hassan v. Sohara ..	*Lahore High Court ..	805
Muhammad Hussain v. Ram Lal ..	5 L. L. J. 198 ..	783
Muhammad Shakur v. Abdul Ghani ..	(1923) A. I. R. (A.) 362 ..	369
Muhammad Umar Khan v. Amtul Rahim Bibi ..	21 A. L. J. 267; (1923) A. I. R. (A.) 311; 45 A. 376 ..	965
Muhammad Waheb Hussain v. Abbas Hussain ..	4 P. L. T. 326 ..	280
Mukhtara v. Sardara ..	(1923) A. I. R. (A) 417 ..	444
Mula Mal v. Piara Singh ..	*Lahore High Court ..	828
Mula Singh v. Emperor ..	24 Cr. L. J. 177 ..	593
Mulloo v. Kundanlal ..	(1923) A. I. R. (N.) 139 ..	863
Municipal Committee, Delhi v. Abdul Hussan Khan ..	*Lahore High Court ..	775
Muniswami Mudaliar v. Rajaratnam Pillai	16 L. W. 305; 43 M. L. J. 375; (1922) M. W. N. 594; 31 M. L. T. 287; 24 Cr. J. L. 78 ..	126
Mustafai Bibi v. Muhammad Shabbir ..	(1923) A. I. R. (A.) 164 ..	273
Namberumal Chettiar v. Raghava Chariar ..	14 L. W. 563 ..	390
Nana v. Jogilal ..	19 N. L. R. 69; (1923) A. I. R. (N.) 151; 6 N. L. J 81 ..	566
Nanak Chand v. Sajjad Hussain ..	*Lahore High Court ..	813
Nanak Chand v. Sajjad Hussain ..	*Lahore High Court ..	824
Nand Lal v. Firm Gulab Rai-Narain Das ..	(1923) A. I. R. (A) 345 ..	610
Nanha v. Sunda ..	*Lahore High Court ..	840
Nanoo v. Emperor ..	24 Cr. L. J. 135 ..	359
Narain Prasad v. Emperor ..	20 A. L. J. 909; (1923) A. I. R. (A.) 85; 24 Cr. L. J. 115; 45 A. 128 ..	243
Naramban, *In re* ..	15 L. W. 552; (1922) M. W. N. 326; (1922) A. I. R. (M.) 495; 24 Cr. L. J. 269 ..	877

Narantakath Avullah v. Parakkal Mammu ..	(1922) M. W. N. 662; 16 L. W. 626; 43 M. L. J. 663; (1923) A. I. R. (M.) 171; 45 M. 986; 24 Cr. L. J. 17 ..	65
Narasayya v. Venkatappa ..	17 L. W. 92; 44 M. L. J. 62; (1923) M. W. N. 12; (1923) A. I. R. (M.) 359 ..	298
Narsayya v. Laxminarayan ..	19 N. L. R. 34; (1923 A. I. R. (N.) 187; 6 N. L. J. 66 ..	404
National Engineering Coy., Karachi v. Rattan Engineering Coy., Lahore ..	(1923) A. I. R. (L.) 288 ..	268
Nauranga v. Emperor ..	24 Cr. L. J. 248 ..	792
Nayan Manjuri Dasi v. Fazley Huq Sardar ..	49 C. 871; (1922) A. I. R. (C.) 502 24 Cr. L. J. 175 ..	527
Nihal Singh v. Emperor ..	(1922) A. I. R. (L.) 220; 24 Cr. L. J. 183 ..	599
Nimba v. Janki ..	(1923) A. I. R. (N.) 166 ..	176
Niru Bhagat v. Emperor ..	1 Pat. 630; (1922) A. I. R. (Pat.) 582; 4 P. L. T. 76; 24 Cr. L. J. 91 ..	219
Nobin Chandra Bose v. Bandi ..	*Allahabad High Court ..	370
Noor Mahomed Veerjibhai Veelmahomed v. Natwai Lal ..	(1923) A. I. R. (A.) 112; 45 A. 220 ..	452
Nur Mahomed Peerbhoy v. Dinshaw Hormasji Motiwalla ..	(1922) A. I. R. (P. C.) 393 **P. C.** ..	625
Nur Muhammad Khan v. Emperor ..	21 A. L. J. 137; 24 Cr. L. J. 173; (1923) A. I. R. (A.) 276 ..	525
Nur Muhammad Khan v. Noor Muhammad ..	5 L. L. J. 30; (1923) A. I. R. (L) 213 ..	730
Official Assignee of Madras v. Doraiappa Aiyar ..	17 L.W. 350; 44 M. L. J. 411; 32 M. L. T. 172 (1923) M. W. N. 359; (1923) A. I. R. (M) 484 ..	1056
Olayet Khan v. Emperor ..	1 Pat. 589; (1922) A. I. R. (Pat.) 587; 4 P. L. T. 98; 24 Cr. A. J. 118 ..	246
Palaniandi Servai v. Sammandi Ammal ..	16 L. W. 613; (1923) A. I. R. (M.) 87; 24 Cr. L. J. 80 ..	128
Pandurang Bapuji v. Bapuji ..	(1923) A. I. R. (N.) 103 ..	28
Parmananda v. Emperor ..	36 C. L. J. 179; (1922) A. I. R. (C.) 538; 24 Cr. L. J. 1 ..	49
Peare Lal v. Ashraf Khan ..	21 A. L. J. 185; (1923) A. I. R. (A.) 213 ..	456
Phui v. Devatia ..	(1923) A. I. R. (L.) 210 ..	561
Phula v. Kusam Singh ..	(1923) A. I. R. (N.) 70 ..	413
Piara Ram v. Ganga Ram ..	*Lahore High Court ..	45
Pirthipal Singh v. Ganesh Din Singh ..	(1922) A. I. R. (P. C.) 383; 44 M. L. J. 29 37 C. L. J. 219; 9 O. L. J. 649; 25 O. C. 396; 32 M. L. T. 109; 9 O. & A. L. R. (P. C.) 541; 18 L. W. 41 **P. C.** ..	641
Pitam Lal v. Emperor ..	24 Cr. L. J. 276; (1923) A. I. R. (A) 433 ..	996
Ponduri Adeyya v. Jaladi Burrayya ..	43 M. L. J. 725; 16 L. W. 976; (1923) M. W. N. 49; (1923) A. I. R. (M.) 182; 32 M. L. T. 6 ..	305
Pratap Udai Nath Sahi Deo v. Sunderbans Koer ..	3 P. L. T. 628; (1923) A. I. R. (Pat.) 76; 24 Cr. L. J. 279 ..	999
Probodh Chandra Das v. Birsinha Bagani ..	*Calcutta High Court ..	319
Promotha Nath Mukhopadhya v. Emperor ..	27 C. W. N. 389; (1923) A. I. R. (C.) 470; 24 Cr. L. J. 792; 50 C. 518 ..	792
Prosanna Kumar Chakerbutty v. Jotindra Nath Bose ..	*Calcutta High Court ..	1054
Radha Krishna Gopal Lalji v. Lakshmi Narayan ..	1 P. L. R. 86; 4 P. L. T. 329; (1923) Pat. 159; 2 Pat. 273 ..	341
Radha Nath v. Emperor ..	36 C. L. J. 149; (1922) A. I. R. (C) 572; 24 Cr. L. J. 72; 50 C. 94 ..	120
Raghupati Chatterjee v. Krishingha Hari Das ..	36 C. L. J. 491; (1923) A. I. R. (C) 90 ..	1
Rahima v. Razzak Ali ..	21 A. L. J. 184; (1923) A. I. R. (A) 256 ..	562
Rahimuddin v. Shahbaz Khan ..	*Peshawar Judicial Commissioner's Court ..	812
Raj Pal v. Emperor ..	3 L. 405; (1923) A. I. R. (L) 61; 24 Cr. L. J. 167 **S. B.** ..	519
Rajendra Narayan Chaudhury v. Abu Nasar Ahiya	27 C. W. N. 189; 37 C. L. J. 141; 1923 A. I. R. (C) 189; 50 C. 146 ..	327
Rajendra Nath Ghose v. Amrita Lal Chakarvarti	24 Cr. L. J. 233 ..	697
Ram Badan Singh v. Janki ..	21 A. L. J. 207; (1923) A. I. R. (A) 332; 24 Cr. L. J. 228; 45 A 363 ..	692

Ram Bilas v. Lachmi Narain ..	20 A. L. J. 904; (1923) A.I.R. (A.) 84; 45 A. 140; 24 Cr. L. J. 220 ..	684
Ram Bujhawan Prosad Singh v. Nathu Ram ..	4 P. L. T. 29; (1923) A. I. R. (P. C.) 73; 32 M. L. T. 129; 44 M. L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 2 Pat. 285 38 C. L. J. 25 **P. C.** ..	933
Ram Charitara v. Mohan Dei ..	21 A. L. J. 159; (1923) A. I.R. (A) 210; 45 A. 309 ..	488
Ram Das v. Inayatullah ..	21 A. L. J. 263; (1923) A. I. R. (A) 297; 45 A. 374 ..	1027
Ram Dayal v. Mithu Lal ..	(1923) A. I. R. (A.) 410 ..	287
Ram Din Singh v. Naujadak Singh ..	24 Cr. L. J. 204 ..	668
Ram Gajadhar v. Surtani ..	(1923) A. I. R. (A) 343 ..	381
Ram Harakh Pandey v. Chuni Singh ..	(1923) A. I. R. (A.) 446 ..	640
Ram Khelwan v. Brij Lal ..	21 A. L. J. 296; (1923) **A. I.** R. (A.) 295 ..	991
Ram Kishen v. Bhagirti ..	(1923) A. I. R. (L) 304 ..	748
Ram Kishen v. Hirde Ram ..	(1923) A. I. R. L) 135 ..	737
Ram Lal v. Ghanisham Das ..	(1923) A. I. R. (L) 150 ..	825
Ram Lochan Baid v. Kamakhya Narain Singh ..	4 P. L. T. 123; (1923) Pat. 54; (1923) A. I. R. (Pat) 201 ..	570
Ram Narain v. Harbans Singh ..	*Allahabad High Court ..	617
Ram Prasad v. Emperor ..	20 A. L. J. 926; (1923) A. I. R. (A.) 137; 24 Cr. L. J. 153 ..	505
Ram Prasad Singh v. Emperor ..	4 P. L. T. 213; (1923) A. I. R. (Pat) 50; 24 Cr. L. J. 65; 1 Pat. 753 ..	113
Ram Raghubir Lal v. Dip Narain Singh ..	21 A. L. J. 168; 9 O & A. L. R. (A) 349; (1923) A. I. R. (A.) 287; 45 A. 311 ..	749
Ram Ratan v. Ganga Bukhsh Singh ..	9 O. & A. L. R. (O) 222; 10 O. L. J. 193 ..	581
Ram Sahai v. Binod Behari Ghose ..	21 A. L. J. 102; (1923) A I. R. (A) 151; 45 A 306 ..	402
Ram Saran Singh v. Chandra Mohun Saha ..	24 Cr. L. J. 94 ..	222
Ram Sumran Prasad v. Ram Bahadur ..	4 P. L. T. 99; (1923) Pat. 61; (1923) A. I. R. Pat. 224; 2 Pat. 328 ..	741
Ramanand Shukul v. Chhotey Lal ..	20 A. L. J. 969; (1923) A. I. R. (A) 124 ..	417
Ramanathan Chettiar, *In re* ..	17 L. W. 412; 32 M. L. J. 81 and 217; 24 Cr. L. J. 192 ..	608
Ramasami Chettiar v. Muthuvelu Mudali ..	16 L. W. 562 ; 31 M. L. T. 420 ; 45 M. 843 ; (1923) M. W. N. 57; (1923) A. I. R. (M) 191; 24 Cr. L. J. 110 ..	238
Ramasami Gounder v. Muthu Velappa Gounder ..	16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 133; (1923) A. I. R. (M) 192; 46 M. 536	1039
Rambhabai v. Totaram ..	(1923) A. I. R. (N) 188; 6 N. L. J. 39 ..	727
Ramdhari Ahir v. Emperor ..	(1922) Pat. 29; (1922) A. I. R. (Pat.) 52; 4 P. L. T. 370; 24 Cr. L. J. 277 ..	997
Rameshivendra Narayan Ojha v. Audh Behari Saran ..	4 P. L. T. 393 ..	332
Rameshwar Das-Mali Ram v. E. I. Ry. Coy. Ltd. ..	4 P. L. T. 331; (1923) A. I. R. (Pat) 298 ..	5 5
Rameshwar Singh v. Narendranath Das ..	(1923) A. I. R. (Pat) 259 ..	916
Ramji Das v. Mihin Lal ..	(1923) A. I. R. (A.) 441 ..	654
Ramkrishna Puri v. Tanba ..	19 N. L. R. 59; (1923) A. I. R. (N) 153; 6 N. L. J. 85 ..	777
Ramprashad v. Bansilal ..	19 N. L. R. 6; (1923) A. I. R. (N) 117; 6 N. L. J. 121 ..	17
Ramyad Singh v. Chhedia Barhi ..	1 Pat. 750; (1923) A. I R. Pat) 64; 4 P. L. T. 439 ..	345
Rangaswami Nayudu v. Krishnaswami Aiyar ..	17 L. W. 147; 44 M. L. J. 116; (1923) M. W. N. 84; 32 M. L. T. 133; (1923) A. I. R. (M) 276 ..	463
Rangiah Chetty v Govindasami Chetty ..	(1921) M. W. N. 793 ; 15 L. W. 160 ; (1922) A. I. R. (M.) 179 ..	260
Rasik Lal Das v. Emperor ..	26 C. W. N. 712; (1922) A. I. R. (C.) 492; 24 Cr. L. J. 151 ..	503
Rup Singh v. Bhullan Singh ..	20 A. L. J. 956; (1923) A. I. R. (A.) 52 ..	408
Rustam Khan v. Rahman ..	(1923) A. I. R. (.) 289 ..	47
Sadaq Reza v. Khoshmohini Dasi ..	(1922) A. I. R. (C.) 317 ..	346
Sadar Singh v. Amar Singh ..	(1923) A. I. R. (A.) 291; 45 A. 383 ..	991
Sadiq Ali v. Abdul Baqi Khan ..	21 A. L. J. 109; (1923) A. I. R. (A) 251; 45 A. 290 ..	460

Sahdeo Narain Deo v. Kusum Kumari ..	4 P. L. T. 217; (1923) A. I. R. (P. C.) 21; 44 M. L. J. 476; 32 M. L. T. 121; 37 C. L. J. 309; 25 Bom. L. R. 560; (1923) M. W. N. 377; 2 Pat. 230; 27 C. W. N. 901 (P. C.) ..	769
Said Khan v. Zarif Khan ..	*Peshawar Judicial Commissioner's Court ..	781
Sajani Kanta Roy v. Shamsher Ali Sheikh ..	24 Cr. L. J. 235 ..	699
Sakat Mul v. Katori ..	21 A. L. J. 122; (1923) A. I. R. (A) 265 ..	376
Salayjee v. Fatima Bibi ..	(1922) A. I. R. (P. C.) 391; 44 M. L. J. 332 25 Bom. L. R. 301; 32 M. L. T. 90; 37 C. L. J. 302; 1 R. 60; 18 L. W. 44; 2 Bur. L. J. 1; (1923) M. W. N. 522 (P. C.) ..	753
Sampat v. Motilal ..	(1923) A. I. R. (N) 177 ..	808
Sant Singh v. Basant Kaur .	(1923) A. I. R. (L) 81 ..	28
Sarat Chandra Majumdar v. Prasanno Kumar Gope	*Calcutta High Court ..	304
Saratkumari Dasi v. Amullyadhan Kundu ..	17 L. W. 481; (1923) A. I. R. (P. C.) 13; 32 M. L. T. 137; 27 C. W. N. 629; 25 Bom. L. R. 548; 37 C. L. J. 501; (1923) M. W. N. 393 P C ..	632
Sardar Khan v. Abdulla Khan ..	*Lahore High Court ..	885
Sardara v. Emperor ..	24 Cr. L. J. 187; 5 L. L. J. 230; (1923) A. I. R. (L) 380 ..	603
Sardari Lal v. Emperor ..	3 L. 443; (1923) A. I. R. (L) 204; 24 Cr. L. J. 286 ..	1006
Sarju Lal v. Baij Nath Prasad Singh ..	(1923) Pat. 6; (1923) A. I. R. (Pat) 46 ..	20
Sarju Prasad v. Emperor ..	9 O. L. J. 421; (1922) A. I. R. (O.) 280; 24 Cr. L. J. 10; 26 O. C. 4 ..	58
Sat Narayan Singh v. Emperor ..	25 O. C. 37; 9 O. L. J. 280; (1922) A. I. R. (O.) 147 ..	995
Satdeo Narain v. Ramayan Tewari ..	4 P. L. T. 147; (1923) A. I. R. (Pat) 242; 2 Pat. 335 ..	705
Sathappa Chetty v. Subramaniam Chetty ..	16 L. W. 718; 43 M. L. J. 758; 31 M. L. T. 385; (1922) A. I. R. (M.) 510 ..	334
Sawan Mal-Gopi Chand v. Shiv Charan Das ..	*Lahore High Court ..	814
Secretary of State for India v. Firm Jiwan and Abdullah ..	21 A. L. J. 220; 45 A. 380; (1923) A. I. R. 426 ..	609
Secretary of State for India v. Upendra Narain Roy ..	36 C. L. J. 336; (1923) A. I. R (C) 247 ..	849
Secretary to the Board of Revenue (Income-Tax) Madras v. Madras Export Co., Madras ..	17 L. W. 161; 44 M. L. J. 290; (1923) A. I. R. (M) 422; 46 M. 360 ..	756
Shahadat v. Hukam Singh ..	*Lahore High Court ..	736
Shaikh Imam v. Ramchandra ..	(1923) A. I. R. (N) 69 ..	25
Shakur v. Husaini Bibi ..	(1923) A. I. R. (A.) 447 ..	655
Shamrao Dewaji v. Pandurang ..	(1923) A. I. R. (N.) 137; 6 N. L. J. 93 ..	804
Shamshul Hassan v. Syed Hassan ..	(1923) A. I. R. (A) 173 ..	296
Shankar v. Bahadur ..	(1923) A. I. R. (L) 37; 5 L. L. J. 212 ..	864
Shanker v. Rangubai ..	*Nagpur Judicial Commissioner's Court ..	942
Shankergir Guru Motigir v. Chinnuji ..	(1923) A. I. R. (N) 164; 6 N. L. J. 1 ..	140
Sharif v. Emperor ..	24 Cr. L. J. 273 ..	993
Sheo Nandan v. Munni ..	21 A. L. J. 288; (1923) A. I. R. (A.) 398 ..	1013
Sheo Nandan Lal v. Sheo Balak ..	9 O. & A. L. R. (C.) 264 ..	974
Sheo Prasad v. Babu Ram ..	(1923) A. I. R. (A) 168 ..	350
Sheo Ram Koeri v. Ikramunnissa Bibi ..	21 A. L. J. 170; (1923) A. I. R. (A) 282; 45 A. 316 ..	631
Sheo Ramji v. Sri Ridhnath Mahadeoji ..	21 A. L. J. 148; (1923) A. I. R. (A) 160; 45 A. 319 ..	480
Sheogobind Singh v. Mahabir Misser ..	(1922) Pat. 319; (1922) A. I. R. (Pat) 654; 4 P. L. T. 301 ..	143
Sheonandan Chowdhury v. Debi Lal Chowdhury ..	4 P. L. T. 93; (1923) Pat. 78; 1 P. L. R. 134; (1923) A. I. R. (Pat) 239; 2 Pat. 372 ..	484
Sheoram v. Tikaram ..	19 N. L. R. 26; (1923) A. I. R. (N) 93 ..	129
Shriram v. Babaji ..	(1923) A. I. R. (N) 47 ..	49
Shyam Lal v. Padam Singh ..	(1923) A. I. R. (A) 296 ..	1025
Sikandar Shah v. Bhai Ram Chand Sant Ram ..	*Peshawar Judicial Commissioner's Court ..	958

Sinanan Shukulathi Rowther v. Gulam Moideen ..	16 L. W. 338; (1922) M. W. N. 689; (1923) A. I. R. (M.) 24; 24 Cr. L. J. 156 ..	508
Sipahi Singh v. Emperor ..	20 A. L. J. 900; (1923) A. I. R. (A) 88; 24 Cr. L. J. 106; 45 A. 130 ..	234
Sita Ram v. Chait Ram ..	(1923) A. I. R. (A) 257 ..	447
Sita Ram v. Har Sahai ..	(1923) A. I. R. (A.) 438 ..	619
Sita Ram v. Rewa Ram ..	(1923) A. I. R. (A) 366 ..	390
Sonba v. Dattatraya ..	(1923) A. I. R. (N) 192; 6 N. L. J. 59 ..	831
Sonoo v. Bhadaria ..	(1923) A. I. R. (N) 171; 6 N. L. J. 151 ..	468
Sri Krishna Sonar v. Emperor ..	21 A. L. J. 90; 24 Cr. L. J. 144; (1923) A. I. R. (A) 193 ..	368
Sri Ram v. Matwala Ram ..	(1923) A. I. R. (L) 219 ..	577
Srinivasalu Reddiar v. Govinda Goundan ..	17 L. W. 104; 44 M. L. J. 138; (1923) M. W. N. 182; 32 M. L. T. 153; (1923) A. I. R. (M) 239, 24 Cr. L. J. 254 ..	708
Stonewigg v. Kameshwar Narayan Singh ..	(1923) Pat. 122; (1923) A. I. R. (Pat.) 340 ..	1022
Suba Singh v. Gopal Singh ..	*Lahore High Court ..	841
Subba Raidu, *In re* ..	15 L. W. 664; 43 M. L. J. 87; (1922) M. W. N. 494; (1922) A. I. R. (M.) 329; 31 M. L. T. 367; 24 Cr. L. J. 159 ..	511
Subramonian v. Lutchman ..	(1923) A. I. R. (P. C.) 50; 44 M. L. J. 602; 32 M. L. T. 184; 25 Bom. L. R. 582; 1 R. 66; 2 Bur. L. J. 25; 38 C. L. J. 41 (P. C.) ..	650
Sudali Muthu Pillai v. Sudali Muthu Pillai ..	(1922) M. W. N. 831; 17 L. W. 623; (1923) A. I. R. (M) 270 ..	173
Sukh Dial v. Bhopi ..	(1923) A. I. R. (L) 186 ..	481
Sukhrani Kunwar v. Bhukhan Singh ..	21 A. L. J. 193; (1923) A. I. R. (A) 286 ..	628
Superintendent and Remembrancer, Legal Affairs v. Shyam Sardar Bhumij ..	26 C. W. N. 558; (1922) A. I. R. (C.) 106; 24 Cr. L. J. 143 ..	367
Suradhani Dutta v. Sitoo Sheikh ..	(1922) A. I. R. (C.) 311; 27 C. W. N. 280; 38 C. L. J. 17 ..	378
Suryabhan v. Emperor ..	24 Cr. L. J. 203; (1923) A. I. R. (N) 155 ..	667
Tatya v. Sawania ..	(1923) A. I. R. (N) 135; 6 N. L. J. 21 ..	477
Thirumalasseri Kottayil Sreedharam Valia Rajah v. Parakkat ..	(1921) M. W. N. 639; 41 M. L. J. 525 ..	270
Thylayee Ammal v. Srirangaroya Goundan ..	31 M. L. T. 202; 16 L. W. 497; (1922) M. W. N. 629; 43 M. L. J. 624; (1923) A. I. R. (M) 60; 24 Cr. L. J. 100 ..	228
Tika Ram v. Dubo Shib Lal ..	*Allahabad High Court ..	992
Tirkha v. Sohlu ..	5 L. L. J. 75; (1923) A. I. R. (L) 242 ..	739
Tirlok Saithwar v. Lalsa Saithwar ..	*Allahabad High Court ..	465
Tola Ram v. Chandu Mal-Tota Ram ..	*Lahore High Court ..	160
Tulshi v. Bishnath Rai ..	21 A. L. J. 175; (1923) A. I. R. (A) 284 ..	623
Tulsi Prasad Sahai v. Ramraj Ahir ..	(1923) A. I. R. (A.) 414 ..	308
Udai Raj Singh v. Emperor ..	(1922) A. I. R. (A.) 429; 44 A. 691; 24 Cr. L. J. 176 ..	528
Uggar Sain v. Telu ..	(1923) A. I. R. (L) 193; 4 L. 113 ..	829
Umrao Khan v. Emperor ..	21 A. L. J. 194; 24 Cr. L. J. 184 ..	600
Uttam Chand v. Muhammad Bakhsh ..	*Lahore High Court ..	896
Vadamalai Pillai v. Subramania Chettiar ..	16 L. W. 936; (1923) M. W. N. 57; (1923) A. I. R. (M) 262 ..	130
Vasudeo Ramchandra Joshi, *In re* ..	24 Bom. L. R. 1153; 24 Cr. L. J. 171; (1923) A. I. R. (B.) 105 ..	523
Virappa Chettiar v. Kathayee Ammal ..	16 L. W. 592; (1923) A. I. R. (M) 180; 24 Cr. L. J. 64 ..	112
Wajibannissa Begum v. Valmiki Sahay ..	1 P. L. R. 80 ..	589
Wazir v. Girdhari ..	(1923) A. I. R. (L) 311 ..	847
Waziruddin v. Shahabuddin ..	(1922) A. I. R. (N) 254 ..	150
Yerukola v. Yerukola ..	(1922) M. W. N. 215; 30 M. L. T. 279; 42 M. L. J. 507; 15 L. W. 595; (1922) A. I. R. (M.) 150; 45 M. 648 **F. B.** ..	177
Zahir-ud-Din v. Nasir-ud-Din ..	24 Cr. L. J. 186 ..	662
Zamindara Bank, Sherpur Kalan v. Suba ..	*Lahore High Court ..	722

Table showingseriatim the pages of Volume 71 of Indian Cases and the corresponding pages of other Law Journals and Reports.

An asterisk (*) denotes cases not reported yet elsewhere.

Page.	Names of cases reported.	Where reported.
1	Raghupati Chatterjee v. Nrishingha Hori Das ..	36 C. L. J. 491; (1923) A. I. R. (C. 90.
7	Chet Ram v. Kanshi Ram ..	*Peshawar Judicial Commissioner's Court.
11	Maharaj Bahadur Singh v. Hukum Chand ..	4 P. L. T. 48; (1923) A. I. R. (Pat.) 209.
15	Kesho Prasad Singh v. Isser Dubey ..	1 P. L. R. 32.
17	Ramprashad v Bansilal ..	19 N. L. R. 6; (1923) A. I. R. (N.) 117; 6 N. L. J. 121.
20	Lok Nath v. Thakar Das ..	*Peshawar Judicial Commissioner's Court.
25	Shaikh Imam v. Ramchandra ..	(1923) A. I. R. (N.) 69.
26	Sarju Lal v. Baij Nath Prasad Singh ..	(1923) Pat. 6; (1923) A. I. R. (Pat.) 41.
28	Pandurang Bapuji v. Bapuji ..	(1923) A. I. R. (N.) 103.
28	Sant Singh v. Basant Kaur ..	(1923) A. I. R. (L.) 81.
31	Bari Bahu v. Kundan Singh ..	(1922) A. I. R. (N.) 264.
32	Kothandarama Reddy v. Jagathambal Ammal ..	16 L. W. 924; (1923) M. W. N. 74; (1923) A. I. R. (M.) 229.
33	Chaganlal v. Kashiram ..	(1923) A. I. R. (N.) 76.
35	Labh Singh v. Ganpat ..	(1923) A. I. R. (L.) 162.
37	Madhorao v. Nago ..	(1923) A. I. R. (N.) 80.
38	Jagan Nath-Diwan Chand v. Jagan Nath-Moti Lal	*Lahore High Court.
39	Bakaram v. Ramchandra ..	(1923) A. I. R. (N.) 96.
40	Shriram v. Babaji ..	(1923) A. I. R. (N.) 47.
42	Mela Ram v. Prem Kaur ..	(1923) A. I. R. (L.) 143.
42	Laxman v. Bisram Birju ..	(1923) A. I. R. (N.) 94
43	Anandrao v. Dada ..	*Nagpur Judicial Commissioner's Court.
45	Piara Ram v. Ganga Ram ..	*Lahore High Court.
45	Bhojraj v. Shankernath ..	(1922) A. I. R. (N.) 265.
46	Maula Dad v. Wadhawa Singh ..	*Lahore High Court.
47	Rustam Khan v. Rahman ..	(1923) A. I. R. (L.) 289.
48	Balaram v. Atmaram ..	(1923) A. I. R. (N.) 51.
49	Parmananda v. Emperor ..	36 C. L. J. 179; (1922) A. I. R. (C.) 538; 24 Cr. L. J. 1.
49	Ghulam Mohideen v. Ahamadulla Begam ..	16 L. W. 881; (1922) M. W. N. 810; 44 M. L. J. 66; (1923) A. I. R. (M.) 200; 32 M. L. T. 102; 24 Cr. L. J. 2; 46 M. 88.
51	Gulzari Lal v. Emperor ..	49 C. 1075; 24 Cr. L. J. 3; (1923) A. I. R. (C.) 164.
52	Dyal Singh v. Emperor ..	24 Cr. L. J. 4; 5 L. L. J. 228.
53	Bepin Behari Ghose v. Hari Pada Ghose ..	24 Cr. L. J. 5.
54	Deo Datt v. Emperor ..	20 A. L. J. 915; (1923) A. I. R. (A.) 90; 24 Cr. L. J. 6; 45 A. 166.
55	Abdul Gafur v. Emperor ..	35 C. L. J. 437; 26 C. W. N. 996; (1922) A. I. R. (C.) 192; 24 Cr. L. J. 8.
58	Sarju Prasad v. Emperor ..	9 O. L. J. 421; (1922) A. I. R. (O.) 280; 24 Cr. L. J. 10; 26 O. C. 4.
61	Kandaswami Mudali v. Guruswami Pillai ..	16 L. W. 883; 31 M. L. T. 475; 44 M. L. J. 53; (1923) A. I. R. (M.) 184; 24 Cr. L. J. 13.
62	Emperor v. Shankar Dayal ..	25 O. C. 111; (1922) A. I. R. (O.) 224; 9 O. L. J. 667; 24 Cr. L. J. 14.
63	Mattam Shinna Viraiah, *In re* ..	16 L. W. 534; (1923) A. I. R. (M.) 87; 24 Cr. L. J. 15
65	Narantakath Avullah v. Parakkal Mammu ..	(1922) M. W. N. 662; 16 L. W. 626; 43 M. L. J. 663; (1923) A. I. R. (M.) 171; 45 M. 986; 24 Cr. L. J. 17.
77	Emperor v. Mauj Din ..	24 Cr. L. J. 29; 4 L. 7.
79	Hiranand Ojha v. Emperor ..	1 Pat. 621; (1922) A. I. R. (Pat) 586; 4 P. L. T. 44; 24 Cr. L. J. 31.

81	Emperor v. Rajani Kanta Bose . .	35 C. L. J. 356; 26 C. W. N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 Cr. L. J. 33.
110	Chaturbhuj v. Emperor . .	20 A. L. J 877; (1922) A. I. R. (A) 529; 24 Cr. L. J. 62; 45 A. 137.
112	Virappa Chettiar v. Kathayee Ammal . .	16 L. W. 592; (1923) A. I. R. (M.) 180; 24 Cr. L. J. 64.
113	Ram Prasad Singh v. Emperor . .	1 Pat 753; 4 P. L. T. 213; (1923) A. I. R. (Pat.) 50; 24 Cr. L. J. 65.
115	Bechu Chaube v. Emperor . .	20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 Cr. L. J. 67; 45 A. 124.
117	Jagdeo Singh v. Emperor . .	1 Pat 758; 4 P. L. T. 232; (1923) A. I. R. (Pat.) 62; 24 Cr. L. J. 69.
120	Radha Nath v. Emperor . .	36 C. L. J. 149; (1922) A. I. R. (C.) 572; 24 Cr. L. J. 72; 50 C. 94.
122	Mathura Prasad, *In the matter of* . .	1 Pat. 684; (1922) A. I. R, (Pat.) 604; 24 Cr. L. J. 74; 4 P. L. T. 303.
124	Abdul Gahur v. Emperor . .	36 C. L. J. 152; 26 C. W. N. 972; (1922) A. I. R. (C.) 505; 24 Cr. L. J. 76.
126	Muniswami Mudaliar v Rajaratnam Pillai . .	16 L. W. 365; 43 M. L. J. 375; (1922) M. W. N. 594; 31 M. L. T. 287; 24 Cr. L. J. 78.
128	Palaniandi Servai v. Sammandi Ammal . .	16 L. W. 613; (1923) A. I. R. (M.) 87; 24 Cr. L. J. 80.
129	Sheoram v. Tikaram . .	19 N. L. R. 26; (1923) A. I. R. (N.) 93.
30	Vadamalai Pillai v. Subramania Chettiar . .	16 L. W. 936; (1923) M. W. N. 57; (1923) A. I. R. (M.) 262.
140	Shankergir Guru Motigir v. Chinnuji . .	(1923) A. I. R. (N.) 164 6 N. L. J. 1.
143	Sheogobind Singh v. Mahabir Misser . .	(1922) Pat 319; (1922) A. I. R. (Pat.) 654; 4 P. L. T. 301.
144	Kharidar Kapra Co. v. Rukmanand Ramdeo . .	20 A. L. J. 975; (1923) A. I. R. (A.) 139.
145	Aya Ram v. Parshotam Lal . .	*Peshawer Judicial Commissioner's Court.
150	Waziruddin v. Shahabuddin . .	(1922) A. I. R. (N.) 254.
153	Kurukundi Sama Rao v. Firm of Marwadi Vannapi Vajinji . .	(1922) M. W. N. 708; 43 M. L. J. 745; (1923) A. I. R. (M.) 36, 32 M. L. T. 9; 17 L. W. 661; 46 M. 64.
60	Tola Ram v. Chandu Mal-Tota Ram . .	*Lahore High Court.
161	Huri v. Roshan Khudabux . .	(1923) A. I. R. (S.) 5.
171	Anwar v. Kishen Singh . .	(1922) A. I. R. (L) 205.
173	Sudali Muthu Pillai v. Sudali Muthu Pillai . .	(1922) M. W. N. 831; 17 L. W. 623; (1923) A. I. R. (M.) 270.
176	Nimba v. Janki . .	(1923) A. I. R. (N.) 166.
177	Yerukola v. Yerukola . .	(1922) M. W. N. 215; 30 M. L. T. 279; 42 M. L. J. 507; 15 L. W. 595; (1922) A. I. R. (M.) 150; 45 M. 648 **F. B.**
200	Innganti Rajah Gopal Rao v. Chelikani Venkatasurya Rao . .	17 L. W. 6; 44 M. L. J. 64. (1923) A. I. R (M.) 368.
201	Hayat v. Ahmun . .	*Lahore High Court.
204	Malayandi Goundan v. Boman Poosari . .	17 L. W. 159; (1923) A. I. R. (M.) 331.
205	Dongar Singh v. Vishwanath Singh . .	19 N. L. R. 11; (1923) A. I. R. (N.) 86.
207	Gadi v. Govinda . .	(1923) A. I. R. (N.) 141.
209	Banamali Das, *In the matter of* . .	1 Pat. 689; (1922) A. I. R. (Pat.) 608, 4 P. L. T. 235; 1 P. L. R. 57; 24 Cr. L. J. 81.
212	Dervish Hussain, *In re* . .	17 L. W. 18; 44 M. L. J. 84; (1923) A. I. R (M.) 185; 32 M. L. T. 100; 24 Cr. L. J. 84; 46 M. 254.
213	Gajraj Singh v. Emperor . .	20 A. L. J. 906; (1922) A. I. R. (A.) 528; 24 Cr. L. J. 85.
214	Chetto Kalwar v. Emperor . .	49 C. 555; (1922) A. I. R. (C.) 401; 24 Cr. L. J. 86.
215	Gajja Nand v. Emperor . .	(1922) A. I. R. (L.) 139; 24 Cr. L. J. 87.
216	Incha Ram v. Emperor . .	(1922) A. I. R. (A.) 272; 44 A. 647; 24 Cr. L. J. 88.
217	Mittor Moideen Hajee, *In re* . .	43 M. L. J. 561; 16 L. W. 764; (1923) A. I. R. (M.) 95; 24 Cr. L. J. 89.
219	Niru Bhagat v. Emperor . .	1 Pat. 630; (1922) A. I. R. (Pat.) 582; 4 P. L. T. 76; 24 Cr. L. J. 91.

222	Ram Saran Singh v. Chandra Mohun Saha . .	24 Cr. L. J. 94.
225	Aran Sardar v. Hara Sundar Majumdar . .	27 C. W. N. 171; 37 C. L. J. 39; (1923) A. I. R. (C.) 95; 24 Cr. L. J. 97.
228	Thylayee Ammal v. Srirangaroya Goundan . .	31 M. L. T. 202; 16 L. W. 497; (1922) M. W. N. 629; 43 M. L. J. 624; (1923) A. I. R. (M.) 60; 24 Cr. L. J. 100.
232	Khetramani Dasi v. Emperor . .	35 C. L. J. 451; (1922) A. I. R. (C.) 539; 24 Cr. L. J. 104.
234	Sipahi Singh v. Emperor . .	20 A. L. J. 900; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 106; 45 A. 130.
236	Bimala Prosad Mookerjee v. Tata Iron and Steel Co. Ltd. . .	35 C. L. J. 456; (1922) A. I. R. (C.) 83; 24 Cr. L. J. 108.
238	Ramasami Chettiar v. Muthuvelu Mudali . .	16 L. W. 562; 31 M. L. T. 420; 45 M. 843; (1923) M. W. N. 57; (1923) A. I. R. (M.) 191; 24 Cr. L. J. 110.
239	Mahammad Oziullah v. Beni Madhab Chowdhury	26 C. W. N. 878; 36 C. L. J. 180; (1922) A. I. R. (C.) 298, 24 Cr. L. J. 111; 50 C. 135.
241	Abdul Latif Yusuff v. Abu Mohommed Kassim . .	26 C. W. N. 175; (1922) A. I. R. C.) 46; 24 Cr. L. J. 113.
242	Mathi Venkanna, *In re* . .	17 L. W. 451; 24 Cr. L. J. 114; 46 M. 257.
243	Narain Prasad v. Emperor . .	20 A. L. J. 909; (1923) A. I. R. (A.) 85; 24 Cr. L. J. 115; 45 A. 128.
244	Kakarla Chinna Chendrayya v. Maddukkuri Subbarayudu . .	17 L. W. 226; (1923) M. W. N. 77; (1923) A. I. R. (M.) 338; 24 Cr. L. J. 116.
246	Buta Singh v. Emperor . .	5 L. L. J. 36; 24 Cr. L. J. 118; (1923) A. I. R. (L.) 278.
246	Olayet Khan v. Emperor . .	1 Pat. 589; (1922) A. I. R. (Pat.) 587; 4 P. L. T. 98; 24 Cr. L. J. 118.
247	Hajari Sonar v. Emperor . .	26 C. W. N. 344; 24 Cr. L. J. 119.
248	Lalji Singh v. Naurangi Lal . .	(1922) Pat. 304; 3 P. L. T. 764; 4 U. P. L. R. (Pat.) 112; (1922) A. I. R. (Pat.) 618; 24 Cr. L. J. 120.
248	Harnam Dass v. Sain Dass . .	24 Cr. L. J. 120.
252	Marruda Mathu Vannian, *In re* . .	16 L. W. 420; 43 M. L. J. 402; (1922) M. W. N. 601; 44 M. 820; (1922) A. I. R. (M.) 512; 24 Cr. L. J. 124.
254	Harendra Krishna Bagchi v. Bal Kumar . .	3 P. L. T. 762; (1923) A. I. R. (Pat.) 57; 24 Cr. L. J. 126.
256	Hira Lal v. Emperor . .	20 A. L. J. 911; (1922) A. I. R. (A.) 528; 24 Cr. L. J. 128.
257	Arunachalam Chettiar v. Rajeswara Setupati . .	(1921) M. W. N. 873; 15 L. W. 63; 30 M. L. T. 84; 42 M. L. J. 74; (1922) A. I. R. (M.) 55.
259	Abdul Haq v. Firm Shivji Ram-Khem Chand . .	(1922) A. I. R. (L.) 338.
265	Lakhu v. Lal Singh . .	(1923) A. I. R. (A.) 399.
266	Rangiah Chetty v. Govindasami Chetty . .	(1921) M. W. N. 793; 15 L. W. 100; (1922) A. I. R. (M.) 179.
268	National Engineering Coy., Karachi v. Rattan Engineering Coy., Lahore . .	(1923) A. I. R. (L.) 288.
270	Thirumalasseri Kottayil Sreedharam Valia Rajah v. Parakkat . .	(1921) M. W. N. 639; 41 M. L. J. 525.
273	Mustafai Bibi v. Muhammad Shabbir . .	(1923) A. I. R. (A.) 164.
274	Atluru Saraswatamma v. Atluru Paddayya . .	44 M. L. J. 45; (1923) A. I. R. (M.) 297; 46 M. 349.
278	Khunnu Mal v. Indarpal Singh . .	21 A. L. J. 39; (1923) A. I. R. (A.) 183; 45 A. 273.
280	Muhammad Waheb Hussain v. Abbas Hussain ..	4 P. L. T. 326.
283	Behari Lal v. Maqsood Ali ..	(1923) A. I. R. (A.) 189.
284	Jatindra Mohan Chakravarti v. Bijoy Chand Mahatab ..	*Calcutta High Court.
287	Ram Dayal v. Mithoo Lal ..	(1923) A. I. R. (A.) 410.
288	Lakshmana Pillai v. Appalwar Aiyengar ..	31 M. L. T. 451; 44 M. L. J. 77; 17 L. W. 632; (1923) A. I. R. (M.) 246.
289	Ali Ahmad v. Kishan Prasad . .	*Allahabad High Court.

290	Monohar Peshakar v. Haran Chandra Karmakar	*Calcutta High Court.
291	Jhunwa v. Municipal Board, Dhampur . .	21 A. L. J. 101; (1923) A. I. R. (A.) 179; 45 A. 267.
292	Deoki Dube v. Uma Dat . .	(1923) A. I. R. (A.) 369.
293	Fraser v. Krishnaswami Iyer . .	43 M. L. J. 211; 16 L. W. 322; 31 M. L. T. 290; (1922) M. W. N. 745; (1923) A. I. R. (M.) 144.
296	Shamsul Hassan v. Syed Hassan . .	(1923) A. I. R. (A.) 173.
298	Narasayya v. Venkatappa . .	17 L. W. 92; 44 M. L. J. 62; (1923) M. W. N. 12 (1923) A. I. R. (M.) 359.
299	Kuldip Chaube v. Jagnandan Chaube . .	(1923) A. I. R. (A.) 363.
300	Faijaddin v. Agni Kumar Sarma . .	*Calcutta High Court.
303	Gela Ram v. Jhangi Ram . .	*Peshawar Judicial Commissioner's Court.
304	Sarat Chandra Majumdar v. Prasanno Kumar Gope	*Calcutta High Court.
305	Ponduri Adeyya v. Jaladi Burrayya . .	43 M. L. J. 725; 16 L. W. 976; (1923) M. W. N. 49; (1923) A. I. R. (M.) 182; 32 M. L. T. 6
307	Roy Jatindra Nath Choudhury v. Azizarrahaman Shana . .	(1923) A. I. R. (C.) 433; 50 C. 79.
308	Tulsi Prasad Sahai v. Ramraj Ahir . .	(1923) A. I. R. (A.) 414.
309	Haridas Ghose v. Gouri Charan Ghose . .	*Calcutta High Court.
312	Muazam Sher v. Fazal Rahman . .	*Peshawar Judicial Commissioner's Court.
314	Khagendra Nath Mukherjee v. Khetra Nath Pal .	36 C.L.J. 21; (1923) A.I.R. (C.) 21; 50 C. 171.
318	Dhirakshan Singh v. Triloki Prashad Singh . .	(1923) Pat. 22; (1923) A. I. R. (Pat.) 217.
319	Probodh Chandra Das v. Birsinha Bagani . .	*Calcutta High Court.
321	Ambika Prasad v. Jhinak Singh . .	21 A. L. J. 91; (1923) A. I. R. (A.) 211; 45 A. 286.
324	Chandra Kumar Basu v. Rani Sashimukhi Debi . .	*Calcutta High Court.
325	Kunjilal v. Pannalal . .	19 N. L. R. 10; (1923) A. I. R. (N.) 91.
326	Haraprasanna Bandopadhya v. Arab Ali . .	*Calcutta High Court.
327	Rajendra Narayan Chaudhury v. Abu Nasar Ahiya	27 C. W. N. 189; 37 C. L. J. 141; (1923) A. I. R. (C) 189; 50 C. 146.
330	Abdur Salam Sahib v. Kandaswami Chettiar . .	16 L. W. 473; (1922) M. W. N. 639; 43 M. L. J. 556; (1923) A. I. R. (M.) 54.
332	Rameshivendra Narayan Ojha v. Audh Behari Saran . .	4 P. L. T. 393.
334	Sathappa Chetty v. Subramaniam Chetty . .	16 L. W. 718; 43 M. L. J. 758; 31 M. L. T. 385; (1922) A. I. R. (M.) 510.
336	Hara Kumar De v. Jogendra Krishna Ray . .	*Calcutta High Court.
339	Mohammad Karim Khan v. Sadiq Hussain . .	*Oudh Judicial Commissioner's Court.
341	Radha Krishna Gopal Lalji v. Lakshmi Narayan .	1 P. L. R. 86; 4 P.L. T. 329; (1923) Pat. 159; 2 Pat. 273.
343	Karumuri Ramalakshmi v. Boda Nagaratnam . .	17 L. W. 11; (1923) M. W. N. 172; 44 M. L. J. 677; (1923) A. I. R. (M.) 335.
345	Ramyad Singh v. Chhedia Barhi . .	1 Pat. 750; (1923) A. I. R. (Pat.) 64; 4 P. L. T. 439.
346	Sadaq Reza v. Khoshmohini Dasi . .	(1922) A. I. R. (C.) 317.
350	Sheo Prasad v. Babu Ram . .	(1923) A. I. R. (A.) 168.
351	Mayaram v. Bhairon Prasad . .	19 N. L. R. 29; (1923) A. I. R. (N.) 115.
353	Chandrika Ram v. Emperor . .	1 Pat. 401; 3 P. L. T. 771; (1922) A. I. R. (Pat.) 535; (1923) Pat. 26; 24 Cr. L. J. 129; 1 P. L. R. 77 Cr.
359	Nanoo v. Emperor . .	24 Cr. L. J. 135.
360	Khwaja Hassan v. Emperor . .	24 Cr. L. J. 136.
395	Akshoy Kumar Bhattacharjee v. Brojeswar Ghatak	26 C. W. N. 1000; 24 Cr. L. J. 141; (1923) A. I. R. (C.) 303.
397	Superintendent and Remembrancer, Legal Affairs v. Shyam Sardar Bhumij . .	26 C. W. N. 558; (1922) A. I. R. (C.) 106; 24 Cr. L. J. 143.
398	Sri Krishna Sonar v. Emperor . .	21 A. L. J. 90; 24 Cr. L. J. 144; (1923) A. I. R. (A.) 193.
399	Muhammad Shakur v. Abdul Ghani . .	(1223) A. I. R. (A.) 362.
370	Nobin Chandra Bose v. Bandi . .	*Allahabad High Court.
371	Bepin Krishna Roy v. Priyabrata Bose . .	(1923) A. I. R (C.) 387.
374	Jantapuram Subbiah v. Gundalapudi . .	17 L. W. 77; 44 M. L. J. 43; (1923) M. W. N. 13; (1923) A. I. R. (M.) 358; 46 M. 104.
376	Sukat Mul v. Katori . .	21 A. L. J. 122; (1923) A. I. R. (A.) 265.
378	Suradhani Dutta v. Sitoo Sheikh . .	(1922) A. I. R. (C.) 311; 27 C. W. N. 280; 38 C. L. J. 17.

381	Ram Gajadhar v. Surtani ..	(1923) A. I. R. (A.) 343.
382	Janki Ram v. Misri Lal ..	(1923) A. I. R. (A) 377.
383	Ajodhya Kuwar v. Durga Prasad ..	4 P. L. T. 115; (1923) Pat. 145; (1923) A. I. R. (Pat.) 331.
390	Sita Ram v. Rewa Ram ..	(1923) A. I. R. (A.) 366.
390	Namberumal Chettiar v. Raghava Chariar ..	14 L. W. 563.
393	Amar Deo Pande v. Gaya Pande ..	(1923) A. I. R. (A.) 408.
395	Bhola Pandey v. Ram Bilas Pandey ..	*Patna High Court.
400	Muhammad Altaf Ali Khan v. Phool Kunwari ..	(1923) A. I. R. (A.) 367.
401	Ambadas v. Laxman ..	19 N. L. R. 8.
402	Ram Sahai v. Binod Behari Ghose ..	21 A. L. J. 102; (1923) A. I. R. (A.) 351; 45 A. 277.
404	Narsayya v. Laxminarayan ..	19 N. L. R. 34; (1923) A. I. R. (N.) 187; 6 N. L. J. 66.
405	Bahadur Singh v. Ram Bahadur ..	21 A. L. J. 140; (1923) A. I. R. (A.) 204; 45 A. 277.
408	Rup Singh v. Bhullan Singh ..	20 A. L. J. 950; (1923) A. I. R. (A.) 52.
409	Krishna Bai v. Debi Singh ..	(1923) A. I. R. (N.) 195.
411	Abdul Ghafur v. Nuruddin Ahmad ..	20 A. L. J. 984; (1923) A. I. R. (A.) 137; 45 A. 193.
412	Kamal Khan v. Nizamuddin ..	20 A. L. J. 987; (1923) A. I. R. (A.) 123.
413	Phula v. Kusam Singh ..	(1923) A. I. R. (N.) 70.
416	Bhagwan Das v. Mangalia ..	20 A. L. J. 959; (1922) A. I. R. (A.) 540; 45 A. 196.
417	Ramanand Shukul v. Chhotey Lal ..	20 A. L. J. 969; (1923) A. I. R. (A.) 124.
418	Bansilal v. Ranglal ..	19 N. L. R. 32; (1923) A. I. R. (N.) 161; 6 N. L. J. 47.
420	Darshan Lal v. Shibji Maharaj Birajman ..	20 A. L. J. 977; (1923) A. I. R. (A.) 120; 45 A. 215.
421	Kishan Lal v. Abdulla ..	(1923) A. I. R. (N.) 88.
424	Jhinak Singh v. Ambika Prasad ..	(1923) A. I. R. (A.) 414.
424	Hardeo Prasad v. Damodar Prasad ..	20 A. L. J. 980; (1923) A. I. R. (A.) 119.
426	Anand Ram Brahman v. Ramgulam Sahu ..	3 P. L. T. 820; (1922) Pat. 365; 1 P. L. R. 12 (1923) A. I. R. (Pat.) 150; 2 Pat. 264.
431	Bangali Mal v. Firm Ganga Ram-Asharfi Lal ..	*Allahabad High Court.
432	Mohammad Asghar Ali Khan v. Rammon ..	(1923) A. I. R. A. 378.
436	Maharashtraya Jnan Kosh Mandal Ltd. v. Bijjulal	19 N. L. R. 36; (1923) A. I. R. (N.) 182; 6 N. L. J. 100.
441	Lachman Das v. Mulchand ..	(1923) A. I. R. (A.) 411.
443	Dhan Kumari Devi v. Mahendra Singh ..	19 N. L. R. 45; (1923) A. I. R. (N.) 199; 6 N. L. J. 111.
444	Mukhtara v. Sardara ..	(1923) A. I. R. (A.) 417.
445	Arjun v. Narayan ..	19 N. L. R. 50; (1923) A. I. R. (N.) 193.
447	Sita Ram v. Chait Ram ..	(1923) A. I. R. (A.) 257.
450	Chintamaneni Venkatappayya v. Chintamaneni Venkatappayya ..	17 L. W. 150; (1923) A. I. R. (M.) 352.
452	Noor Mahomed Veerjibhai Veelmahomed v. Natwar Lal ..	(1923) A. I. R. (A.) 112; 45 A. 220.
453	Bhairab Chandra Dutta v. Kali Kumar Dutta ..	*Calcutta High Court.
455	Bhirgunath Rai v. Apnarain Rai ..	45 A. 157; (1923) A. I. R. (A.) 445.
456	Peare Lal v. Ashraf Khan ..	21 A. L. J. 185 (1923) A. I. R. (A.) 213.
457	Mahadeo Prasad v. Hamidan ..	21 A. L. J. 97; (1923) A. I. R. (A.) 271. 45 A. 304.
459	Agent, B. B. & C. I. Railway, Bombay v. Firm Manohar Lal-Parwin Chand ..	5 L. L. J. 3; (1923) A. I. R. (L.) 84; 4 L. 46.
460	Sadiq Ali v. Abdul Baqi Khan ..	21 A. L. J. 109; (1923) A. I. R. (A.) 251; 45 A. 290.
463	Rangaswami Nayudu v. Krishnaswami Aiyar ..	17 L. W. 147; 44 M. L. J. 116 (1923) M. W. N. 84; 32 M. L. T. 133; (1923) A. I. R. (M.) 276.
465	Tirlok Saithwar v. Lalsa Saithwar ..	*Allahabad High Court.
466	Kunhikuttiali v. T. P. Kunhammad ..	44 M. L. J. 184; 17 L. W. 243; (1923) M. W. N. 81; (1923) A. I. R. (M.) 278.
468	Sonoo v. Bhadaria ..	(1923) A. I. R. (N.) 171; 6 N. L. J. 151.
470	Chaturgun Bind v. Tilakdhari Singh ..	*Patna High Court.
472	Bhola Nath v. Ram Sahai ..	*Allahabad High Court.
473	Mosafir Lal Das v. Ganesh Jha ..	(1922) Pat. 347; (1922) A. I. R. (Pat.) 656; 4 P. L. T. 134.

474	Badlu Singh v. Panthu Singh ..	21 A. L. J. 173; 9 O. & A. L. R. (A.) 4331 (1923) A. I. R. (A.) 270.
475	Jasram v. Amar Nath ..	(1923) A. I. R. (A.) 439.
475	Dasi Chamar v. Ram Auttar Singh ..	*Patna High Court.
477	Tatya v. Sawania ..	(1923) A. I. R.) (N.) 135; 6 N. L. J. 21.
478	Jantra Koer v. Ali Jan Darji ..	*Patna High Court.
480	Sheo Ramji v. Sri Ridhnath Mahadeoji ..	21 A. L. J. 148; (1923) A. I. R. (A.) 160; 45 A. 319.
481	Sukh Dial v. Bhopi ..	(1923) A. I. R. (L.) 186.
484	Sheonandan Chowdhury v. Debi Lal Chowdhury ..	4 P. L. T. 93; 1 P. L. R. 134; (1923) A. I. R. (Pat.) 239; 2 Pat. 372; (1923) Pat. 78.
487	Colony Flour Mills Co., Ltd., Lyallpur v. Firm Bhai Sant Singh-Bhagwan Singh ..	5 L. L. J. 140; (1923) A. I. R. (L.) 414.
488	Ram Charitara v. Mohan Dei ..	21 A. L. J. 159; (1923) A. I. R. (A.) 210; 45 A 309.
489	Dukhit Ojha v. Janki Singh ..	4 P. L. T. 377.
491	Ganpat v. Firm of Bissessarlal-Govindram ..	*Nagpur Judicial Commissioner's Court.
495	Hukam Chand v. Shahab Din ..	4 L. 90.
497	Emperor v. Biseswar De ..	26 C. W. N. 1010 (1923) A. I. R. (C.) 217; 24 Cr. L. J. 145.
501	Durga Prasad v. Emperor ..	20 A. L. J. 981 (1923) A. I. R. (A.) 126; 24 Cr. L. J 149: 45 A. 223.
503	Rasik Lal Das v. Emperor ..	26 C. W. N. 712; (1922) A. I. R. (C.) 492; 42 Cr. L. J. 151.
503	Gokal v. Emperor ..	20 A. L. J. 921; (1923) A. I. R. (A) 87; 24 Cr. L. J. 151; 45 A. 142.
504	Jayaramulu v. Emperor ..	(1922) M. W. N. 570; 16 L. W. 496; 31 M. L. T. 310; 43 M. L. J. 553; 45 M. 842; (1923) A. I. R. (M.) 50; 24 Cr. L. J. 152.
505	Ram Prasad v. Emperor ..	20 A. L. J. 926 (1923) A. I. R. (A.) 137; 24 Cr. L. J. 153.
506	Mohammad Ismail v. Barkat Ali ..	26 C. W. N. 904; (1922) A. I. R. (C.) 483; 24 Cr. L. J. 154.
507	Ganeshi Lal v. Emperor ..	20 A. L. J. 967; (1923) A. I. R. (A.) 88; 24 Cr. L. J. 155.
508	Sinanan Shukulathi Rowther v. Gulam Moideen ..	16 L. W. 338; (1922) M. W. N. 689; (1923) A. I. R. (M.) 24. 24 Cr. L. J. 156.
509	Gosto Behary Basu v. Baistom Das Denre ..	26 C. W. N. 831; 37 C. L. J. 105; (1923) A. I. R. (C.) 105; 24 Cr. L. J. 157.
511	Subba Raidu, *In re* ..	15 L. W. 664; 43 M. L. J. 87; (1922) M. W. N. 494; (1922) A. I. R. (M.) 329; 31 M. L. T. 367; 24 Cr. L. J. 159.
512	Gulam Muhammad v. Emperor ..	3 L. 401; (1923) A. I. R. (L.) 81; 24 Cr. L. J. 160.
514	Arunachala Thevan v. Vellachami Thevan ..	44 M. L. J. 56; 17 L. W. 462; 32 M. L. T. 104; 24 Cr. L. J. 162; 46 M. 162; 1923 A. I. R. (M.) 324.
516	Benowari Lal Ram v. Pronab Krishna Majumdar	35 C. L. J. 397; 26 C. W. N. 663; (1922) A. I. R. (C.) 569; 24 Cr. L. J. 164.
519	Raj Pal v. Emperor ..	3 L. 405; (1923) A. I. R. (L.) 61; 24 Cr. L. J. 167 S. B.
523	Vasudeo Ramchandra Joshi, *In re* ..	24 Bom. L. R. 1153; 24 Cr. L. J. 171; (1923) A. I. R. (B.) 105.
525	Nur Muhammad Khan v. Emperor ..	21 A. L. J. 137; 24 Cr. L. J. 173; (1923) A. I. R. (A.) 276.
527	Nayan Manjuri Dasi v. Fazley Huq Sardar ..	49 C. 871; (1922) A. I. R. (C.) 502; 24 Cr. L. J. 175.
528	Udai Raj Singh v. Emperor ..	(1922) A. I. R. (A.) 429; 44 A. 691; 24 Cr. L. J. 176.
529	Dina Singh v. Devi Chand ..	(1923) A. I. R. (A) 263.
530	Jagannatha Sastry v. Sarathambal Ammal ..	44 M. L. J. 202; 17 L. W. 251; (1923) M. W. N. 157; (1923) A. I. R. M.) 321; 46 M. 574.
532	Anandrao v Saraswatibai ..	(1923) A. I. R (N.) 125; 6 N. L. J. 115.
533	Annadana Jadaya Gounder v. Konammal ..	17 L. W. 107, (1923) M. W. N. 15; (1923) A. I. R. (M.) 402.
556	Jainarayen Bapu v Vithoba ..	1923) A. I. R. (N.) 143.
557	Hayat Ali Shah v. Taj-ul-Nissa ..	(1923) A. I. R. (L.) 205.

558	Govinda v. Abdul Kadir ..	(1923) A. I. R. (N.) 150.
559	Badri Upadhia v. Dwarka Upadhia ..	*Allahabad High Court.
560	Jhumak Singh v. Mahindra Singh ..	*Patna High Court.
561	Phui v. Devatia ..	(1923) A. I. R. (L.) 210.
562	Rahima v. Razzak Ali ..	21 A. L. J. 184; (1923) A. I. R. (A.) 256.
563	Mahesha v. Rameshar ..	*Oudh Judicial Commissioner's Court.
564	Kanhaiya Lal v. Gora ..	(1923) A. I. R. (A.) 436.
565	Rameshwar Das-Mali Ram v. E. I. Ry. Coy, Ltd.	4 P. L. T. 331; (1923) A. I. R. (Pat.) 298.
566	Nana v. Jogilal ..	19 N. L. R. 69; (1923) A. I. R. (N.) 151; 6 N. L. J. 81.
568	Chuha Mal v. Rahim Baksh ..	*Lahore High Court.
570	Ram Lochan Baid v. Kamakhya Narain Singh ..	4 P. L. T. 123; (1923) A. I. R. (Pat.) 201; (1923) Pat. 54.
572	Khushal Devi v. Sukh Dial ..	*Lahore High Court.
573	Harnarain Pandey v. Nandkeswar Pandey ..	1 P. L. R. 127.
574	Lachhmi Chand v. Anandi ..	21 A. L. J. 73:(1923)A.I.R.(A.)109; 45 A 245.
577	Sri Ram v. Matwala Ram ..	(1923) A. I. R. (L.) 219.
581	Ram Ratan v. Ganga Bukhsh Singh ..	9 O. and A. L. R. (O) 222; 10 O. L. J. 193.
587	Ajudhia Parshad v. Imam-ud-Din ..	(1923) A. I. R. (L.) 230.
589	Wajibannissa Begum v Valmiki Sahay ..	1 P. L. R. 80
593	Mula Singh v. Emperor ..	24 Cr. L. J. 177.
595	Jain-ud-Din v. Keramatulla ..	24 Cr. L. J. 179.
596	Khan Muhammad v. Emperor ..	24 Cr. L. J. 180; 4 L. 58.
597	Durga Singh v. Emperor ..	24 Cr. L. J. 181.
599	Nihal Singh v. Emperor ..	(1922) A. I. R (L.) 220 24 Cr. L. J. 183.
600	Umrao Khan v. Emperor ..	21 A. L. J. 190; 24 Cr. L. J. 184.
601	Gopal Singh v. Emperor ..	(1922) A. I. R. (L.) 221; 24 Cr. L. J. 185.
602	Zahir-ud-Din v. Nasir-ud-Din ..	24 Cr. L. J. 186.
603	Sardara v. Emperor ..	24 Cr. L. J. 187; 5 L. L. J. 230; (1923) A. I. R. (L.) 380.
605	Hira v. Emperor ..	24 Cr. L. J. 189; (1923) A. I. R. (A.) 194; 45 A. 250.
608	Ramanathan Chettiar, *In re* ..	17 L. W. 412; 32 M. L. T. 81 and 217; 24 Cr. L. J. 192.
609	Secretary of State for India v. Firm Jiwan and Abdullah ..	21 A. L. J. 220; 45 A. 380 (1923) A. I. R. (A.) 426.
610	Nand Lal v Firm Gulab Rai-Narain Das ..	(1923) A. I. R. (A.) 345.
611	Ishan Chandra Sarkar v. Monmotha Nath Dutta	37 C. L. J. 298; (1923) A. I. R. (C.) 339.
614	Cawnpore Cotton Mills Co. Ltd. v. Great Indian Peninsula Railway ..	21 A. L. J. 223; (1923) A. I. R. (A.) 301; 45 A. 353.
617	Ram Narain v. Harbans Singh ..	*Allanabad High Court.
618	Phag Singh v. Khushal Singh ..	*Lahore High Court.
619	Sita Ram v Har Sahai ..	(1923) A. I. R. (A.) 438.
620	Hulas Rai v. Sohan Lal ..	(1923) A. I. R. (A.) 443.
621	Akhtari Begam v. Diljan Ali ..	(1923) A. I. R. (P C.) 11; 32 M. L. T. 180; 45 M. L. J. 193 (**P. C.**)
623	Tulshi v. Bishnath Rai ..	21 A. L. J. 175 (1923) A. I. R. (A.) 284.
625	Nur Mahomed Peerbhoy v. Dinshaw Hormasji Motiwalla	(1922) A. I. R. (P. C.) 393 **P. C.**
628	Sushrani Kunwar v. Bhukhan Singh ..	21 A. L. J. 193; (1923) A. I. R. (A.) 286.
629	Harnath Kuar v. Indar Bahadur Singh ..	(1922) A. I. R (P. C.) 403; 9 O. and A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179 (P. C.) 27 C. W. N. 949.
631	Sheo Ram Koeri v. Ikramunnissa Bibi ..	21 A. L. J. 176; (1923) A. I. R. (A) 282; 45 A. 316.
632	Saratkumari Dasi v Amullyadhan Kundu ..	17 L. W. 481; (1923) A I. R. (P. C.) 13; 32 M. L. T. 137; 27 C. W. N. 620; 25 Bom. L. R. 548; 37 C. L. J. 501; (1923) M. W. N. 393 **P. C.**
640	Hafiz Abdullah v. Alli ..	21 A. L. J. 204; (1923) A. I. R. (A.) 291.
641	Pirthipal Singh v. Ganesh Din Singh ..	(1922) A. I. R. (P. C.) 383; 44 M. L. J. 29; 37 C. L. J. 219, 9 O. L. J 649; 25 O. C. 396; 32 M. L. T. 109; 9 O. & A. L. R. (P. C.) 541; 18 L. W. 41 **P. C.**

643	Kamulammal v. Visvanathaswami Naicker ..	17 L. W. 298; (1923) A. I. R. (P. C.) 8 44 M. L. J. 465; 32 M. L. T. 48; 37 C. L. J. 363; 25 Bom. L. R. 577; 46 M. 167 (P. C.).
645	Kunwar Pal v. Madan Mohan ..	21 A. L. J. 213 (1923) A. I. R. (A.) 428.
646	Abdur Rahim v. Narayan Das Aurora ..	(1923) A. I. R. (P. C.) 44; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; 1923 M. W. N. 441 **P. C.**
649	Ram Harakh Pandey v. Chuni Singh ..	(1923) A. I. R. (A.) 446.
650	Subramonian v. Lutchman ..	(1923) A. I. R. (C. P.) 50; 44 M. L. J. 602; 32 M. L. T. 184; 25 Bom. L. R. 582; 1 R. 66; 2 Bur. L. J. 25; 38 C. L. J. 41 **P. C.**
653	Shakur v. Husaini Bibi ..	(1923) A. I. R. (A.) 447.
654	Ramji Das v. Mihin Lal ..	(1923) A. I. R. (A.) 441.
655	Kundan v. Sobhon Ram ..	(1923) A. I. (A.) 375.
657	Emperor v. Satyendra Kumar Dutt Chowdhury ..	37 C. L. J. 173; 24 Cr. L. J. 193; (1923) A. I. R. (C.) 463.
661	Abdul Wahid Khan v. Abdullah Khan ..	21 A. L. J. 211; 24 Cr. L. J. 197; (1923) A. I. R. (A.) 325.
662	Mazahar Ali v. Emperor ..	36 C. L. J. 417; 27 C. W. N. 99 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196; 50 C 223.
665	Khanun v. Emperor ..	(1922) A. I. R. (L.) 75; 24 Cr. L. J. 201.
666	Girija Nanda Kali Mirter v. Emperor ..	26 C. W. N. 666; 24 Cr. L. J. 202.
667	Suryabhan v. Emperor ..	24 Cr. L. J. 203; (1923) A. I. R. (N.) 155.
668	Ram Din Singh v. Naujadak Singh ..	24 Cr. L. J. 204.
669	Emperor v. Jangusingh ..	24 Cr. L. J. 205; (1923) A. I. R. (N.) 158, 19 N. L. R. 48; 6 N. L. J. 68.
670	Asutosh Das Gupta v. Purna Chandra Ghose ..	36 C. L. J. 287; (1923) A. I. R (C.) 11 24 Cr. L. J. 206; 50 C. 159.
673	Mohendra Lal Roy, *In the matter of* ..	27 C. W. N 88; (1922) A. I. R. (C.) 550; 24 Cr. L. J. 209.
681	Brij Kumar v. Manna Lal Misra ..	(1922) A. I. R. (O.) 18; 25 O. C 153; 9 O.L.J. 662; 24 Cr. L. J. 217.
684	Ram Bilas v. Lachmi Narain ..	20 A. L. J 904; (1923) A. I. R. (A.) 84; 45 A. 140; 64 Cr. L. J. 220.
685	Emperor v. Balaram Das ..	49 C. 358; (1922) A. I. R (C.) 382; 24 Cr. L. L. 221.
689	Anandi v. Emperor ..	(1923) A. I. R. (A.) 327; 45 A. 329; 24 Cr. L. J. 225.
691	Dubri v. Emperor ..	8 O. L. J. 318.
692	Ram Badan Singh v. Janki ..	21 A. L. J. 207; (1923) A. I. R. (A.) 332; 24 Cr. L. J. 228; 45 A. 363.
693	Jagat Chandra Roy v. Kalimaddi Sardar ..	26 C. W. N. 880; 24 Cr. L. J. 229.
694	Ainuddin v. Emperor ..	(1922) A. I. R. (C.) 97; 24 Cr. L. J. 230.
696	Jasna v. Emperor ..	21 A. L. J. 215; (1923) A. I. R. (A.) 332; 24 Cr. L. J. 232.
697	Rajendra Nath Ghose v. Amrita Lal Chakervarti ..	24 Cr. L. J. 233.
698	Athar Hussain v. Emperor ..	(1922) Pat. 27; (1922) A. I. R. (Pat.) 51; 24 Cr. L. J. 234.
699	Sajani Kanta Roy v. Shamsher Ali Sheikh ..	24 Cr. L. J. 235.
700	Bishan Das v. Emperor ..	5 L. L. J. 272; 24 Cr. L. J. 236.
702	Gour Mohan Dalui v. Bansidhar Dyas ..	24 Cr. L. J. 238.
703	Manazir-ul-Haq v. Emperor ..	4 P. L. T. 97 (1923) Pat. 45; (1923) A. I. R. (Pat.) 185; 24 Cr. L. J. 239.
704	Har Narain Prasad v. Emperor ..	(1923) A. I. R. (A) 327; 24 Cr. L. J. 240.
705	Sa deo Narain v. Ramayan Tewari ..	4 P. L. T. 147; (1923) A. I. R. (Pat.) 242; 2 Pat. 335.
722	Zamindara Bank, Sherpur Kalan v. Suba ..	*Lahore High Court.
724	Gobind Singh v. Official Liquidator, Union Bank of India, Limited, Delhi ..	(1923) A. I. R. (A.) 85.
727	Rambhaba v. Tolaram ..	(1923) A. I. R. (N.) 188; 6 N. L. J. 39.
730	Nur Muhammad Khan v. Noor Muhammad Khan	5 L. L. J. 30; (1923) A. I. R. (L.) 212.
734	Bhamoar Mal-Pama Mal v. Ganga Sahai Nihal Chand ..	5 L. L. J. 5, (1923) A. I. R. (L) 212.
736	Shahadat v. Hukam Singh ..	*Lahore High Court.

737	Ram Kishen v. Hirde Ram ..	(1923) A. I. R. (L) 135.
739	Turkha v. Sohlu ..	5 L. L. J. 75 (1923) A. I. R. (L) 272.
741	Ram Sumran Prasad v. Ram Bahadur ..	P. L. T. 99; (1923) Pat. 61; (1923) A. I. R. 4 (Pat) 224; 2 Pat 328.
743	Ishri v. Shib Ram ..	(1923) A. I. R. (L) 239.
746	Lal Chand v. Begam ..	3 L. 433 (1923) A. I. R. (L) 262; 5 L. L. J. 193.
748	Ram Kishen v. Bhagirti ..	(1923) A. I. R. (L) 304.
749	Ram Raghubir Lal v. Dip Narain Singh ..	21 A. L. J. 168; 9 O. & A. L. R. (A) 349 (1923) A. I. R. (A) 287; 45 A. 311.
753	Salayjee v. Fatima Bibi ..	(1922) A. I. R. (P. C) 391; 44 M. L. J. 372 25 Bom. L. R. 301; 32 M. L. T. 96; 37 C. L. J. 302; I. R. 60 18 L. W. 44; 2 Bur. L. J. 1; (1923) M. W. N. 522 **P. C.**
755	Jagdeo Tiwari v. Kuber Nath Pandey ..	(1923) A. I. R. (A.) 312
756	Secretary to the Board of Rev. (Income-Tax) Madras v. Madras Export Co., Madras ..	17 L. W. 161; 44 M. L. J. 290; (1923) A. I. R. (M) 422; 46 M. 360
761	Kesho Ram v. Peare Lal ..	21 A. L. J. 209; (1923) A. I. R. (A.) 443.
762	Mohammad Ahmad v. Babu ..	(1923) A. I. R. 442.
763	Harichand Mancharam v. Govind Luxman ..	(1923) A.I.R. (P. C.) 47; 17 L. W. 572; 44 M. L. J 608; 32 M L T. 175; 37 C L. J. 440; 25 Bom. L. R. 531; 47 B. 335 **P. C.**
767	Inayat Husain v. Faiz Muhammad ..	21 A. L. J. 191; (1923) A. I. R. (A.) 319; 45 A. 335
768	Lala Singh v. Basdeo ..	(1923) A. I. R. (A.) 429.
769	Sahdeo Narain Deo v. Kusum Kumari ..	4 P. L. T. 217; (1923) A. I. R. P. C. 21; 44 M. L. J. 476; 32 M. L. T. 121; 37 C. L. J. 369; 25 Bom. L. R. 560; (1923) M. W. N. 377; 2 Pat. 230, 27 C. W. N. 901 **P. C.**
773	Lalta Prasad v. Kharga ..	21 A. L. J. 189 (1923) A. I. R. (A.) 313; 45 A. 336.
775	Municipal Committee, Delhi v. Abdul Hussan Khan ..	*Lahore High Court.
777	Ramkrishna Puri v. Tanba ..	19 N. L. R. 59; (1923) A. I. R. (N.) 153; 6 N. L. J. 80.
779	Kewal Ram v. Abdul Hai ..	(1923) A. I. R. (L.) 409.
781	Said Khan v. Zarif Khan ..	*Peshawar Judicial Commissioner's Court.
783	Muhammad Hussain v. Ram Lal ..	5 L. L. J. 198
783	Darshan Ram-Ganesh Das v. Khair Din-Allah Bakhsh ..	*Lahore High Court.
785	Kamla Prasad Singh v. Gobind Sahay ..	(1922) A. I. R. (Pat.) 13; 3 P. L. T. 826; 24 Cr. L. J. 241.
789	Khem Chand v. Emperor ..	24 Cr. L. J. 245.
792	Nauranga v. Emperor ..	24 Cr. L. J. 248.
792	Promotha Nath Mukhopadhya v. Emperor ..	27 C. W. N. 389; (1923) A. I. R. (C) 470; 24 Cr. L. J. 792; 50 (C.) 518.
795	Dewa Singh v. Emperor ..	(1923) A. I. R (L.) 194; 24 Cr. L. J. 251.
795	Emperor v. Jiyalal Bhoi ..	(1923) A. I R. (N.) 158; 24 Cr. L. J. 251.
797	Lazarus Megh Nath v. Emperor ..	24 Cr. L. J. 253.
798	Srinivasalu Reddiar v. Govinda Goundan ..	17 L. W. 104; 44 M. L. J. 138; (1923) M. W. N. 182. 32 M. L. T. 153; (1923) A. I. R. (M) 439; 24 Cr. L. J. 254.
801	Jwala Singh v. Teja Singh ..	*Lahore High Court.
804	Shamrao Dewaji v. Pandurang ..	(1923) A. I. R. (N) 137; 6 N. L. J. 93.
805	Muhammad Hussan v Sohara ..	*Lahore High Court.
808	Sampat v. Motilal ..	(1923) A. I R (N.) 177.
811	Kanshi Ram v. Shah Nawaz ..	(1923) A. I. R. (L.) 295.
812	Rahimuddin v. Shahbaz Khan ..	*Peshawar Judicial Commissioner's Court.
813	Nanak Chand v Sajjad Hussain ..	*Lahore High Court.
814	Sawan Mal-Gopi Chand v. Shiv Charan Das ..	*Lahore High Court.
816	Govind v. Anant ..	19 N. L. R. 54: (1923) A. I. R. (N.) 145; 6 N. L. J. 49.
817	Bakhsh Ilahi v. Abdul Rahman ..	*Lahore High Court.
820	Malawa Ram v. Sundra ..	*Lahore High Court.
822	Azim Khan v. Karim ..	*Lahore High Court.
823	Misri Khan v. Shahji ..	*Lahore High Court.
824	Nanak Chand v. Sajjad Hussain ..	*Lahore High Court.

825	Ram Lal v. Ghanisham Das ..	(1923) A. I. R. (L.) 150
826	Budha Mal v. Shib Dayal ..	*Lahore High Court.
827	Ayub v. Kirpal Singh ..	*Lahore High Court.
828	Mula Mal v. Piara Singh ..	*Lahore High Court.
829	Uggar Sain v. Telu ..	(1923) A. I. R. (L.) 193; 4 L 113.
830	Bakho v Lal ..	*Lahore High Court
831	Sonba v. Dattatraya ..	(1923) A. I. R. (N) 192; 6 N. L. J. 59.
833	Malan v. Kishore Chand ..	(1923) A. I. R. (L.) 17.
836	Birj Narain Rai v. Kedar Nath ..	20 A. L. J. 918; (1923) A. I. R. (A.) 57; 45 A. 186.
837	Kallan v. Jawahar Singh ..	5 L. L. J. 99.
840	Nanha v. Sunda ..	*Lahore High Court.
841	Suba Singh v. Gopal Singh ..	*Lahore High Court
843	Damodar Prasad v. Ram Sarup ..	4 P. L. T. 102 (1923) Pat 137; 1 P. L. R. 252; (1923) A. I. R. (Pat) 327.
847	Wazir v. Girdhari ..	(1923) A. I. R. (L.) 311.
849	Secretary of State for India v. Upendra Narain Roy ..	36 C. L. J. 336 (1923) A. I. R. (C.) 247.
855	Magdoom Mahamad v. Bansi Lal ..	(1922) M. W. N. 824; (1923) A I. R. (M.) 248.
860	Dharnidhar v Sakharam ..	*Nagpur Judicial Commissioner's Court.
862	Karam Chand v. Jinda Ram ..	*Lahore High Court.
863	Mulloo v. Kundanlal ..	(1923) A I. R. (N.) 139.
864	Shankar v. Bahadur ..	(1923) A. I. R. (L.) 37; 5 L. L. J. 212
865	Angnoo Singh v. Emperor ..	20 A. L. J. 881; (1923) A. I. R. (A.) 35; 45 A. 109; 24 Cr. L. J 257.
871	Mahadeo Dutt v. J. N. Sarkar ..	(1922) Pat. 122; (1922) A. I. R. (Pat.) 340; 24 Cr L. J. 263.
877	Naramban, *In re* ..	15 L. W. 552; (1922) M. W. N 926; (1922) A. I. R. (M.) 195; 24 Cr. L. J. 269.
879	Muhammad Afzal v. Emperor ..	24 Cr. L. J. 271.
881	Jai Krishna v. Bibi Soghra ..	4 P. L. T. 418.
885	Sardar Khan v. Abdulla Khan ..	*Lahore High Court.
887	Jagernath Das v. Jang Bahadur Rai ..	(1923) Pat. 33; 4 P. L. T. 285; (1923) A. I. R. (Pat.) 218.
893	Allah Din v. Shankar Shah ..	*Lahore High Court.
896	Uttam Chand v. Muhammad Bakhsh ..	*Lahore High Court.
897	Dalpheroo Mian v. Bangali Mah ..	4 P. L. T 397.
899	Bank of Multan Ltd. v. Hukam Chand ..	*Lahore High Court.
902	Kesho Prasad Singh v. Parmeshri Prasad Singh ..	4 P. L. T. 135; (1923) Pat. 65; 1 P. L. R 111; (1923) A I. R. (Pat.) 276 2 Pat; 414.
911	Harihar Prasad Singh v. Kesho Prasad Singh ..	*Patna High Court.
916	Rameshwar Singh v. Narendranath Das ..	(1923) A. I. R (Pat.) 259.
925	Didar Ali v. Kusum Kumari ..	*Patna High Court.
929	Guru Mahadeo Asram Prasad Sahi v. Jagatraj Kuer	*Patna High Court.
933	Ram Bujhawan Prosad Singh v. Nathu Ram ..	4 P. L. T. 29, (1923) A. I. R. (P. C.) 37 32 M. L. T. 129; 44 M L. J. 615; 25 Bom. L. R. 568; (1923) M. W. N. 382; 2 Pat. 285 33 C. L. J. 25 P. C.
937	Barcley v. Dhondai ..	4 P. L. T. 112; (1923) A. I. R. (Pat.) 322; (1923) (Pat.) 194.
940	Jai Prakash Singh v. Rupmanjari Dasi ..	4 P. L. T. 91; (1923) A. I. R. Pat.) 199
942	Shanker v. Rangubai ..	Nagpur Judicial Commissioner's Court.
944	Brij Ratan Das v. Raghunandan Gir ..	(1923) Pat. 49; 1 P.L. R 225; 4 P. L. T. 457; (1923) A. I. R. (Pat.) 203.
948	Lal Bihari Singh v. Gur Prasad Singh ..	4 P. L. T. 108; (1923) Pat. 118; 1 P. L. R. 238; (1923) A. I. R.(Pat.) 290; 2 Pat. 435;
951	Mool Chand v. Mool Chand ..	(1923) A. I. R. (L.) 197.
957	Gokaran Prasad Singh v. Waris Ali ..	1 P. L. R. 285.
959	Bhagwan Das v. Mahadeo Prasad ..	21 A. L. J. 271; (1923) A. I. R. (A.) 298; 45 A. 390.
962	Jogesh Chandra Ghose v. Prosanna Kumar Talukdar ..	*Calcutta High Court.
963	Amjad Ali Khan v. Mohammad Usman ..	*Allahabad High Court.
965	Muhammad Umar Khan v. Amtul Rahim Bibi ..	21 A. L. J. 267; (1923) A. I. R. (A.) 311; 45 A. 376.
968	Sikandar Shah v. Bhai Ram Chand-Sant Ram ..	*Peshawar Judicial Commissioner's Court.

971	Kampta Prasad v. Sheo Prasad	21 A. L. J. 292; 45 A. 361; (1923) A. I. R. (A.) 406.
972	Equitable Coal Company, Limited v. Bagala Sundari Debi ..	*Calcutta High Court.
973	Abdul Ghafoor v. Qamar-ud-Din ..	21 A. L. J. 279; (1923) A. I. R. (A.) 397.
974	Sheo Nandan Lal v. Sheo Balak ..	9 O & A L. R. (O.) 264.
975	Mohan Lal v. Ganga Prasad ..	(1923) A. I. R. (A.) 298; 45 A. 395.
976	Jamini Mohan Sarkar v. Debendra Narayan Singh	*Calcutta High Court.
979	Basra Begam v. Sheo Narain ..	(1923) A. I. R. (A) 293.
979	Ambadas v. Kashibai ..	(1923) A. I. R. (N.) 27.
983	Abdul Haq v. Moti Lal ..	(1923) A. I. R. (A) 293.
984	Jagdeo Narain Singh v. Baldeo Singh ..	3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 36 C. L. J. 499; 32 M. L. T. 1; (1923) M. W. N. 361; 2 Pat. 38; 27 C. W. N. 025 **P. C.**
991	Ram Khelwan v. Brij Lal ..	21 A. L. J. 296; (1923) A. I. R. (A) 295
991	Sadar Singh v. Amar Singh ..	(1923) A. I. R. (A) 291; 45 A. 383.
992	Tika Ram v. Dubo Shib Lal ..	*Allahabad High Court.
993	Sharif v. Emperor ..	24 Cr. L. J. 273.
995	Sat Narayan Singh v. Emperor ..	25 O. C. 37; 9 O. L. J. 280; (1922) A. I. R. (O.) 147.
996	Pitam Lal v. Emperor ..	24 Cr. L. J. 276; (1923) A. I. R. (A.) 433.
997	Ramdhari Ahir v. Emperor ..	(1922) Pat. 29; (1922) A. I. R. (Pat) 52 4 P. L. T. 370; 24 Cr. L. J. 279.
998	Abdulla v. Emperor ..	5 L. L. J. 271; 24 Cr. L. J. 278.
999	Pratap Udai Nath Sah Deo v. Sunderbans Koer..	3 P. L. T. 628; (1923) A. I. R. (Pat.) 76; 24 Cr. L. J. 279.
1006	Sardari Lal v. Emperor ..	3 L. 443 (1923) A. I. R. (L.) 264; 24 Cr. L. J. 286
1009	Akhi v. Hazratgul ..	*Peshawar Judicial Commissioner's Court.
1012	Bansidhar v. Sham Lall ..	(1923) A. I. R. (A) 292.
1013	Sheo Nandan v. Munni ..	21 A. L. J. 288; (1923) A. I. R. (A.) 398.
1014	Harihar Das v. Raj Kumar Mukherjee ..	(1923) A. I R. (C.) 405.
1017	Habib Khan v. Fida Husain Khan ..	*Allahabad High Court.
1018	Abul Nasar Rashiduddin Ahmad v. Lalta Prasad	21 A. L. J. 162; (1923) A. I. R. (A.) 315.
1022	Stonewigg v. Kameshwar Narayan Singh ..	(1923) (Pat.) 122; (1923) A. I. R. (Pat.) 340.
1025	Shyam Lal v. Padam Singh ..	(1923) A. I. R. (A) 296.
1026	Kunj Behari Lal v. Naraini ..	(1923) A. I. R. (A.) 425.
1027	Ram Das v. Inayatullah ..	21 A. L. J. 263 (1923) A. I R. (A.) 207; 45 A. 374.
1028	Hansraj v. Baldeo Singh ..	21 A. L. J. 289; (1923) A. I. R. (A.) 304.
1030	Kamala Kanta v. Annanda Chandra Chakrabortty	*Calcutta High Court.
1032	Abdul Wahid v. Municipal Board, Allahabad ..	21 A. L. J. 161; 9 O. & A. L. R. (A) 327 (1923) A. I. R. (A.) 267.
1033	Jharap Rai v. Jaint Rai ..	(1923) A. I. R. (A.) 418.
1034	Ajodhia Prasad v. Gobind Prasad ..	21 A. L. J. 63; (1923) A. I. R. (A.) 250; 45 A. 276.
1035	Chalikani Venkatarayanim Garu v. Venkatasubadrayamma Jagapati ..	17 L. W. 383 (1923) A. I R. (P. C.) 26; 32 M. L. T. 70; 44 M. L. J. 631 25 Bom. L. R. 541; 46 M. 108 38 C I. J 34 **P. C.**
1038	Hazari Lal v. Nimar ..	21 A. L. J. 277; (1923) A. I. R. (A.) 295; 45 A. 386.
1039	Ramasami Gounder v. Muthu Velappa Gounder..	16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 133; (1923) A. I. R. (M.) 192; 46 M. 536.
1054	Prosanna Kumar Chakerbutty v Jotindra Nath Bose ..	*Calcutta High Court.
1056	Official Assignee of Madras v. Doraiappa Aiyar ..	17 L. W. 350; 44 M. L. J. 411; 32 M. L. T. 172; (1923) M. W. N. 359; (1923) A. I. R. (M.) 484.

TABLE

OF

Cases Applied, Approved, Considered, Disapproved, Dissented from, Distinguished, Explained, Followed, Not Followed and Relied upon in Volume 71 of Indian Cases, 1923.

APPLIED.

Page.

Chatenay v. Brazilian Submarine Telegraph Co. Ltd., (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 03 L. T. 739; 39 W. R. 65 .. 369

Durga Chowdhrani v. Jewahir Singh Chowdhri, 17 I. A. 122 at p. 127; 18 C. 23; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. C.) .. 369

Emperor v. Ranchhod Bawla, 18 Ind. Cas. 413; 37 B. 369; 15 Bom. L. R. 61; 14 Cr. L. J. 77 .. 602

Udai Raj Singh v. Emperor, 71 Ind. Cas. 528; 44 A. 691; (1922) A. I. R. (A) 429 .. 600

APPROVED OF.

Bhagtu Singh v. Raghu Nath Sahai, 1 Ind. Cas. 571; 13 C. W. N. 135; 9 C. L. J. 15.. 902

Hori Lal v. Thakur Bhagwan Bakhsh, 34 Ind. Cas. 281; 19 O. C. 23 .. 805

Rajmangal Misir v. Mathura Dubain, 30 Ind. Cas. 576; 13 A. L. J. 881; 38 A. 1 .. 805

Ram Hari Kapali v. Rohini Kanta Chakravarti, 67 Ind. Cas. 943; 35 C. L. J. 330; (1922) A. I. R. (C) 492 .. 916

Salimatul Fatima v. Koylashpoti Narain Singh, 17 C. 903; 8 Ind. Dec. (N. S.) 1147.. 805

CITED WITH APPROVAL.

Emperor v. Bhaskar, 8 Bom. L. R. 421; at p. 438; 30 B. 421; 4 Cr. L. J. 1 .. 519

Queen-Empress v. Bal Gangadhar Tilak, 22 B. 112 at p. 135; 11 Ind. Dec. (N. S.) 050 .. 519

CONSIDERED.

Balakrishna Udyar v. Vasudeva Aiyar, 40 Ind. Cas. 650; 40 M. 793; 15 A.L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 50; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.) ..1039

Banindra Deb Raikat v. Rajeswar Das, 12 I. A. 72; 11 C. 463; 4 Sar. P. C. J. 615; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.) .. 769

Kandaswami Goundan v. Kuppa Moopan, 55 Ind. Cas. 320; 43 M. 421 at p. 422; 38 M. L. J. 203; 11 L. W. 221; (1920) M. W. N. 181; 27 M. L. T. 96 .. 153

Mahomed Ibrahim Rowther v. Shaikh Ibrahim Rowther, 67 Ind. Cas. 115; 49 I. A. 123; 30 M. L. T. 85; 26 C. W. N. 793; 45 M. 308; (1922) A. I. R. (P. C.)59, 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 479; 24 Bom. L. R. 944 (P. C.) .. 769

CONSIDERED—concld.

Page.

Minakshi Naidu v. Subramanya Sastri, 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54 11 Ind. Jur 393; 4 Ind. Dec. (N. S.) 18 1039

Modhu Sudan Das Mohant v. Ishwari Debi, 61 Ind. Cas. 25; 48; C. 341; 24 C.W. N. 949.. 153

Municipality of Belgaum v. Rudrappa, 34 Ind. Cas. 21; 40 B. 509; at p. 512; 18 Bom. L. R. 340 ..1039

National Telephone Co. v. Postmaster General (1913) A. C. 546, at p. 560; 562; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637 ..1039

Palaniappa Chettiar v. Alagan Chetti, 64 Ind. Cas. 439; 44 M. 740; (1921) M. W. N. 687; 26 C. W. N. 417; 30 M. L. J. 208; 15 L. W. 521; 4 U. P. L. R. (P. C.) 21; (1922) A. I. R. (P. C.) 228 (P. C.) .. 769

Vesudeva Aiyar v. Devasthanam Committee of Negapatam, 21 Ind. Cas. 451; 38 M. 594; 14. M. L. T. 354 (1913) M. W. N. 842; 25 M. L. J. 559 ..1036

DISAPPROVED.

Abdul Muhammad Mian v. Mukut Pertap Narain, 34 Ind. Cas. 88; 1 P. L. J. 02; 2 P. L. W. 400 .. 401

Husen v. Rajaram, 26 Ind. Cas. 813; 10 N. L. R. 133 .. 401

DISSENTED FROM.

Abdul Gani v. Azizul Huq, 14 Ind. Cas. 641; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257; 39 C. 409. .. 65

Ajudhia Prasad v. Jagannath Bakhsh Singh, 38 Ind. Cas. 605; 20 O. C. 18. .. 805

Ashfaq Ahmad v. Wazir Ali, 11 A. 423; 6 Ind. Dec. (N. S.) 698 .. 847

Ashfaq Ahmad v. Wazir Ali, 14 A. 1; A. W. N. (1891) 11; 7 Ind. Dec. (N. S.)373.. 847

Begu Singh v. Emperor, 34 C. 551; 5 Cr. L. J. 398; 5 C. L. J. 508; 11 C. W. N. 568; 2 M. L. T. 298 (F. B.) .. 596

Bhau Abaji v. Rama Maruti, 2 Bom. L. R. 545 .. 61

Birendra Lal v. Emperor, 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794 .. 593

Chunilal Someshwar Bhatt v. Vithaldas Karsandas, 68 Ind. Cas. 1005; 24 Bom. L. R. 502 .. 130

Emperor v. Dauli, 2 Ind. Cas. 812; 6 P. R. 1909 Cr.; 12 P. W. R. 1909 Cr.; 104 P. L. R. 1909; 10 Cr. L. J. 158 .. 596

DISSENTED FROM—concld.

Page.

Fazal v. Hashmat, 31 Ind. Cas. 914 ; 40 P. R. 1916 ; 133 P. W. R. 1916 .. 587
Gobind Chandra Majumdar v. Uma Charan Sen, 14 C. 679 ; 7 Ind. Dec. (N. S.) 450.. 631
Gulab Kunwar v. Thakur Das, 24 A. 464 ; A. W. N. (1902) 136 .. 587
Isher Das V. Emperor, 10 P. R. 1908 Cr. 112 P. L. R. 1908 ; 8 P. W. R. 1908 Cr. ; 7 Cr. L. J 290 .. 77
Jai Narayan Rai v. Queen Empress, 17 C. 862 ; 8 Ind. Dec. (N. S.) 1119 .. 54
Kartik Ram Bhakat v. Emperor, 35 C. 114 ; 7 Cr. L. J 134 .. 596
Khiali Ram v. Taik Ram, 36 Ind. Cas. 452 ; 38 A. 540 ; 14 A. L. J. 834 .. 847
Labhu v. Emperor, 52 Ind. Cas. 797 ; 25 P R. 1919 Cr. ; 20 Cr. L. J. 717 .. 77
Nilmoney Chukerbutty v. Bykunt Nath Bera, 17 C. 466 ; 8 Ind. Dec. (N. S.) 850.. 902
Nityanund Kur v. Raj Bullubh Adyapurhit, 25 W. R. 267 .. 805
O'Gorman v. Mahtab Singh, 92 P. R. 1898 .. 968
Radha Kishen Man v. Bachhaman, 3 A. 118 ; 2 Ind. Dec. (N. S.) 64 .. 564
Ram Dei v. Suraj Bakhsh, 60 Ind Cas. 177 ; 23 O. C. 204 ; 7 O. L. J. 509 ; 2 U. P. L. R. (O) 156 .. 130
Rama Nand v. Teja Singh, 40 Ind. Cas. 1008; 26 P. R. 1917 Cr. ; 18 Cr L. J 688 ; 31 P W R. 1917 Cr. .. 77
Tassaduq Hussain v. Hyat-un-nissa, 25 A. 280 ; A. W. N. (1903) 39 .. 587
Thama v. Gobind Bilal, 9 Bom. L. R.401.. 805

DISTINGUISHED.

Adamji Khadibhai v. Issuf Ahmad Mulla, 16 Ind. Cas. 750 .. 530
Amrith Nath Jha v. Dhunput Singh, 20 W. R. 253 .. 530
Apurba Krishna Bose v. Emperor, 35 C. 141; 7 C L J. 49 ; 7 Cr. L. J. 10 ; 2 M. L. T. 500 .. 239
Asgar Ali v. Trailokya Nath Ghose, 17 C. 631 ; 8 Ind. Dec. (N. S.) 960 (F. B.) .. 741
Baghela v. Sallo, 18 Ind. Cas. 994 ; 3 P. R. 1913 ; 226 P. L. R. 1913 ; 303 P. W. R. 1912 .. 35
Baid Nath Sahay v. Nanku Mahton, 29 Ind. Cas. 219 .. 453
Bakht Bhari v Isa Shah, 11 Ind Cas. 403 ; 6 P. W. R. 1911 .. 743
Balaji Sakharam, Gurav v. Merwanji Nowroji, 21 B. 279 ; 11 Ind. Dec. (N. S.) 189 .. 1039
Balwant Singh v Rev. Rockwell Clancy, 14 Ind. Cas. 629 ; 34 A. 296 ; (1912) M. W. N. 462 ; 11 M. L. T. 344 ; 9 A. L. J. 509 ; 15 C. L. J. 475 ; 16 C. W. N. 577 ; 23 M. L. J 18 ; 14 Bom. L. R. 422 ; 39 I. A. 109 (P. C.) .. 130
Batcha Sahib v. Abdul Gunny, 21 Ind. Cas. 308 ; (1914) M. W. N. 142 ; 38 M. 256 ; 14 M. L. T. 314 ; 25 M. L. J. 507 .. 266

DISTINGUISHED—contd.

Page.

Bejoy Nath Chatterji v. Bengal Coal Company Limited, 23 W. R. Cr. 45 .. 871
Bhagwati v. Chaoli, 55 Ind. Cas. 698 ; 2 L. L. J. 689 ; 2 U P. L. R. (L.) 70 .. 581
Bhai Bhagat Singh v. Harnam Singh, 136 P. R. 1800 .. 743
Bisheshar Singh v. Hanuman Singh, 63 Ind. Cas. 802 ; 19 A. L. J. 780 ; 3 U. P. L. R. (A.) 143 ; 44 A. 1 ; (1922) A I. R (A.) 314 .. 649
Bryant v. Bull, (1878) 10 Ch. D 153 at p. 155 ; 48 L. J. Ch. 325 ; 39 L. T. 470 ; 27 W R. 246 .. 293
Budal v. Kirpa, 23 Ind. Cas. 211 ; 76 P. R. 1914 ; 148 P. L. R. 1914; 131 P. W. R. 1914 .. 829
Chandidat Jha v. Padmanand Singh Pahadur, 22 C. 459 ; 11 Ind. Dec. (N. S.) 207.. 743
Chunde Charan Mandal v. Banke Behary Lal Mandal, 26 C. 440 ; 3 C. W. N. 283; 13 Ind Dec. (N. S.) 890 (F. B.) .. 925
Connel v. Himalaya Bank, Limited, 18 A. 12 ; A. W N. (1895) 136; 8 Ind. Dec. (N. S.) 712 .. 899
Dalip Singh v. Rannia, 29 Ind Cas. 348 ; 25 P R. 1915 ; 20 P. L. R. 1916 ; 215 P. W. R. 1 14 .. 805
Damodar Das v. Municipal Committee, Delhi, 27 P. R. 1901 ; P. L. R. 1900, p. 395 .. 775
Dhanoolal v. Baji, 37 Ind. Cas. 103 ; 12 N. L. R 189 .. 436
Dharani Kanta Lahiri v. Gaber Ali Khan, 30 C. 337; at p. 364 ; 7 C. W. N. 33.. 307
Dial Singh v. Bakhshish Singh, 21 P. R. 1907 ; 24 P. L. R. 1908 ; 129 P. W. R. 1907 .. 746
Durga Parshad v. Hajari Singh, 11 Ind. Cas. 116 ; 8 A. L. J. 1025 ; 33 A. 799.. 992
Emperor v Madar Bakhsh, 25 A 128 ; A W. N. (1902) 200 .. 602
Emperor v. Niadar Singh, 6 Ind. Cas. 717 ; 13 P. R. 1910 Cr ; 27 P. W. R. 1910 Cr. ; 181 P. L. R. 1910 ; 11 Cr. L. J. 394.. 599
Emperor v. Ram Nevas, 21 Ind. Cas. 663 ; 35 A. 506 ; 11 A. L. J. 804 ; 14 Cr. L. J. 615 .. 235
Emperor v. Ranchhod Bawla, 18 Ind. Cas. 413 ; 37 B. 369 ; 15 Bom. L. R. 61 ; 14 Cr. L. J. 77 .. 602
Empress v. Jia Lal, A. W. N. (1889) 181.. 525
Fakirchand Lallubhai v. Naginchand Kalidas, 33 Ind. Cas. 423 ; 40 B. 210 ; 17 Bom. L. R. 1106 .. 481
Fatima Bibi v. Shah Nawaz, 60 Ind. Cas. 509; 2. L. 98 ; 3 L. L. J. 152 .. 201
Fazal Rab v. Manzur Ahmad, 45 Ind. Cas. 773 ; 16 A. L. J. 433 ; 40 A. 425 .. 1018
Gangaram v. Imperator, 62 Ind. Cas. 545 ; 22 Bom. L. R. 1274 ; 22 Cr. L. J. 529.. 360
Ghulam Mohiuddin Khan v. Hardeo Sahai, 58 Ind. Cas. 93 ; 42 A. 402 ; 18 A. L. J. 413 .. 836

DISTINGUISHED—contd.

	Page.
Gurusami Pandiyan v. Sendatti Kali Pandia, 61 Ind. Cas. 242 ; 44 M. 01 ; 39 M. L. J. 529 ; (1920) M. W. N. 660 ; 28 M. L. T. 365 ..	533
Hannu Mal v. Atma Ram, 27 Ind. Cas. 799; 47 P. L. R. 1915 ; 239 P. W. R. 1915..	746
Hari Charan Ghose v. Manmatha Nath Sen, 19 Ind. Cas. 683 ; 18 C. W. N. 343 ; 41 C. I ..	484
Hobibullah v. Abtaikullah, 34 Ind. Cas. 693 ; 23 C. L. J. 567 ; ..	743
Imam-ud-din v. Sadarat Rai, 5 Ind. Cas. 897 ; 32 A. 301 ; 7 A. L. J. 228 ..	321
Inderun Valungypooly Taver v. Ramasawmy Pandia Talavar, 13 M. I. A. 141 ; 14 W. R. P. C. 41 ; 3 B. L. R. P. C. 1 ; 2 Suth P. C. J. 267 ; 2 Sar P. C. J. 498 ; 20 E. R. 504..	727
Indian Iron and Steel Company v. Bansu Gopal Tevari, 59 Ind. Cas. 403 ; 32 C. L. J. 54 ; 22 Cr. L. J. 99 ..	871
Jagan Nath v. Manu Lal, 16 A. 231 ; A. W. N. (1894) 60 ; 8 Ind. Dec. (N. S.) 150..	734
Jagar Nath Ojha v. Ramphal, 13 Ind. Cas. 79 ; 34 A. 150 ; 8 A. L. J. 1312 ..	649
Jagdeo Lal v. Ram Lagan Singh, 53 Ind. Cas. 826 ; 20 Cr. L. J. 826 ..	997
Jagdeo Narain Singh v. Baldeo Singh, 71 Ind. Cas. 984 ; 49 I. A. 399 ; 3 P. L. T. 605 ; (1922) A. I. R. (P. C.) 272 ; 30 C. L. J 499 ..	1022
Jai Chand v. Girwar Singh, 52 Ind. Cas. 366 ; 41 A. 669 ; 17 A. L. J 814 ; ..	1033
Jiwani v. Labhu Ram, 4 Ind Cas 694 ; 107 P. R. 1908 ; 12 P. L. R. 1909 ; 179 P. W. R. 1908 ..	743
Joher Mull v. Rupendra Nath Basu, 67 Ind. Cas. 1108 ; 34 C. L. J. 79 ; ..	327
Juggobhundu Mukerjee v. Ram Chandar Bysack 5 C. 584 ; 5 C. L. R 548 ; 3 Shom. L. R. 68 ; 2 Ind. Dec. (N. S) 970 (F. B.)..	885
King-Emperor v. Alagarisami Pathan, 25 M. 546 ; 2 Weir 245 ..	212
Krishnasami Panikondar v. Ramasami Chettier, 43 Ind. Cas. 493 ; 41 M. 412 ; 34 M. L. J. 63 ; 4 P. L. W. 54 ; 16 A. L. J. 57 ; 7 L. W 150 ; 23 M. L. T. 101 ; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481 ; 21 Bom. L. R. 541 ; 11 Bur. L. T. 121 ; (1918) M. W. N. 906 ; 45 I. A. 25 (P. C.) ..	736
Lachmi Narayan Marwari v. Bhagwali Singh, 55 Ind. Cas. 33 ; 1 P. L. T. 629 ..	948
Leigh v. Dickeson, (1885) 15 Q. B. D. 60 ; 54 L. J. Q. B. 18 ; 52 L. T. 790 ; 33 W. R. 538 ..	374
Manindra Chandra Nandi v. Upendra Chandra Hazra, 2 Ind. Cas. 828 ; 36 C. 604 ; 9 C. L. J. 343 ..	143
Mir Dad Khan v. Ramzan Khan, 44 Ind. Cas. 988 ; 16 A. L. J. 329 ; 40 A. 449..	382
Mohan Lal v. Niranjan Das, 60 Ind. Cas. 619 ; 2 L. 175 ..	748
Moti Chand v. Ikram Ullah Khan, 20 Ind. Cas. 454; 39 A. 173; 5 L. W 388; 15 A. L. J. 150 ; 21 M. L. T. 267; 32 M. L. J. 281; 21 C. W. N. 616 ; 19 Bom. L. R. 433 ; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.) ..	382
Musa Kutti v. Rangacharriar, 8 Ind. Cas. 309 ; 8 M. L. T. 238 ..	837
Muthusami Mudaliar v. Nallakulantha Mudaliar, 18 M. 418 ; 6 Ind. Dec (N.S) 640..	533
Naba v. Pathana, 18 Ind. Cas. 86 ; 60 P. R. 1913 ; 53 P. L. R. 1913 ; 72 P. W. R. 1913	35
Nanhu v. Malloo, 44 Ind Cas. 528 ..	404
Naraina Naika v. Vasudeva Bhatta, 28 M. 389 ; 15 M. L. J. 208 ; ..	837
Narainaswami Naidu, *In re*, 1 Ind. Cas. 228 ; 32 M. 220 ; 5 M. L. T. 233 ; 19 M. L. J. 157 ; 9 Cr. L. J. 192 (F. B.)..	252
Nawab Ali Khan v. Emperor, 63 Ind. Cas. 409 ; 24 O. C. 165 ; 22 Cr. L. J. 649..	681
Noor Muhammad Saib v. Karima Bibi Ammal, 25 Ind. Cas. 559 ; 27 M. L. J 270 ; 16 M. L. T. 165 ..	46
Panjab Singh, *In the matter of the petition of*, 6 C. 579 ; 3 Ind. Dec. (N. S.) 377..	212
Param Hansnan Tewari v. Dasrathman Tewari, 60 Ind. Cas. 770 ; 19 A. L. J. 292 ; 43 A 445 ..	350
Purshotam v Raj Devi, 19 Ind. Cas. 702 ; 219 P. L. R. 1913 ; 129 P. W. R. 1913..	28
Partap Singh v. Bhabutti Singh, 21 Ind. Cas. 288 ; 35 A. 487 ; 17 C. W. N. 1165 ; 40 I. A. 182 ; (1913) M. W. N. 785 ; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247 ; 18 C. L. J. 384 ; 15 Bom. L. R. 1001 (P. C.) ..	705
Periasami v. Periasami 5 I. A. 61; 1 M. 312 ; 2 C. L. R. 81; 3 Sar. P. C. J. 795 ; 3 Suth P. C. J. 508 ; 1 Ind. Dec. (N. S.) 208 (P. C.) ..	533
Puran Mal v. Brij Lal, 41 Ind. Cas. 835 ; 15 A. L. J. 666 ; 39 A. 651 ..	1026
Queen-Empress v. Shidgauda, 18 B. 97 ; 9 Ind. Dec. (N. S.) 573 ..	212
Radha Kunwar v. Reoti Singh, 35 Ind. Cas. 939 ; 38 A. 488 ; 14 A. L. J. 1002 ; 20 C. W. N. 1279 ; 20 M. L. T. 211 ; (1916) 2 M. W. N. 200 ; 31 M. L. J. 571 ; 18 Bom. L. R. 850; 24 C. L. J. 373; 5 L. W. 456 ; 43 I. A. 264 (P. C.) ..	371
Radha Sham Basak v. Secretary of State for India, 34 Ind. Cas. 130 ; 20 C. W. N. 790 ; 44 C. 16 ; 23 C. L. J. 547 ..	565
Ram Dei v. Munna Lal, 38 Ind. Cas. 175 ; 39 A. 109 ; 14 A. L. J. 1041 ..	390
Ram Pershad Sookul v. Rajunder Sahay, 6 W. R. 762 ..	453
Ramasami v. Streeramulu Chetty, 19 M 149; 6 Ind. Dec. (N S.) 809 ..	899
Rameshar Singh v. Madho Lal, 52 Ind. Cas. 191 ; 17 A. L. J. 971 ; 42 A. 36 ..	350
Ramji Lal v. Tej Ram, 73 P. R. 1895 (F. B.) ..	829
Rash Mohun Goshamy v. Kali Nath Raha 19 W. R. 3 Cr. ..	511

DISTINGUISHED—contd.

Page.

Rashidunnissa v. Mohammad Ismail Khan 3 Ind. Cas. 864 ; 31 A. 572 ; 13 C. W. N. 1182 ; 10 C. L. J. 318 ; 6 A. L. J. 822 ; 11 Bom. L. R. 1225 ; 6 M. L. T. 279 ; 19 M L. J. 631 ; 36 I A. 168 (P. C.) .. 705

Reg v. Tolson, (1889) 23 Q. B. D. 168 ; 58 L. J. M. C. 97 ; 60 L. T. 899 ; 37 W. R. 716 ; 16 Cox C. C. 629 ; 54 J. P. 4 .. 65

Saleji (A E.) v. Ahmad Musaji 19 Ind. Cas 643 .. 530

Sant Ram v, Ram Chand, 6 Ind. Cas. 659 ; 36 P. R. 1910 ; 53 P. W. R. 1910 72 P. L. R. 1910 .. 743

Sarjoo Prasad Missir v. Nanoo Rai, 35 Ind. Cas. 779 ; 1 P. L. J. 459 ; 3 P. L. W. 48 ;.. 925

Sawan Singh v Jafar Khan, 13 Ind. Cas. 405 ; 39 P. R. 1912; 7 P. W. R. 1912 ; 13 P. L. R. 1912 .. 811

Secretary of State v. Chelikani Rama Rao, 35 Ind. Cas. 902 ; 39 M. 617 ; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224 ; 14 A L. J. 1114 ; 20 M. L. T. 435 ; 4 L. W. 486 ; 18 Bom. L. R 1007 ; 25 C. L. J. 69 ; 43 I. A. 192 (P. C.) .. 1033

Shah Din v. Emperor, 4 Ind. Cas 993 ; 20 P. W. R. 1909 ; Cr. 11 Cr. L. J. 131 .. 593

Sheo Narain v. Janki Parshad, 16 Ind. Cas. 88 ; 34 A. 505 ; 9 A. L. J. 749 .. 564

Shib Dayal v. Sheo Ghlam, 38 Ind. Cas. 694 ; 39 A. 241 ; 15 A. L. J. 164 .. 390

Shivabasava v. Sangappa, 29 B. 1, 1 A L. J. 637; 8 C. W. N. 865; 6 Bom L. R. 770 ; 8 Sar P. C. J. 720 ; 31 I. A. 154 (P. C.) .. 441

Shive Gowda v Fernendez, 8 Ind. Cas. 141 ; 34 M. 513 ; 8 M. L. T. 412 o (1911) 1 M. W. N. 1 ; 21 M. L. J. 391 .. 259

Sidheswari Dabi v, Abhoyeswari Dabi, 15 C. 818 ; 7 Ind. Dec. (N. S.) 1128 .. 74

Simhachalam v. Rati Kanta Laha, 41 Ind. Cas 138 ; 44 C 912 ; 21 C W N. 573; 25 C L J 451 ; 18 Cr. L. J. 762 .. 241

Sinnu Gounden, *In re*, 23 Ind Cas 188 ; 38 M 1028 ; 26 M. L. J. 160 ;(1914) M. W. N. 273 ; 15 Cr. L. . J. 236 .. 602

Sivagnanthammal v. Arunachalam Pillai, 11 Ind. Cas. 870 ; (1911) 2 M. W. N. 75 ; 21 L. J. 821 ; 10 M. L. T. 490 .. 743

Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj, 19 A. 428 ; A. W. N. (1897) 103 ; 9 Ind. Dec. (N. S.) 276 .. 1026

Stanwigg v. Dwarka Singh, 45 Ind. Cas. 706 ; 4 P. L. W. 428 .. 1022

Sub ahmania Ayyar v. King-Emperor, 25 M. 61 ; 11 M. L. J. 233 ; 3 Bom L R 540 28 I A 257 ; 5 C. W. N. 866 ; 2 Weir 271 ; 8 Sar P. C. J. 160 (P. C.) 120, 593

Sunder Lal, *In the matter of an application of*, 55 Ind. Cas. 110 ; 42 A. 233 ; 18 A. L. J. 11 ; 2 U. P. L. R. (A.) 1 ; 21 Cr. L. J. 238 ..

Taj Muhammad v Islan, 21 Ind Cas 631 ; 230 P. W. R. 1913 ; 343 P. L. R. 1913.. 561

DISTINGUISHED—concld.

Page.

Tara Kumari v. Chattarbhuj Narayan Singh, 30 Ind Cas 833 ; 42 C 1719 ; 19 C W N 1119 ; 29 M L J 371; 18 M L T 228 ; 2 L. W. 843 ; 13 A. L. J. 1034; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M W. N. 717; 42 I. A. 192 P. C. .. 533

Thakur Prasad v. Fakirullah, 17 A. 106 ; 5 M L. J. 3 ; ; 22 I. A. 44 ; 6 Sar P. C. J. 526 ; 8 Ind. Dec. (N. S.) 393 .. 293

Tilak Chandra Sarkar v. Baisogomoff, 23 C. 502 ; 12 Ind. Dec. (N. S.) 334 .. 212

Valikath Puthiah Maliyakkal Mammi Kutti Haji v. Manakkal Parameswaran Nambudri, 35 Ind Case 240 ; 3 L W 601 .. 881

Veerabadran Chetty v Nataraja Desikar 28 M 28 ; 14 M. L. J. 329 .. 530

Vijiaraghavalu Pillai v. Emperor, 25 Ind. Cas. 345 ; 38 M. 581 ; 16 M. L. T. 128 ; 27 M. L. J. 227 ; 15 Cr. L. J. 593 .. 1039

Visalatchi Ammal v. Annasamy Sastri, 5 M. H. C. R. 150 .. 855

Von Hatzfeldt-Wildenburg v. Alexander, (1912) 1 Ch. 284 ; 81 L. J. Ch. 184; 105 L. T. 434 .. 763

Young v. Kershaw, (1899) 81 L. T. 531 ; 16 T. L. R. 52 .. 453

EXPLAINED AND DISTINGUISHED.

Amir Hassan Khan v. Sheo Bakhsh Singh, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 359; Rafique and Jackson's P. C. N. 83; 5 Ind. Dec. (N. S.) 760 (P.C.) ..1039

Manisha Eradi v. Stiyal Koya, 11 M 220 at p. 228; 12 Ind. Jur. 49; 4 Ind. Dec. (N. S.) 153 ..1039

Sheo Raj Nandan Singh, *In the matter of* 18 C. 290; 9 Ind. Dec. (N S.) 195 ..1039

Shew Prosad v. Rama Chunder, 23 Ind. Cas. 977; 41 C 323 ..1039

FOLLOWED.

Abdul Satar v. Satya Bhushan, 35 C. 767 .. 840

Abdulla v. Emperor, 63 Ind. Cas. 869; 2 L. 279; 22 Cr. L. J. 709 .. 880

Akbar v. Tabu, 22 Ind. Cas. 805; 45 P. R. 1914; 105 P. L. R. 1914; 61 P. W. R. 1914 805

Amir Chand v. Kanhaya Ram, 16 Ind. Cas. 777; 86 P. R. 1912; 222 P. L. R. 1912; 225 P. W. R. 1912 .. 737

Annie Besant v. Narayaniah, 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L.W. 520; (1914) M.W.N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.) 443

Arur Singh v. Bua Ditta, 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911 .. 827

Ayatannessa Bibi v. Kulper Khalifa, 22 Ind. Cas. 677; 41 C. 749; 19 C. W. N. 234 .. 767

FOLLOWED—contd.

Page.

Bai Ganga v. Emperor, 39 Ind. Cas. 308; 19 Bom. L. R. 56 at p. 60; 18 Cr. L. J. 468 65

Baijnath Prasad Singh v. Tej Bali Singh, 60 Ind. Cas. 534; 43 A. 228; 19 A. L. J. 317; 33 C. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358 (P. C.) .. 533

Baikuntha Nath Chowdhury v. Ramanand Patnaik, 61 Ind. Cas. 923; 33 C. L. J. 414; 25 C. W. N. 776; 48 C. 1036 .. 290

Balaram Pal v. Kanysha Majhi, 53 Ind. Cas. 548 321, 424

Banarsi Das v. Partab Singh, 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63 668

Bapu v. Bapu, 14 Ind. Cas. 305; 39 M. 750; 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209 .. 681

Beni Ram v. Kundan Lal, 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022; (P. C.) .. 942

Beni Ram v. Man Singh, 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015 .. 749

Bhani v. Bhag Mal, 65 P. R. 1885 .. 618

Bindhachal Prasad Rai v. Lal Bihari Rai, 25 Ind. Cas. 330; 12 A. L. J. 506; 36 A. 382; 15 Cr. L. J. 578 .. 692

Bisheshar Singh v. Hanuman Singh, 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A) 143; 44 A. I. (1922) A. I. R. (A) 314 .. 559

Chhotey Lal v. Lakhmi Chand, 34 Ind. Cas. 113; 38 A. 425; 14 A. L. J. 549 .. 474

Colville v. Kristo Kishore Bose, 26 C. 746; 3 C. W. N. 508; 13 Ind. Dec (N. S.) 1077 .. 241

Dalgan Singh v. Kalka Singh, 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.) .. 408

Dowlat Ram v. Asa Ram, 46 P. R. 1886.. 827

Faujdar Thakar v. Kasi Choudhuri, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122 .. 670

Faulkner v. Brine (1858) 1 F & F. 251 .. 657

Felaram Roy v. Bagalanand Banerjee, 6 Ind. Cas. 207; 14 C. W. N. 895 .. 532

Ganga Dei v. Badam, 30 A. 134; 5 A. L. J. 99; 3 M. L. T. 194; A. W. N. (1908) 51 .. 971

Ghunsham Das v. Uma Pershad, 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.) .. 28

Ghure v. Chatrapal Singh, 23 Ind. Cas. 11; 12 A. L. J. 239 .. 654

Girija Sankar Roy v. Binode Sheikh, 5 C. L. J. 222; 5 Cr. L. J. 188 .. 681

Great Indian Peninsula Railway Company v. Chandra Bai, 28 A. 552; A. W. N. (1906) 101; 3 A. L. J. 329 .. 614

Great Indian Peninsula Railway v. Ganpat Rai, 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543 .. 614

Great Western Railway Company v. Wills, (1917) A. C. 148; 86 L. J. K. B. 641; 116 L. T. 615; 61 S. J. 335; 33 T. L. R. 254 .. 565

FOLLOWED—contd.

Page.

Gumanan v. Jahangira, 46 Ind. Cas. 186; 40 A. 518; 16 A. L. J. 465 .. 755

Gupteshwar Ram v. Rate Krishna Ram, 15 Ind. Cas. 174; 34 A. 542; 10 A. L. J. 70 .. 562

Hansraj v. Shiam Sunder, 63 Ind. Cas. 423; 19 A. L. J. 407 .. 289

Harjas Rai v. Narain Singh, 29 Ind. Cas. 938; 51 P. R. 1915; 98 P. L. R. 1916 .. 862

Hayat v. Emperor, 14 P. R. 1904; Cr. 111 P. L. R. 1904; 1 Cr. L. J. 946 .. 700

Hirada Basappa v. Gadigi Muddappa, 6 M. H. C. R. 142 .. 466

Huree Doss Bysack v. Meer Moazzum Hossein 15 W.R. 447; 8 B. L. R. App. 16 .. 530

Imam-ud-din v. Sadarat Rai, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228 .. 424

Jagan Nath v. Chet Ram, 28 A. 470; A. W. N. (1906) 93; 3 A. L. J. 318 .. 474

Jaint Singh v. Gosain, 46 Ind. Cas. 85; 16 A. L. J. 493 .. 755

Jaiprakash, Lal *In the matter of the petition of*, 6 A. 26; A. W. N. (1883) 208; 3 Ind. Dec. (N. S.) 641 .. 694

Jharu Sheikh v. Emperor, 14 Ind. Cas. 320; 16 C. W. N. 696; 13 Cr. L. J. 224 .. 247

Kachi Kaliyana Rengappa Kalakha Thola Udayar v. Kachi Yuva Rengappa Kalakka Thola Udayar, (Udayarpalayam *case*), 32 I. A. 261; 2 C. L. J. 231; 10 C. W. N. 95; 15 M. L. J. 312; 2 A. L. J. 845; 7 Bom. L. R. 907; 1 M. L. T. 12; 28 M. 508; 8 Sar. P. C. J. 855; (P. C.) .. 533

Kamala Prasad v. Nathuni Narayan, 66 Ind. Cas. 149; (1922) Pat. 136; 3 P. L. T. 401; (1922) A. I. R. (Pat.) 347 .. 581

Kamalanand Singh v. Prem Lal Ganesh, 9 Ind. Cas. 651 .. 307

Katama Natchiar v. Rajah of Shivagunga, 9 M. I. A. 539; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 F. R. 843 .. 533

Kesho Prasad Singh v. Harbans Lal, 53 Ind. Cas. 85; (1920) Pat. 109; 2 P. L. T. 22 .. 332

Kessowji Issur v. Great Indian Peninsula Railway Company, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; 34 I. A. 115; (P. C.) .. 881

Khalil Ahmad v. Malik Israfil, 37 Ind. Cas 302; 2 P. L. J. 108; 1 P. L. W. 284; (1917) Pat. 73 .. 65

Khirodamoyi Dasi v. Adhar Chandra Ghose, 21 Ind. Cas. 516; 18 C. L. J. 321 .. 290

Krishna Kamini v. Abdul Jubbar, 30 C. 155; 6 C. W. N. 737 (F. B.) .. 699

Krishnasami Chetty v. Cottah Mangamma, 10 Ind. Cas. 283; (1911) 1 M. W. N. 365 .. 298

Kristo Kissor Neaghy v. Kadermoyi Dossee, 2 C. L. R. 583 .. 298

Lachman v. Nanhusing, 8 C. P. L. R. 39 .. 863

Lakhi v. Emperor, 27 P. R. 1902 Cr.; 5 P. L. R. 1903 .. 60 1

Lalta Prasad v. Ram Karan, 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666 .. 283

FOLLOWED—contd.

Page.

Mackenzie v. Laia Narsingh Sahai, 1 Ind. Cas. 413; 10 C. L. J. 113; 36 C. 762 .. 290

Mahomed Hossein v. Emperor, 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247 .. 247

Malayath Veetil Raman v. Krishnan Nambudripad, 69 Ind. Cas. 828; 43 M. L. J. 354; 31 M. L. T. 208; 16 L. W. 425; (1922) M. W. N. 589 .. 204

Marian Beeviammal v. Kadir Meera Sahib Taragan, 29 Ind. Cas. 275 .. 177

Maya Das v. Malik Aulia Khan, 10 P. R. 1896 Rev. .. 811

Mazahar Ali v. Emperor, 71 Ind. Cas. 662; 27 C. W. N. 99; 36 C. L. J. 417; 24 Cr. L. J. 198 .. 792

Miller v. Barlow, (1871) 8 Moore P. C. (N. S.) 127; 3 P. C. 733; 17 E. R. 276; 14 M. I. A. 209; 20 E. R. 765; 3 Sar. P.C. J. 727 (P. C.) 257

Mohammad Ali Khan v. Jasram, 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015 .. 436

Mohammad Jamil v. Khub Lal Raut, 58 Ind. Cas. 534; 5 P. L. J. 740; 2 P. L. T. 138; (1921) Pat. 130 .. 319

Mohendro Narain Chaturaj v. Gopal Mondul, 17 C. 769; 8 Ind. Dec. (N. S.) 1056 .. 631

Mohima Chunder Mazoomdar v. Mohesh Chunder Neoghi, 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312; (P. C.). .. 1033

Muhammad Abdul Majid v. Ahmad Saeed Khan, 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673 .. 767

Muhammad Asghar Ali Khan v. Muhammad Imtiaz Ali, A. W. N. (1898) 200 .. 761

Mumtaz Begam v. Fateh Husain, 6 A. 391; A. W. N. (1884) 129; 4 Ind. Dec. (N. S.) 61 .. 444

Murlidas v. Haridas, 62 Ind. Cas. 246 .. 207

Musaheb Zaman Khan v. Inayat Ullah, 14 A. 513; A. W. N. (1892) 80; 7 Ind. Dec. (N. S.) 698 .. 303

Muttuvaduganadha Tevar v. Periasami Tevar, 23 I. A. 128; 19 M. 451; 6 M. L. J. 149; 7 Sar. P. C. J. 83; 6 Ind. Dec. (N. S.) 1020 .. 533

Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri, 36 Ind. Cas. 420; 14 A.L.J. 1103; 20 M.L.T. 535; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 147; 43 I. A. 249 (P. C.) .. 390

Naraganti Achammagaru v. Venkatachalapati Nayanivaru, 4 M. 250; 1 Ind. Dec. (N. S.) 1010 .. 533

Narayanaswamy Naidu v. Emperor, 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192. .. 608

Nemai Charan v. Secretary of State, 46 Ind. Cas. 741; 45 C. 496 .. 957

Padarath Singh v. Ratan Singh, 54 Ind. Cas. 673; 5 P. L. J. 23; (1920) Pat. 140; 1 P. L. J. 458; 21 Cr. L. J. 145 .. 681

Palni Goundan v. Pramasiva Goundan, 6 M. L. J. 263 .. 33

FOLLOWED—contd.

Page.

Pandurang Krishnaji v. Markandeya Tuka Ram, 65 Ind. Cas. 954; 18 N. L. R. 1; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. J. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 49 C. 334; (1922) A. I. R. (P. C.) 20 (P. C.) .. 43

Parbhu Ram v. Tek Chand, 53 Ind. Cas. 865; I. L. 241 .. 837

Pethperpemal Chetty v. Muniandy Servai, 5 A. L. J. 290, 10 Bom. L. R. 590; 12 C. W. N. 502; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266, (P. C.) .. 441

Pokhpal Singh v. Dambar Singh, 6 A. L. J. 110 *Notes* .. 436

Queen-Empress v. Abdullah 7 A. 385; A. W. N. (1885) 78; 4 Ind. Dec. (N. S.) 692; (F. B.) .. 353

Queen-Empress v. Munda Shetti, 24 M. 121; 2 Weir 170 .. 64

Raja Dei v. Umed Singh, 13 Ind. Cas. 632; 34 A. 207; 9 A. L. J. 158 .. 755

Ram Chand v. Dewan Chand, 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912 .. 748

Ram Pershad v. Harbans Singh, 6 C. L. J. 158 .. 466

Ram Sukh Rai v. Mahadeo Rai, 7 Ind. Cas. 290; 7 A. L. J. 743; 11 Cr. L. J. 446 .. 692

Ramakrishna Mallay v. Baburaya, 17 Ind. Cas. 947; 23 M. L. J. 715; 12 M. L. T. 656 .. 445

Ramalingam Pillai v. Muthayan, 24 Ind. Cas. 356; 26 M. L. J. 528; 16 M. L. T. 76; 1 L. W. 544 .. 749

Ramchandra Row v. Seesha Aiyangar, 3 M. L. J. 225 .. 130

Ramji v. Fakira, 6 C. P. L. R. 71 .. 863

Ramnandan Prasad Narayan Singh v. Public Prosecutor, 61 Ind. Cas. 995; 22 Cr. L. J. 467 .. 681

Rangasami Goundan v. Nachiappa Coundan, 50 Ind. Cas. 498; 17 A. L. J. 536; 36 M. L. J. 493; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.) 287

Reg v. Sambhu Raghu, 1 B. 347; at p. 352; 1 Ind. Jur. 380; 1 Ind. Dec. (N. S.) 231 .. 65

Sabapathy Chetty v. Ponnusawmy Chetty, 28 Ind. Cas. 365 .. 130

Sadhu Charan Datta v. Hara Nath Datta, 27 Ind. Cas. 135; 20 C. W. N. 231 .. 290

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.) .. 465

Saif-ud-din v. Hansraj, 11 Ind. Cas. 76; 15 P. R. 1912; 203 P. L. R. 1911; 252 P. W. R. 1911 .. 822

Sami Row v. Eliavatha Row, 16 M. L. J. 357 .. 298

FOLLOWED—contd.

Page.

Sarakhi Abdul Rahiman v. Mahaidin Pathummal, Bivi, 32 Ind. Cas. 83; 30 M. L. J. 104; 19 M. L. T. 88 .. 177

Sarat Chandra Mandal v. Ram Shashi Roy, 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265; 23 Cr. L. J. 665 .. 595

Sarbjit Singh v. Raj Kumar Rai, 63 Ind. Cas. 806; 44 A. 5; 19 A. L. J. 783; 3 U. P. L. R. (A) 146; (1922) A. I. R. (A.) 162 455, 559, 649

Satya Narayan Lal v. Gobind Sahay, 43 Ind. Cas. 951; 3 P. L. J. 250; 4 P. L. W. 102 .. 484

Sayad Ahmad Shafi v. Bunyadi Begam, 88 P. R. 1891 .. 840

Shankar Lal v. Emperor, 51 Ind. Cas. 473; 41 A. 651; 17 A. L. J. 830; 1 U. P. L. R. (A) 125; 20 Cr. L. J. 489 .. 608

Sheo Dyal Tewaree v. Judoonath Tewaree, 9 W. R. 61 .. 504

Sheo Prasad v. Lalit Kuar, 18 A. 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975 .. 654

Sita Ram v. Emperor, 39 Ind. Cas. 998; 39 A. 466; 15 A. L. J. 469; 18 Cr. L. J. 630 .. 668

Sokkalinga Chetty v. Krishnaswami Ayyar, 55 Ind. Cas. 786; 11 L. W. 479; (1920) M. W. N. 192; 38 M. L. J. 324; 27 M. L. J. 259 .. 150

Sri Ram v. Ramji Das, 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94. P. W. R. 1909 .. 561

Sultan Beg v. Chunilal Maturam, 46 Ind. Cas. 922 .. 204

Suraj Prasad v. Makhan Lal, 66 Ind. Cas. 134; 44 A. 382; 20 A. L. J. 51; (1922); A. I. R. (A.) 200 .. 465

Tanguturi Sriratmulu v. Nalam Krishna Row, 25 Ind. Cas. 1001; 38 M. 585; (1914) M. W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673 .. 608

Tellachuri Venkatachaennaya v. Emperor, 56 Ind. Cas. 50; 43 M. 511; 11 L. W. 435; (1922) M. W. N. 280; 38 M. L. J. 370; 21 Cr. L. J. 402; 27; M. L. T. 178 .. 608

Thayarammal v. Lakshimi Ammal, 59 Ind. Cas. 417; 43 M. 822; 12 L. W. 161; (1920) M. W. N. 457; 39 M. L. J. 181 .. 33

Tilakdhari Lal v. Khedan Lal, 57 Ind. Cas. 465; 48 C. 1; 30 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 .. 653

Umed Singh v. Sobhag Mal Dhadha, 32 Ind. Cas. 161; 20 C. W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 67; 18 Bom. L. R. 308; 43 C. 290; 43 I. A. 1 (P. C.) 7

Velayuda Kone v. Narayana Kone, 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789 .. 112

Venkata Krishnayya, *In re*, 39 Ind. Cas. 294; 40 M. 591; 31 M. L. J. 837; 18 Cr. L. J. 454 .. 217

Venkatasami v. Kristayya, 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945 .. 33

Venkatasubban Patter v. Ayyathurai, 54 Ind. Cas. 202; 37 M. L. J. 554; 20 M. L. T. 364 463

FOLLOWED—concld.

Page.

Venkatesh Damodar Mokashi v. Mallappa Bhimappa Chikkalki, 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B. 722 .. 808

Vidya Purna v. Seethamma, 12 Ind. Cas. 74; 21 M. L. J. 889 .. 530

Vidyapurna Thirtha Swamiar v. Rangappayya 21 Ind. Cas. 405; 25 M. L. J. 486; 14 M. L. T. 344; (1913) M. W. N. 901 .. 445

Walidad v. Emperor, 15 P. R. 1907; Cr. 14 P. W. R. 1907; Cr. 6 Cr. L. J. 444; 56 P. L. R. 1908 .. 792

Yellavajhula Surayya v. Yellavajhula Subbamma, 53 Ind. Cas. 498; 43 M. 4; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405 566

NOT FOLLOWED.

Bagram v Khettranath Karformah, 3 B. L. R. O. C. J. 18 .. 831

Bhubaneswar Prasad Singh v. Tilakdhari Lal, 49 Ind. Cas. 617; 4 P.L.J. 135; (1919) Pat. 75 (F. B.) .. 484

Choti v. Khecheru, 58 Ind. Cas. 250; 42 A. 649; 18 A. L. J. 758; 2 U. P. L. R. (A) 353; 21 Cr. L. J. 746 .. 681

Debi Sahai v. Raghunathu Sahai, 61 Ind. Cas. 173; 19 A. L. J. 399; 22 Cr. L. J. 349.. 681

Emperor v. Rab Nawaz, 59 Ind. Cas. 854; 1 L. 612; 22 Cr. L. J. 150 .. 795

Goroo Dass Nag v. Motee Lal Nag. 6 B. L. R. App. 16; 14 W. R. 468 .. 305

Hem Chunder Chunder v. PrankristoChunder, 1 C. 403; 1 Ind. Dec. (N. S.) 252 .. 293

Jiwa Ram v. Nand Ram, 66 Ind.Cas. 144; 44 A. 407; 20 A. L. J. 226; (1922) A. I. R. (A.) 223 .. 173

Junmajoy Mojoomdar v. Keshub Laul Ghose, 2 B. L. R. A. C.J. 134; 10W.R. 484; 1 Ind. Dec. (N. S.) 737 .. 305

Kali Kinkar Sett v. Dinobandhu Nandy, 32 C. 379 at p. 381; 9 C. W. N. 321; 2 Cr.L. J. 106 .. 222

Pranjivandas v. Mayaram, 1 B. H.C.R. O. C. J. 151 .. 831

Sham Lal v. Bindo, 26 A. 494; 1 A.L. J. 266; A. W. N. (1904) 135 .. 443

Sundaram Ayyar v. Emperor, 47 Ind. Cas. 658; 41 M. 533; 19 Cr. L. J. 934 .. 795

RELIED UPON.

Abdul Gani v. Azizul Haq, 14 Ind. Cas. 641; 39 C. 409; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257 .. 830

Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank, Limited, 41 Ind. Cas. 598; 44 C. 929; 26 C. L. J. 49, 21 C. W. N. 877 .. 453

Achuthayya v. Thimmayya, 31 M. 345; 3 M. L. T. 315; 18 M. L. J. 228 .. 587

Adityam Iyer v. Ramakrishna Iyer, 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602 .. 768

they had such a right both under law and custom, and that the plantiff was now estopped from questioning this right in view of the private partition to which he had already given his assent. The point relating to jurisdiction was not seriously pressed before the lower Court apparently in view of the several rulings of this Court in which it has been held that a suit of this description is maintainable in a Civil Court. On the other points the learned Subordinate Judge found entirely in favour of the defendants, and as a result of those findings dismissed the plaintiff's suit. The plaintiff has now filed a first appeal to this Court, and we have listened to lengthy arguments by Counsel. Defendants Nos. 1 and 2 having confessed judgment in this Court, the only contesting respondent to this appeal now is *Musammat* Basant Kaur, the widow. It is again urged before us on her behalf that Civil Courts have no jurisdiction to entertain this suit. The argument of the learned Vakil who represents her is two-fold. Firstly, it is contended that section 111 of the Land Revenue Act confers an absolute right over a joint land-owner (in which term is included also a widow having a life-interest) to apply for partition, and that if a Revenue Officer acting in pursuance of the powers possessed by him under section 115 allows or disallows partition, he cannot be controlled by a Civil Court in the exercise of such a discretion. Reliance is also placed on section 158 which ousts the jurisdiction of a Civil Court from taking cognizance of the manner in which a Revenue Officer exercises the powers possessed by him under the Act. But it is clear that here a question of title is involved and that section 111 does not deal with questions of title or with questions relating to the right of a joint land-owner to *obtain* or *compel* partition which are in fact governed by sections 116 and 117 of the Act. As pointed out in *Abdul Qadir* v. *Rabia* (1), section 111 merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying for partition which she may or may not be entitled to obtain in virtue of her life-estate. In our opinion the proper course to adopt for the Revenue Officer in this case would have been to proceed under section 117 and to have either stayed the proceedings for the determination of the question of the widow's right to obtain partition by a competent Court or to have determined the question himself as if he were a Civil Court. He did not adopt either of the two courses open to him, and the question of title which was undoubtedly raised was left undisposed of. The rulings *Bachan Singh* v. *Madhan Singh* (2), *Buta* v. *Jiwani* (3), *Bhag Bhari* v. *Wazir Khan* (4) and *Purshotam* v. *Raj Devi* (5) are clear authority for the proposition that the mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title which has not been disposed of during the partition proceedings, is barred.

Secondly, it is argued that as the parties had privately partitioned the property with mutual consent no question of title or in fact of any other nature arose for the determination of the Revenue Officer and consequently the orders passed by him were final and not liable to be questioned in a Civil Court. We confess we are not at all impressed with the story of this so-called private partition. There is no evidence worth the name on the record in support of this story and in the absence of any reliable evidence to the contrary we must hold that no private partition took place. In fact the conduct of the plaintiff evidenced as it is, by the various applications that he made to the Revenue Authorities from time to time, militates against such partition and it is indeed strange that the plaintiff who had all along been contesting the right of the widow to obtain partition should suddenly on the 8th June have changed his mind and agreed to forego a valuable right for practically no consideration whatsoever.

The next question is whether the widow is entitled to claim partition. It is argued

(1) 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev.

(2) 61 P. R. 1897 (F. B.)

(3) 82. P. R. 1898 (F. B.)

(4) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

(5) 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913.

that the general rule as laid down in paragraph 15 of Rattigan's Customary Law and other rulings of this Court is that ordinarily a widow governed by the agricultural custom of the Punjab is not entitled to and that the burden of proving that she can claim partition is upon the widow. It is pointed out that in the present case the widow has absolutely failed to discharge the onus.

A reference to section 3, sub-clause 2 and section 111 of the Land Revenue Act, however, makes it clear that a widow is a joint owner of land though with limited rights of ownership and as such is possessed of a statutory right to demand partition. Applying the ordinary rule of the law of evidence the *onus* is then clearly upon the party who disputes her right to obtain partition. We are not unmindful of the distinction between a widow's right to *apply* for partition and her right to *obtain* or *compel* partition so forcibly brought out in *Abdul Qadir* v. *Rabia* (1), but this, in our opinion, has nothing to do with the question of onus which is regulated by entirely different considerations. A widow may not be entitled to obtain partition in view of her life-estate or in view of any established agricultural custom to that effect, but this must be proved by the party who denies her that right. As held in *Bhag Bhari* v. *Wazir Khan* (4), she has in virtue of her possession under the Land Revenue Act a "clear unequivocal statutory right to demand partition," and it is for the co-sharer who disputes that right to prove that by custom or for any other reason she is not entitled to obtain partition of the joint holding in which she is a co-sharer for life. It is contended that in a later ruling reported as *Parshotam* v. *Raj Devi* (5) this view was not accepted and that in that case the burden of proof was thrown upon the widow. It will be observed, however, that the judgment in that case proceeded merely on the basis of paragraph 15 of Rattigan's Customary Law and that the attention of the learned Judges was probably not drawn either to section 111 of the Land Revenue Act or to the earlier decision of 1912. We entirely concur in the view enunciated in *Bha Bhari* v. *Wazir Khan* (4) and have no hesitation in holding that the onus is upon the plaintiff.

Counsel for the appellant, however, contends that his client did not produce any evidence in the lower Court in proof of this issue, as the onus was laid upon the defendants which they failed to discharge and wants opportunity to be allowed to produce evidence. We think there is force in this contention and we consequently remand the case to the lower Court for enquiry and finding on the following issue :—

Whether by custom obtaining among the parties a widow is restrained from obtaining partition of the joint holding in which she is a co-sharer for life ?

Return within three months.

S. D. *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 15 OF 1922.

September 8, 1922.

Present—Mr. Batten, J. C.

Musammat BARI BAHU—PLAINTIFF—APPELLANT

versus

KUNDAN SINGH—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suit for declaration that certain sum settled as maintenance and for amendment of document—Nature of suit—Declaration with consequential relief—Court-fee payable—Specific Relief Act (I of 1877), s. 31—Revision—Wrong view of law.

A suit asking for a declaration that a certain sum of money was settled as the maintenance of the plaintiff, and for the amendment of a document to this effect, is, strictly speaking, a suit for a declaration with consequential relief under section 31 of the Specific Relief Act, and, for purposes of Court-fees and jurisdiction, it is governed by section 7 (*iv*) (*c*) of the Court Fees Act. (p. 32, col. 2.)

An alleged wrong view of the law is not a ground for interference in revision. (p. 32, col. 2.)

Devidas v. *Ramlal*, 13 Ind. Cas. 864; 7 N. L. R. 190 and *Raj Krishna Dey* v. *Bepin Behary Dey*, 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591, referred to.

RELIED UPON—contd.

Page.

Khagendra Nath Mahata v. Pran Nath Roy, 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.) 705
Khan Bibi v. Pir Shah, 132 P. R. 1886 .. 830
Kishori Lal Goswami v. Rakhal Das Banerjee, 31 C. 155 .. 801
Koleangereth Raman Nair v. Kolimatamullathil Mariyomma, 56 Ind. Cas. 13; (1920) M. W. N. 332; 11 L. W. 513; 43 M. 480 .. 270
Komalikutti v. Puthiakath Muhamad, 45 Ind. Cas. 743; (1918) M. W. N. 200; 41 M. 629; 34 M. L. J. 170; 23 M. L. T. 178; 7 L. W. 291 .. 270
Kottarathil Puthiyapurayil Pokkar v. Balathil Parkum Chandrankandi, 51 Ind. Cas. 714; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 42 M. 143; 36 M. L. J. 231 .. 20
Krishtokishore Dutt v. Rooplal Dass, 8 C. 687; 10 C. L. R. 609; 4 Ind. Dec. (N. S.) 442 741
Kumara Venkata Perumal v. Velayuda Reddi, 24 Ind. Cas. 195; 27 M. L. J. 25 .. 270
Kumarapuram Seshadari Doraswamy v. Pestonjee Jamesjee Padshah, 5 Bom. L. R. 633 .. 899
Kurgodigauda v. Ningangauda, 41 Ind. Cas. 238; 41 B. 625; 19 Bom. L. R. 638 .. 173
Lackersteen v. Rostan, 7 C. 32; 3 Ind. Dec. (N. S.) 570 .. 7
Lahore Bank Limited v. Lakhi Ram, 19 Ind. Cas 970; 105 P. R. 1913; 242 P. L. R. 1913; 144 & 215 P. W. R. 1913 .. 896
Lakhshmidas Lalji, *In re*, 32 B. 184; 10 Bom. L. R. 28; 7 Cr. L. J. 35; 3 M. L. T. 110 .. 596
Lala v. Hira Singh, 2 A. 49; 1 Ind. Dec. (N. S.) 576 .. 432
Lane v. Sterne, (1862) 3 Giff. 629; 9 Jur. (N. S.) 320; 10 W. R. 555; 66 E. R. 559; 133 R. R. 207 .. 293
Levenia Ashton v. Madhabmoni Dasi, 5 Ind. Cas. 390; 14 C. W. N. 560; 11 C. L. J. 489 293
Lutawan Kubar v. Lachiya, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 .. 7
Madan Mohan Dey v. Nogendra Nath Dey, 39 Ind. Cas. 640; 21 C. W. N. 544 .. 173
Madhave Motiram v. Jairam Sakharam, 63 Ind. Cas. 950; 23 Bom. L. R. 540 .. 259
Mahadev Sakharam Parkar v. Janu Namji Hatley, 14 Ind. Cas. 447; 26 B. 373; 14 Bom. L. R. 115 .. 885
Mahamaya Debi v. Haridas Haldar, 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183 .. 944
Maharaja of Bobbili v. Narasaraju Peda, 15 Ind. Cas. 738; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721, 23 M. L. J. 236 .. 741
Maharaja of Jeypore v. Rukmini Pattamahadevi, 50 Ind. Cas. 631; (1919) M. W. N. 271; 42 M. 589; at p. 598; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; 23 C. W. N. 889; 26 M. L. T. 16; 10 L. W. 381; 46 I. A. 109 .. 270

RELIED UPON—contd.

Page.

Maharajah of Bobbili v. Narasaraju Peda Baliara, 36 Ind. Cas. 682; 21 C. W. N. 162; 31 M. L. J. 300; 18 Bom. L. R. 909; 39 M. 640; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 1 P. L. W. 26; 43 I. A. 238 (P. C.) .. 741
Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh, 14 Ind. Cas. 496; 39 C. 527; 15 C. L. J. 411; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 22 M. L. J. 408; 20 I. A. 68 (P. C.) .. 918
Makhan Lal-Parsottam Das v. Chunni Lal-Brij Lal, 47 Ind. Cas. 610; 16 A. L. J. 777; 41 A. 42 .. 487
Manjuri Bibi v. Akel Mahmud, 19 Ind. Cas. 703; 17 C. W. N. 889; 17 C. L. J. 316 .. 957
Matangini Devi v. Girish Chunder Chongder, 30 C. 619; 7 C. W. N. 433 .. 1039
Mathura Prasad v. Emperor, 41 Ind. Cas. 995; 15 A. L. J. 517; 18 Cr. L. J. 883 .. 601
Maung Kyin v. Mal Shwe La, 42 Ind. Cas. 642; 22 C. W. N. 257, 15 A. L. J. 825; 6 L. W. 777, 2 M. L. T. 30; 27 C. L. J. 175, 20 Bom. L. R. 278; (1918) M. W. N. 300; 45 C. 220; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.) .. 1030
Maya Ram v. Shib Das, 20 P. R. 1901; 84 P. L. R. 1901 .. 840
McClean v. Kennard, (1874) 9 Ch. 330 at p. 346; 43 L. J. Ch. 323; 30 L. T. 186; 22 W. R. 382 .. 951
Mittrsami v. Rama Krishna, 12 M. 292; 4 Ind. Dec. (N. S.) 553 .. 171
Mohunt Rama Nooj Das v. Mohunt Debraj Das, (1839) 6 S. D. A. Beng. 202 .. 887
Motilal Bechardas v. Ghellabhai Hariram, 17 B. 6; Chitty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4 .. 951
Muhammad Abdul Gaffur Rowthar v. Hamida Beevi Ammal, 52 Ind. Cas. 505; (1919) M. W. N. 484; 42 M. 661; 25 M. L. T. 242; 36 M. L. J. 456 .. 257
Muhammad Ibrahim Sahib v. Shaik Dawood, 65 Ind. Cas. 549; 44 M. 417; 40 M. L. J. 351; 13 L. W. 379; (1921) M. W. N. 227; 23 Cr. L. J. 117; 30 M. L. T. 349 .. 77
Muhammad Nizam-ud-din v. Amin-ud-din, 67 Ind. Cas. 885; (1922) A. I. R. (L.) 35; 4 L. L. J. 441 .. 730
Mulk Raj v. George Knight, 10 P. R. 1906; 43 P. W. R. 1906 .. 951
Mullaseri Gopala Menon v. Krisheki Kovilaknath Manavikraman, 13 Ind. Cas. 179; 10 M. L. T. 508; 22 M. L. J. 140 .. 173
Mungni Ram Marwari v. Gursahai Nand, 17 C. 347; 16 I. A. 195; 13 Ind. Jur. 449; 5 Sar. P. C. J. 463; 8 Ind. Dec. (N. S.) 770 .. 336
Murajalli Hunia Goundan v. Ramasami Chetti, 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448 .. 847
Murlidhar Roy v. Mohini Mohan Koer, 30 Ind. Cas. 510; 19 C. W. N 794 note .. 840

RELIED UPON—contd.

Page.

Muthu Korakhi Chetty v. Mahamad Ammal, 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1; 11 L. W. 487; (1920) M. W. N. 42 (F. B.) .. 495

Muthura Sundari Dassi v. Haran Chandra Shaha, 34 Ind. Cas. 634; 43 C. 857 at p. 870; 20 C. W. N. 594; 23 C. L. J. 443 .. 824

Namberumal Chetty v. Kotayya, 21 Ind. Cas. 773; 14 M. L. T. 498 .. 259

Nand Lal v. Jethu Mal, 33 Ind. Cas. 255; 21 P. R. 1916; 197 P. W. R. 1915 .. 1

Nand Ram v. Bhopal Singh, 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130 .. 587

Nawab Nazir Begum v. Rao Raghunath, 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 80; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 (P. C.) .. 933

Nawal Singh v. Emperor, 14 Ind. Cas. 760; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302 596

Nil Kamal v. Jahnabi Chowdhurani, 20 C. 949; 13 Ind. Dec. (N. S.) 1205 .. 378

Nowroz Ali v. Aziz Bibi, 124 P. R. 1874 .. 830

Nur Jahan v. Aziz-ud-din, 108 P. R. 1895 .. 145

Palaniappa Udayar v. Arumuga Pandaram, 33 Ind. Cas. 697; (1916) 1 M. W. N. 256 .. 730

Pandurang Babu Parab v. Mahadaji Moreshvar Gokhale, 27 B. 23; 4 Bom. L. R. 714 .. 279

Parshotam v. Raj Devi, 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913 .. 28

Petherpermal Chetty v. Muniandy Servai, 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266 .. 1

Ponniah Thirumali Vandaya Thevar, *In re*, 65 Ind. Cas. 993; (1922) M. W. N. 13 & 45; 30 M. L. T. 72; 42 M. L. J. 49; 23 Cr. L. J. 209; 16 L. W. 460 .. 877

Pranjivandas Jagjivandas Mehta v. Chan Mah Phee, 35 Ind. Cas. 190; 43 I. A. 122; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 24 C. L. J. 314; 8 L. B. R. 458 (P. C.) .. 650

Preo Nath Koer v. Kazi Mahomed Shazid, 8 C. W. N. 620 .. 1

Purna Chandra Pal v. Barada Prasunna Bhattacharjee, 45 Ind. Cas. 783; 46 C. 111; 22 C. W. N. 637 .. 847

Purtap Udai Nath Sahi Deo v. Gunesh Narain Sahi, 70 Ind. Cas. 232; (1921) Pat. 369 .. 929

Qamar-ud-din Ahmad v. Jawahir Lal, 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.) .. 963

Radha Kishun v. Khurshed Hossein, 55 Ind. Cas. 959; 47 C. 662; 18 A. L. J. 401; (1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 28 M. L. T. 425; 25 C. W. N. 417 (P. C.) .. 948

RELIED UPON—contd.

Page.

Raghubar Dayal Sukul v. Jadu Nandan Missir, 13 Ind. Cas. 365; 16 C. W. N. 736; 15 C. L. J. 89 .. 925

Ram Autar Tewari v. Deoki Tewari, 729 Ind. Cas. 411; 37 A. 456; 13 A. L. J. 656 .. 58

Ram Narayan Singh v. Ram Saran Lal, 50 Ind. Cas. 1; 46 C. L. J. 332; 36 M. L. J. 344; 17 A. L. J. 398; 21 Bom. L. R. 597; 23 C. W. N. 866; (1919) M. W. N. 518; 26 M. L. T. 207; 46 I. A. 88 (P. C.) .. 920

Ram Pershad v. Harbans Singh, 6 C. L. J. 158 .. 259

Ram Sahai v. Emperor, 55 Ind. Cas. 1008; 18 A. L. J. 381; 2 U. P. L. R. (A.) 145; 21 Cr. L. J. 400 .. 66

Ramanugrah Narayan Singh v. Chuni Lal, 27 Ind. Cas. 822 .. 840

Ramchandra Narayan v. Narayan Mahadev, 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142 .. 481

Rameshar v. Rukmin, 12 Ind. Cas. 770; 14 O. C. 244 at p. 255 .. 581

Ratan Chand-Jwala Das v. Asa Singh Bogha Singh, 59 Ind. Cas. 669; 3 U. P. L. R. (L.) 3; 26 P. W. R. 1921 .. 259

Reg v. Manchester Justices, (1899) 1 Q. B 571 at p. 574; 68 L. J. Q. B. 358; 63 J. P. 360; 47 W. R. 410; 80 L. T. 531 .. 1039

Ridgway v. Wharton, (1857) 6 H. L. C. 238 at p. 289; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 10 E. R. 1287; 108 R. R. 88 763

Ruldu Singh v. Sawal Singh, 67 Ind. Cas. 388; 3 L. 188; (1922) A. I. R. (L.) 380 .. 824

Runga Ayyar v. Emperor, 29 M. 331; 4 Cr. L. J. 175 .. 596

Sabri v. Ganeshi, 14 A. 23; A. W. N. (1891) 205; 7 Ind. Dec. (N. S.) 387 .. 896

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.) .. 130

Saroda Prosad Mullick v. Luchmeeput Singh Doorgur, 14 M. I. A. 529; 17 W. R. 289; 10 B. L. R. 214; 2 Suth. P. C. J. 560; 3 Sar. P. C. J. 77; 20 E. R. 883 .. 741

Satis Chunder Mukhopadhya v. Mohendro Lal, 17 C. 849; 8 Ind. Dec. (N. S.) 1110 .. 336

Sawan Mal v. Kanhaya Lal-Gopal Das, 59 Ind. Cas. 680; 40 P. W. R. 1921 .. 487

Secretary to the Commissioner, Salt, Abkari and Separate Revenue Madras v. Ramanathan Chetty, 53 Ind. Cas. 976; 43 M. 75; (1919) M. W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447 .. 756

Shafaqai Ullah v. Wali Ahmad Khan, 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124; 7 Cr. L. J. 48 .. 995

Shaikh Bahadur v. Eradatullah Mullick, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407 .. 596

RELIED UPON—contd.

Page.

Shambati Koeri v. Jago Bibi, 29 I. A. 127 at p. 131; 29 C. 749; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304; (P. C.) .. 632

Shamu Patter v. Abdul Kadir Rowthan, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.) 390

Shanmuka Nadan v. Arunachalam Chettiar, 69 Ind. Cas. 961; 45 M. 194; 14 L. W. 642; (1921) M. W. N. 799; 42 M. L. J. 97; 30 M. L. T. 172; (1922) A. I. R. (M.) 332 .. 173

Shaw v. Fostir, (1872) 5 H. L. 321 at p. 341; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907 650

Sheikh Ibrahim v. Sheikh Suleman, 9 B. 146; 5 Ind. Dec. (N. S.) 98 .. 897

Sheo Saran Chaudhuri v. Ram Lagan Das, 64 Ind. Cas. 413; 19 A. L. J. 852; 44 A. 64; (1922) A. I. R. (A.) 355 .. 279

Shridharnarayan v. Atma Govind, 7 B. 455 at p. 458; 4 Ind. Dec. (N. S.) 366 .. 558

Sitaramaya v. Ramappaya, 39 Ind. Cas. 160; 5 L. W. 207 .. 173

Smidth & Co., v. Greenwood, (1920) 3 K.B. 275; 89 L.J. K. B. 993; 36 T. L. R. 760 .. 756

Smidth & Co., v. Greenwood, (1921) 3 K B. 583; 37 T. L. R. 949; 756

Sohandan v. Aurang Khan, 9 Ind. Cas 540; 23 P. L. R. 1911; 48 P. W. R. 1911 ..171

Somasundaram Pillai v. Chokkalingam Pillai, 38 Ind. Cas. 806; 40 M. 267; 5 L. W. 267 .. 173

Sooraparaju v. Narayanaraju, 17 Ind. Cas. 431; (1912) M. W. N. 1232; 12 M.L. T. 408 266

Sri Gopal v. Pirthi Singh, 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I.A. 118; 8 Sar. P. C. J. 293; (P. C.) .. 948

Subramanian Chetti v. Arunachelam Chetti, 28 M. 1 (F. B.) .. 833

Sukha Nand v. Behari Ram-Ishar Das, 68 Ind. Cas. 750 .. 734

Sulley v. Attorney-General, (1860) 5 H. & N. 711; 29 L. J. Ex. 464; 6 Jur. (N.S.) 1018; 2 L. T. 439; 8 W. R. 472; 157 E. R. 1364; 120; R. R. 793 .. 756

Sundaram v. Mamsa Mavuthar, 63 Ind. Cas. 937; 44 M. 554; 40 M. L.J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272 (F. B.) ..1039

Sunder Mall v. Jhari Lal, 41 Ind. Cas. 132; 2 P. L. W. 54; 18 Cr. L. J. 756; 2 P. L. J. 637 .. 871

Sunitabala Debi v. Dhara Sundari Debi Chowdhurani, 53 Ind. Cas. 131; 46 I. A. 272; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 821; 22 Bom. L. R. 1; 24 C. W. N. 297; 11 L. W. 227; 47 C. 175; 2 U. P. L. R. (P. C.) 2 (P. C.) .. 632

Surajmani v. Rabi Nath Ojha, 30 A. 84; 35 I. A. 17; 7 C. L. J. 311; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 3 M. L. T. 144 (P. C.) .. 748

Suranjan Singh v. Rambahal Lal, 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950 .. 35

Swaminatha Aiyar v. Sivagurunatha Chettiar, 32 Ind. Cas. 990 .. 730

RELIED UPON—concld.

Page.

Swan v. Swan, (1822) 8 Price 518; 22 R. R. 770; 146 E. R. 1218 .. 374

Tacoordeen Tewarry v. Nawab Syed Ali, Hossein Khan, 1 I. A. 192; 21 W. R. 340; 13 B. L. R. 427; 3 Sar. P. C. J. 368. (P. C.) .. 632

Tayabali v. Atma Ram, 25 Ind. Cas. 375; 38 B. 631; 16 Bom. L. R. 520 .. 45

Taylor v. Bowers, (1876) 1 Q. B. 291; 46 L. J. Q. B. 39; 34 L. T. 938; 24 W. R. 499 .. 1

Thakur Prasad v. Fakir Ullah, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 .. 484

Trye v. Trye, (1851) 13 Beav. 422; 20 L. J. Ch. 368; 15 Jur. 809; 50 E. R. 163; 88 R. R. 526 ... 293

Ugar Sen v. Lakhmi Chand, 6 Ind. Cas. 840; 32 A. 638; 7 A. L. J. 759 .. 951

Umesh Chunder Roy v. Satis Chandra Roy, 41 Ind. Cas. 998; 22 C. W. N. 69; 26 C. L. J. 208; 18 Cr. L. J. 886 .. 693

Umraobi v. Himmatbi, 54 Ind. Cas. 200 ..1009

Unnamalai Ammal v. Muthan, 42 Ind. Cas. 530; 33 M. L. J. 413 at p. 414; 6 L. W. 359; (1917) M. W. N. 643; 22 M. L. T. 333 .. 173

Upendra Nath Banerjee v. Umesh Chandra Banerjee, 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375 .. 374

Uppara Chinnagappa v. Gaddam Chinna Hanumanna, 50 Ind. Cas. 471; 9 L. W. 314; (1919) M. W. N. 425 .. 734

Uttam Singh v. Hukam Singh, 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 107 .. 390

Vaidyanatha Ayyar v. Chinnasami Naik, 17 M. 108; 6 Ind. Dec. (N. S.) 74 .. 951

Valli Ammal v. Corporation of Madras, 16 Ind. Cas. 971; 38 M. 41; 12 M. L. T. 469; 23 M. L. J. 531; (1912) M. W. N. 1162 ..1039

Vasudev v. Balaji, 26 B. 500; 4 Bom. L. R. 178 .. 847

Velu Pillay v. Appasawmi Pandaram, 9 Ind. Cas. 197; (1911) 1 M. W. N. 141; 9 M. L. T. 301; 21 M. L. J. 444 .. 266

Vuppuluri Atchayya v. Sri Konchumarti Venkata Seetarama Chundra Rao, 18 Ind. Cas. 555; 39 M. 195; 13 M. L. T. 60; 24 M. L. J. 112 ..1039

Waliam v. Banke Behari Pershad Singh, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sem. P. C. J. 512 (P. C.) ..7,705

Wallingford v. Mutual Society, (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81 .. 705

Weldon v. Neal, (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820 .. 270

Womes Chunder Chatterjee v. Chundee Churn Roy Chowdhury, 7 C. 293; 3 Ind. Dec. (N. S.) 737 . 300

Yarakalamma v. Anakala Naramma, 2 M. H. C. R. 276 .. 929

INDIAN CASES

1923.

VOLUME 71.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1149 OF 1918.

August 9, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

RAGHUPATI CHATTERJEE—DEFENDANT—APPELLANT

versus

NRISHINGHA HORI DAS AND OTHERS—PLAINTIFFS, AND OTHER DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Fraud accomplished—Transferee, whether entitled to recover possession from transferor—Estoppel—Equity—Rule of decision.

On no principle of justice, equity and good conscience is a transferee, under a fictitious and fraudulent conveyance never intended to pass title and executed without consideration to defraud the creditors of the transferor, entitled to recover from the transferor possession of the property through the Court, if the fraudulent purpose has in fact been accomplished. (p. 7, col. 1.)

The balance of authority in such cases is in favour of permitting the defendant to set up the true transaction ; the maxim *nemo allegans suam turpitudinem audiendus est* gives way to the maxim *in pari delicto, potior est conditio possidentis.* (p. 6, col. 2.)

Holman v. *Johnson*, (1775) 1 Cowp. 341 at p. 343; 98 E. R. 1120, *Preo Nath Koer* v. *Kazi Mahomed Shazid*, 8 C. W. N. 620; *Nand Lal* v. *Jethu Mal*, 33 Ind. Cas. 255; 21 P. R. 1916; 197 P. W. R. 1915 and *Chenvirappa* v. *Puttappa*, 11 B. 708 ; 12 Ind. Jur. 102; 6 Ind. Dec. (N. S.) 466, relied upon.

Where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of Equity, following the rules of law as to participators in a common crime, will not interpose to grant any relief, and will leave the parties where they find them giving no relief and no countenance to claims of this sort. In other words, wherever two or more persons are engaged in a fraudulent purpose to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct. (p. 6, col. 2.)

Story's Equity Jurisprudence, Volume I, section 481, relied upon.

The strictness of the rule of estoppel by deed has been much relaxed in recent times, and it has been maintained that where both parties to an indenture either know or had the means of knowing that it is executed for an immoral purpose or in contravention of a Statute, or of public policy in general, neither will be estopped from proving facts which will render the instrument void *ab initio*. (p. 6, col. 1.)

(Case-law reviewed.)

If the purpose for which a fraudulent assignment is made, is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to take his property back from the assignee who has given no consideration for it. (p. 3, col. 2.)

Jadu Nath Poddar v. *Rup Lal Poddar*, 33 C. 967 ; 10 C. W. N. 650 ; 4 C. L. J. 22, *Petherpermal Chetty* v. *Muniandy Servai*, 35 C. 551; 10 Bom. L. R. 590 ; 12 C. W. N. 562 ; 5 A. L. J. 290 ; 7 C. L. J. 528 ; 14 Bur. L. R. 108 ; 18 M. L. J. 277; 35 I. A. 98 ; 4 M. L. T. 12 ; 4 L. B. R. 266 and *Taylor* v. *Bowers*, (1876) 1 Q. B. 291 ; 46 L. J. Q. B. 39 ; 34 L. T. 938 ; 24 W. R. 499, relied upon.

Appeal against the decree of the Subordinate Judge, Second Court, Burdwan, dated the 28th of February 1918, reversing that of the Munsif, Second Court at Katwa, dated the 30th January 1915.

Babus *Mohendranath Ray* (with him Babu *Baranasibashi Mukherjee*), for the Appellant.—The plaintiff bases his claim to recover possession upon a fictitious mortgage which was a fraudulent device to delay, if not to defeat, the creditors of the mortgagor. The fraudulent purpose of the fictitious transaction has been accomplished. The question is whether the plaintiff is entitled to recover possession as against the true owner on the basis of the fictitious transfer, and whether the true owner is estopped from setting up the true character of the transaction to defend his possession.

My submission is that on principle as well as on authority the plaintiff's suit is bound to fail.

Although in *Jadu Nath Poddar* v. *Rup Lal Poddar* (1) the last word on the subject has been said when recovery is claimed by the fraudulent grantor, the principle which induced the Court to allow the grantee to *retain* his ill-gotten gain cannot be invoked when the grantee seeks the assistance of the Court to take away from the grantor what rightfully belongs to the latter. There is clearly a difference between a man's putting forward his misconduct as a cause of action and his setting it up as a defence. It is true that the Court will not permit a plaintiff to set up his iniquity as a cause of action, but there may be circumstances such as the present in which an iniquity is a good defence to a cause of action; for where both parties to an action are equally to blame, a Court of justice will leave them where they are and will refuse active assistance to either of them. See Per Lord Mansfield in *Holman* v. *Johnson* (2). See also *Scott* v. *Brown* (3). The right of the fraudulent grantor to plead such a defence has been recognised by the highest judicial authority, both Indian and English. See *Babaji* v. *Krishna* (4), *Preo Nath Koer* v. *Kazi Mohamed Shazid* (5), *Yaramati Krishnayya* v. *Chundru Papayya* (6), *Honapa* v. *Narsapa* (7), *Petherpermal Chetty* v. *Muniandy Servai* (8), *Nand Lal* v. *Jethu Mal* (9) and *Gascoigne* v. *Gascoigne* (10).

There is neither law nor equity in favour of the plaintiff in the present case and he is not entitled to any assistance from the Court in his attempt to appropriate what is not his, for which he paid no consideration and which rightfully belongs to the defendant in possession.

Babu *Ram Chandra Mazumdar* (with him Babus *Brajalal Chakraburtty* and *Narendra Nath Chaudhury*), for the Plaintiffs-Respondents.—The authorities on the effect of fraudulent transfers have recognised a clear distinction between the class of cases in which the fraudulent purpose has been accomplished and that in which the fraud has not been effectuated. After the fraud is perpetrated the real owner who is a perpetrator of the fraud cannot be permitted to say that the apparent is not the real state of things. If it were otherwise there would be nothing to check such cases of clandestine transactions in fraud of creditors. Thus, for the protection of society and not for the purpose of helping a participator in a fraudulent transaction, it is necessary that the real owner should not be permitted to set up his own fraud even in defence. The defendant by his own deliberate action created an ostensibly valid title in the plaintiff. It is, therefore, inconsistent with all principles of justice, equity and good conscience to permit him to invoke the assistance of the Courts to enable him to escape from the consequences of his own action. See *Sidlingappa* v. *Hirasa* (11). Refers also to *Jadu Nath Poddar* v. *Rup Lal Poddar* (1), *Akhil Prodhan* v. *Manmatha Nath* (12), *Doe d. Roberts* v. *Roberts* (13). The case in *Preo Nath Koer* v. *Kazi Mahomad Shazid* (5) only follows *Babaji* v. *Krishna* (4) and no independent reasoning was assigned for that decision.

Babu *Baranasibashi Mukherjee*, in reply refered to *Robinson's Settlement*, *In re*, *Gant* v. *Hobbs* (14), *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (15), *Honapa* v. *Narsapa* (7), *Rajab Ali* v. *Hedayet Ali* (16).

Babu *Krishna Lal Banerjee*, for Defendant No. 5 Respondent.

(1) 33 C. 967; 10 C.W. N. 650; 4 C. L. J. 22.
(2) (1775) 1 Cowp. 341 at p. 343; 98 E. R. 1120.
(3) (1892) 2 Q. B. 724 at p. 728; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.
(4) 18 B. 372; 9 Ind. Dec. (N. S.) 756.
(5) 8 C. W. N. 620.
(6) 20 M. 326; 7 Ind. Dec. (N. S.) 231.
(7) 23 B. 406; 12 Ind. Dec. (N S.) 270.
(8) 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).
(9) 33 Ind. Cas. 255; 21 P. R. 1916; 197 P. W. R. 1915.
(10) (1918) 1 K. B. 223; 87 L. J. K. B. 333; 118 L. T. 347; 34 T. L. R. 168.
(11) 31 B. 405 at p. 410; 9 Bom. L. R. 542.
(12) 22 Ind. Cas. 86; 18 C. L. J. 616 at p. 619.
(13) (1819) 2 B. & Ald. 367; 20 R. R. 477; 106 E. R. 401.
(14) (1912) 1 Ch. 717 at p. 725; 81 L. J. Ch. 393; 106 L. T. 443; 28 T. L. R. 298.
(15) 21 W. R. 422 at p. 423.
(16) 29 Ind. Cas. 699; 22 C. L. J. 197 at pp. 205-208; 19 C. W. N. 1151.

JUDGMENT.—This is an appeal by the second defendant in a suit for recovery of immoveable property on establishment of title. The disputed land belonged to one Saha and was occupied by one Mallik as a tenant under him. On the 15th June, 1886, Saha executed a mortgage-deed in favour of Das. This transaction, it has now been ascertained, was fictitious, and the mortgage was effected solely with a view to delay, if not to defeat, the creditors of Saha. Das sued on the mortgage, obtained a decree, and on the 7th November, 1892, became purchaser at the sale which followed in due course. The fifth defendant is the representative-in-interest of Saha. The second defendant is the successor of Mallik. The plaintiffs are the representatives of Das. They commenced this action on the 2nd January 1914 for declaration of their title by purchase at the mortgage sale and for recovery of possession. The claim was contested by the second and fifth defendants; they united and urged that the mortgage was fictitious and had not vested the title in the plaintiffs. The Courts below have found that the mortgage was fictitious and was a fraudulent device to delay, if not to defeat, the creditors of the mortgagor. The Courts below have further held that the fraudulent purpose was, in fact, accomplished. The Courts have, however, disagreed upon the question whether, upon these facts, the plaintiffs were entitled to relief. The Trial Court held that as the mortgage was fictitious, no title had passed to the plaintiffs, who could not consequently claim a declaration of title and recovery of possession. The Subordinate Judge, on the other hand, has held that, as the fraudulent purpose had been accomplished, the mortgage must be deemed operative and unimpeachable between grantor and grantee, and the plaintiffs were,consequently,entitled to recover possession. The second defendant, the tenant, alone has appealed against this decree. The fifth defendant, who holds the superior interest, was joined as a respondent to the appeal, and has prayed for an order that she might, if necessary, be transferred to the category of appellants. There can be no question that the second defendant is competent to maintain the appeal. He is a transferee of the tenancy, and while he has been accepted as tenant by the fifth defendant, the plaintiffs have questioned the legality of his purchase on the allegation that the tenancy is non-transferable. The second defendant has, consequently, a substantial interest in the determination of the question whether the superior interest has vested in the plaintiffs or is still held by the fifth defendant.

The history of the development of the Law of Fraudulent Conveyances in Indian Courts was reviewed in *Jadu Nath Poddar* v. *Ruplal Poddar* (1). It was ruled in that case that, if the purpose for which the assignment is made, is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee who has given no consideration for it. This view was approved by the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (8). The Indian Trusts Act, likewise, enacts in section 84 that where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee,or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor. This is a modification of the stringent rule enunciated in the earliest cases, namely, that a person is not entitled to ask a Court of Justice to afford him relief from the consequences of his own misconduct. The later cases enunciate the more lenient rule that the real nature of the transaction should guide the Court in determining the real rights of the parties. Thus has been slowly evolved the modern rule that, although where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud; *Cf. Taylor* v. *Bowers* (17).

(17) (1876) 1 Q. B. 291; 46 L. J. Q. B. 39; 34 L. T. 938; 24 W. R. 499.

We have next to consider the class of cases where the fraudulent purpose has in fact been accomplished. In such cases, it is well settled that the Courts will not aid a fraudulent grantor to reclaim, or recover from his transferee, property transferred in fraud of creditors, or its proceeds. The object of the rule is not to protect the fraudulent grantee, but to protect society, and this purpose cannot be achieved without allowing the grantee to retain his ill-gotten gains. The reasons for the rule have been expressed in a variety of ways: (1) considerations of public policy as well as the expressed provisions of the Statute of Frauds forbid relief against a transaction of this nature; (2) the Courts refuse to interfere, not because they approve the reprehensible conduct of the confederate but because they will not aid the other party in an illegal undertaking; (3) the law will not permit a party to deliberately put his property out of his control for a fraudulent purpose and then, through the intervention of the Courts, regain the same after his fraudulent purpose has been accomplished; (4) where both parties are equally culpable, the law will leave the parties where it finds them, and not engage itself to determine the rights of the matter as between them; (5) when a suitor applies for equitable relief, he must come into Court with clean hands, with respect to the matters concerning which he asks relief; (6) he who doth fraud may not borrow the hands of the Chancellor to draw equity from a fountain his hand hath polluted; (7) when property has been fraudulently conveyed, the grantor, his heirs and assigns are afterwards estopped to set up the fraud as a foundation for an action for the recovery of the property. We have stated the leading reasons usually assigned in support of the rule enforced when recovery is claimed by the fraudulent grantor, in order to enable us to determine what rule should be enforced when a recovery is sought by the fraudulent grantee. Upon that question, there has been divergence of judicial opinion, as is indicated by the decisions in *Montefiori* v. *Montefiori* (18) and *Holman* v. *Johnson* (2). In *Montefiori* v. *Montefiori* (18), Lord Mansfield, C. J., when invited to decide whether a note without consideration given fraudulently to carry on a marriage treaty, shall be good against the drawer, observed that,

"no man shall set up his own iniquity as a defence any more than as a cause of action."

On the other hand, in *Holman* v. *Johnson* (2) Lord Mansfield, C. J., observed as follows:—

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

This radical divergence of opinion is reflected in other judicial pronouncements. In *Babaji* v. *Krishna* (4) Sir Charles Sargent, C. J., remarked that in *Chenvirappa* v. *Puttappa* (19) no authority of a Court of Equity was cited which questions the right of a fraudulent grantor to plead such a defence, and he ruled that the defendant should be heard. This decision was followed by Banerjee and Pargiter, JJ., in *Preoa Nath* v. *Kazi Mahomed Shazid* (5), when they held that in a suit for recovery of land, the defendant is not debarred from pleading that a transaction is *benami*, by reason of his having previously successfully set up the *benami* transaction to defraud creditors; it was competent for him to show the real nature of the transaction in order to defend his position and defeat

(18) (1762) 1 Black. W 363; 96 E. R 203.

(19) 11 B. 708; 12 Ind. Jur. 102; 6 Ind. Dec. (N. S.) 466.

the claim of the *benamidar*. It is different where, as in *Banka Behary* v. *Raj Kumar Dass* (20), the real owner who has successfully set up the *benami* transaction to defeat or defraud his creditors, himself asks for relief as plaintiff, on the allegation that the transfer relied upon by the defendant is a *benami* transaction. The Court will, in such a case, refuse relief to the party who sets up his own fraud, and will leave matters where they are. But that principle does not hold good where the defendant in possession seeks to show the real nature of a transaction to defend that possession. This view is identical with that adopted by Benson, J , in *Yaramati Krishnayya* v. *Chundru Papayya* (6) namely, that if a *benamidar*, who has used a fraudulent transfer in his name, to defeat an execution levied by his ostensible transferor, were to seek the assistance of the Court to obtain possession from the latter, the Court might well allow the transferor to plead the real facts, even though the plea involved a declaration by the defendant of his own turpitude. This opinion, subsequently approved by Farran, C.J., in *Honapa* v. *Narsapa* (7), dissenting from *Param Singh* v. *Lalji Mal* (21), was fortified by reference to the dictum of Parker, J., in *Venkatramanna* v. *Viramma* (22) to the effect that when a deed is made for an illegal or immoral purpose, a defendant against whom it is sought to be enforced may—not for his own sake, but on grounds of public policy—show the turpitude of both himself and the plaintiff. A similar view was adopted in *Janardan* v. *Paikanlala* (23) and *Maniram* v. *Ganesh* (24).

The respondents have, however, relied strongly upon the decision of Sir Lawrence Jenkins, C. J., in *Sidlingappa* v. *Hirasa* (11) where it was ruled that the defendant would not be permitted to invoke the aid of the Courts to enable him to escape from the consequences of a fraudulent sale-deed, which ostensibly created a valid title in the plaintiff. But we must observe that the authority of the case principally relied upon by Jenkins, C. J., namely, *Doe d. Roberts* v. *Roberts* (13) must be deemed to have been considerably weakened by *Prole* v. *Wiggins* (25) where Tindal, C. J. permitted the defendant, who was sued for debt on a bond, to plead that the bond was given to defeat the provisions of a certain Statute, and distinguished the earlier case on the ground that the defence therein set up was inconsistent with the deed. See *Gascoigne* v. *Gascoigne* (10). The view that the illegality of a contract may be set up by way of defence to an action on the contract, even if it does not appear on the face of the contract, is supported by high authority; *Cork and Yonghal Ry., In re* (26), *Jones* v. *Merionethshire Permanent Benefit Building Society* (27). It is equally clear that, when the object of the contract is illegal, the whole transaction is tainted with illegality; no right of action exists in respect of anything arising out of it, and it is the duty of thd Judge to take the objection that the contract is illegal and void; *Montefiore* v. *Monday Motor Components Co.* (28), *Scott* v. *Brown* (3), *Robinson's Settlement, In re, Gant* v. *Hobbs* (14), *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (29).

One of the decisions mentioned in *Sidlingappa* v. *Hirasa* (11) is that of *Brakenbury* v. *Brackenbury* (30). There, a conveyance of land had been made, as in *Doe d. Roberts* v. *Roberts* (13) to give a fictitious qualification to kill game, and this conveyance—which was in fraud of the policy of the then law requiring that a man, in order to sport, should have a qualification in landed property—had been lent by the proper owner of the land to the ostensible transferee, to enable the latter to commit a fraud upon a third person. The transferee was about to sue in ejectment to obtain possession of the

(20) 27 C. 231; 4 C. W. N. 289; 14 Ind. Dec. (N. S.) 153.
(21) 1 A. 403; 1 Ind. Dec. (N. S.) 319.
(22) 10 M. 17; 11 Ind. Jur. 18; 3 Ind. Dec. (N. S.) 762.
(23) 7 C. P. L. R. 50.
(24) 4 Ind. Cas. 233; 5 N. L. R. 146.
(25) (1836) 3 Scott. 601; 3 Bing. N. C. 230; 43 R. R. 621; 2 Hodges 204; 6 L. J. (N. S.) C. P. 2; 132 E. R. 398.
(26) (1869) 4 Ch. 748; 39 L. J. Ch. 277; 21 L. T. 735; 18 W. R. 26.
(27) (1892) 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 17 Cox C. C. 389.
(28) (1918) 2 K. B. 241; 87 L. J. K. B. 907; 119 L. T. 340; 62 S. J. 585; 34 T. L. R. 463.
(29) (1914) A. C. 461; 83 L. J. K. B. 530; 110 L. T. 852; 58 S. J. 338; 30 T. L. R. 313.
(30) (1820) 2 J. & W. 391; 22 R. R. 180; 37 E. R. 677.

land, when the proper owner filed a bill in Equity for an injunction to restrain the action and delivery of the deed. Lord Eldon held that a Court of Equity should grant relief to neither party, and the injunction asked for was consequently refused. This rather favours the view that the plaintiff, whether he be the grantor or the grantee, should not be assisted by the Court; see *Cecil* v. *Butcher* (31).

The strictness of the rule of estoppel by deed has been much relaxed in recent times, and it has been maintained that, where both parties to an indenture either know or had the means of knowing that it is executed for an immoral purpose or in contravention of a Statute, or of public policy in general, neither will be estopped from proving facts which will render the instrument void *ab initio*, for, although a party will thus in certain cases be enabled to take advantage of his own wrong, yet this evil is trifling in comparison with the flagrant evasion of the law that results from an opposite rule.

It may further be observed that in *Sidlingappa* v. *Hirasa* (11) reliance was placed upon the decision of the Bengal Sadar Court in *Abhoya Charan* v. *Trilochan* (32). As pointed out in *Jadu Nath Poddar* v. *Rup Lal Poddar* (1), this case was followed in *Kaleenath* v. *Doyal Kristo Deb* (33), though with considerable hesitation by Sir Charles Hobhouse, J., and the latter case was expressly dissented from by Sir Richard Couch, C. J., in *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (15), where the decisions of the Judicial Committee in *Ram Surun Singh* v. *Pran Peary* (34) and *Oodey Koowur* v. *Ladoo* (35) were applied. We are consequently unable to follow the decision in *Sidlingappa* v. *Hirasa* (11) or the later decision, substantially to the same effect, in *Nahanna Pachhasaheb* v. *Sabinibibi* (36), which also was based on the authority of *Doe d. Roberts* v. *Roberts* (13). On the other hand, the cases of *Preo Nath Koer* v. *Kazi Mahomed Shazid* (5) and *Babaji* v. *Krishna* (4) appear to us to lay down the correct rule on the subject.

The following passage from Story may be usefully recalled here (Equity Jurisprudence, Volume I, section 421 and Note, English Edition by Randall, 1920, section 298).

"In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of Equity, following the rule of law as to participators in a common crime will not interpose to grant any relief acting upon the known maxim—*In pari delicto potior es conditio defendentis et possidentis*. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort."

The view we take accords with that adopted in *Nand Lal* v. *Jethu Mal* (9), where Shadi Lal, J., pointed out that the balance of authority in such cases is in favour of permitting the defendant to set up the true transaction; the maxim *nemo allegans suam turpitudinem audiendus est* gives way to the maxim *in pari delicto potior est conditio possidentis*.

We may now usefully recall the words of Baldwin, J., in delivering the opinion of the Supreme Court of the United States in *Bartle* v. *Nutt, Administrator of Coleman* (37):—

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis* it is but a just infliction for pre-meditated and deep y practised fraud which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws."

Or, as Chancellor Walworth states it:

"Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons as against the other, from the consequences of their own misconduct."

(31) (1821) 2 J. & W. 565; 22 R. R. 213; 37 E. R. 744.
(32) (1859) Beng. S. D. A. 1639.
(33) 13 W. R. 87.
(34) 13 M. I. A. 551; 15 W. R. P. C. 14; 2 Suth. P. C. J. 386; 2 Sar. P. C. J. 620; 20 E. R. 656.
(35) 13 M. I. A. 585; 15 W. R. P. C. 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 669.
(36) 12 Ind. Cas. 583; 37 B. 217; 13 Bom. L. R. 1011.
(37) (1830) 4 Peters 184; 7 Law. Ed. 825.

Bolt v. *Rogers* (38); see also *Randall* v. *Howard* (39), *Wheeler* v. *Sage* (40), *Dent* v. *Ferguson* (41), *Strum* v. *Boker* (42).

What, then, is the true aspect of the relative situation of the parties *A.* executes a conveyance of land in favour of *B.* *B.* sues *A.* to recover possession. *A.* answers and establishes that, as *B.* is well aware, there was no consideration for the deed, that the transaction was fictitious and that the conveyance was never intended to pass title. *B.* retorts, with cynical frankness, that though this be the truth, yet, as he conspired with *A.* to create the document so as to cheat *C.*, a creditor of *A.*, who might otherwise have pursued the property, his conduct has been so meritorious that he is entitled to invoke the aid of the Court in his endeavour to appropriate what rightfully belongs to *A.* We are unable to appreciate on what conceivable principle of justice, equity and good conscience, the Court may be thus called upon to promote actively the roguery of *B.* at the expense of *A.*; merely because *B.* has helped *A.* to cheat *C.* it does not follow that the Court should assist *B.* to cheat *A.* We are clearly of opinion that the plaintiffs in the present case have established no claim whatsoever to the assistance of the Court to enable them to commit a fraud upon the true owner and they must be left to congratulate themselves upon nothing beyond a useless mortgage and the memory of a successful fraud which has brought them no benefit whatever.

The result is, that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs in all the Courts.

S. D. *Appeal allowed.*

(38) (1832) 3 Paige 157.
(39) (1862) 2 Black. 585; 17 Law. Ed. 269.
(40) (1863) 1 Wallace 518; 17 Law. Ed. 646.
(41) (1889) 132 U. S. 50; 33 Law. Ed. 242.
(42) (1893) 150 U. S. 334; 37 Law. Ed. 1093.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 40 OF 1922.

December 5, 1922.

Present:—Mr. Pipon, J. C.

CHET RAM AND OTHERS—DEFENDANTS—PETITIONERS

versus

KANSHI RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 7, 3—Next friend or guardian—Reference to arbitration—Agreement—Leave of Court—Irregularity—Minor substantially represented—Assumption—Joint Hindu family—Karta—Reference to arbitration—Jurisdiction of Court.

The next friend or guardian of a minor can make an agreement to refer to arbitration on behalf of the minor, under O. XXXII, r. 7, Civil Procedure Code, without the leave of the Court. (p. 8, col. 2.)

Hardeo Sahai v. *Gauri Shankar*, 28 A. 35; 2 A. L. J. 493; A. W. N. (1905) 171 and *Lutawan Kubar* v. *Lachiya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57, relied upon.

A mere irregularity in procedure in arbitration cases cannot vitiate a reference to arbitration where the interests of the minor have in no way been prejudiced. (p. 9, col. 1.)

Umed Singh v. *Sobhag Mal Dhadha*, 32 Ind. Cas. 161; 20 C. W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 67; 18 Bom. L. R. 308; 43 C. 290; 43 I. A. 1 (P. C.), followed.

Therefore, a reference to arbitration by the guardian of a minor does not fail on the technical ground that the leave of the Court was not expressly recorded. (p. 9, col. 1.)

Where a minor is substantially represented by a guardian *ad litem*, an appointment by the Court under O. XXXII, r. 3, of the Civil Procedure Code can be assumed from the action of the Court, provided that the guardian really acts in the interest of the minor and the minor is in no way prejudiced. (p. 9, col. 2; p 10, col. 1,)

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), relied on.

If the Court accepts the pleas of a major defendant on behalf of a minor defendant, the action of the Court amounts substantially to a recognition of the major defendant as guardian *ad litem* for the minor. (p. 9, col. 2,)

Obiter:—The *Karta* of a joint Hindu family can act, without specific appointment, as guardian of the minor. But a Court must decide whether or not he was acting in the interest of the minor. (p. 10, col. 1.)

Lackersteen v. *Rostan*, 7 C. 32; 3 Ind. Dec. (N. S.) 570, relied upon.

Once a reference to arbitration is made, the jurisdiction of the Court is ousted and any order passed after such reference, except under the provisions of the law relating to arbitration, is *ipso facto* an illegal order made without jurisdiction. (p. 10, col. 2.)

Imam Din v. *Jawahirl*, 10 P. R. 1899, relied upon.

CHET RAM v. KANSHI RAM.

Petition for revision of an order of the District Judge, Abbottabad, dated the 21st January 1922.

Mr. *Diwan Chand*, R. S., for the Petitioners.

Mr. *Parma Nand*, R. S., for the Respondent.

JUDGMENT.—The material facts of this case are these. The parties concerned are the descendants of Sukh Raj. Kanshi Ram, plaintiff, grandson of Sukh Raj, lodged a suit for rendition of accounts against Chet Ram and Hemraj, sons of Sukh Raj, and Fakir Chand and Harnam Das, grandsons of the same. Fakir Chand and Harnam Das are minors, and the plaint recited that they were sued through their mother *Musammat* Gopi. *Musammat* Gopi made no appearance, and pleas were put in by Chet Ram and Hemraj on behalf of all the defendants jointly. An application was then made by all the parties to the suit for a reference to arbitration. In this application Hemraj was stated to be the guardian of the minors, and his statement was recorded declaring that he was responsible for their interests. An award was duly filed by the arbitrator, finding Rs. 2,500 due to the plantiff from the defendants jointly in addition to a one-quarter share in certain immoveable property. The Munsif, on finding that the amount granted by the award removed the case from his jurisdictional powers, submitted it at once to the District Judge for transfer without hearing objections to the award. The District Judge transferred the case to the Court of Muhammad Sarwar Khan, Judicial Extra Assistant Commissioner. Objections to the award were then put in. It was represented that Hemraj had not been appointed guardian *ad litem* of the minor defendants, and that his interest was adverse to them. Another objection was taken on the ground of the minority of the plaintiff and his competency to refer to arbitration. The Judicial Extra Assistant Commisssoner passed no order setting aside the award, but directed that the name of Hemraj should be expunged as guardian *ad litem* of the minor defendants, and that *Musammat* Gopi was appointed guardian *ad litem*. The order continued that, since proceedings were starting *de novo*, no question arose as to the validity or otherwise of the award. The hearing of the case was then begun on the merits. At a later date, owing to the necessity of re-distribution of work among Judicial Officers, the case was withdrawn for trial by the District Judge. The District Judge held that the reference to arbitration was a valid one, that it still subsisted, and that the Judicial Extra Assistant Commissioner in hearing the case on its merits, was *functus officio* and without jurisdiction. No objection, valid under paragraph 15, Schedule II, Civil Procedure Code, having been urged against the award, he passed a decree according to its terms.

An application for revision to this Court has been made by the defendants. The first argument put forward for the petitioners is, that the reference to arbitration was invalid from the beginning. I do not propose to re-open the question of the plaintiff's minority. I accept the finding of the District Judge that he was a major, and that the reference cannot be impugned on this ground. The argument that the reference was invalid by reason of the minority of the defendants, Fakir Chand and Harnam Das, however, is a more serious one. I deal first with the contention that, in any case, no next friend or guardian can make an agreement to refer to arbitration on behalf of a minor under O. XXXII, r. 7. Civil Procedure Code, without the leave of the Court.

There has been a certain conflict of rulings among High Courts with regard to the interpretation of O. XXXII, r. 7. It has been held by the Madras High Court that a reference to arbitration by the guardian of the minor is an agreement within the meaning of this rule, and that it is void unless there is an express record of the leave of the Court. A contrary view was taken by the Allahabad High Court in *Hardeo Sahai* v. *Gauri Shankar* (1) and *Lutawan Kubar* v. *Lachiya* (2). I have no hesitation in this respect in following the ruling of the Allahabad High Court. It is confirmed by the spirit of the Privy Council ruling published as *Umed Singh* v. *Sobhag*

(1) 28 A. 35; 2 A. L. J. 493; A. W. N. (1905) 171.

(2) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

Mal Dhadha (3). In that case an application for reference to arbitration was not signed by the guardian *ad litem* of the minor. The general principle deducible from that ruling is that, mere irregularities in procedure in arbitration cases cannot vitiate a reference to artibration where the interests of the minor have been in no way prejudiced. So far as regards the purely technical point as to whether the expressly recorded leave of the Court was essential under O. XXXII, r. 7, I hold that the present reference to arbitration does not fail on that account.

Apart, however, from the question of the operation of O. XXXII, r. 7, it is argued by the petitioners that there was, in this case, no guardian *ad litem* at all appointed by the Court in accordance with the provisions of O. XXXII, r. 3; that *Musammat* Gopi was represented in the plaint as guardian *ad litem*; that Hemraj defendant, plaintiff's uncle, was treated as guardian *ad litem* by the plaintiff and by himself without authority from the Court; that his interest was adverse to the minors, and that the minors could not make any submission to arbitration through a guardian who had not been validly appointed and who was not in any case acting in their interest. It is necessary, before dealing with the legal position created, to examine closely the facts of the case. *Musammat* Gopi was described in the plaint as the guardian *ad litem*. She was duly served with a summons but put in no appearance. The minors' uncles, Chet Ram and Hemraj, put in a plea on behalf of themselves and on behalf of the minors. This was treated by the parties and by the Court as a valid appearance on their behalf. When, later, the application for arbitration was put in, it was Hemraj who represented himself specially as the guardian *ad litem*, and stated in Court that he was responsible for the minor's interests. It has been explained by the respondent's Counsel that there was a special reason for this. Hemraj and Jairam, the father of the minors, had married two sisters and, in consequence, the interest of the minors was specially looked after by Hemraj. During these proceedings *Musammat* Gopi made no move, and she did not challenge the action of the major defendants until the award of the arbitrator had actually been filed. It was after the filing of the award that Hemraj and Chet Ram themselves raised the question that the award was invalid by reason of the minority of Fakir Chand and Har nam Das. *Musammat* Gopi also brought forward an application stating that she had only just become aware of the reference to arbitration and demanding to be appointed guardian *ad litem* by the Court on the ground that the interest of Hemraj was adverse. On this the Judicial Extra Assistant Commissioner, to whom the case had been transferred, made an order to the effect that the name of Hemraj should be expunged as guardian *ad litem* and that of *Musammat* Gopi substituted. Now, there cannot be the least doubt that the proceedings of the defendants were highly collusive. I have no hesitation in holding that the attempt to impugn the award on the ground of the petitioners' minority was a mere device to upset it not in the interest of the minors but in the interest of Chet Ram and Hemraj themselves. Taking these facts as established, I proceed to examine the legal position. There is clear authority for the view that if a minor is *substantially* represented by a guardian *ad litem*, an appointment by the Court under O. XXXII, r. 3, can be assumed from the action of the Court. This principle is clearly enunciated in the ruling *Walian* v. *Banke Behari Pershad Singh* (4). In the present case there is not the least doubt that the action of the Court in accepting the pleas of the major defendants on behalf of the minors amounted substantially to their recognition as guardian *ad litem* for the minors. This action was confirmed when Hemraj definitely took up the position of guardian *ad litem* on the application for arbitration, and was recognized as such by the parties and by the Court. This principle, of course, is subject to the pri o

(3) 32 Ind. Cas. 161; 20 C. W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 67; 18 Bom. L. R. 308; 43 C. 290; 43 I. A. 1 (P. C.).

(4) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 771; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

that the guardian was really acting in the interest of the minors, and that they were in no way prejudiced. Apart from this, there is also authority for the view that in the case of a joint Hindu family the *Karta* can act without specific appointment as guardian in the interest of the whole family including that of the minors. *Lackersteen* v. *Rostan* (5) has been quoted as an authority, and, indeed, it would appear that all High Courts concur, that a *Karta* has the power in question, but that a Court must decide whether or not he was acting in the interest of the minor. It is undeniable that in the present case the defendants were members of a joint Hindu family. The plaintiffs, no doubt, have separated. But the defendants themselves in their pleas admitted that they were members of a joint Hindu family, and indeed they contested the claim on the ground that all the members of this joint family had not been impleaded. It is clear, therefore, that the elder of the two major defendants, Chet Ram, was the *Karta* of the family, and that he had the right to bind all the members including the minors, always provided that the rights of the minors were being properly protected and that there was no question of interests adverse to them. I have already mentioned that the general principle of the liability of minors for a reference to arbitration made in their interest, as apart from technicalities in procedure, is confirmed by the Privy Council ruling *Umed Singh* v. *Sobhag Mal Dhadha* (3). It is, therefore, clear that in the present case the reference to arbitration on behalf of the minors may be treated as a valid reference provided that their rights have been protected and that the interest of Hemraj and Chet Ram was not adverse to theirs. This is a question of fact. I cannot see the least reason for supposing that the interest of the major defendants was in any way adverse to that of the minors. The contention was one obviously put forward by the major defendants themselves collusively and with a view to upsetting the award in the absence of any of the grounds mentioned in paragraph 15, Schedule II, Civil Procedure Code. The arbitrator's award was a perfectly fair one, and there is not the least suspicion that he has sacrificed the interests of the minors. The arbitrator appears to have considered that the plaintiffs were entitled to a larger sum than Rs. 2,500 but he has reduced the sum from that amount in the interest of the defendants' family. I hold, therefore, that this award was a valid one and binding upon the petitioners.

It remains to consider a further argument. It is contended that the Judicial Extra Assistant Commissioner by his order of the 5th of November 1921 revoked the reference to arbitration; that this order was appealable and that it could not have been set aside by the successor of the presiding officer who passed it, and that no proceedings on review were taken. As against this, it is argued by the respondent that the Judicial Extra Assistant Commissioner did not set aside the reference to arbitration, but simply ignored its existence under the impression that in any case he was obliged to continue the hearing of the suit on its merits. *Imam Din* v. *Jawahari* (6) is quoted as authority for the proposition that once a reference to arbitration is made, the jurisdiction of the Court is ousted, and that any order passed after such reference except under the provisions of law referring to arbitration, is *ipso facto* an illegal order made without jurisdiction. This was the view taken by the District Judge in ignoring all the proceedings made by the Judicial Extra Assistant Commissioner after the 5th of November 1921. I consider that the position taken by the District Judge is shown by the record to be the correct one. It is clear to my mind from the wording of the order of the Judicial Extra Assistant Commissioner that he was acting in the belief that in any case he had to decide the suit on its merits without considering the question as to whether the award was or was not invalid. His order concludes with the words:

"Since proceedings start afresh, no question arises of the validity or otherwise of the award."

It may further be remarked that on the 6th of September he had already pass-

(5) 7 C. 32; 3 Ind. Dec. (N. S.) 570.

(6) 10 P. R. 1899.

ed orders for the parties to appear on the 17th of September 1921 with evidence. This was tantamount to ignoring altogether the existence of the award and to proceedings for disposal of the case on its merits. The Judicial Extra Assistant Commissioner, in fact, was already assuming a jurisdiction which he did not possess and which he could not assume without having set aside the award. I must hold, therefore, that his successor-in-office was perfectly entitled to take up the case from the point where the jurisdiction of the Court had ceased, and that he had no alternative but to treat the award as one validly subsisting and one which could only be set aside for one of the reasons detailed in paragraph 15, Schedule II, Civil Procedure Code.

On the above findings, I see no reason to interfere with the decree passed by the District Judge, and I dismiss this petition with costs.

S. D.

Petition dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 109 OF 1921.

November 21, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

MAHARAJ BAHADUR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Seth HUKUM CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Injunction—Jurisdiction to grant against person residing outside Court's territorial jurisdiction—Injunction when to be granted—Shrine—Worship—Use of property by its owner—Religious feelings and beliefs.

A Court should not grant an injunction against a person residing outside its jurisdiction and not subject to its jurisdiction in cases where it has no means of enforcing the injunction. But where the acts complained of are acts committed or to be committed within the jurisdiction of the Court and the party proceeded against, although he resides outside the jurisdiction, has appeared in the suit and submitted personally to the jurisdiction of the Court, the Court has jurisdiction to make the order. (p. 13 col. 1.)

Ganga Singh v. *Pirthichand Lal*, 69 Ind. Cas. 891; 1 Pat. 356; (1922) A. I. R. (Pat.) 34, referred to.

Before granting a temporary injunction the Court must be satisfied that the plaintiff has a fair question to raise as to the extent of the right alleged. It must also be satisfied that the defendant has infringed or is threatening an infringement of that right. (p. 13, col. 2.)

No person is entitled, to whatever religion he may belong, to enforce his religious views upon another or to restrain that other from doing any lawful act or making any lawful use of his property merelybecause it would not fit in with the tenets of his particular religion. The mere fact that the contemplated act of the owner of the property would shock the religious sentiments of the other is not in itself a matter which would give rise to a cause of action. (p. 13, col. 2.)

The right to worship at a shrine built on a hill, belonging to another with free access to the hill for the purpose of worship, is a right in *alieno solo*, and so long as it is not interfered with, the owner of the hill can do what he likes with his property. (p. 14, col. 2.)

Behari Lal v. *Ghisa Lal*, 24 A. 499; A. W. N. (1902) 169, referred to.

Every one is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs. (p 14, col. 2.)

Appeal from an order of the Additional Subordinate Judge, Hazaribagh.

Messrs. *K. Sahai* and *B. C. De*, for the Appellants.

Messrs. *S. Ahmad*, *S. M. Mullick* and *S. N. Bose*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted in 1920 by the plaintiffs representing the Digambari sect of Jains against the defendants who are representatives of the Sitambaris claiming a declaration of the plaintiffs' rights in connection with their worship at the tonks and temples on Paresnath Hill and a permanent injunction restraining the defendants from committing certain acts alleged to be an infringement of the plaintiffs' rights.

After filing the plaint the plaintiffs applied for and obtained a rule calling upon the defendants to show cause why a temporary injunction restraining them from committing certain of the acts complained of in the plaint should not be granted pending the hearing of the suit. An interim injunction pending the hearing of the rule having been granted, the defendants appeared before the learned Additional Subordinate Judge of Hazaribagh to show cause, and after hearing the parties the rule was made absolute pending the hearing of the suit which has not yet taken place. From that

decision the defendants have preferred this appeal.

We are told that the suit is practically ready for hearing and has only been held up as the record was sent here from the subordinate Court for the purposes of this appeal and that we ought not in the circumstances to interfere with the temporary injunction which was granted in May last year, and that no useful purpose would be served by vacating the order already made and deciding without full material questions which will be the subject of determination in the suit. I am not satisfied that this reason in itself is sufficient for dismissing the appeal, although on the score of convenience it may have some weight. It is necessary, therefore, to consider the grounds upon which the learned Judge below has based his decision.

I need not repeat here what has been said in the judgment under appeal as to the differences which divide the two sects of the Jain community and the protracted litigation which for some years now has been tending to widen the breach between them. It is sufficient to bear in mind that the ritual attending the worship of the two sects has marked differences which in recent years have formed the subject of heated disputes and much litigation. The fact that they both have rights of worship in the same shrines on Paresnath Hill is, no doubt, a source of continual friction as each sect regards the mode of worship of the other as unorthodox. Sometime before the present suit was instituted the Sitambaris, who are represented by the defendants in the present suit, sued the present plaintiffs and others, representing the Digambaris, for a declaration that the Digambaris were not entitled to worship in the shrines and temples on Paresnath Hill except with their permission and in the manner prescribed by them. That suit was decided on appeal in this Court in April last year after the present suit had been instituted, and by that decision it was declared that both sects had equal rights of worship in the majority of the tonks on Paresnath Hill. Up to that time, however, there can be no doubt that the Sitambaris had been claiming exclusive rights over the hill and the tonks and temples thereon and the right to control the mode of worship of the other sect. The proprietary rights in the hill itself are now vested in the Sitambaris by a recent purchase and they have for many years in fact exercised acts of management and superintendence over the existing shrines and temples repairing or re-building the same when necessary. The *Charans* which are representations in stone or marble of the footprints of the Tirthankars who have attained Nirvan on the hill in past and present cycles are enshrined in the tonks and are devoutly worshipped and regarded as objects of peculiar sanctity by both sects. The ritual attending the worship, however, is marked by broad differences as already mentioned. Both sects also regard the hill itself as an object of veneration and are very tenacious of the rights which they claim to have acquired therein and resent the intrusion of those of a different faith or the performance of any act on the hill itself which may offend their religious scruples. The Digambaris, it is said, regard eating and drinking on the hill or the performance of any of the usual functions of nature as a desecration of that holy place.

The acts complained of in respect of which the injunction has been granted are divided into four heads :—

(1). The construction of houses for residential purposes on top of the hill tending to the desecration of the sanctity of the hill.

(2). The collection of building materials on the top of the hill for the purposes of constructing a gate or closed archway tending to prevent free access by the Digambaris to the summit of the hill and the tonks thereon.

(3). Interference with the worship of the Digambari pilgrims in their own prescribed way in company with their *pujaris* and guards.

(4). The removal of existing *Charans* and the substitution of new *Charans* offensive to the religious sentiments of the plaintiffs' community.

It was contended on behalf of the appellants in the first instance that as they reside in the Presidencies of Calcutta and Bombay, outside the jurisdiction of this Province, the Court has no jurisdiction to grant an injunction against them. This argument is based upon the assumption that the Court would be unable to enforce

its order against persons not subject to its jurisdiction. No doubt the Courts of this country would not grant an injunction against persons residing outside its jurisdiction and not subject to the jurisdiction of the Court in cases where they would have no means of enforcing the order. In the present case, however, the acts complained of are acts taking place within the jurisdiction and the appellants, although they reside outside the jurisdiction, have appeared in the suit and submitted personally to the jurisdiction of the Court. Nor was this done under protest or merely as a means of questioning the jurisdiction of the Court. No point is taken in the written statement that the Court has no jurisdiction over the defendants. In fact it would appear that both parties are anxious to obtain a judicial decision from the Courts of this Province upon the matters in issue between them. Had they merely appeared for the purpose of questioning jurisdiction other considerations would arise. The late Professor Dicey, an authority of undoubted weight on this subject, in his Conflict of Laws (Second Edition, at page 44) states the rule thus :-

"The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction."

And again at page 48 he says :

"The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to; or a plaintiff who brought an action or suit. This again is in strict conformity with the principle or test of submission."

Indeed in such a case the Courts in England would restrain a foreigner who had appeared and submitted to the jurisdiction from committing certain acts outside the jurisdiction. The late Lord Halsbury in Volume XVII, page 263 of the Laws of England, expresses the rule thus :

"A foreigner who has appeared to an action in an English Court gives jurisdiction to the English Court to restrain him from proceeding to litigate the same subject-matter in the Courts of his own country."

In the case of *Ganga Singh* v. *Prithichand Lal* (1) this Court has followed the principle of the rules above stated and held that a Court has jurisdiction on the application of the plaintiff in a suit in which the defendants have entered appearance to issue a temporary injunction restraining the defendant from executing in another Court a decree obtained against the plaintiff This point which was not raised by the defendants in their written statement nor taken in argument before the lower Court was put forward here for the first time. The defendants are before the Court, having submitted to the jurisdiction, and the acts complained of are acts committed or to be committed within the jurisdiction, and I have no doubt whatever that the Court has jurisdiction to make the order.

With regard to the merits of the case, one must be satisfied in the first instance before granting a temporary injunction, as pointed out by the learned Subordinate Judge, that the plaintiff has a fair question to raise as to the existence of the right alleged. I may add that the Court must also be satisfied that the defendants have infringed or are threatening an infringement of those rights. I have considered each of the four grounds in respect of which the plaintiffs claim the injunction and, in my opinion, the first ground stands upon an entirely different footing from the other three. The defendants are the proprietors of Pareshnath hill and are, therefore, entitled to erect buildings thereon as and where they please so long as they do not interfere with the rights of other parties. It has been declared by the decision of this Court that the plaintiffs as well as the defendants have rights of worship in the majority of the shrines on that hill, and any act calculated to interfere with or restrict in any way the plaintiffs' right of worship would give rise to a cause of action. The mere fact, however, that the contemplated act of the proprietor would shock the religious sentiments of the plaintiffs is not in itself a matter which would give rise to a cause of action. No person is entitled, to whatever religion he may belong, to enforce his religious views upon another or to restrain that other from committing any lawful act or making any lawful use of his property merely because it would not fit in with the tenets of his particular religion, and it is not suggested in the present case that the building of residential houses upon the hill would interfere in any way with the unrestricted right of worship

(1) 69 Ind. Cas. 891 ; 1 Pat. 356; (1922) A. I. R. (Pat.) 34.

in the tonks and temples by the plaintiffs. Nor can the act of building itself be regarded as a nuisance which might give rise to a cause of action. There are already on the hill buildings of various sorts. There are rest houses for the pilgrims and a Dak Bungalow and servants quarters near the principal temple on the hill and the defendants contend that the buildings, it is proposed to put up, are necessary for the purposes connected with the religious institutions over which they have the management. The plaintiffs, however, rely upon the judgment of the Calcutta High Court in what is known as "The Piggery case" in which an injunction was granted at the instance of representative members of the Jain community against Mr. Boddam, the lessee of the Raja of Palganj, then the proprietor of the hill, restraining him from slaughtering pigs and carrying on the manufacture of lard on a certain part of the hill. The decision in that case, however, was based upon an *ekrarnama* of 1872 granted to certain persons representing the whole Jain community giving them certain rights over the hill, and the lease by the Raja of Palganj to Mr. Boddam was found to be a contravention of certain restrictive covenants in favour of the Jains contained in the *ekrarnama* (such covenants?) have been declared inoperative by the Privy Council, but the decision relied upon gains no more binding force by that fact. It could not, in my opinion, be supported upon any other ground.

The case of *Behari Lal* v. *Ghisa Lal* (2) appears to me to have been properly decided and is an authority directly in point. The plaintiffs in that case were the owners of a house adjacent to the site of a temple. Within the temple enclosure was a Pipal tree which had grown there for many years. Some of the branches of the tree extended over the plaintiff's premises and over his house. He thereupon proceeded to cut down the offending branches which he had a perfect right to do as the owner of the property. The defendants, the proprietors of the temple, endeavoured forcibly to prevent him from doing so. The plaintiff then sued for an injunction against the defendants to restrain them from obstructing his right to cut the branches which spread over his house. It was contended that the Pipal tree was an object of veneration to pious Hindus and that the cutting of the branches was regarded by them as an act of sacrilege and highly offensive to their religious sentiments. It was held that the plaintiff was entitled to the injunction prayed for and that the fact that his action might cause annoyance to and offend the religious sentiments of a large number of Hindus was no sufficient ground for cutting down the well recognised Common Law rights of an owner of property. The proposition put forward by the defendants in that case was stated by the learned Judge to be unsupported by authority and inconsistent with common sense. With every desire to avoid offending the religious scruples of any sect of the community I am unable to hold that such a consideration should be allowed unduly to restrict the recognised rights of ownership in property. The plaintiffs have no proprietary rights in the hill. The extent of their interest therein is the right to worship at the shrines with free access to the hill for that purpose. It is a right in *alieno solo* and as long as it is not interfered with the owner can do what he likes with his own. The fact that the plaintiffs' veneration for the hill leads them to regard the erection of buildings thereon as an act of sacrilege cannot in itself confer the right to restrain the owner from exercising the ordinary acts of ownership. Everyone is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs. It has been pointed out that the plaintiffs claim the rights by custom to worship every part of the hill. It may be so. But it is not clear how such a right, if it can be established, is interfered with. The particular objects of worship at present are in the tonks and temples and access to these is not barred by the proposed buildings. It is argued, however, that at some distant period in the future footprints of the saints may be discovered on the very spot where it is now proposed to erect buildings. I think a claim based upon this somewhat insecure foundation may be left to be considered by the Courts if and when the

(2) 24 A. 499; A. W. N. (1902) 169.

event foreshadowed becomes an accomplished fact. In any case it should not be allowed to interfere with the present rights of the proprietors. In my opinion the plaintiffs have failed to make out a case for a temporary injunction upon the first of the grounds alleged and the injunction under that head should be discharged.

The case presented under the other three grounds stands upon a different footing. The learned Judge has found that the erection of a gate-way or closed arch upon the pilgrim road on the summit of the hill would have the effect of obstructing the free access of the Digambaris to certain of the tonks wherein their rights of worship have been declared. No satisfactory explanation has been given by the defendants why such an obstruction is needful and what its real object is and in the present tension of feeling between the two sects the temptation to use it for obstructing free access to the shrines would, I think, be almost irresistable. I see no reason to interfere with the learned Judge's decision upon this part of the case.

With regard to the third ground, the injunction was granted without much opposition, the plaintiffs' right to worship in their own way having been declared by the Court in the other suit before this application was presented. The defendants, however, had up to that time been strenuously contending that the plaintiffs' rights of worship were permissible and could be performed only in a manner conformable to the ritual of the Sitambari sect. Under this head also I think that the learned Judge's decision should be confirmed.

As to the fourth ground on which the rule was based I think the plaintiffs' apprehensions are well-founded. The defendants in their written statement whilst asserting the right to replace the *Charans* which had been broken or destroyed and denying the right of Digambaris to any part in their re-establishment did not allege that they intended to replace them in the same form as before. On the contrary, they alleged that they had every right to construct and establish any kind of *Charans* permissible by the Jain Sitambari religion. Their attitude, it is true, has been somewhat modified since the plaintiffs rights were declared in this Court and they now say that they have no intention of replacing the old *Charans* by those of a different form. However this may be, I agree with the learned Subordinate Judge in thinking that the injunction based upon this part of the case should continue until the hearing of the suit.

In my opinion the injunction in so far as it restrains the defendants from constructing houses for residential purposes on the top of Paresnath Hill should be discharged. In other respects I think that the appeal should be dismissed. The order of the learned Subordinate Judge will be varied accordingly. As the appellants have succeeded upon one substantial matter in the appeal but have failed in the others, I think that the justice of the case would be met by ordering that each party bear his own costs of this appeal.

Ross, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREE NOS. 331 TO 354 OF 1921.

October 23, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

Maharaja Bahadur KESHO PRASAD SINGH—APPELLANT

versus

ISSER DUBEY AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (2)—Record of Rights against tenant—Benefit of presumption afforded by s. 50 (2)—Same rent paid for large number of years—Presumption—Second appeal—Inference of law.

When the Record of Rights is against tenants, they are not entitled to the benefit of the presumption afforded by section 50 (2) of the Bengal Tenancy Act. (p. 16, col. 1.)

Once the Record of Rights shows that a tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has been unchanged from the time of Permanent Settlement; and the proof of the fact that he has been paying the same rent for 48 years would not entitle him to the presumption that he has been paying at fixed rate from the time of the Permanent Settlement. (p. 16, col. 1.)

The inference that fixity of rent could be presumed from the fact that there has been no change of rent for 48 years is an inference of law and can be set aside in second appeal. (p. 16, col. 2.)

KESHO PRASAD SINGH *v.* ISSER DUBEY.

Appeals from a decision of the District Judge, Shahabad.

Messrs. *Kulwant Sahay* and *N. N. Sinha*, for the Appellant.

Messrs. *P. Dayal* and *Jadubans Sahai*, for the Respondents.

JUDGMENT.

Das, J.—The only question which has been argued before us is whether the learned District Judge was right in coming to the conclusion that the plaintiffs were tenants at a fixed rate of rent. The learned District Judge thought that the tenants were entitled to the presumption of section 50 (2) of the Bengal Tenancy Act, he also thought that even if section 50 (2) did not apply there was evidence from which fixity of rent might be inferred.

Now so far as the first point is concerned, it is settled law so far as this Court is concerned that when the Record of Rights is against them, the tenants are not entitled to the benefit of the presumption afforded by section 50 (2) of the Bengal Tenancy Act. This was the view which was adopted in this Court only on the 20th of July last by a Bench of which I was a member.

The next point is whether the learned District Judge was right in coming to the conclusion that under the general law it could be inferred that there was fixity of rent.

Now so far as the evidence is concerned, the learned District Judge has summarised it in the judgment. The plaintiffs produced rent-receipts which show payment of rent for twenty years and it appears that the defendants' Patwari said in his evidence that there was no alteration of rent for 48 years.

Now in the case of *Maharaja Kesho Prasad Singh* v. *Ramjas Pandey*, Second Appeal No. 544 of 1921, this Court came to the conclusion that where the tenants could not have the benefit of the presumption of section 50 (2) of the Bengal Tenancy Act he had to establish by evidence that the rate of rent had not been changed from the time of the Permanent Settlement; in other words, once the Record of Rights shows that the tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has not been changed from the time of the Permanent Settlement. Mr. Justice Coutts, in delivering the judgment in the case just cited, said this:

"It is contended by the learned Vakil for the respondents that in view of the fact that the tenants have proved that they have paid rent at a fixed rate for 25 to 33 years the Court is entitled to presume that they have been paying at fixed rate from the time of the Permanent Settlement. I am unable to accept this contention. If it were correct it would lead to this, that a tenant, although he was not entitled to the presumption which arises under section 50, clause (2) of the Bengal Tenancy Act, would be entitled to prove that he had paid rent at the same rate for, say, 21 years and would then be entitled to what has been called a natural presumption in his favour. This could clearly not be so. No such presumption arises."

I entirely agree with the view which was expressed in the case cited by Mr. Justice Coutts.

The learned Vakil for the respondents has urged before us that the finding of the learned District Judge is a finding of fact and is, therefore, binding on us in second appeal. In my opinion the argument is not a correct one. The learned Judge found as a fact that the evidence established that there has been no change of rent for 48 years. He then inferred, and that inference was an inference of law, that fixity of rent could be presumed. In my opinion he erred in coming to the conclusion that from the facts found by him fixity of rent could be inferred.

The appeals succeed on the point which has been urged before us by Mr. Kulwant Sahai; in other words, the findings of the learned District Judge that the plaintiffs are tenants at fixed rates is set aside. The plaintiffs are not in any of these cases entitled to the declaration that they are tenants holding at a fixed rate. The appellant will be entitled to the costs of these appeals.

Adami, J.—I agree.

S. D. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 6 OF 1921.

September 22, 1922.

Present:—Mr. Batten, J.C., and Mr. Hallifax, A. J. C.

Babu RAMPRASHAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu BANSILAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Payment within period of limitation—Statement after expiry of limitation—Limitation, extension of—Hindu Law—Decree for damages against father—Liability of sons.

A payment whether towards interest or principal by a debtor before the expiry of the period of limitation extends the period of limitation under section 20 of the Limitation Act, even though the written statement as to payment is made after the expiry of the period of limitation. (p. 18, cols. 1 & 2.)

Venkatasubbu v. *Appusundram*, 17 M. 92; 6 Ind. Dec. (N. S.) 63 and *Gopal* v. *Govind*, 19 Ind. Cas. 849; 9 N. L. R. 78, referred to.

A Hindu son is not bound to pay the damages decreed against his father for a tort, provided the decree was in respect of any act amounting to such immorality as would free the son of the wrongdoer under the Hindu Law from liability for the debt. (p. 19, col. 2; 20 col. 1.)

The right to enforce payment of a Hindu's debts against his son is a different matter from that Hindu's right to alienate his son's share in the family property himself for the satisfaction of those debts. (p 20, col. 1.)

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P.C.), referred to.

Appeal from a decree of the Additional District Judge, Raipur, in Civil Suit No. 22 of 1919, dated the 24th September 1920.

Sir *B. K. Bose* and Mr. *V. Bose*, for the Appellants.

Dr. *H. S. Gour* and Mr. *S. N. Bose*, for the Respondents.

JUDGMENT.—The first defendant, Ram Prasad, executed the three mortgages in suit along with his elder brother Mohan Lal, who is now dead. The remaining three defendants are the sons of the first. In the first three of the five grounds of appeal it was contended that the letter, dated 4th August 1911, written by Mohal Lal (Exhibit P-4) had not been proved, that it did not amount to an acknowledgment of the sort contemplated by section 19 of the Limitation Act, and that in any case it could attract the operation of that section only in respect of the writer himself and not in respect of his brother or his nephews. As the letter had been expressly admitted in the lower Court by the defendants and as its contents very decidedly bring it within the terms of section 19 of the Limitation Act, the first two of these contentions were abandoned by the appellants. It is unnecessary to consider the third as the plaintiff's suit in respect of all the mortgage-bonds is proved to be within time by the first defendant, Ram Prasad, who is father of the remaining three and manager of the joint Hindu family of which they are members.

2. The suit was filed on 18th December 1919. The first mortgage (Exhibit P.-1) is dated 24th August 1902 and the consideration of Rs. 4,500 was payable on 24th August 1906. On the deed there is an endorsement, written and signed by Ram Prasad on 6th August 1918, to the effect that there had been a payment of Rs. 1,200 on 2nd June 1903 and another of Rs. 700 on 19th June 1916. The period of limitation would have expired in the ordinary course on 24th August 1918. The payment of 1903 could not extend it as it had not then begun to run, but if the second payment operates in this way the period is extended by it to 19th June 1928. The endorsement itself was made within the original period.

3. The second mortgage (Exhibit P-2) was executed on 4th August 1904 for Rs. 951 payable on 4th August 1906. It bears two endorsements of payment written and signed by Ram Prasad, one dated 6th August 1918 stating that there had been a payment of Rs. 900 on 11th August 1907 and the other dated 11th February 1919 stating that there had been a payment of Rs. 100 on that day. The date of the first of these two payments is given as Sawan Sudi 2nd, 1962, and 11th August 1907. Now in the Sambat year 1962 there was no Sawan Sudi 2nd. The 1st and 3rd of the bright half of that year were 2nd August 1905 and 3rd August 1905. But Sawan Sudi 2nd, 1964, corresponds to 11th August 1907. The mistake was a natural one to make in 1918, and indeed the year of the English date of the payment was first written 13 and corrected to 07, so that

it is beyond doubt that the date to which the endorsement refers is 11th August 1907. In the ordinary course the period of limitation for this bond would expire on 4th August 1918. Ram Prasad's endorsement was made two days later and if the payments operate to extend the period the first does so up to 11th August 1919 and the second up to 11th February 1931.

4. The third bond for Rs. 2,500 (Exhibit P-3) is dated 25th July 1906 and the consideration is payable on 25th July 1907. It bears an endorsement of a payment of Rs. 500 made on 27th January 1918. This was written and signed by Ram Prasad on 6th August 1918, the date of that on Exhibit P-1 and of the earlier of the two on Exhibit P-2. The original period of limitation in this case expired on 25th July 1919. The endorsement was made between eleven and twelve months before that date, and the payment, if it is effective for this purpose, extends the period to 27th January 1930.

5. It seems clear that the suit is well within time in respect of all three bonds. It has been contended that a statement of a payment made in writing by the payer after the expiry of the original period of limitation is not such a statement as is contemplated by section 20 of the Limitation Act, even though the payment itself was made within that period. This contention can have reference only to the second of the three mortgages, but it is unsound. The written statement is merely evidence of the fact and date of the payment, and it is that fact of payment that extends the period and it is the date of payment from which it is extended. The proviso to the section lays down that the fact and date of payment can be taken as proved only by evidence of a certain kind, and so imposes a minimum degree of credibility in the evidence. A statement of payment in writing made by the payer at some time after the payment is perhaps less trustworthy than one made on the same day, but even so it does not fall below the standard required by section 20 of the Limitation Act. It cannot any more be brought below that standard by the fact that it was made after the expiry of the original period of limitation; indeed that fact would tend to make it more credible rather than less. That the fact of the written statement being made after the expiry of the original period of limitation does not affect the question is the view of the law on the point taken by the Madras High Court in *Venkatasubbu* v. *Appusundram* (1), though no reasons were stated in the judgment for doing so. If, therefore, the payments were wholly or partly towards the principal amounts due on the mortgages, time is extended by reason of the endorsement to a date much later in each case than that on which the suit was filed. This is equally true if the payments are taken as wholly or partly towards interest under the principles set out in *Gopal* v. *Govind* (2).

6. The only question remaining is whether it is proved, as against the three sons of Ram Prasad, that the whole of the consideration was received by their father and uncle, and whether so much of it as was received is a proper charge on the shares in the property belonging to them when the mortgages were executed. That Mohan Lal and Ram Prasad received the whole of the stated consideration is proved, as far as they themselves are concerned, by the written admissions made by them in the mortgage-bonds and repeated by them at the time of registration. Their shares, amounting to five-eighths of the whole property are, therefore, liable for the whole of the mortgage-debt. For the remaining three defendants, the sons of Ram Prasad, it is admitted that the whole of the consideration of the second mortgage amounting to Rs. 951 and Rs. 1,332 of that of the third mortgage were duly paid and are a proper charge on their shares. The consideration of the first mortgage includes an item of Rs. 1,800 *plus* interest due to one Lutudhar on a mortgage and another of Rs. 200 *plus* interest due to Govind Prasad. The mortgage to Lutudhar by Mohan Lal and Ram Prasad, bearing an endorsement of the payment of Rs. 2,294 on 24th September 1902, a month after the execution of the first mortgage, is filed as Exhibit P-6 and is proved by Lutudhar (P. W. No. 7). Also Govind Prasad (P. W. No. 9) proves the payment to him of Rs. 284 in satisfaction of

(1) 17 M. 92; 6 Ind. Dec. (N. S.) 63.
(2) 19 Ind. Cas. 849; 9 N. L. R. 78.

the debt due to him by both Mohan Lal and Ram Prasad. It is admitted that in these circumstances these two amounts are a proper charge on the shares of Ram Prasad's sons.

7. It appears then that a sum of at least Rs. 4,861 out of the total consideration of Rs. 7,950 of the three mortgages is a proper charge on the three-eighths share of the property belonging to the three sons of Ram Prasad. It would scarcely benefit them to be given an opportunity of redeeming three-eighths of the property for a sum which is very nearly five-eighths of that payable for the redemption of the whole, which is what a decree giving effect to these findings would come to, even if no more of the consideration of the first and last mortgages is found to be binding on the shares of Ram Prasad's sons. It is, therefore, hardly necessary to examine the nature of the rest of the consideration of the first and last mortgages.

8. The matter may, however, be briefly stated. The rest of the consideration of the first mortgage is stated in the bond as follows:

Rs. 600 *plus* interest due to Lutudhar.

Rs. 550 *plus* interest due to Faujmal Marwari.

Rs. 300 borrowed in Baisakh 1959 (which ended on 22nd May 1902) for a marriage.

Rs. 450 advanced on the date of the mortgage for the payment of land revenue.

As to the first item Lutudhar (P. W. No. 7) has no recollection of the debt, as he had none of the payment of the mortgage till he saw the mortgage-bond, and Ram Prasad (D. W. No. 1) in his deposition says:

"My village was mortgaged to Lutudhar. We never incurred oral loans from Lutudhar. I am not aware if my brother borrowed Rs. 600 from him."

The man is, of course, lying as steadily as he has done all through the case, but the fact that what he does say is untrue does not prove that any one of the very many things he does not say is true. In addition to this there is the written admission made by both Ram Prasad and Mohan Lal in the mortgage-bond, Mohan Lal's admission being receivable in evidence under section 32 (3) of the Evidence Act. But all this cannot possibly be held to prove against the sons of Ram Prasad that the sum of Rs. 600 was actually received by their father and their uncle or that, if it was, it was used for paying of a debt they owed. The evidence in regard to the Rs. 550 stated in the bond to have been borrowed for payment to one Faujmal Marwari is weaker still. It consists of an admission by Ram Prasad that Mohan Lal was the manager of the family and used to purchase cloth from Faujmal, and the statements of Ram Prasad and Mohan Lal in the mortgage-bond. In respect of the last two items these statements in the mortgage-bond are all that there are. It must, therefore, be held that the receipt of these four sums of money has not been proved against the sons of Ram Prasad.

9. The consideration of the third mortgage is made up of two items. The first is a sum of Rs. 1,332 previously borrowed by Mohan Lal and Ram Prasad for payment of the costs of certain suits. The liability of Ram Prasad's sons for this sum is not disputed. The other item is Rs. 1,768 borrowed on the day of the execution of the mortgage "in order to make payments ordered by the Court to the tenants of Jenira in respect of damages to crops, etc., and the costs of the suit." For the three sons of Ram Prasad it is admitted that the money he borrowed in order to carry on the litigation was, at the time of the mortgage, an antecedent debt of his for which he was authorised to alienate their shares in the property but at the same time it is contended that the debt of which payment was enforced by the decree was "tainted with immorality" as it arose out of a tort committed by their father. The two positions are entirely inconsistent; if there was any immorality about the incurring of the debt enforced in the decree there was exactly the same taint in respect of the money borrowed for the expenses of defending the suit in which that decree was passed.

10. It was, however, argued at some length that a Hindu son is not bound to pay the damages decreed against his father for a tort. That may be so; but there is nothing to show that this decree was in respect of any act amounting to such immorality as would free the son of the wrong-

doer under the Hindu Law from liability for the debt. All the evidence we have about it is a very vague statement by one Ratiram Sonar (P. W. No. 10) that the money was required "for payment of a decree that some tenants had obtained," and the statement in the bond that the decree was "in respect of damages to crops, etc., and costs." There is nothing to show that there was any trespass, and if there were any trespass it may well have been done in good faith and in the interests of the joint family and have merely failed of proof in Court.

11. It was finally urged on behalf of Ram Prasad's sons that according to the ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3) they are not liable for his debts while he is alive. The right to enforce payment of a Hindu's debts against his son is a different matter from that Hindu's right to alienate his son's share in the family property himself for the satisfaction of those debts. But anyhow it is too late to take that plea now; all through the case and even in the petition of appeal it has been admitted that the mortgages are valid and binding on Ram Prasad's sons for the amounts of any debts that were legally due by him before the execution of the mortgages and the plaintiffs were not called upon to prove any other form of legal necessity for the borrowings.

12. As has been already pointed out, there is a certain degree of futility in this appeal and the discussion of the portion of the consideration that is binding on the shares of Ram Prasad's sons. It was admitted at the beginning that a sum of Rs. 2,283 was so binding, and that it is not quite Rs. 700 less than three-eighths of the principal of the three mortgages. But further it was not seriously disputed that the two sums of Rs. 2,294 and Rs. 284 out of the consideration of the first mortgage were so binding, giving a total of Rs. 4,861, which is only Rs. 107-12-0 less than five-eighths of the total consideration of the three mortgages. By adding the Rs. 1,168 which has been found to be a proper charge on the three-eighths share we get a total which exceeds three-quarters of the total mortgage-money by Rs. 66-8-0.

13. There seems to be no great advantage in being allowed to redeem three-eighths of the property for six or even for five-eighths of the sum for which the whole can be redeemed. This right may possibly, however, be of benefit to the defendants in some way and will be declared in the decree. The time for payment will be extended to the 24th of January 1923. A decree will, therefore, issue in supersession of that of the lower Court, in the terms of r. 2 of O. XXXIV of the Civil Procedure Code allowing redemption by the defendants by the 24th of January 1923 either of the whole of the mortgaged property on payment of Rs. 7,950 with interest up to that date and all the costs of the plaintiffs in both Courts, or of a three-eighths share in the mortgaged property on payment of Rs. 6,029 with interest up to the same date and three-eighths of the costs of the plaintiffs in both Courts *minus* five-eighths of the costs of the defendants in both Courts.

G. R. D. & N. K.

Order accordingly.

(3) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C).

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 97-60 OF 1921.

November 29, 1922.

Present—Mr. Pipon, J. C.

DR. LOK NATH—APPELLANT

versus

THAKAR DAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, O. VII, r. 7—Nature and form of suit by decree-holder—Relief—Transfer of Property Act (IV of 1882), s. 53, cl. 2—Presumption—Consideration—Frontier Crimes Regulation (III of 1901), s. 40—Surety—Mortgagee—Lien.

A decree-holder has a statutory right to sue, under O. XXI, r. 63, Civil Procedure Code, in his personal capacity as a decree-holder, represent ag merely his own right, to have the property attached under his decree. He is not obliged to take the

general ground that as against all other creditors and all other persons a mortgage or a sale is to be void. (p. 22, col. 2.)

Kottarathil Puthiyapurayil Pokker v. *Balathil Parkum Chandrankandi*, 51 Ind. Cas. 714; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 42 M. 143; 36 M. L. J. 231, relied upon.

After the passing of a money-decree the judgment-debtor mortgaged his property and in execution proceedings the mortgagee's objection to the attachment of the property was allowed and the decree-holder was directed to seek his relief by a civil suit. Before the lodging of the civil suit the property was sold by the judgment-debtor and the mortgage was redeemed by the vendee. The decree-holder attacked the validity of the said sale in his plaint, but prayed only for a declaration that the property was liable to attachment without mortgage incumbrance; and sought no relief regarding the sale, as he denied that the sale had really taken place:

Held, that the decree-holder was not obliged to ask for a separate relief voiding the sale. (p. 22, col. 2.)

A judgment-debtor is under no obligation to maintain his property intact for the decree-holder and even where his intention is clearly proved to be to defeat a decree-holder, he is entitled to do so. (p. 23, col. 1.)

Karam Ilahi v. *Gulab Rai*, 33 Ind. Cas. 960; 39 P. R. 1916; 102 P. W. R. 1916 and *Bhagwant Appaji* v. *Kedari Kashinath*, 25 B. 202; 2 Bom. L. R. 986, relied upon.

The second clause of section 53 of the Transfer of Property Act relates to a question of evidence and the presumption referred to in that clause is rebuttable. (p. 23, col. 1.)

Obiter.—The failure of consideration does not necessarily void a sale. (p. 24, col. 1.)

(2). The omission to transfer possession is one of the badges of fraud. (p. 24, col. 1.)

(3). To stand surety for a man under section 40, Frontier Crimes Regulation, argues a very personal and intimate connection. (p. 24, col. 2.)

(4). The lien of a mortgagee may subsist for such portion of the consideration as has passed. (p. 24, col. 2.)

Allah Ditta v. *Nazar Din*, 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916 (F. B.), referred to.

Appeal from an order of the Divisional Judge, Dera Ismail Khan, dated the 2nd of June 1921, setting aside a decree of the Munsif, First Class, Bannu, dated the 29th of October 1920.

Mr. *Gokal Chand Dhawan*, for the Appellant.

Mr. *Diwan Chand*, R. S., for the Respondents.

JUDGMENT.—The facts of this case are these. Thakar Das sued Nur Muhammad and his brothers for Rs. 1,500 on book account, and obtained a decree for Rs.1,309 on the 5th of July 1916 against Nur Muhammad only, the suit being dismissed against his brothers. Thakar Das appealed unsuccessfully against the order releasing the other defendants from liability. His appeal was dismissed on the 30th March 1917. On the 6th of July 1917 he applied for execution of his decree against Nur Muhammad, and got the latter's share in certain land attached. Meanwhile transactions of mortgage in respect of this land had been entered up and attested in revenue records. Both these mortgages were to one Abid Khan. One portion of the land was mortgaged for Rs. 120 and another for Rs. 500. The first of these mortgages was reported on the 18th of May 1917 and attested on the 4th of June. The second was reported on the 7th of June and attested on the 12th of June 1917. That is to say, both mortgages had been attested before the application for execution was instituted. The mortgagee Abid Khan filed objections to the attachment claiming his incumbrance of Rs. 620 in all. His objections were accepted, and on the 30th of May 1918 Thakar Das was directed to seek his relief by a civil suit. The execution proceedings were then filed. On the 5th of April 1919, *i.e.*, within one year from the decision of the objections, the present suit was lodged by Thakar Das under O. XXI, r. 63, Civil Procedure Code, praying for a declaration that the property was liable to attachment without mortgage incumbrance. Meanwhile, however, between the decision of the objections and the institution of the suit further mutations had been effected in the revenue records recording a sale of the land in question to Dr. Lok Nath for Rs. 737. The two transactions—redemption from Abid Khan for Rs. 620 and the sale of the proprietary title for an additional sum of Rs. 117—were reported to the Patwari on the 21st of February 1919 and were brought up for attestation five days later on the 26th of February 1919. The mutation of redemption was accepted, but final orders were not passed on either mutation owing to the fact that the 30 days necessary for a proclamation inviting objections to the sale had not expired. Before the mutations could come up again for attestation, Thakar Das obtained from the Court an interlocutory order forbidding the mutations to be attested pending decision of the suit. The Trial Court threw

out the suit on the ground that the mortgage had merged in the sale, and that in consequence the plaintiff's suit for a declaration respecting the mortgage did not lie. On appeal the Divisional Court held that the suit could lie as the plaintiff in his plaint had attacked the existence of the sale, and that it would complicate matters if he were directed to bring a fresh suit in its respect. The learned Divisional Judge mentioned in his order that the plaint could be amended under O. VI, r. 17 by the parties or by the Court. He, therefore, remanded the suit for trial on its merits under O. XLI, r. 23, Civil Procedure Code. The Trial Court, on resuming the hearing, did not direct amendment of the plaint, and no application by the plaintiff was made in this respect. It proceeded to determine the issue which it had already framed as to whether the sale was invalid. It decided that both the mortgage and the sale were valid transactions, and dismissed the suit. The Divisional Court, on appeal, held that both the mortgage and the sale were fictitious transactions intended to defeat the creditors of Nur Muhammad and voidable under the principles laid down in section 53 of the Transfer of Property Act which are accepted in this Province as binding in equity though not in law, and decreed the relief sought for. The present appeal in this Court is by the vendee Dr. Lok Nath.

The first point argued in appeal is that the plaintiff has been given a relief which he did not seek in his plaint, and that the omission to amend the plaint is fatal to the decree. It is admitted that the suit is one under O. XXI, r. 63, Civil Procedure Code, and that a declaration was the proper relief which had been asked. It is contended, however, that inasmuch as the mortgage had merged in the sale and there is no prayer to declare the sale invalid, the suit is barred by O. VII, r. 7, Civil Procedure Code. I do not think that this contention can be accepted. Under O. XXI, r. 63, Civil Procedure Code, the plaintiff was entitled to ask for a declaration that the land was liable to attachment free of incumbrance. He was not necessarily bound to add a prayer for co sequential relief that the mortgage be set aside. This is clear from the Madras ruling published as *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandrankandi* (1). It is shown very clearly in that ruling that a decree-holder has a statutory right to sue under O. XXI, r. 63, in his personal capacity as a decree-holder respecting merely his own right to have the property attached under his decree. He is not obliged to take the general ground that as against all other creditors and all other persons a mortgage or a sale is to be void. So far as regards the mortgage, therefore, the form of the suit was correct. There is then the question of the sale. In his plaint the plaintiff attacked the validity of the sale, because he was obliged to do so if he could assume that the property was liable to attachment at all as the judgment-debtor's property irrespective of the question of mortgage incumbrance. It does not appear to me that he is under an obligation to ask for a separate relief voiding the sale. He denies that the transaction of sale ever really took place, or that the transferee was ever put in possession. It has been admitted by the learned Counsel for the appellant that the proviso to section 42 of the Specific Relief Act does not apply to this case, and that the suit is purely one under O. XXI, r. 63, Civil Procedure Code. That being so, it is simply necessary for the plaintiff to challenge the sale in order to show that his suit to declare the mortgage ineffectual against his rights is one which can still be brought. In these circumstances it does not appear to me that the omission to amend the plaint to cover a declaration that the sale is also invalid, is in any way fatal to the decree. The remarks of the learned Divisional Judge in this respect were not mandatory. It was certainly open to the plaintiff to have applied for amendment, but it is also clear that neither he nor the Court itself regarded this amendment as having been directly ordered. I do not consider myself that an amendment was absolutely necessary, and I must overrule the objection to the decree taken on this ground.

The next question is the legal position which is involved when a decree-holder seeks to ignore transfers made by the judg-

(1). 51 Ind. Cas. 714; 25 M. L. T. 47; (1919) M. W. N. 39; 9 L. W. 138; 42 M. 143; 36 M. L. J. 231.

ment-debtor after he has obtained a decree. It has been argued before me at some length by the learned Counsel for the appellant that a judgment-debtor is under no obligation to maintain his property intact for the benefit of the decree-holder, and that even where his intention is clearly proved to be to defeat a decree-holder, he is entitled to do so. *Karam Ilahi* v. *Gulab Rai* (2) is a clear authority for the first of these two propositions. The position with regard to transfers made by a judgment-debtor which have the effect of defeating a decree-holder, is given very concisely in *Bhagwant Appaji* v. *Kedari Kashinath* (3). It was held that the transaction may defeat or delay; that the transferor may intend that it should; that the transferee may know that it will; that the consideration may be inadequate; and yet unless the transferee himself has been wanting in good faith, the presumption given in the second paragraph of section 53 of the Transfer of Property Act does not arise. I think that the real question at issue is apt in these cases to be somewhat obscured. The question really is one of fact, and it is the *intention* of the parties. But the intention which we must consider is not so much the intention to defeat the decree-holder, but the intention to create a valid transfer at all. The position may be perhaps seen more clearly where the subject is moveable property. A judgment-debtor, knowing that his property is about to be attached, may be perfectly entitled to sell a motor-car knowing that by doing so it will escape attachment. Even the buyer of the motor-car may rejoice in the fact that the decree-holder may not be able to lay his hands upon it. But the sale is only valid if the motor-car was actually and genuinely sold. The second clause of section 53 of the Transfer of Property relates to a question of evidence. A certain presumption arises when the effect of the transfer is to defeat the creditor and where the transfer is gratuitous or without adequate consideration. But it is a presumption which can be rebutted. The question at issue really is whether the transfer ever actually occurred. What we have to consider in the present case is an issue of fact, *i. e.*, whether the mortgage to Abid Khan and the sale to Dr. Lok Nath were colourable transactions with the object of defeating execution, or were genuine transactions representing real transfers.

It will be more convenient to take first the question of the sale as it appears to me that the grounds for attacking it are more overwhelming than in the case of the mortgage. In the first place, the sale was made after the objections to the mortgage had been disposed of, and when the judgment-debtor knew that the decree-holder had the right to institute a suit in respect of the mortgage. It has been argued that the intention of the parties clearly was to prejudice the suit on the mortgage by pleading that it had disappeared into a sale. This argument, however, will carry little force unless it can be shown that the circumstances of the sale were such as to show that no transfer of interest really occurred. It appears to me that the sale was suspicious in the extreme. There is no sale-deed, and it would be unusual for a vendee in the position of the present appellant to be satisfied with a mere mutation. There was clearly an attempt to rush through this mutation. It was brought up only five days after it had been reported and came before the Naib Tahsildar at his house in Bannu. He quite rightly refused to attest it until the period for objections to the sale had elasped. There is very incomplete proof of the payment of consideration and every thing to show that no money actually passed. The mutation records that the vendor had admitted receipt of Rs. 400, leaving Rs. 220 due to the mortgagee and Rs. 117 due to the proprietor to be paid at the time of attestation. There are no kind of accounts produced to show that Rs, 400, had been paid. Dr. Lok Nath may, as alleged by his Counsel, keep no personal accounts and rely on one Paras Ram for a record of his transactions with the latter. At the same time I agree with the learned Divisional Judge in thinking that it is most unlikely that Dr. Lok Nath would not keep some personal accounts which would show a payment of this nature. The Patwari has given evidence that the Rs. 220 and Rs. 117 were actually counted out and paid in his presence. I do not believe this statement at all, as it is quite clear that these sums

(2) 33 Ind. Cas. 960; 39 P. R. 1916; 102 P. W. R. 1916.
(3) 25 B. 202; 2 Bom. L. R. 986.

were to be paid at attestation, and although redemption was accepted by the Revenue Officer, the mutations were not actually attested. Even if it be assumed that Rs. 220, might have passed hands in view of the question of redemption having been settled, the question of the passing of proprietary title clearly remained unsettled until the period for objections would expire, and it would be most unlikely that the sum of Rs. 117 could have changed hands if the transactions were genuine, while mutation (which was the sole record of the sale, there being no deed) remained unattested. The failure of consideration, of course, does not necessarily void a sale. This, however, is beside the point. The failure of consideration in this case is being adduced not to show that the sale, as between the vendor and the vendee, was incomplete, but as evidence that the transaction was a colourable one representing no genuine sale at all. There is then the question of the transfer of possession. The omission to transfer possession is one of the "badges of fraud" given on page 247 of Mittra's Transfer of Property Act. So far as I can see from the evidence, it is clear that no possession was ever delivered to Dr. Lok Nath. Certain witnesses have been produced to show that it was, but the entries in the *khasra girdawari*, which is a record drawn up on the spot, are directly against it. The land was held jointly by Nur Muhammad and his brothers, and they continued, as before, in cultivating possession. There is nothing worthy of the name of evidence to show that the so-called vendee ever received any share of the produce from them or anything representing the rent of his joint interest. I agree on the evidence with the view of the learned Divisional Judge that this sale never really occurred at all, and that it was purely a colourable transaction intended to secure the property from attachment.

The character of the mortgage to Abid Khan is not quite so obvious. It was reported about 2½ months after the dismissal of Thakur Das's appeal against the order releasing the other defendants from liability and when it had, therefore, become finally decided that he would execute against Nur Muhammad alone. It was argued that no connection or necessary collusion has been shown between Nur Muhammad and Abid Khan. I think that it is clear that there was a very intimate connection in view of the fact that Abid Khan only two days before the first mortgage was entered, stood surety for Nur Muhammad in a case under section 40, Frontier Crimes Regulation. To stand surety for a man under that provision of the law argues a very personal and intimate connectoin, as the obligation is very onerous. The main questions as regards this mortgage are those of consideration and delivery of possession. It has been argued by the learned Counsel for the appellant that the failure of consideration does not annul a mortgage any more than it annuls a sale. The question of whether a mortgage subsists when consideration has partially failed is dealt with at lenght in *Allah Ditta* v. *Nazar Din* (4). It is certainly true that the lien of a mortagagee on a property may subsist for such portion of the consideration which has passed. Here again, however, as I have remarked on the question of the sale, the argument is really beside the point. What I have to consider is whether there has been a failure of consideration as showing that the transaction was fraudulent and colourable, and that no mortgage took place at all. In the first of the two mortgages Rs. 30 were said to have been paid before the Patwari and a previous receipt of Rs. 90 admitted. In the second mortgage Rs. 500 was admitted in the report to have been received by the mortgagor. In neither case is the proof of the passing of consideration very convincing. This fact alone, however, might be insufficient to prove that the mortgage was a mere colourable transaction if it were shown that the mortgagee had obtained any kind of possession, or had derived any actual benefit from the supposed transaction. So far I can see, he never took any possession at all, and that when he gave up his title in favour of the vendee nearly two years later, he had not yet exercised any of the rights of a mortgagee in possession. Possession was alleged to have been delivered, and it has never

(4) 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916 (F. B.).

been contended that the mortgage was one under which the land was merely hypothecated without possession and on which interest was paid. Unless the mortgagee did obtain possession, the transaction could not have been a genuine one. The *jamabandi* of 1918-19 naturally showed the existence of a mortgage. This is a necessary corollary from the fact of the mutation having been attested before the *jamabandi* in question was prepared. The entry in the *jamabandi* carries no more and no less weight than the attested mutation. But the *khasra girdawari* never showed that Abid Khan had assumed possession, and there is no evidence worthy of the name of his either having cultivated jointly or received rent from the owners who remained in cultivating possession. I consider that the view of the learned Divisional Judge must be accepted, and that, as a matter of fact, no mortgage ever took place at all.

On the above findings the appeal fails and is dimissed with costs.

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 124-B OF 1921.

August 28, 1922.

Present:—Mr. Prideaux, A. J. C.

SHAIKH IMAM AND OTHERS—DEFENDANTS —APPELLANTS

versus

RAMCHANDRA AND OTHERS—PLANTIFFS —RESPONDENTS.

Berar Alienated Villages Tenancy Law, s. 40 — Ante-izara tenant, rights of, whether transferable— Ante-alienation tenant, whether liable to be ejected.

A person who has been in possession for a large number of years as a tenant of land which was under cultivation before the grant of an *izara* is an ante-*izara* tenant under section 40 of the Berar Alienated Villages Tenancy Law and the rights of such a tenant are transferable. (p. 26, col. 1.)

Notwithstanding any contract to the contrary, an ante-alienation tenant cannot be ejected from his holding by his landlord as such for any cause. (p. 26, col. 1.)

Appeal from a decree of the Additional District Judge, Akola, dated the 25th November 1920, in Civil Appeal No. 388 of 1919.

Mr. *N. G. Sarkar*, R. B., for the Appellants.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—In my opinion the lower Courts have gone absolutely wrong in disposing of this case. The facts are sufficiently given in the judgment of the Courts below and it is enough to state that plaintiffs, who are the *izaradars* of Pimpalgaon Isara, Taluq Mangrul Pir, sued the defendants for ejectment from Survey No. 15 and half of Survey No. 16 of that village on the ground that they are annual tenants. The defence was that they were ante-*izara* tenants, or if not that, at least tenants of antiquity.

The Courts below have found that the first defendant, Sheikh Imam, who is the tenant of the land in suit is neither an ante-*izara* tenant nor, as he is termed in the law now, an ante-alienation tenant, nor yet a tenant of antiquity or a permanent tenant. The respondents-plaintiffs have filed in this Court a document which goes a long way towards disproving their claim, that is, a copy of document for *survey che pahani sud.* I have marked this as Exhibit A.-1. Exhibit D.-1 shows that one Ambadas Patki held 12 *bighas* of land as an ante-*izara* tenant. It is common knowledge that village officials, and Ambadas was a Patwari, held in the old days much larger areas than their papers showed, and at the time of Settlement and Survey this fact was frequently discovered and correct measurements made of all tenants' holdings. In Exhibit A-1 the fields in suit were in 1894 described as being tenancies of Ambadas Patki and that they were held by him on ante-*izara* tenancies. The conclusion, therefore, is irresistible that Ambadas held these fields as an ante-*izara* tenant.

Now, it has been the defendants' case all through that Sheikh Lal, father of Sheikh Imam, jointly held the land as Lambardar and that, later, it was divided, two shares going to the defendant No. 1's father and the other share going to Ambadas, and that the land in suit is that which came to defendant No. 1's father, Sheikh Lal. There is evidence, both of plaintiffs and of the defendants, to show that the defendants have cultivated this land for a very long time. P.W. No. 4, one of the plaintiffs, has himself had to admit that defendants had cultivated for 20 or 22 years, but the rest of the evidence goes to show that plantiffs have been in possession from beyond the

memory of living man. It seems to me that it has been established that the fields in suit formed part of Ambadas' ante-*izara* tenancy. The defendants have been in possession for a very large number of years as tenants of land which was under the cultivation before the grant of the *izara*, and it seems to me that this can only mean one thing, that is, that they are ante-*izara* tenants; for the present law in section 40 runs :—

"Every tenant other than a sub-tenant, who has, either by himself or by himself and through his predecessor-in-title, sub-tenant or mortgagee in possession, held land continuously in an alienated village from a period antecedent to the alienation, shall be deemed to be an ante-alienation tenant of such land."

The principal defendant in the present case seems to me unquestionably to fall within that category. Such rights are transferable, and it is now law that, notwithstanding any contract to the contrary, an ante-alienation tenant should not be ejected from his holding by his landlord as such for any cause.

For the above reasons, I set aside the decree of the Courts below and dismiss the plaintiffs' suit with costs, in all three Courts. This decree applies to all the plaintiffs.

S. D. *Suit dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDERS NOS. 120 AND 121 OF 1921.

November 17, 1922.

Present :—Mr. Justice Das and Mr. Justice Adami.

Rai Sahib SARJU LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAIJ NATH PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage decree—Execution—Option of decree-holder to proceed against any of mortgaged properties—Subsequent purchaser of equity of redemption, rights of—Contribution, suit for—Rateable distribution—Execution proceedings.

The holder of a mortgage-decree has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties, or in any of them, may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Each parcel of the mortgaged properties is liable rateably to its value, and the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security, but an enquiry as to rateable distribution of mortgage-debt cannot be made in execution proceedings without serious complications; therefore, the equity must be left to be worked out in a properly constituted suit between the parties. (p. 27, cols. 1 & 2.)

Appeal against an order of the Subordinate Judge, Gaya, dated the 17th June 1921.

Messrs *S.M. Mullick* and *Kailaspatti*, for the Appellants.

Messrs. *Kulwant Sahai* and *Rai Guru Saran Prasad*, for the Respondents.

JUDGMENT.

M. A. No. 120 of 1921.

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

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

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

course adopted by the decree-holders in purchasing some of the properties clearly prejudiced them and they asked the Court to direct that the properties should be sold in the order in which they are named in the mortgage-decree. The learned Subordinate Judge acceded to the arguments advanced before him on behalf of Mr. Kulwant Sahai's clients and the decree-holders appeal to this Court.

Numerous authorities were cited on behalf of the parties before us. It is unnecessary to discuss all those authorities; it is sufficient to say that though here and there a discordant note has been struck, still the balance of authorities is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security; but I do not think that an enquiry as to rateable distribution of the mortgage-debt can be made in execution proceedings without serious complications. To take the present case, the respondents assert that the decree-holders have purchased property No. 1 at a price much below the market price and that they are now attempting to throw the burden of the entire debt on them. The decree-holders retort by saying that the respondents interested in properties Nos. 9 and 10 have purchased these properties for a nominal sum and on an express undertaking to pay the entire mortgage-debt, an undertaking which they never attempted to carry out. The learned Subordinate Judge has not entered into an investigation as to the valuation of the different properties comprised in the mortgage but he thought that the action of the decree-holders in purchasing some of the properties clearly prejudiced the rights of the respondents, and that he was entitled to use his discretion in directing in what order the properties should be sold. For myself I do not understand how the act of the decree-holders could possibly have prejudiced the subsequent purchasers. The learned Subordinate Judge admits that the decree-holders have not released any of the mortgaged properties so as to throw the entire burden of the mortgage-debt on the others. As purchasers of some of the motgaged properties, they must themselves contribute to the mortgage-debt, but the problem is not solved by compelling the decree-holders to sell the properties which they have themselves purchased. The course adopted by the learned Subordinate Judge has unduly favoured the respondents; and for that there is no warrant either in law or in equity. As I have said before, the equities arising as a result of the transactions that have taken place since the mortgage was executed cannot without serious inconvenience be worked out in the execution proceedings, and I must prefer the rule which gives the decree-holders complete dominion over the sale leaving the equities to be worked out in a properly constituted suit between the parties.

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

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

M. A. No. 121 of 1921.

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

Adami, J.—I agree.

S. D.

Appeals allowed.

PANDURANG BAPUJI *v.* BAPUJI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 316-B OF 1921.
September 23, 1922.

Present:—Mr. Kotwal, A. J. C.

PANDURANG BAPUJI—PLAINTIFF—APPELLANT

versus

BAPUJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Transfer with intent to defeat creditors—Delivery of possession to and payment of consideration by transferee—Transfer, setting aside of.

A transfer will not affect the rights of a creditor if the intention of the transferor was to defeat or delay him, even where consideration has been paid and the possession transferred. But where the transferee had no notice of and did not share in the fraudulent intention, the transfer will not be set aside.

Hakim Lal v. *Mooshahar Sahu*, 34 C. 999 at p. 1017; 11 C. W. N. 889; 6 C. L. J. 410, *Bhikhabhai Muljibhai Patel* v. *Panachand*, 52 Ind. Cas. 682; 43 B. 707; 21 Bom. L. R. 770, referred to.

The proper way of dealing with a question of a transfer made with the intention of defeating and delaying a creditor is to consider the facts in relation to each other and weigh them as a whole.

Ghunsham Das v. *Uma Pershad*, 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.), followed.

Appeal from the decree of the District Judge, Amraoti, dated the 13th July 1921, in Civil Appeal No. 143 of 1921.

Mr. *M. B. Niyogi*, for the Appellant.

Sir *B. K. Bose*, Messrs. *V. Bose* and *F. E. Sanjana* and *P. N. Rudra*, for Respondents Nos. 2 and 3.

JUDGMENT.—The lower Appellate Court appears to have decided this case on the view that if consideration for the transfer was paid by the transferee and possession was delivered to him the transfer must be given effect to as against the creditor of the transferor even if the intention was to defeat or delay the creditor. This view is not entirely correct. Even where consideration has been paid and possession delivered the transfer will not affect the right of the creditor if the intention was to defeat or delay him; but so far as the transferee is concerned it must be found that he participated in the intention to defeat or delay the creditor; *vide Hakim Lal* v. *Mooshahar Sahu* (1) cited with approval in

(1) 34 C. 999 at p. 1017; 11 C. W. N. 889; 6 C. L. J. 410.

SANT SINGH *v.* BASANT KAUR.

Bhikahbhai Muljibhai Patel v. *Panachand* (2), If the transferee had no notice of and did not share in the fraudulent intention the transfer will not be set aside.

It may also be pointed out here that the proper way of dealing with a question of the sort involved in this case is, as pointed out in *Ghunsham Das* v. *Uma Pershad* (3), to consider the facts in relation to each other and weigh them as a whole. The facts relied on in this case by the plaintiff are the relationship of the parties to the transferor, the sale being in respect of the whole of the property of the transferor, the subsequent connection of the transferor with the property and the inadequacy of the price.

The decree of the lower Appellate Court is set aside and the case is remanded for a fresh decision with advertence to the above remarks. Costs of this appeal will abide the result.

G. R. D. & N. H.

Case remanded.

(2) 52 Ind. Cas. 682; 43 B. 707; 21 Bom. L. R. 770.

(3) 50 Ind. Cas 264; 15 N. L. R. 68; 17 A. L. J. 410; 21 Bom. L. R. 472; 36 M. L. J. 483; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1235 OF 1918.
November 7, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

SANT SINGH—PLAINTIFF—APPELLANT

versus

Musammat BASANT KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), ss. 3 (2), 111, 117, 158—Custom—Partition—Widow—Burden of proof—Question of title—Procedure—Civil suit—Jurisdiction of Civil and Revenue Courts.

Section 111 of the Punjab Land Revenue Act merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying for partition, which she may or may not be entitled to obtain by virtue of her life-estate. (p. 30, col. 1.)

SANT SINGH *v.* BASANT KAUR.

Abdul Qadir v. *Rabia*, 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev., referred to.

Where the right of a widow to obtain partition is contested, the proper course for the Revenue Officer to adopt is to proceed under section 117 of the Punjab Land Revenue Act, and either to stay the proceedings for the determination of the question of title by a competent Court or to determine the question himself as if he were a Civil Court. (p. 30, cols. 1 & 2.)

The mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title, which has not been disposed of during the partition proceedings, is barred. (p 30, col. 2.)

Bachan Singh v. *Madhan Singh*, 61 P. R. 1897 (F. B.), *Buta* v. *Jiwani*, 82 P. R. 1898 (F. B.), *Bhag Bhari* v. *Wazir Khan*, 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912 and *Parshotam* v. *Raj Devi*, 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913, relied upon.

Section 3, sub-clause (2) of the Punjab Land Revenue Act, read with section 111 of the Punjab Land Revenue Act, makes it clear that a widow is a joint owner of land though with limited rights of ownership, and as such is possessed of a statutory right to demand partition. The onus is upon the party who disputes her right to obtain partition to prove that such right does not exist. (p. 31, col. 1.)

Abdul Qadir v. *Rabia*, 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev., referred to.

Parshotam v. *Raj Devi*, 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913, distinguished.

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 31st January 1918.

Sardar *Kharak Singh*, for the Appellant.

Mr. *N. C. Mehra* and Lala *Ram Chand Manchanda*, for the Respondents.

ORDER.—This is a plaintiff's appeal, and has arisen out of certain partition proceedings. Defendants Nos. 1 and 2 are the sons of Ganda Singh, a brother of the plaintiff, and defendant No. 3 is the widow of Lachhman Singh, another brother of the plaintiff. The suit relates to 720 *kanals* 12 *marlas* of land in Chak No. 263, R. B. in the District of Lyallpur, and is for a declaration to the effect that certain entries in the mutation register and the Record of Rights made in accordance with an order of the Tahsildar; dated the 8th June 1916, relating to the partition of the property in suit are incorrect and that the said property is still jointly owned and possessed by the parties. It appears that on the 17th February 1916 *Musammat* Santi, mother of defendants Nos. 1 and 2, applied to the Revenue Authorities for a partition of their shares in the joint holding, alleging that disputes had arisen between the parties and that the plaintiff was refusing to give them their proper share of the profits. *Musammat* Basant Kaur, defendant No. 3, was no party to this application, but she appears to have come on the scene later, and to have joined in making a similar application to the Tahsildar to whom the case had been sent down by the Revenue Officer for proposing a scheme of partition. The plaintiff strenuously opposed these applications and denied the right of the applicants to get a partition of their shares effected. It is, however, alleged by the defendants that subsequently a settlement was arrived at and a partition privately effected between the parties. On the 8th June 1916 the Tahsildar gave effect to the alleged private partition by sanctioning the mutation in respect thereof, and by ordering entries to be made in the revenue papers in accordance with the above arrangement. A report was in the usual course submitted to the Revenue Officer who ordered the case to be consigned to the record-room in view of the fact that partition proceedings had been completed and come to an end. The plaintiff was apparently dissatisfied with these orders, for he soon after filed an appeal to the Collector against the orders of the Tahsildar sanctioning mutation of the partition, but it was dismissed on the 28th August 1916.

The plaintiff thereupon brought the present suit questioning the right of the defendants to get a partition of their shares effected and impugning the jurisdiction of the Revenue Officer to proceed with the partition when a question of title was raised before him and left undetermined. The factum of the private partition relied on by the defendants was also denied, and it was further urged that the application for partition made by *Musammat* Santi on behalf of her minor sons was not a *bona fide* application made in their interests, but one that had been made in collusion with *Musammat* Basant Kaur who, it was stated, was only interested in ruining the estate. The defendants put up a joint defence and objected to the jurisdiction of the Civil Courts to entertain this suit. As to their right to get a partition effected it was pleaded that

they had such a right both under law and custom, and that the plantiff was now estopped from questioning this right in view of the private partition to which he had already given his assent. The point relating to jurisdiction was not seriously pressed before the lower Court apparently in view of the several rulings of this Court in which it has been held that a suit of this description is maintainable in a Civil Court. On the other points the learned Subordinate Judge found entirely in favour of the defendants, and as a result of those findings dismissed the plaintiff's suit. The plaintiff has now filed a first appeal to this Court, and we have listened to lengthy arguments by Counsel. Defendants Nos. 1 and 2 having confessed judgment in this Court, the only contesting respondent to this appeal now is *Musammat* Basant Kaur, the widow. It is again urged before us on her behalf that Civil Courts have no jurisdiction to entertain this suit. The argument of the learned Vakil who represents her is two-fold. Firstly, it is contended that section 111 of the Land Revenue Act confers an absolute right over a joint land-owner (in which term is included also a widow having a life-interest) to apply for partition, and that if a Revenue Officer acting in pursuance of the powers possessed by him under section 115 allows or disallows partition, he cannot be controlled by a Civil Court in the exercise of such a discretion. Reliance is also placed on section 158 which ousts the jurisdiction of a Civil Court from taking cognizance of the manner in which a Revenue Officer exercises the powers possessed by him under the Act. But it is clear that here a question of title is involved and that section 111 does not deal with questions of title or with questions relating to the right of a joint land-owner to *obtain* or *compel* partition which are in fact governed by sections 116 and 117 of the Act. As pointed out in *Abdul Qadir* v. *Rabia* (1), section 111 merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying for partition which she may or may not be entitled to obtain in virtue of her life-estate. In our opinion the proper course to adopt for the Revenue Officer in this case would have been to proceed under section 117 and to have either stayed the proceedings for the determination of the question of the widow's right to obtain partition by a competent Court or to have determined the question himself as if he were a Civil Court. He did not adopt either of the two courses open to him, and the question of title which was undoubtedly raised was left undisposed of. The rulings *Bachan Singh* v. *Madhan Singh* (2), *Buta* v. *Jiwani* (3), *Bhag Bhari* v. *Wazir Khan* (4) and *Parshotam* v. *Raj Devi* (5) are clear authority for the proposition that the mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title which has not been disposed of during the partition proceedings, is barred.

Secondly, it is argued that as the parties had privately partitioned the property with mutual consent no question of title or in fact of any other nature arose for the determination of the Revenue Officer and consequently the orders passed by him were final and not liable to be questioned in a Civil Court. We confess we are not at all impressed with the story of this so-called private partition. There is no evidence worth the name on the record in support of this story and in the absence of any reliable evidence to the contrary we must hold that no private partition took place. In fact the conduct of the plaintiff evidenced as it is, by the various applications that he made to the Revenue Authorities from time to time, militates against such partition and it is indeed strange that the plaintiff who had all along been contesting the right of the widow to obtain partition should suddenly on the 8th June have changed his mind and agreed to forego a valuable right for practically no consideration whatsoever.

The next question is whether the widow is entitled to claim partition. It is argued

(1) 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev.

(2) 61 P. R. 1897 (F. B.)

(3) 82. P. R. 1898 (F. B.)

(4) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

(5) 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913.

that the general rule as laid down in paragraph 15 of Rattigan's Customary Law and other rulings of this Court is that ordinarily a widow governed by the agricultural custom of the Punjab is not entitled to and that the burden of proving that she can claim partition is upon the widow. It is pointed out that in the present case the widow has absolutely failed to discharge the onus.

A reference to section 3, sub-clause 2 and section 111 of the Land Revenue Act, however, makes it clear that a widow is a joint owner of land though with limited rights of ownership and as such is possessed of a statutory right to demand partition. Applying the ordinary rule of the law of evidence the *onus* is then clearly upon the party who disputes her right to obtain partition. We are not unmindful of the distinction between a widow's right to *apply* for partition and her right to *obtain* or *compel* partition so forcibly brought out in *Abdul Qadir* v. *Rabia* (1), but this, in our opinion, has nothing to do with the question of onus which is regulated by entirely different considerations. A widow may not be entitled to obtain partition in view of her life-estate or in view of any established agricultural custom to that effect, but this must be proved by the party who denies her that right. As held in *Bhag Bhari* v. *Wazir Khan* (4), she has in virtue of her possession under the Land Revenue Act a "clear unequivocal statutory right to demand partition," and it is for the co-sharer who disputes that right to prove that by custom or for any other reason she is not entitled to obtain partition of the joint holding in which she is a co-sharer for life. It is contended that in a later ruling reported as *Parshotam* v. *Raj Devi* (5) this view was not accepted and that in that case the burden of proof was thrown upon the widow. It will be observed, however, that the judgment in that case proceeded merely on the basis of paragraph 15 of Rattigan's Customary Law and that the attention of the learned Judges was probably not drawn either to section 111 of the Land Revenue Act or to the earlier decision of 1912. We entirely concur in the view enunciated in *Bha Bhari* v. *Wazir Khan* (4) and have no hesitation in holding that the onus is upon the plaintiff.

Counsel for the appellant, however, contends that his client did not produce any evidence in the lower Court in proof of this issue, as the onus was laid upon the defendants which they failed to discharge and wants opportunity to be allowed to produce evidence. We think there is force in this contention and we consequently remand the case to the lower Court for enquiry and finding on the following issue :—

Whether by custom obtaining among the parties a widow is restrained from obtaining partition of the joint holding in which she is a co-sharer for life ?

Return within three months.

S. D. *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 15 OF 1922.

September 8, 1922.

Present:—Mr. Batten, J. C.

Musammat BARI BAHU—PLAINTIFF—APPELLANT

versus

KUNDAN SINGH—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suit for declaration that certain sum settled as maintenance and for amendment of document—Nature of suit—Declaration with consequential relief—Court-fee payable—Specific Relief Act (I of 1877), s. 31—Revision—Wrong view of law.

A suit asking for a declaration that a certain sum of money was settled as the maintenance of the plaintiff, and for the amendment of a document to this effect, is, strictly speaking, a suit for a declaration with consequential relief under section 31 of the Specific Relief Act, and, for purposes of Court-fees and jurisdiction, it is governed by section 7 (*iv*) (*c*) of the Court Fees Act. (p. 32, col. 2.)

An alleged wrong view of the law is not a ground for interference in revision. (p. 32, col. 2.)

Devidas v. *Ramlal*, 13 Ind. Cas. 864; 7 N. L. R. 190 and *Raj Krishna Dey* v. *Bepin Behary Dey*, 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 391, referred to.

KOTHANDARAMA REDDY *v.* JAGATHAMBAL AMMAL.

Appeal from the order of the District Judge, Saugor, in Miscellaneous Appeal No. 2 of 1922, dated the 21st March 1922.

Mr. *B. V. Pradhan*, for the Appellant.

Mr. *G. L. Subhedar*, for the Respondent.

FACTS.—The plaintiff's husband Babhutsingh and the defendant's father Anantsingh were real brothers. Babhutsingh died 8 years ago while joint. At the time of Babhutsingh's death the moveable and immoveable property of his share was worth Rs. 15,000. The plaintiff was maintained according to the status of Babhutsingh's family. In August 1919 the defendant's guardian gave this advice to the plaintiff that as she had been sick and could not manage the property herself it would be better for her to give her property to the defendant and take Rs. 150 per year for her maintenance during her lifetime and cease to have any claim to the ancestral property and execute a document. The plaintiff accepted this condition because she was sick and helpless. In accordance with the above agreement the defendant executed a document on 5th August 1919 through his guardian and received Rs. 150 in the presence of the Registrar. When the amount for the maintenance for the second year became payable in August 1920, the plaintiff demanded it from the defendant who refused to pay it. Defendant's guardian stated that plaintiff had taken Rs. 150 and giving up her claim for ever had executed a registered document. The plaintiff is of very weak understanding and is altogether illiterate and the defendant's guardian deceived her and got the document executed. Under these circumstances the document may be amended in accordance with the agreement. On coming to know of the deception the plaintiff asked the defendant to amend the document but the defendant does not do so.

The plaintiff prays a decree may be passed for a declaration of right to the effect that Rs. 150 was settled to be the maintenance amount and for amendment of the document to the effect that defendant should pay Rs. 150 per year during the plaintiff's lifetime.

JUDGMENT.—No second appeal lies in this case, *vide* section 104 (2), Civil Procedure Code. I am asked to treat the case as a revision application. In my opinion no revision lies, as the District Judge had full jurisdiction to pass the order he did, and an alleged wrong view of the law is not a ground for interference in revision. But even if an application for revision lay, I am of opinion that the decision of the Munsif and District Judge is correct. The suit, strictly speaking, is one under section 31 of the Specific Relief Act and as brought it is a suit for a declaration with consequential relief, and for purposes of Court-fee and jurisdiction it is governed by section 7 (*iv*) (*c*) of the Court Fees Act. Art. 17 (*vi*) of Schedule II of the Court Fees Act cannot apply since it is possible to estimate the money-value of the claim and the plaintiff herself has attempted to do so. This case comes within the scope of my ruling in *Devidas* v. *Ramlal* (1). The views in which are confirmed in *Raj Krishna Dey* v. *Bepin Behary Dey* (2). The plaintiff has herself stated the real value of her claim which should as the Munsif has done be calculated on the principles of section 7 (*ii*) of the Court Fees Act, though the suit is not under that section. The appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 13 Ind. Cas. 864; 7 N. L. R. 190.

(2) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 72 OF 1922.

October 11, 1922.

Present:—Mr. Justice Krishnan.

KOTHANDARAMA REDDY AND ANOTHER—RESPONDENTS NOS. 1 AND 4—PETITIONERS

versus

JAGATHAMBAL AMMAL—PETITIONER—RESPONDENT.

Succession (Property Protection) Act (XIX of 1841), action under—Prejudice to applicant, finding of, absence of—Revision—Civil Procedure Code (Act V of 1908), s. 115.

Where a Court acts under Act XIX of 1841 without a definite finding to the effect that the applicant would be materially prejudiced if left to the ordinary remedy of a regular suit, the order is without jurisdiction and open to revision by the High Court. (p. 33, col. 1.)

CHAGANLAL *v.* KASHIRAM.

Petition, under section 115 of Act V of 1908 and sections 107 and 108 of the Government of India Act, praying the High Court to revise an order of the District Court, Chingleput in Original Petition No. 25 of 1919, dated the 17th November 1921.

Messrs. *E. Duraiswami Aiyar* and *T. R. Srinivasa Aiyangar*, for the Petitioners.

Mr. *T. Narasimha Aiyangar*, for the Respondent.

JUDGMENT.—To apply the Act XIX of 1841 to any particular case it is a condition precedent that the Judge should find or be satisfied that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application was made *bona fide*. See section 3 of Act XIX of 1841. There is no finding here by the Court that these conditions are fulfilled. Without that finding, the Court had no jurisdiction to act under the Act and its order is revisable; see *Bapamma* v. *Collector of Godavari* (1).

The revision has been confined by the petitioners to B and C schedule properties only. The order of the lower Court with regard to these properties is set aside. Each party will bear his or their own costs.

N. H. *Order set aside.*

(1) 12 M. 341; 4 Ind, Dec. (N. S.) 587.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO 547 OF 1921.

October 4, 1922.

Present:—Mr. Hallifax, A. J. C.

CHAGANLAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KASHIRAM—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 23—Registration, postponement of, beyond period allowed by law, validity of—Contract Act (IX of 1872), s. 23—Agreement postponing registration—Fraudulent intention—Enforceability—Registration of executed document, how enforced—Oral agreement to lease—Unregistered document executed subsequently—Oral evidence, admissibility of, to prove oral agreement.

An agreement for the postponement of the registration of an executed document beyond the time allowed by the Registration Act for the purpose cannot be enforced. (p. 34, col. 1.)

Venkatasami v. *Kristayya*, 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945, *Palni Goundan* v. *Pramasiva Goundan*, 6 M. L. J. 253, *Thayarammal* v. *Lakshimi Ammal*, 59 Ind. Cas. 417; 43 M. 822; 12 L. W. 161; (1920) M. W. N. 457; 39 M. L. J. 181, followed.

Where the parties agree that a properly stamped deed of lease should not be executed and registered till after the Settlement, the object being to conceal the actual assets of the village and so to reduce the assessment of Land Revenue, the agreement is void under section 23 of the Contract Act and cannot be specifically enforced.

Registration of an executed document can only be enforced by the proper proceedings under the Registration Act, followed, if necessary, by a suit under section 77 of the Act, but not by a suit of any other kind. (p. 34, col. 2.)

An unregistered deed of lease cannot be given in evidence in proof of the terms of the lease and its existence excludes all extrinsic evidence on the point. Oral evidence of the execution of such a document is admissible in proof of the oral agreement to lease made before the execution of the document, in order to support a claim for specific performance of the oral agreement. (p. 34, col. 2; p. 35, col. 1.)

Gangabisan v. *Tukaram*, 2 Ind. Cas. 244; 5 N. L. R. 70, referred to.

Appeal from a decree of the District Judge, Bhandara, dated the 31st August 1921, in Civil Appeal No. 67 of 1921.

Messrs. *M. Gupta* and *Erachshah*, for the Appellants.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—It has been assumed in this case that when Radha Bai gave the fourth defendant Nanhu, or rather his son Jairam, the unregistered deed of lease in September 1916 there was a contemporaneous oral agreement between them that a properly stamped deed should be executed and registered as soon as the Settlement then in progress had been announced. There is, in the first place, no evidence on which such a finding could legally be based. Lalu Kalar (4 D. W. No. 1), who was Radha Bai's Mukhtyar at the time and acted for her in the matter, says an oral agreement to this effect was made before the deed was executed but was not incorporated or mentioned in the deed; he appears to mean also that the oral agreement was not made or even mentioned on the occasion of the execution of the deed. Kanhu Mahar (4 D. W. No. 3) declares that the agreement was made on that occasion and was incorporated in the deed. The other two witnesses on this point are Keu Kohli (4 D. W. No. 2) and Kanhu Kohli (4 D. W. No. 4), and they declare that the matter was not even men-

tioned on the occasion of the execution of the deed. Hoktia Mahar (4 D. W. No. 5) also gave evidence on the point but admitted finally that it was all hearsay. The utmost that this evidence could be held to prove is that the parties agreed that a proper deed should *not* be executed till after the Settlement. But even if the agreement were to the effect accepted in the lower Courts, it could not be specifically enforced. The announcement of the Settlement might well have been after the end of the alleged term of the lease, which was seven years; as a matter of fact it seems to have been announced five years later.

(2) But any such agreement is entirely void under the provisions of section 23 of the Contract Act. The consideration for the agreement to postpone the registration of the deed of lease is obvious enough from the circumstances and scarcely needs specific admission, but it is clearly stated by the parties and the witnesses; the object was to conceal the actual *siwai amdani* of the village, and so to reduce the assessment of Land Revenue. This would defeat the provisions of the Registration Act and probably the Transfer of Property Act and the Stamp Act as well; it was fraudulent, in that it attempted to conceal the assets of the village and so reduce the assessment; it involved injury to all other members of the community, in that they would get as Land Revenue less than their proper share of the income of the village; and it was obviously opposed to public policy; indeed, of the five clauses of of section 23 of the Contract Act there was only one, that "it is forbidden by law" which would not necessarily avoid this agreement, and even that cannot be said with any certainty.

(3) But in any case no agreement for the postponement of the registration of an executed document beyond the time allowed by the Registration Act for the purpose can be enforced. This was very clearly laid down by the Madras High Court in *Venkatasami* v. *Kristayya* (1), and accepted by the same Court in the later cases of *Paini Goundan* v. *Paramasiva Goundan* (2) and *Thayarammal* v. *Lakshimi Ammal* (3). Registration of an executed document can only be enforced by the proper proceedings under the Registration Act, followed, if necessary, by suit under section 77 of the Act, but not by a suit of any other kind.

(4) A great deal has been said throughout the case about "the doctrine of part performance." But what is it that has been partly performed? We can get as far as discovering that it was an agreement to lease a half share in the lac produce of the village forests from September 1916, but there is no way in which the fourth defendant or any body else can show that the term of the lease was to exceed the four years during which he has actually held possession. The unregistered deed of lease cannot be given in evidence in proof of the term of the lease, and its admitted existence excludes all extrinsic evidence on the point.

(5) Very great laxity appears to have been shown in the lower Appellate Court in admitting secondary evidence of the contents of this document. In the first place, its loss was not proved. The fourth defendant pleaded that the first defendant took the document from him to show it to the Settlement Authorities and had never returned it; he did not say he had even asked for it. He said, further, that he would file copies of certain statements, which he never did, but apparently they were to prove only that the first defendant had had the document at one time, not that he had lost it or refused to return it. The fourth defendant's servant Lakshia (4 D. W. No. 6) and his son-in-law Dasrath (4 D. W. No. 7) speak of his handing over a number of documents to the first defendant just before the Settlement Officer came to the village, and Dasrath vaguely suggests that this document was in the bundle, though Lakshia scarcely goes even as far as that. This would clearly be insufficient to let in secondary evidence of the contents of the document, even if it were not excluded in any case by the fact that primary evidence of them is inadmissible because the document is unregistered, as was explained in *Gangabisan* v. *Tukaram* (4).

(1) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 913.
(2) 6 M. L. J. 263.
(3) 59 Ind. Cas. 417; 42 M. 822; 12 L. W. 161; (1920) M. W. N. 457; 39 M. L. J. 181.
(4) 2 Ind. Cas. 244; 5 N. L. R. 70.

(6) Oral evidence of the execution of such a document and probably of most of its contents could, I think, be given in proof of the oral agreement to lease that was made before the document was executed, according to the principles set out in the case just mentioned, but that would be of use only to support a claim for specific performance of that oral agreement, and a suit for that purpose was barred by time some months before the end of 1919, whereas the present suit was instituted on 7th August 1920.

(7) The fourth defendant, who is the only respondent here, is liable for his half share of the damages which amounted in all to Rs. 175 just as much as the fifth and sixth defendants, against whom a decree for Rs 87-8-0 was passed. The proper decree in the case would be one that made all these three defendants jointly and severally responsible for Rs. 175. Such a decree cannot, however, be given now as the fifth and sixth defendants were not joined as respondents to this appeal. The decree of the lower Courts will accordingly be modified by the excision from it of the order that the plaintiff's suit as against the fourth defendant Kashiram, son of Nanhu, be dismissed and the addition to it of an order that the fourth defendant Kashiram, son of Nanhu, do pay to the plaintiffs the sum of Rs. 87-8-0. The same defendant, who is the respondent, will pay to the plaintiffs and be paid by them costs in the first Court (apart from the sum of Rs. 56-7-0 for witnesses which he will pay himself) in the proportion ordered by that Court in the case of the fifth and sixth defendants, that is, in the proportion of 7 to 153, and will pay all the costs of both appeals.

Note.—(*October* 14, 1922).—Owing to the exaggeration of their claim by the plaintiffs, and also probably in no small degree to dishonest concealment of the amount of lac collected by the defendants, the final result of this judgment is that the fourth defendant has to pay only Rs. 32-11-2 to the plaintiffs. In regard to the fifth and sixth defendants the result of the litigation appears to be that the plaintiffs get one rupee and eight pies from them, on a proper calculation of the proportionate shares of the costs in the first Court, which are wrongly stated in the schedule of costs annexed to the decree of that Court. The decree now to issue will state only the amount payable by the fourth defendant to the plaintiffs.

G. R. D. & N. K. *Decree modified.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 507 OF 1922.

June 21, 1922.

Present:—Mr. Justice Scott-Smith.

LABH SINGH AND ANOTHER—DEFENDANTS—PETITIONERS

versus

GANPAT—PLAINTIFF, AND GANDA—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 148, 104—Pre-emption decree—Time for payment, whether can be extended—Appeal—Revision.

Section 148 of the Civil Procedure Code does not entitle a Court to extend the time fixed by the decree for payment of the purchase-money in pre-emption cases. (p. 36, col. 2.)

Suranjan Singh v. *Rambahal Lal*, 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950. *Hukam Chand* v. *Hayat*, 15 Ind. Cas. 941; 99 P. R. 1912; 121 P. W. R. 1912, relied upon.

Bachela v. *Sallo*, 18 Ind. Cas 991; 3 P. R. 1913; 226 P. L. R. 1913; 303 P. W. R. 1912. *Nabi* v. *Pathana*, 18 Ind Cas. 86; 60 P. R. 1913; 53 P. L. R. 1913; 72 P. W. R. 1913, distinguished.

An order made under section 148 of the Civil Procedure Code is not a decree and is not appealable as an order under section 104 of the Code. (p. 36, col. 2.)

The only way in which such an order can be set aside is by an application to the High Court in revision. (p. 36, col. 2.)

Suranjan Singh v. *Rambahal Lal*, 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950, relied upon.

Petition for revision of the order of the District Judge, Jullundur, dated the 3rd December 1921.

Mr. *B. D. Qureshi*, for the Petitioners.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—Ganpat, plaintiff-respondent, whose suit was dismissed by the Trial Court, obtained, on the 13th October 1921, a decree from the District Judge, Jullundur, for pre-emption of a plot of land on payment of Rs. 190-1-6 within one month from the date of the decree. He did not pay the money within the period fixed, and, therefore, under O. XX, r. 14 of the Civil Procedure Code the suit stood dismissed with costs from the date of the default

namely, from the 13th November 1921. On the 23rd November 1921, he applied to the Court for an extension of time for payment on the ground that though he was informed that his appeal had been accepted and that he had been given a decree for possession of the land in suit, he was not informed that he was to pay the sale-money within a certain fixed period. The learned District Judge, by his order of 3rd December, 1921, extended the period for payment of the money up to the 3rd January, 1922. From this order the defendants-vendees have appealed.

Lala Fakir Chand on behalf of the respondent raises a preliminary objection that no appeal lies and in support of his contention has referred to 34 Indian Cases, 88 [*Abu Muhammad Mian* v. *Mukut Pertap Narain* (1)] which corresponds with 1 Patna Law Journal 92. The first question which I have to determine is, whether the learned District Judge was justified in extending the period fixed for payment under section 148 of the Civil Procedure Code. Counsel for the respondent cites *Baghela* v. *Sallo* (2) and *Naba* v. *Pathana* (3) in support of the view that the Court had the power to extend the time. The facts of the case reported as *Baghela* v. *Sallo* (2) are quite distinguishable from those of the present case. There the decree directed payment of the purchase-money only and stated nothing about the costs, and it was held that the plaintiff had substantially complied with the decree of the Court, and that he was entitled to a further time for payment of costs. In *Naba* v. *Pathana* (3), a Single Judge's decision, it was held that the plaintiff had substantially complied with the order of the Court by paying the money into the Post-Office for transmission to the vendee within ample time in order to reach him, under ordinary circumstances, within the period fixed. At the end, there is an *obiter dictum* by the learned Judge that the time can be extended under section 148 of the Civil Procedure Code. The matter was fully considered by a Full Bench of the High Court of Allahabad in the case reported as *Suranjan Singh* v. *Rambahal Lal* (4), in which it was held that section 148 of the Civil Procedure Code does not entitle the Court to extend the time fixed by the decree for payment of the purchase-money in pre-emption cases. The same view was taken by this Court in the case reported as *Hukam Chand* v. *Hayat* (5). I fully agree with this view. In accordance with the terms of the decree plaintiffs' suit stood dismissed when he made default of payment of the amount within the period fixed by the Court, and the Court could not thereafter restore the decree by extending the time.

In *Suranjan Singh* v. *Rambahal Lal* (4) it was also held that an order made under section 148 of the Code of Civil Procedure is not a decree and is not appealable as an order under section 104. The Learned Judges said that the only way in which such an order could be set aside was by an application to the High Court in revision. Mr. Qureshi asks that, if this Court holds that no appeal lies, it may treat the present appeal as a revision. This, I think, is a reasonable request. I agree with the authority cited that no appeal lies, but on the Revision Side, I set aside the order of the learned District Judge extending the time. The effect of this order will be that the plaintiff's suit stands dismissed with costs. I make no order as to costs in this Court.

Z. K. *Order set aside.*

(1) 34 Ind. Cas. 88; 1 P. L. J. 92; 2 P. L. W. 400.
(2) 18 Ind. Cas. 994; 3 P. R. 1913; 226 P. L. R. 1913; 303 P. W. R. 1912.
(3) 18 Ind. Cas. 86; 60 P. R. 1913; 53 P. L. R. 1913; 72 P. W. R. 1913.
(4) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950.
(5) 15 Ind. Cas. 941; 99 P. R. 1912; 121 P. W. R. 1912.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 7-B OF 1922.

October 13, 1922.

Present:—Mr. Kotwal, A. J. C.

MADHORAO DEORAO—NON-APPLICANT NO. 5—APPELLANT

versus

NAGO AND OTHERS—DEBTOR-APPLICANTS AND CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 3 (1), 75 (1)—Subordinate Court invested with insolvency jurisdiction—Appeal, whether lies to District Court.

The provisions of an Act conferring jurisdiction for a particular purpose cannot by implication affect or modify the provisions of an Act creating a status for general purposes. (p. 38, col. 1.)

Although the Provincial Insolvency Act of 1920 provides that so far as original proceedings under it are concerned a subordinate Court specially invested with insolvency jurisdiction shall exercise it concurrently with the District Court, yet an appeal from the decision of such a subordinate Court lies to the District Court. (p. 37, col. 2.)

Appeal from an order of the Sub-Judge, Yeotmal, dated the 20th October 1921, in Insolvency Case No. 11 of 1921.

Mr. *R. R. Jaywant*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge, Yeotmal, adjudging Nago Bhumya insolvent under section 27 (1) of the Provincial Insolvency Act of 1920 on the petition of one of his creditors Gangaram Rajayya. Gangaram had alleged that Nago had executed a sale-deed of all his property in favour of Madhorao Deshmukh with intent to defraud his creditors. The grounds on which the adjudication order was made are given in the extract from the Subordinate Judge's order:—

"Statements of the debtor and the affidavits of the applicant and of the alleged transferee make it quite clear that Nago has made a 'transfer of all or substantially all his property to a third person for the benefit of his creditors generally' within section 6 (*a*) of the Insolvency Act of 1920. This is itself an act of insolvency under clause (*a*) of section 6, whether it has been done with or without any intention to defeat or delay creditors within clause (*b*) of the said section. Thus I find that Nago has committed an act of insolveney. The requirements of section 9 of Act V of 1920 are thus satisfied in all respects."

Madhorao appeals from the order. A preliminary objection is raised that the appeal, if one is at all allowed by law, does not lie to this Court. *Prima facie* the decision is that of a Court subordinate to the District Court and appeal therefrom lies under section 75 (1) to the District Court. But the learned Pleader for the appellant argues that insolvency cases may involve subject-matter of a value over Rs. 10,000, that suits of a value over Rs. 10,000 are triable only by the District Judge and that, therefore, as soon as a Subordinate Judge is appointed a Judge under section 3, Insolvency Act, he is by implication appointed an Additional District Judge under section 26 of the Central Provinces Courts Act as applied to Berar. An Additional District Judge, it is argued, is not subordinate to the District Judge and the appeal from his order does not lie to the District Judge but to this Court.

The Insolvency Act provides for the trial of original proceedings under that Act as well as appeals.

Section 3 (1) provides that:—

"The District Courts shall be the Courts having jurisdiction under this Act:

Provided that the Local Government may, by notification in the Local Official Gazette, invest any Court subordinate to a District Court with jurisdiction in any class of casses, and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act."

Section 75 (1) provides that:—

"The debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final:

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit:

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of Civil Procedure Code, 1908."

Although the Act provides that, so far as original proceedings under it are concerned, a subordinate Court when it is specially invested with insolvency jurisdiction shall exercise it concurrently with the District Court, yet for the purpose of appeal it makes that Court subordinate to the District Court. Under the Act, therefore, the appeal lies to the District Court. No question of any status brought into existence by implication here arises. I am, besides unable to see how an appointment as an

Additional District Judge under section 26 (1), Central Provinces Courts Act, can be implied from an appointment as an Insolvency Judge under the Insolvency Act. The provision of an Act conferring jurisdiction for a particular purpose cannot by implication affect or modify the provisions of an Act creating a status for general purposes. I hold that the appeal does not lie to this Court. It is, therefore, rejected. The appellant will pay the respondent's costs. Pleader's fee Rs. 25.

G. R. D. *Appeal rejected.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 817 OF 1921.

June 16, 1922.

Present:—Mr. Justice Scott-Smith.

THE FIRM JAGAN NATH-DIWAN CHAND OF GUJRANWALA, THROUGH JAGAN NATH BHAHBRA—PLAINTIFF—PETITIONER

versus

THE FIRM JAGAN NATH-MOTI LAL OF CALCUTTA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 20 (c), 115, O. VII, r. 10, O. XLIV, r. 1 (a)—Failure to deliver goods—Cause of action—Place of suing—Order returning plaint—Appeal—Revision.

Plaintiff, residing at Gujranwala, ordered goods from defendant, residing at Calcutta. Defendant sent the goods by Railway but consigned them to himself and sent the Railway Receipt to plaintiff per V.-P. P. for the balance of the price. The latter refused to pay for the V.-P.P. but sent the amount of the balance to the defendant and demanded delivery of the goods. The goods were, in the meantime, lost by the Railway. Plaintiff, thereupon, sued the defendant at Gujranwala for return of the price paid by him:

Held, (1) that the goods had throughout continued under the control of the defendant;

(2) that the goods had to be delivered at Gujranwala;

(3) that the failure to deliver the goods was a part of the cause of action;

(4) that, therefore, the Gujranwala Courts had jurisdiction to entertain the suit.

Interference in revision is ordinarily inadvisable with an order passed on appeal from an order of the Trial Court returning a plaint for presentation to the proper Court, and should only be exercised in exceptional cases to remedy an injustice.

Vuppuluri Atchayya v. *Sri Kanchumarti Venkata Seetarama Chandra Rao*, 18 Ind Cas. 555; 24 M. L. J. 112; 39 M. 195; 13 M. L. T. 80, *Ram Labhaya* v. *Bishan Das*, 3 Ind Cas. 607; 77 P. R. 1909; 125 P. W. R. 1909; 124 P. L. R. 1909, *Durga Parshad Mutsaddi Lal* v. *Ruria Mal-Dogar Mal*, 65 Ind. Cas. 282; 4 L. L. J. 176; 29 P. L. R. 1922; (1922) A. I. R. (L) 100, *Chandu Lal* v. *Kokamal*, 61 Ind. Cas. 36; 43 A 334; 19 A. L. J. 110, referred to.

Petition under section 44 of Act VI of 1918, for revision of an order of the Dist ict Judge, Gujranwala, dated the 19th July 1921, affirming that of the Subordinate Judge, 2nd Class, Gujranwala, dated the 31st May 1920.

Lala *Jagan Nath*, for the Petitioner.

Lala *Amar Nath Chona*, for Mr. *B. N. Kapur*, for the Respondent.

JUDGMENT.—The plaintiff-firm residing in Gujranwala arranged with the defendant-firm residing in Calcutta to purchase certain goods and send them to Gujranwala; the plaintiff-firm was to send the money to the defendant-firm in Calcutta. The plaintiff remitted Rs. 800 to the defendant and the latter consigned the goods to itself in G jranwala sending the Railway Receipt by value-payable post against a sum of Rs. 314, which was the balance due for the goods purchased. The plaintiff refused to take delivery of the Railway Receipt through the value-payable post and it was returned to the defendant. The plaintiff then sent the balance of Rs. 314 to the defendant and asked the latter to instruct the Railway Authorities at Gujranwala to deliver the goods to the plaintiff. Correspondence shows that frequent requests were made to the Railway Authorities to deliver the goods but without success and it appears that the goods have been lost. The plaintiff, therefore, sued the defendant for return of Rs. 1,114 remitted to the defendant. The suit was instituted in the Court of a Subordinate Judge at Gujranwala, who held that he had no jurisdiction, no part of the cause of action having arisen at Gujranwala. The lower Appell te Court upheld the order in appeal and the plaintiff has, therefore, come to this Court on the Revision Side.

Counsel for the respondent refers to *Chandu Lal* v. *Kokamal* (1), in which it was held that an order of this ort could not be the subject of revision. A different view was taken by a majority of the Judges in a Madras

(1) 61 Ind. Cas. 36; 43 A. 334; 19 A. L. J. 110.

case reported as *Vuppuluri Atchayya* v. *Sri Kanchumarti Venkata Seetarama Chandra Rao* (2), and also in *Ram Labhaya* v. *Bishan Das* (3), and in a single Bench judgment of this Court reported as *Durga Parshad-Mutsaddi Lal* v. *Rulia Mal-Dogar Mal* (4). In my opinion interference in revision is ordinarily inadvisable in a case of this sort and should only be exercised in exceptional cases to remedy an injustice ; see in this connection *Ram Labhaya* v. *Bishan Das* (3). Now, if the plaintiff is by law entitl d to institute this case in Gujranwala it wou'd be a grave injustice to him to insist on its trial in Calcutta which would put him to very great expense, merely because the lower Courts have erroneously held that the Gujranwala Court has no jurisdiction. I will, therefore, proceed to dispose of the application on the merits.

Both the Courts below have omitted to notice that the Railway Receipt was originally sent by the defendant to the plaintiff in Gujranwala through the medium of value-payable post. They have also omitted to notice that the goods were consigned by the defendant-firm to itself in Gujranwala. It is, therefore, clear that the goods at Gujranwala were in possession of the Railway Authorities as agents of the defendant-firm and that the latter still had control over them and that the plaintiff had no control over them. Whatever the original contract may have been it was modified by what subsequently occurred. It does not appear that the parties ever agreed that the value-payable post should be used for the purpose of recovering the whole or part of the money due from the plaintiff to the defendant, and this was why the plaintiff did not take delivery of the Railway Receipt upon payment of Rs. 314. Instead of that, the plaintiff sent the money remaining due to the firm in Calcutta and asked that firm to give the necessary directions to the Railway for the goods to be delivered. The goods, therefore, had to be delivered to the plaintiff in Gujranwala, and the non-delivery of the goods is certainly a part of the cause of action. I, therefore, hold that the Gujranwala Courts have jurisdiction to try this case.

I allow the revision and, setting aside the orders of the lower Courts, remand the case to the Subordinate Judge at Gujranwala for disposal in accordance with law. Costs in this Court shall be costs in the case.

Z. K. *Revision allowed.*

(2) 18 Ind. Cas 555 ; 24 M. L. J. 112 ; 39 M. 195 ; 13 M. L. T. 60.
(3) 3 Ind. Cas. 607 ; 77 P. R. 1909 ; 125 P. W. R. 1909, 124 P. L. R. 1909.
(4) 65 Ind. Cas. 282 ; 4 L. L. J. 176; 29 P. L. R. 1922; (1922) A. I. R. (L.) 100.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 305-B OF 1921.
September 23, 1922.
Present :—Mr. Kotwal, A. J. C.
BAKARAM—DEFENDANT NO. 5—APPELLANT
versus
Shri RAMCHANDRA MAHARAJ SAUSTHAN, THROUGH WAHIWATDARS HIRALAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r.17—Amendment—Description of plaintiff corrected—Limitation—Gift not affirmed—Validity—Berar Land Revenue Code, 1896, ss. 205, 201 Presumption—"Co-occupant," whether includes juridical person.

No question of limitation arises in the case of an amendment of plaint when the description of the plaintiff is corrected and when there is no substitution or addition of a new plaintiff. (p. 40, col. 1.)

A gift is valid until it is avoided by the donee; it does not cease to be operative because it is not affirmed by him. (p. 40, col. 1.)

A co-occupant who is entitled to pre-empt under the Berar Land Revenue Code may be a juridical person as well as a living person. (p. 40, col. 2.)

Appeal from a decree of the District Judge, Amraoti, in Civil Appeal No. 24 of 1920, dated the 27th July 1921.

Messrs. *D. W. Kathalay* and *P. N. Rudra*, for the Appellant.

Mr. *N. G. Bose*, R. B., for the Respondents.

JUDGMENT.—The main ground urged in this appeal is with regard to the amendment of the plaint allowed in the First Court. In the original plaint Hiralal and Tulsiram were mentioned as the plaintiffs. After the case was closed by the parties and a date fixed for hearing arguments the Court took

an objection *suo motu* to the frame of the suit. The plaintiffs thereupon applied for amendment by adding the name of the temple as the plaintiff and retaining the names of Hiralal and Tulsiram as the *wahiwatdars* of the temple. The amendment was allowed, the defendant's Pleader not opposing it. In this Court, as in the lower Appellate Court, it is urged that the amendment should not have been allowed as the period of limitation for the suit had expired at the date of the amendment. There is no force in this contention. No substitution or addition of a new plaintiff was made by the amendment but only the description of the plaintiff was corrected. The first paragraph of the plaint stated that Hiralal and Tulsiram were managers of the temple. The deed of gift on which the title in suit rested was filed. This deed mentions the temple as the donee and Hiralal and Tulsiram as the managers. It is clear, therefore, that the suit was not filed by Hiralal and Tulsiram on their own behalf but on behalf of the temple and the omission to mention the temple in the heading was merely a mistake in the description of the plaintiff. No question of limitation arose when that description was corrected. That it was understood by the defendant's Pleader to be a mere misdescription is clear from the fact that he did not oppose the amendment. This ground must, therefore, fail.

Reference is made to *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1), and it is urged that, as defendants Nos. 1 and 2 did not elect to affirm the gift till the 29th June 1919, the gift did not become valid till then and the plaintiff had, therefore, no title at the time of the sale to the appellant, defendant No. 6, on the 7th May 1919. This contention assumes that the gift was invalid till affirmed, whereas the contrary is the law, namely, that it is valid till avoided. Under it, therefore, the plaintiffs had a valid subsisting title as co-occupants at the date of the sale to the appellant.

Reference is made to sections 205 and 211 of the Berar Land Revenue Code and it is argued that Rs. 600, which is the price mentioned in the sale-deed of 34 *gunthas*, dated the 21st July 1919, should have been awarded as the price of pre-emption since there was no allegation that that price was not fixed *bona fide*. The plaintiffs stated in the plaint that Rs. 250 was the market-value of this land. He was claiming pre-emption under the above sections and, though he did not expressly state that the price mentioned in the deed was not *bona fide*, he must be taken to have said so by implication. The defendant admitted that the value was Rs. 350 and urged that the pre-emption price should be fixed at that figure. The plaintiff agreed to this figure. I do not see how the lower Courts were wrong in allowing the amount agreed to by the parties. It may be taken that the defendant did not wish the question of *bona fides*, which would have more definitely arisen if he had not urged that the pre-emption price should be fixed at Rs. 350, to be raised and tried.

It is lastly urged that under the Berar Land Revenue Code the co-occupant who is entitled to pre-empt is a human being and not a temple. I am unable to follow the reasoning on this point. A co-occupant may be a juridical as well as a living person.

The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 152-B OF 1921.

August 24, 1922.

Present:—Mr. Prideaux, A. J. C.

SHRIRAM—DEFENDANT—APPELLANT

versus

BABAJI AND OTHERS—PLAINTIFFS—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Registration—Agreement to give share of property in consideration of assistance in recovering it, whether registrable—Suit for specific performance, whether maintainable—Limitation, terminus a quo.

A written agreement whereby a person agrees to give another a share in certain property in consideration of that other's advice and assistance in recovering the property through the Court does not by itself create or extinguish any right in immoveable property and is not compulsorily registrable to render it admissible in evidence, and a suit for

specific performance of such an agreement is maintainable. (p. 41, col. 2.)

Where in such an agreement no particular date is fixed for giving the share of the property, limitation for a suit for the recovery of the property would commence when the final order in the case is passed. (p. 41, col. 2.)

Appeal from a decree of the First Additional District Judge, Akola, in Civil Appeal No. 259 of 1920, dated 22nd February 1921.

Mr. *Atmaram Bhagwat*, for the Appellant.

Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—The facts of this case are sufficiently given in the judgments of the Courts below. It is sufficient to state that the plaintiff's case is that the first defendant was really the owner of fields, Survey Numbers 42 and 43, situate at Mouza Ekamba, *taluq* Basim. The plaintiff agreed to help him in recovering these fields and did so. For the help so accorded the first defendant agreed to give the plaintiff a half share in the two fields. Having obtained his land the first defendant now refuses to give the plaintiff what he agreed to give him. Hence the present suit. Plaintiff claims that defendant should be made to give him a deed of relinquishment in respect of a half in each field in suit. The second defendant is a lessee of defendant No. 1.

The first defendant contended that though he gave the agreement (Exhibit P-3) to the plaintiff as alleged, it was executed under undue influence. The agreement was champertous and against public policy. Further pleas were that the suit was barred by limitation as the first defendant got the fields through the Court on 15th March 1916 and the present suit was filed more than three years from that date. The plaintiff has obtained a decree in both lower Courts.

The plea of undue influence has certainly not been proved and, in my opinion, the case is clearly not barred by limitation. The agreement (Exhibit P-3) fixes no particular time for the giving of the half fields to the plaintiff though it states that if the present defendant No.1 got the land in Court he would give it to plaintiff. Limitation would, therefore, arise when he refused to do so and if it be held that the date of the final order in either of the two cases which defendant brought be the date for the commencement of limitation, then in one case at least such order was passed within three years of the institution of the suit. There is no force in the argument that, because as regards the other case this does not apply, therefore, the case must fail on the ground of limitation. The halves of the two fields were the subject-matter of a single contract and it must be held that the date of Mr. Mittra's order in Second Appeal No. 103-B of 1916, namely, 24th August 1917, governs the case. There is no force in the argument that the suit is barred by limitation.

It is contended that the want of registration of the document (Exhibit P.3) bars the present suit. Here, again, I am unable to agree with the appellant's learned Pleader. That document does not by itself extinguish any right in property over Rs. 100 in value. It is obvious that some further document was contemplated, for the present appellant could not, if so disposed, have made over the land as a gift to the plaintiff without a duly registered document. I agree with the lower Appellate Court as to its finding on the question of registration.

It is next argued here that specific performance of the contract should not have been decreed because breach of it could be adequately compensated for by a money award. But this is not so, in my opinion. The appellant agreed to give certain specific lands to the plaintiff. If he had agreed to sell certain named lands there is no doubt that a suit would lie for the specific performance of the contract, because the breach of it could not be adequately compensated for by money. And the same rule applies in the present case.

Nothing also has been argued here. It is perfectly clear that the defendant, having obtained the advice and assistance of the plaintiff in the running of his previous suits, now wishes, afeter being successful in those suits, to avoid the agreement wich made such assistance available. Having obtained his land through the Courts he wishes to keep it all and deprive the plaintiff of the agreed reward for the assistance rendered by him. The case, in my opinion, has been rightly

decided. This appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1714 OF 1919.

August 2, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

MELA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat PREM KAUR—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), s. 36—Document admitted by Trial Court on payment of penalty—Appellate Court, whether can interfere.

Where a Trial Court holding that a certain document is an agreement to pay and not a pro-note, admits it in evidence on payment of the requisite amount of stamp and the penalty prescribed by the law, that admission, however erroneous, cannot, under the provisions of section 36 of the Stamp Act, be questioned in the Court of Appeal.

Second appeal from a decree of the District Judge, Lahore, dated the 23rd (26th) July 1919, affirming that of the Senior Subordinate Judge, Lahore, dated the 24th August 1918.

Mr. *Des Raj Sawhny*, for the Appellants.

JUDGMENT.—The learned District Judge, concurring with the Subordinate Judge, has held that the defendants' father made an entry in the plaintiff's book on the 18th January 1912, admitting his liability for the payment of Rs. 1,000, and the only point urged by the learned Counsel for the defendants in this appeal is that the entry in question constituted a promissory note and was inadmissible in evidence for want of stamp. Now, the Trial Court, holding that the document was an agreement to pay, admitted it on payment of the requisite amount of stamp and the penalty prescribed by the law. Under section 36 of the Indian Stamp Act that admission, however erroneous, cannot be questioned in the Court of Appeal. The law contained in the aforesaid section is perfectly clear,

and the document cannot be excluded from consideration.

This is the only contention raised before us, and we have no hesitation in holding that it is wholly untenable.

We must, therefore, dismiss the appeal.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 552 OF 1921.

October 4, 1922.

Present:—Mr. Hallifax, A. J. C.

LAXMAN AND ANOTHER—NON-APPLICANTS—APPELLANTS

versus

BISRAM BIRJU—APPLICANTS—RESPONDENTS.

Money wrongly recovered under authority of decree—Proper remedy—Suit—Limitation Act (IX of 1908), Sch. I, Art. 120.

For the refund of money wrongly recovered under the authority of a decree, the proper remedy is a regular suit and the limitation for such suit is six years under Art. 120 of Schedule I to the Limitation Act.

Appeal from a decree of the District Judge, Bhandara, dated the 13th August 1921, in Civil Miscellaneous Appeal No. 58 of 1921.

Mr. *M. B. Kinkhede*, R. B., for the Appellants.

Mr. *M. K. Padhye*, for the Respondents.

JUDGMENT.—At the beginning of this litigation the appellants, who were non-applicants in the present proceeding, were represented by their father, Narayan Shridhar Naik, and it will be convenient to speak of them as the Naik. The respondents, whose application under section 144 of the Civil Procedure Code for restitution of half the amount recovered from them under a decree was rejected by the First Court and allowed in the lower Appellate Court, are two brothers of the Lodhi caste and will be so described. The assumptions now made by the learned District Judge that the decree relating to title

and possession in Suit No. 8 of 1913 made the Naik entitled to half the profits for the years 1908-09 and 1909-10, and that the decree for mesne profits in Suit No. 73 of 1911 represented the full profits of the land for those same years are as entirely without warrant as the assumption made in the latter suit that the decree in the suit under the Specific Relief Act made him entitled to the full profits for those two years. It is quite impossible to hold, as the learned District Judge has held, that the decree relating to title and possession in Suit No. 8 of 1913 modified or varied in any way the decree for mesne profits in suit No. 73 of 1911.

(2) It is necessary, further, to point out that, even if the learned Judge's view were correct, his order of the remand was not justifiable in any way. He raised a question of limitation himself at the end of his judgment which, as he says himself, was not mentioned by either party even in argument, and passed an order for the payment of a sum of money to the applicants subject to the decision by the lower Court of that question, though there were ample materials on the record for a decision by himself; indeed, no further materials were either required or conceivably available. The answer to the question stated is also perfectly obvious. The application was not an application for execution of a decree and, therefore, limitation cannot be governed by Art. 182 of the Limitation Act; it is, therefore, governed by Art. 181, assuming, of course, that the application lay at all. It is equally beyond doubt that if the right to apply ever did accrue, it did so on the date on which the original decree was passed in Suit No. 8 of 1913, which was the 12th of March 1915.

(3) The proper remedy of the Lodhi brothers was a separate suit for a refund of the money wrongly recoverd from them by the Naik. The limitation of such a suit would be governed by Art. 120 of the Limitation Act and the period would run from 12th March 1915. The present application was made on 25th September 1920 and the whole of the period since then can be counted out under section 14 of the Limitation Act. They have, therefore, still very nearly six months in hand. The attitude of the Naik as appellants in this Court, and throughout the case, is most discreditable, though unfortunately too common to excite much remark. It is this:

"Through a mistake of a Civil Court due to the lies we told it we have been enabled to extract Rs. 526 from the Lodhi brothers dishonestly, and we do not intend to disgorge it until we are compelled to do so by their having gone through every formality required by the law, and we insist on taking full advantage of their ignorance of those formalities of re-paying this money of theirs which we have wrongfully taken; before we are absolutely compelled to do so we refuse even to think,"

(4) Fortunately, this cynically dishonest position cannot be maintained in this case in the face of section 14 of the Limitation Act. If this appeal is allowed to succeed on the technicalities of procedure that have been urged, the respondents will have merely to file a regular suit within five or six months, the result of which would inevitably be a decree for the amount of money that the appellants have already been ordered to pay together with the costs of the suit. It would seem that it was mainly to avoid a claim being defeated on mere technical pleas of the sort that have been taken here that section 47 (2) of the Civil Procedure Code was enacted. As to the facts, and the money being really due, and as to limitation and jurisdiction, there is no dispute. I, therefore, treat the application as a regular suit and order that, on the payment by the applicants of the amount of the Court-fees leviable in such a suit, a decree shall issue directing the payment to them by the non-applicants of the sum of Rs. 526 with interest thereon at 12 per cent. per annum from the 12th of December 1914 to the date of payment, and also the payment by the non-applicants of half the total costs of these proceedings in the First Court and of all the costs of the appeals to the Court of the District Judge and this Court. The Pleader's fee in this Court will be Rs. 55.

S. D. *Claim decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO.253-B OF 1921.
August 14, 1922.
Present:—Mr. Kotwal, A. J. C.
ANANDRAO AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
DADA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Incomplete partition,

ANANDRAO v. DADA.

allegation of—Burden of proof—Presumption—Appeal, second—Remand—Attestation—Knowledge of contents.

Once it is admitted that a partition has taken place, the presumption is that all the property belonging to the joint family has been divided, and the burden of proving that some of the property was left undivided and continued to be joint, lies upon the person alleging it.

Unless it is shown that material circumstances were brought to the notice of an Appellate Court which it has omitted to consider, a Court of second appeal will not impute any negligence, and remand the case for re-consideration.

Mere attestation of a deed does not lead to the inference that the person attesting the deed knows its contents.

Pandurang Krishnaji v. *Markandeya Tukaram*, 65 Ind. Cas. 954; 18 N. L. R. 1; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 49 C. 334; (1922) A. I. R. (P. C.) 20 (P. C.), followed.

Appeal from a decree of the Additional District Judge, Amraoti, dated the 19th April 1921, in Civil Appeal No. 39 of 1921.

Mr. *G. G. Hatwalne*, for the Appellants.

Mr. *Balwantrao Pendharkar*, for th Respondents.

JUDGMENT.—After the plaintiffs had once admitted the partition before the date of the decree, the burden of proof lay upon them to prove that the property at the time of the partition was joint family property and was left undivided at the partition, that is, continued to be kept joint till the date of the suit, the presumption being that all property that belonged to the joint family was divided at the partition. Whether the property in suit was joint at the date of the partition and continued to be joint thereafter depends upon the questions, when was the property acquired and when did the partition take place. It is not disputed that the property was acquired in 1871. As to the date of the partition the palintiffs alleged that it took place 25 years before 1919, and the defendants that it took place 50 years before that year. Both parties adduced evidence to prove their respective allegations. The lower Courts have disbelieved the plaintiffs' evidence and have found that the partition took place 50 years before 1919. The appellants' complaint is, that a number of circumstances from which inferences favourable to them could have been drawn have not been considered. The circumstances are that some fields which appear on the record to have been with Gunpatrao, the defendants' father, in 1873 and 1874 and 1875, and others which appear to have been acquired by him in or about the year 1890 are not with the plaintiffs. It is that the inference is that the partition must have taken place after 1890. It cannot be said that no other inference than that of an acquisition under a partition can be drawn from these circumstances. It is not unlikely that the plaintiffs may have acquired the fields from Gunpatrao otherwise than under a partition, *i.e.*, by sale or exchange, and it does not appear that these circumstances were placed before the lower Appellate Court and relied on by the plaintiffs. In the grounds of appeal before the lower Appellate Court they are not specially referred to nor is it complained in the memorandum of appeal to this Court that the lower Appellate Court has failed to consider them. Unless it is very clearly shown to this Court that material circumstances were brought to the notice of the lower Appellate Court and that it has omitted to consider them, this Court will not impute any negligence to it and remand the case for re-consideration by it. The lower Appellate Court has relied upon the oral evidence of the defendants supported by the *faisal patraka* and no reason is shown why that finding should not be accepted.

With regard to ground No. 3, the evidence of Sarjerao, as P. W. No. 6, that the deed of partition of the year 1907 between Satwaji and himself was read out to Gunpatrao and that Gunpatrao otherwise knew its contents has been disbelieved and the mere fact of Gunpatrao's attestation does not lead to the inference that he knew the contents of the deed. *Pandurang Krishnaji* v. *Markandeya Tukaram* (1). The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 65 Ind. Cas. 954; 18 N. L. R. 1; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 49 C. 334; (1922) A. I. R. (P. C.) 20 (P. C.).

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 75 OF 1922.
June 28, 1922.
Present:—Sir Shadi Lal, KT., Chief Justice.
PIARA RAM—DEFENDANT—PETITIONER
versus
GANGA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Attachment of debt—Objection dismissed—Finality of order.

The procedure laid down in rules 58 to 63 of O. XXI of the Civil Procedure Code applies to a debt attached in execution of a decree, and an order dismissing the objection of the alleged debtor that no debt is due from him is binding upon him, if he does not institute a suit for a declaration within a year from the date of the order passed against him.

Tayabali v. *Atma Ram*, 25 Ind Cas 375; 38 B. 631; 16 Bom. L. R. 520, relied upon.

Unless such a suit is brought by the alleged debtor he cannot assert, in answer to a suit brought by the auction-purchaser of the debt for the recovery of the debt, that no debt was due from him.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Munsif, First Class, exercising the powers of a Judge, Small Cause Court, Jhang, dated the 17th August 1921.

Mr. *Beni Parshad Khosla*, for the Petitioner.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The facts of this case are briefly as follows:—In execution of a decree obtained by one Masta Ram against Shada, the decree-holder attached a debt alleged to be due by the defendant, Piara Ram, to the judgment-debtor Shada. It appears that Piara Ram raised an objection that no debt was due by him to Shada, but the Executing Court did not accede to the objection and passed an order advertising the sale. In November 1920 the plaintiff, Ganga Ram, purchased the debt at the auction-sale, and has now brought this suit for the recovery of the money against Piara Ram.

The Trial Judge holds, that, as the defendant, Piara Ram, did not bring a suit within one year in accordance with the provisions of O. XXI, r. 63, Civil Procedure Code, he is precluded from urging that no money was due from him to Shada. The learned Counsel for the defendant contends that the statutory period of one year had not expired when his client denied in the written statement his liability to Shada, and that it is not necessary that he should have filed a suit in order to establish his contention. But, as pointed out in Mulla's Civil Procedure Code, 7th Edition, page 615, unless a suit is brought, as provided by rule 63, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceedings, the right denied to him by the order. Further, it has been held in *Tayabali* v. *Atma Ram* (1), that the procedure laid down in rules 58 to 63 applies to a debt attached in execution of a decree, and that an order made against the alleged debtor is binding upon him if he does not institute a suit for a declaration that no debt was due from him, within a year from the date of the order passed against him.

For the aforesaid reasons, I am of opinion that no ground for my interference has been established. The application for revision is, therefore, dismissed with costs.

Z. K. *Application dismissed.*

(1) 25 Ind. Cas. 375; 38 B. 631; 16 Bom. L. R. 520.

NAGPUR JUDICIAL COMMISSINER'S COURT.

CIVIL REVISION NO. 114 OF 1922.
September 8, 1922.
Present:—Mr. Batten, J. C.
Seth BHOJRAJ—PLAINTIFF—APPLICANT
versus
Panda SHANKERNATH—DEFENDANT—NON-APPLICANT.

Account—Mistake, right of party to prove—C. P. General Clauses Act (I of 1914)—Interest, calculation of—Gregorian calendar.

A person is always entitled to prove that there was a mistake in the accounts and that he signed them as correct by mistake.(p. 46, col. 1).

Interest on an account need not be calculated according to the Gregorian calendar, as the General Clauses Act does not apply to cases of this kind. (p. 46, col. 1.)

Revision against the decree of the Small Cause Court, Saugor, in Small Cause Suit No. 1938 of 1921, dated the 17th March 1922.

FACTS.—The plaintiff-applicant had borrowed three amounts from the defendant non-applicant on *sarkhals*. He made certain re-payments on 19th November 1921. Rupees 1,090-2-0 were debited

to plaintiff's account by the defendant in his *sarkhat* on acount of interest at *hatmiti* system and the total was struck on the debit side the very day. The palintiff signed the account adding the words " *chook bhool lena dena* " errors and omissions excepted, and paid up the balance found due as per accounts. On calculation, he found that there was an error and overpayment of Rs. 123-14-6. He demanded back the money from the defendant which he refused to pay. He filed the suit for recovery of the amount. The Court found that the amount as debited on account of interest to plaintiff's account was wrongly calculated but held that the plaintiff was precluded from claiming it back as he had signed the accounts. The lower Court further went out of its way in holding that the plaintiff was liable to pay *batta* Rs. 23 and interest on Rs. 700 which the defendant alleged was kept idle in plaintiff's account. The plaintiff denied his liability for *batta* and interest. These items arose separately out of transactions having no connection with the *sarkat* account. The defendant, if he wanted to claim set off, should have paid Court-fees on the amount which he did not do and yet the lower Court allowed these items and dismissed the claim.

Mr. *V. D. Kale*, for the Applicant.

Mr. *B. R. Pendharker*, for the Non-Applicant.

ORDER.—A person is always entitled to prove, if he can, that there was a mistake in the accounts and that he signed them as correct by mistake. In this case the learned Pleader for respondent (non-applicant) admits that there was a mistake to the extent of Rs. 49 and the applicant-plaintiff is entitled to a decree for that amount. If the interest was calculated according to Gregorian calendar, plaintiffs would be entitled to Rs. 123-14-6, but there is nothing to show that the parties usually went by the Gregorian calendar and the probabilities are the other way. The provisions of the General Clauses Act do not apply to cases of this kind. The learned Pleader for the non-applicant does not support the counter-claim for Rs. 47 alleged by the lower Court since this claim did not arise out of the same transaction and no Court-fee was paid by the defendant. A decree will be given in favour of the plaintiff for Rs.49. The parties will pay their own costs in both Courts.

S. D. *Decree modified.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2756 OF 1921.

June 2, 1922.

Present:—Mr. Justice Harrison.

MAULA DAD—JUDGMENT-DEBTOR—APPELLANT

versus

WADHAWA SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Principal and surety—Surety for amount of decree—Principal, death of—Decree against estate—Surety, liability of.

Where a surety renders himself liable for any decree which might be passed against his principal, the mere fact that the latter dies before any decree is passed, does not absolve the surety from performing his contract. (p. 47, col. 1.)

Chandulal Dalsukhram v. *Jeshanghbai Chhotalal*, 39 Ind. Cas. 88; 41 B. 402; 19 Bom. L. R. 112, relied upon.

Miscellaneous second appeal from the order of the District Judge, Jhelum, dated the 22nd August 1921, affirming that of the Senior Subordinate Judge, Gujrat, dated the 11th October 1920.

Mr. *S. A. Razaq*, for the Appellant.

Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—One Ghasita Singh brought a suit against one Kalu Khan and during the pendency of the suit applied for attachment before judgment of a cheque for Rs. 1,400 which the Canal Department was about to issue in favour of the defendant. The defendant objected and the Court decided that if he could furnish security to the value of the cheque the order of attachment would not be issued. Maula, the present defendant, gave security and made himself liable for the amount of the decree which might be passed against the defendant. Kalu Khan then died and a decree was passed against his estate.

In execution of that decree the decree-holder applied to execute against the surety after having failed to realise anything from the estate. He, Maula, presented an objection which was decided against him both by the Subordinate Judge and the District Judge. He now presents this second appeal urging that the death of his principal has released him from all liability and the decree being against the estate and not against the man who has died, he cannot be held liable in any way.

Both questions are clearly and definitely decided in *Chandulal Dalsukhram* v. *Jeshangbhai Chhotalal* (1) which is a precisely similar case. The surety rendered himself liable for any decree which might be passed against his principal and in consideration for his doing so the plaintiff dropped his proceedings against the very tangible sum of Rs. 1,400. The mere fact that the principal has since died does not absolve the surety from performing his contract, and, following *Chandulal Dalsukhram* v. *Jeshangbhai Chhotalal* (1), I find that there is no force whatever in the objection, and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 39 Ind. Cas. 88; 41 B. 402; 19 Bom. L. R. 112.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 378 OF 1922.

July 25, 1922.

Present:—Mr. Justice Martineau.

RUSTAM KHAN—PLAINTIFF—APPELLANT

versus

RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Shamilat—*Exclusive possession*—*Injunction*—*Suit by one co-sharer.*

Where a co-sharer builds without the permission of the other co-sharers over a portion of the village *shamilat* which is not likely to be partitioned and converts it to his own exclusive use, any other co-sharer may sue to restrain such user, and it is not necessary for him to prove special damage. (p. 48, col. 1.)

Manji v. *Ghulam Muhammad*, 57 Ind. Cas. 207 : 1 L. 249 and *Manji* v. *Ghulam Muhammad*, 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75, referred to.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 16th November 1921, reversing that of the Munsif, Second Class, Hoshiarpur, dated the 20th June 1921.

Mr. *P. N. Rozdon*, for the Appellant.

Mr. *Devi Dayal*, for Respondent No. 1.

JUDGMENT.—In this case one of the proprietors of the village of Sakrala, in the Hoshiarpur District, sues for the ejectment of Rahman, defendant No. 1, who is also a proprietor, from two *kothas* built by him on the common land and for their removal. The First Court found that a part of the *kothas* had been built on *Khasra* No. 1173, which was the village pond, and granted an injunction for the removal of that part. The District Judge on appeal has dismissed the suit on the ground that the plaintiff has not proved that he has suffered any special damage, and he holds that the plaintiff's remedy is to apply for partition of the *shamilat*. Plaintiff has preferred a second appeal to this Court.

It has no doubt been laid down in certain cases that a proprietor is not entitled to an injunction for the removal of the building erected by another proprietor without the permission of the co-sharers on common land unless he proves special damage, the theory being that he has a remedy open to him by applying for partition. This principle, however, seems to be inconsistent with another well-established principle, laid down in paragraph 235 of Rattigan's Digest of Customary Law, that a proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use, and in *Manji* v. *Ghulam Muhammad* (1), where two of the proprietors of a village had taken exclusive possession of a plot of *abadi* land, it was held by Abdul Raoof, J., that other proprietors were entitled to joint possession, and that the plaintiffs were not obliged to show material and substantial injury. That judgment was upheld in *Manji* v. *Ghulam Muhammad* (2), and the argument that an action by the co-sharers for joint possession could not be sustained because they had a remedy by partition did not find favour with the learned Judges in that case.

(1) 57 Ind. Cas. 207 : 1 L. 249;
(2) 61 Ind. Cas. 415 ; 2 L. 73; 3 L. L. J. 75.

But, whatever may be the correct principle to apply in ordinary cases, where a proprietor has appropriated a portion of the common land to his exclusive use, I think it is clear that in this particular case the rule that the plaintiff must prove special damage cannot be applied, because the land on which defendant No. 1 has built is part of the village pond, a partition of which is not at all likely to be allowed by the Revenue Authorities; so that, a remedy by partition, which may in some cases be available, is in the present case practically shut out.

It is urged for the respondent that, although there are many proprietors, only one has brought the suit, but this is not a reason for refusing an injunction. The plaintiff is entitled as much as any other proprietor to prevent an encroachment on the common land.

It is also contended that the plaintiff has shown great delay in bringing his suit. It is true that he has not brought the suit till some years after the *kothas* were built, but the reason of this is that he first tried to get a Revenue Officer to take action in the matter. He had made an application under section 150 of the Land Revenue Act on the 27th of November 1916, shortly after the *kothas* were built, to have the defendant ejected. He waited mainly for more than 3½ years for the Revenue Officer to take action on that application, and then at last had to bring the present suit.

In the circumstances, I think he is entitled to an injunction and I accordingly accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the Court of first instance. The defendant Rahman will pay the appellant's costs throughout.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 528 OF 1921.

August 5, 1922.

Present:—Mr. Hallifax, A. J. C.

BALARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ATMARAM—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 100, 105—Suit by village service tenant for possession—Ejectment by landlord—Jurisdiction of Civil Court, whether barred.

A civil suit for possession of his holding by a village service tenant asserting that he has been ejected by the landlord is barred by sections 100 and 105 of the C. P. Tenancy Act of 1920.

Appeal from a decree of the Additional District Judge, Bilaspur, dated the 25th July 1921, in Civil Appeal No. 121 of 1921.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *S. C. Dutta Chaudhary*, for the Respondent.

JUDGMENT.—In this suit, which was filed on 23rd December 1920, the respondent claimed to be a village service tenant and prayed to be restored to possession of his holding, asserting that he had been ejected by the landlord on 5th June 1920. There is little to be found in the judgment of either of the Courts below which is not wrong, but I do not propose to discuss mistakes that have been made. It suffices to say that the suit is entirely barred by sections 100 and 105 of the Tenancy Act of 1920 and must be dismissed. The appeal in that sense succeeds and the decree of the lower Appellate Court must be set aside. But there are only two pieces of relevant evidence on the record, the settlement *parcha* of 1911 and the *jamabandi* of 1919-20, and on that the plaintiff would very clearly have been entitled to a decree for possession if the case had been triable by a Civil Court. I, therefore, order that each party shall pay its own costs throughout.

G. R. D. *Order accordingly.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 375 OF 1922.
June 21, 1922.
Present:— Mr. Justice Walmsley and Mr. Justice Suhrawardy.

PARMANANDA AGARWALA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Law Amendment Act (XIV of 1908), s. 17 (2), offence under—Prima facie *case.*

A Police Report which merely states that action should be taken against a person on the ground that he had been assisting volunteers by giving them shelter in his house, is insufficient upon which to institute proceedings against that person under section 17 (2) of the Criminal Law Amendment Act, as it fails to make out a *prima facie* case in respect of the offence described in that section.

Criminal revision against the proceedings pending in the Court of the Extra Assistant Commissioner, Tezpur.

Babus *Dasarathi Sanyal, Manmatha Nath Mukherjee* and *Debendra Narain Bhattacharjee,* for the Petitioner.

Mr. *Orr,* for the Crown.

JUDGMENT.

Walmsley, J.—This Rule was obtained by the petitioner calling upon the Deputy Commissioner to show cause why the proceedings instituted against him under section 17, clause (2) of the Criminal Law Amendment Act (XIV of 1908) should not be quashed or, in the alternative, why the case should not be transferred to some other District for trial. The case originated on a Police Report, dated the 10th April, 1922, which is in these words: "I beg to report that Srijut Parmanand Agarwala has been assisting the volunteers by giving them shelter in a house belonging to him in the Tezpur town. I, therefore, request the action under the Criminal Law Amendment Act may be taken against him." Upon this, the Deputy Commissioner ordered: "Issue warrant with bail under section 17 (2) of the Act." That section is in these words: "Whoever manages, or assists in the management of, an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished, etc." It appears to me that this report fails to make out a *prima facie* case in respect of the offence described in this section. Mr. Orr, who appears for the Crown, concedes that the report is defective and he has drawn our attention to a later report, dated the 16th May, 1922, which is very much fuller. That, however, is not on the record and it is quite clear that the report of the 16th May is not the report on which the warrant was issued. I think that, for these reasons, we must order that the present proceedings should be quashed. It is unnecessary for us to go into the further question raised as to the cognizance taken by the Deputy Commissioner. The result is that the proceedings based on the report of the 10th of April 1922 are quashed and the petitioner will be discharged from bail so far as those proceedings are concerned.

Suhrawardy, J.—I agree.

W. C. A. *Proceedings quashed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 1030 OF 1922.
October 26, 1922.
Present:—Mr. Justice Oldfield and Mr. Justice Devadoss.

GHULAM MOHIDEEN QURAISHI SAHIB—RESPONDENT—PETITIONER
versus
AHAMADULLA BEGAM SAHIBA—PETITIONER NO. 2—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Death of appli-

cant—Legal representative, whether can continue proceedings.

In the case of an application for sanction to prosecute for an offence under section 193 of the Penal Code, if the applicant dies, sanction cannot, on that application, be granted to his legal representative.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue an order revoking the sanction accorded by the District Court, South Arcot, in Original Petition No. 68 of 1921, on the 31st of October 1921, to the respondent herein to prosecute the petitioner herein for an offence punishable under section 193 of the Indian Penal Code.

Mr. *L. S. Veeraraghava Aiyar*, for the Petitioner.

Mr. *S. Ranganatha Aiyar*, for the Respondent.

ORDER.—The petitioner asks us to revoke the sanction granted by the District Court, South Arcot, for his prosecution for an offence punishable under section 193 of the Indian Penal Code. Sanction was originally refused by the District Munsif and was afterwards granted by the District Court. During the pendency of the proceedings in the District Court, the original applicant for the sanction died and the application was continued by his widow as his legal representative; and she is here to support the District Court's order.

The only question, which it is necessary for us to decide, is wether a legal representative is in such circumstances entitled to continue an application originally made by her predecessor-in-interest. The general rule is that any person whatever can institute a complaint of an offence other than certain offences clearly specified in the Code, such as defamation. An offence under section 193, Indian Penal Code, is not one of those excepted offences. There would, therefore, be no objection to an application for sanction by the legal representative of a person directly affected instead of that person himself; and that was the basis of the order of the District Judge. That, however, takes no account of another principle of equally general application, that criminal proceedings instituted by a private complainant abate on such person's death. It is not necessary to give authority in support of that principle. We may, however, point out that, when an exception is intended, as in the case of proceedings, under section 145, Criminal Procedure Code, such exception is specified clearly. We have not been shown that an application for sanction differs from other criminal proceedings. It is suggested that an application for sanction is merely preliminary to the making of a substantive complaint and that is true; but, at the same time, we must regard it as part of criminal proceedings, since there is no justification for holding that it is not an essential stage in one.

In these circumstances, we cannot agree with the lower Court that it was entitled to grant the sanction to the legal representative on a petition presented by that representative's predecessor. We must, therefore, revoke the sanction granted. We add only that it is no doubt open to the legal representative herself to apply for sanction if so advised; and we express no opinion as to the prospects of such application.

V. N. V.

W. C. A.

Sanction revoked.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 326 OF 1922.

June 9, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

GULZARI LAL—PETITIONER

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 342 —Omission to examine accused, effect of.

A Magistrate is bound, under section 342 of the Code of Criminal Procedure, to question an accused after all the witnesses for the prosecution have been examined.

Therefore, if a witness is examined after questioning the accused and the accused is not questioned again after the examination of that witness, his conviction is illegal.

Criminal Revision.

Mr. *Monnier* (with him Mr. *Debendra Nath Kumar*), for the Petitioner.—The petitioner before your Lordships was charged with an offence under section 54 (A) of the Police Act, as he was found to have in his possession three bottles of French wine. I beg to submit that the lower Court did not comply with the provisions of the law as they are laid down in section 342 of the Code of Criminal Procedure. Non-compliance with the requirements of section 342 has vitiated the judgment which must be set aside. The accused had no opportunity to test the evidence of the *Mehter*. The accused ought to have been asked after prosecution evidence had closed. I submit that there has been serious irregularity which has prejudiced the accused. The accused is a young lad of 18 or 19 and should be let off as he has served out a substantial part of his sentence in Jail.

No one appeared for the Crown.

JUDGMENT.

Sanderson, C. J.—This was a Rule granted by two of my learned brothers calling upon the Chief Presidency Magistrate to show cause why the conviction of, and the sentence passed upon, the petitioner should not be set aside on the third ground mentioned in the petition. The third ground is, "that the Magistrate did not apparently examine the accused under section 342, Criminal Procedure Code, and the omission to do so is an illegality vitiating the conviction."

The accused was charged under section 54A of the Police Act, and the property which he had in his possession, in respect of which this charge was made, was three bottles of French wine, which, the learned Magistrate in his explanation says, was valuable.

The story of the prosecution apparently seems to be that the accused was arrested on information given by Mrs. Singh, whose servant he was. And after Mr. Singh and the Inspector of Police had been examined, the Magistrate, as appears from his explanation, asked the accused "how he came by the bottles of wine," and the accused said that a *Mehter* gave them to him to sell. It appears, however, that after this question had been put by the Magistrate to the accused, a further witness was called and that was the *Mehter* whose name was Kalkatti and he said that he never gave these bottles to the accused. That being the state of the proceedings, the learned Counsel for the accused lays stress upon the latter part of section 342 of the Code of Criminal Procedure which provides, "the Court shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined." Technically speaking, the learned Counsel is right in the point he has taken that the Magistrate should have questioned the accused after all the witnesses for the prosecution had been examined. This he did not do. Therefore, on this ground, in my judgment, the Rule must be made absolute. I am unable to say whether the accused would have been able to throw any more light upon this question if the learned Magistrate had strictly followed the provisions of section 342. But it seems to me we have no option in this case except to say that the Rule should be made absolute. Having regard to the fact that the learned Counsel has stated that the accused has already served a substantial part of his sentence and that he is a young man, we do not direct that he should be placed upon his trial again.

We accordingly make this Rule absolute, set aside the conviction and the remaining

portion of the sentence and direct that the bail bond be discharged.

Panton, J.—I agree.

B. N. & S. D. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL CASE NO. 1052 OF 1921.

March 7, 1922.

Present:—Mr. Justice Harrison.

DYAL SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 325, 304—Blow aimed at woman causing death of child—Offence.

Accused attempted to enter a house in order to beat the owner of the house. The latter's wife, who was carrying her infant in her arms, tried to bar accused's passage by shutting the door. The accused forced open the door and aimed a *lathi* blow at the woman which struck the child and killed it. It was found that it was too dark for the accused to have perceived that the woman was carrying a child :

Held, (1) that the accused could only be convicted of the offence of striking the woman; (p. 53, col. 1.)

(2) that inasmuch as the accused used a *lathi* and struck the blow with some force he must be held to have intended to cause grievous hurt. (p. 53, col. 1.)

Appeal from an order of the Magistrate, First Class, exercising enhanced powers under section 30, Criminal Procedure Code, Lahore, dated the 5th December 1921.

Lala *Ram Chand Manchanda,* for the Appellants.

Mr. *M. Saleem,* for the Government Advocate, for the Respondent.

JUDGMENT.—The facts of this case have been found to be that one Wadhawa Singh had gone to Lahore from his village and in his absence his mother who lives near by and his wife, *Musammat* Budhan, had a heated altercation about an amulet which had been lost. He returned in the middle of the dispute and ordered his mother out of the house. She went home, and, shortly afterwards, at about 7.30 P.M., Natha Singh, who is Wadhawa Singh's father, and Dyal Singh, Jiwan Singh and Ishar Singh, his uncles, all returned armed with *lathis. Musammat* Budhan who had her small son, aged 1, in her arms, tried to close the *deorhi* door but the three men forced it open and Dyal Singh aimed a blow at her which struck the little child and killed it. Jiwan Singh and Ishar Singh then struck her. They forced their way into the house and all of them beat Wadhawa Singh, Natha Singh slapped *Musammat* Soman, Wadhawa Singh's daughter, a girl aged 10. Ishar Singh has absconded. Dyal Singh has been convicted under section 304 (*ii*) and Natha Singh and Jiwan Singh have both been convicted under section 452 and sentenced to 6 months' rigorous imprisonment each. All three appeal.

The evidence for the prosecution falls under two heads, that of the family consisting of Wadhawa Singh, *Musammat* Budhan and *Musammat* Soman, and that of the three independent witnesses, Sundar Singh, *Lambardar,* Hazara Singh and Kahna, a servant of Wadhawa Singh. These men say that *Musammat* Budhan fell down on being pushed by Wadhawa Singh and that the child was killed in this way.

Dyal Singh and Jiwan Singh have produced evidence as to their having been in Kasur and Lahore respectively at the time the affray took place and Natha Singh tells the same story as the unrelated witnesses. So far as Natha Singh and Jiwan Singh are concerned, I find that it is not established that they struck *Musammat* Budhan.

The *post mortem* of the child showed that it had distinct marks of two blows on the head but all that *Musammat* Budhan is able to say about the injuries to her child is that one blow struck it and that Dyal Singh was the person who inflicted it. She herself had only one mark of injury and this on her buttocks. I, therefore, find that, so far as these two men are concerned, they are only guilty of striking Wadhawa Singh and this not very seriously, and under the provocation caused by his conduct to his mother. They have been in confinement for nearly two months including the under-trial period and this is, I think, sufficient under the circumstances

I, therefore, reduce their sentences to the amount of imprisonment already undergone but dismiss their appeals as I am satisfied that they did go into the house of Wadhawa Singh with every intention of beating him.

So far as Dyal Singh is concerned, I find that his *alibi* evidence, as explained by the Magistrate, is worthless and that he certainly did strike the child and kill it. I am not, however, of opinion that he even knew that *Musammat* Budhan was carrying the child. The affray took place at half past seven in the evening on the 15th of October on the threshold of the *deorhi* which is a roofed building. The sun had set at 6 o'clock, and it was, therefore, dark. The woman was trying to shut the door to keep out the three men who had come to attack her husband, and Dyal Singh struck at her as he forced the door open. A woman or anybody else closing a door against a person trying to get in would naturally put down anything he or she was carrying in order to have both hands free. It is not stated that the woman had been outside where Dyal Singh might have seen what she was carrying but that she came from the inside of the house and, as there was no lamp burning and it was dark, it appears to me to be only natural to suppose that Dyal Singh cannot have seen the child. His conduct in striking the woman is no doubt reprehensible but the offence appears to be equivalent to striking the woman and nothing more. The question, therefore, remains whether the offence is that of causing simple hurt or that of causing grievous hurt, and, inasmuch as he used a *lathi* and struck at the woman with some force, I think, he must be held to have intended to cause grievous hurt. I, therfore, accept his appeal in so far as to alter the conviction to one under section 325, Indian Penal Code, and I reduce the sentence to one year's rigorous imprisonment.

Wadhawa Singh applies for enhancement of all the sentences passed. For the reasons given above, I dismiss this application.

Z. K.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 471 OF 1922.

July 26, 1922.

Present:—Mr. Justice Ghose and Mr. Justice Cuming.

BEPIN BEHARI GHOSE—COMPLAINANT—PETITIONER

versus

HARI PADA GHOSE—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 494—Withdrawal allowed—Sufficient reasons recorded—Revision.

An order allowing a case to be withdrawn under section 494, Criminal Procedure Code, is open to revision but the High Court will not interfere if sufficient reasons are recorded by the Court allowing the withdrawal. (p. 54, col. 1.)

In the matter of the withdrawal of a case section 494, Criminal Procedure Code, controls the other sections of the Code relating to the trial of cases committed to the Sessions Court. (p. 54, col. 2.)

Criminal Revision.

Babu *Manmatha Nath Mukherjee*, for the Petitioner.—The facts of the case are these. The opposite party was charged under sections 109, 477, Indian Penal Code. The Trial Court committed him to the Court of Session. There the Public Prosecutor prayed for withdrawal of the case. The Sessions Judge allowed the case to be withdrawn under section 494, Criminal Procedure Code. The question is whether he is entitled to do that. The complainant is the petitioner. My submission is that the Judge had no jurisdiction to make the order. He should have directed a further trial. Section 494, Criminal Procedure Code, has got to be read along with the other sections of the Code relating to Sessions trials.

Babu *Dasarathi Sanyal* (with him Babu *Sita Ram Banerjee*), for the Opposite Party.—I submit the learned Judge was quite competent to make the order. He had every jurisdiction to order withdrawal under section 494, Criminal Procedure Code. He has stated his reasons for passing the order. I do not dispute your power of revising that order but the circumstances of the case as disclosed by the Judge are quite sufficient to conclude the matter.

Babu *Manmatha Nath Mukherjee* replied in brief.

JUDGMENT.—In this case the opposite party was charged with having committed

offences under sections 109, 477 and other sections of the Indian Penal Code. There was an order of commitment committing the opposite party to take his trial in the Sessions Court. The Public Prosecutor at the outset of the trial informed the learned Sessions Judge that he had been instructed after consultation with the District Magistrate to withdraw the case against the opposite party. The learned Sessions Judge thereupon recorded an order to the effect that on perusing the record he found little or nothing in the way of proof against the accused and under these circumstances he allowed the withdrawal of the case against the opposite party under the provision of section 494, Criminal Procedure Code.

On behalf of one Bepin Behari Ghose Mr. Mukherjee has applied to this Court to set aside the order passed by the learned Sessions Judge (which order amounted to an order of acquittal) and has asked that this Court should after setting aside the order passed under section 494 direct a further trial of the opposite party. In support of Mr. Mukherjee's contention he has referred to two cases decided in this Court where orders under section 494, Criminal Procedure Code, were revised by this Court. That an order under section 494 passed by a Sessions Judge can be revised by this Court has, no doubt, been decided in the two cases, but the question is whether in the circumstances of this case, and having regard to the way in which the Sessions Judge put the matter in his order of the 2nd May, 1922, this Court should interfere. It is not the case that the learned Sessions Judge has given his consent under section 494 without recording his reasons. No doubt the reasons which he has given have been put very briefly by him, but nonetheless he has given reasons which reasons to our minds seem to be sufficient. In this view of the matter we think no valid reasons have been shown for interfering with the order of the Sessions Judge. It has also been argued by Mr. Mukherjee that the learned Sessions Judge had no jurisdiction to make the order which he did and Mr. Mukherjee argues that section 494 is controlled by the other sections in the Criminal Procedure Code relating to the trial of cases committed to the Sessions Court. Having regard, however, to the language of section 494 there are good reasons for thinking that section 494 really controls so far as this matter is concerned, namely, the withdrawal by the Public Prosecutor with the consent of the Court of the case against the accused, the other sections of the Criminal Procedure Code. We think it cannot with reason be said that the learned Sessions Judge had no jurisdiction to make the order which he did under the provisions of section 494, Criminal Procedure Code.

The Rule is accordingly discharged.

S. D. *Rule discharged.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 787 OF 1922.

November 1, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Ryves.

DEO DATT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 533—Statement of accused recorded in English, admissibility of—Informality, whether curable.

Where a Magistrate records the statement of an accused in English in a narrative form, after the Police is removed from the Court-room, and he is satisfied that the accused is not tutored by anybody and the statement is translated to the accused who admits it to be correct and fixes his thumb-mark thereto, the statement is admissible in evidence and any formal defects that might have been made in the recording of it are cured by section 533 of the Criminal Procedure Code. (p. 55, col. 2)

Queen-Empress v. *Raghu*, 23 B. 221; 12 Ind. Dec. (N. S.) 146, *Queen-Empress* v. *Bachanna*, A. W. N. (1891) 55, *Queen-Empress* v. *Anta*, A. W. N. (1892) 60, referred to.

Jai Narayan Rai v. *Queen-Empress*, 17 C. 862; 8 Ind. Dec. (N. S.) 1119, dissented from.

Criminal appeal from an order of the Additional Sessions Judge, Allahabad, at Mirzapur.

Mr. *Mohan Lal Sandal*, for the Appellant.

Mr. *Lalit Mohan Banerji*, Government Advocate, for the Crown.

JUDGMENT.—Deo Datt Koeri, aged 46, has been convicted of the murder of a

Kaharin woman, named *Musammat* Gauri, and sentenced to death. He has appealed. The record is also before us for confirmation of the death sentence passed on him.

It appears that *Musammat* Gauri lived in Chunar, first of all, with Sheobaran, after his death with Chhedi and after Chhedi's death, she continued to live in the shop which had been occupied by Chhedi, with the accused Deo Datt, and they together carried on a dairy business. The woman seems to have been of loose character and, recently, she had formed an intimacy with a young man named Gajadhar. The accused undoubtedly became jealous of this, and there were frequent quarrels between her and the accused on the subject. This is borne out by the evidence of neighbours put forward by the prosecution and whose evidence does not seem to admit of any doubt. The accused himself admits that he had no enmity with any one of them. The woman was last seen alive up to 8 or 9 P. M. on the night of the 20th of July; at that time the accused was in the shop occupied by the woman. The next morning the shop was found closed; on the third day, in consequence of an offensive smell attracting the notice of the Police, the shop was opened and the dead body of *Musammat* Gauri was found lying on her cot. It was evident from the wounds that she had been killed instantaneously, as she slept, by two blows on the neck caused probably by an axe. The axe was found lying near the bed. A pair of shoes and an umbrella, which subsequently were identified as having belonged to the accused, were also found inside the shop. Suspicion at once fell upon the accused who was not found at Chunar but was arrested, on the 24th July, in Benares. On the 25th he was placed before a Magistrate of the Second Class, and made a statement which was recorded by the Magistrate. In that statement he admitted that he had killed *Musammat* Gauri because she had within the last four months fallen in love with Gajadhar and quarrelled with him and had refused to give him food for three days. He said that he struck her twice on the neck with an axe and she died instantaneously; that he then ran off to Benares and was arrested at Rajghat. Apart from this statement, the only other evidence against the accused is circumstantial; but, in our opinion, it leaves no sort of doubt as to the guilt of the accused. It has been argued that this statement, recorded by the Magistrate, is inadmissible in law because it was taken down in English and in a narrative form. In our opinion section 533 of the Criminal Procedure Code completely cures any formal defects which might have been made in the recording of the confession. The Magistrate himself was called and he swore that he had all Police removed from the Court-room and also had the handcuffs removed from the accused's hands, he asked the accused whether he was tutored by anybody and, after being satisfied that the accused was not tutored by anybody, he recorded his confession. He admitted having recorded the confession in English but says that he translated it to the accused who admitted the statement to be correct and fixed his thumb-mark thereto. It is true that the Calcutta High Court, in *Jai Narayan Rai* v. *Queen-Empress* (1), has held that under such circumstances a confession is inadmissible, but this ruling has been dissented from by the Bombay High Court, *Queen-Empress* v. *Raghu* (2), and twice in our own Court, *Queen-Empress* v. *Bachanna* (3), and *Queen-Empress* v. *Anta* (4) by a Divisional Bench. There the facts were almost exactly the same as here and a Bench of this Court has held that under such circumstances section 533 completely cures any such irregularities or informalities in the recording of a confession. The accused, when he was examined, before the Magistrate on the 22nd of August, stated that he had never been in Chunar in his life and that he did not even know *Musammat* Gauri. He denied that the shoes and umbrella were his and could suggest no reason at all why the charge has been brought against him. He stated that he had made no statement before any Magistrate in Benares. He repeated this statement throughout the case until we come

(1) 17 C. 862; 8 Ind. Dec. (N. S.) 1119.
(2) 23 B. 221, 12 Ind. Dec. (N.S.) 146.
(3) A. W. N. (1891) 55.
(4) A. W. N. (1892) 60.

to his examination on the 26th September before the learned Sessions Judge. He there admitted, although he denied having made any statement before the Deputy Magistrate in Benares or that the shoes belonged to him, that he did krow *Musammat* Gauri and that he lived at her house. He said that he had a quarrel with *Musammat* Gauri at 10-30 P. M. when Gajadhar, with whom she had criminal intimacy, came up and told him to go away from the shop and said that if he did not go away, he would kill him. He said he then went away to Benares by the 12 P. M. train leaving all his things in the house of *Musammat* Gauri. The suggestion, of course, is that the woman was killed, after he had left the shop, by Gajadhar. In his memorandum of appeal, for the first time, he sets up a definite *alibi*. He said that he was in Benares when the woman was killed and that he had been in Benares for six years and had nothing whatever to do with the woman. Even if we leave out the confession altogether, we think the circumstantial evidence, coupled with the contradictory statements of the accused in themselves, leave no room for doubt that he murdered *Musammat* Gauri in a fit of jealousy. The fact that all her ornaments were found on her person shows that theft was not the object of the murder. Both the Assessors would acquit on the ground that there was no eye-witness. In our opinion, there is no room for reasonable doubt in this case. The murder was a deliberate and cruel murder of a defenceless woman in her sleep. We, therefore, see no reason to interfere with either the conviction or the sentence. We dismiss the appeal, confirm the conviction and sentence and direct that the latter be carried out according to law.

N. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 76 OF 1922.

March 28, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

ABDUL GAFUR KHAN *alias* KALA-CHAND KHAN AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Jury trial—Recording the heads of charge, meaning of.

Although in a Jury trial the law requires the Judge only to record the heads of his charge these should be so recorded as to enable the High Court to know what was actually said. (p. 57, col. 1)

Queen v. *Kasim Shaikh*, 23 W. R. Cr. 32, referred to.

Criminal appeal against the order of the Additional Sessions Judge, Mymensing, dated the 13th January 1922.

Mr. *A. K. Fuzlul Huq* and Babu *Sachindra Kumar Roy*, for the Appellants.

Mr. *Orr*, for the Crown.

JUDGMENT.

Walmsley, J.—The appellants, Abdul Gafur Khan *alias* Kala Chand Khan and Abdul Sattar Khan, *alias* Chotu Khan, have been convicted, on a unanimous verdict, under section 395, Indian Penal Code, and sentenced to undergo ten years' rigorous imprisonment each.

The inmates of the house in which the dacoity is said to have been committed were Abdul Jabbar, the complainant, a boy of fifteen, his elder brother Abdul Nabi, another brother, two sisters, one of whom is the witness, Alekjan, a girl of eleven, their mother, some servants, and a beggar woman.

The occurrence is said to have taken place on the night of September 4th and information was lodged at the Thana seven miles distant, on the morning of the 6th.

The description of the dacoity is of the usual kind, but there is this singular feature in the case that the appellant, Kala Chand Khan, has given his daughter in marriage to Abdul Nabi just mentioned. Relations are strained because Abdul Nabi has married a second wife, and Kala Chand's daughter is living with her father. The second appellant is brother of the first.

The case for the prosecution is that Kala Chand was recognised at the time

of the dacoity by Abdul Jabbar, and by no one else, while Chotu Khan was recognised by Abdul Jabbar and his mother and his sister and a neighbour named Mushim. Apart from this oral evidence, there is nothing whatever to show that the appellants joined in committing the dacoity.

The objections to the charge are threefold. First, it is urged that the whole charge is so condensed that it is difficult to understand exactly what the learned Judge really said. Secondly, it is said that there ought to have been a reference to the fact that the prosecution did not examine all the servants and the beggar woman, and that there ought to have been a direction as to the inference to be drawn from the omission.

Thirdly, the manner in which the learned Judge dealt with the evidence of identification is criticised as being incomplete and unlikely to help the Jury in arriving at a right conclusion.

With the first objection I agree. It is true that the law requires a Judge only to record the heads of his charge; but the meaning of those words have often been explained in this Court, and I should like to draw the attention of the Judge to the case of *Queen* v. *Kasim Shaikh* (1) I have no doubt that the learned Judge could from his brief notes prepare a full statement of what he said to the Jury, but it is hardly possible for others to do so.

As to the second objection, I think the point is one which ought not to have been overlooked by the Judge but the case is not one in which it would be reasonable to hold that the witnesses not examined were really important witnesses, and on this ground alone I should not be prepared to hold that the charge was bad.

The third criticism, which is to some extent a repetition of the first, has much more substance. The Judge's comments on the evidence of identification like the remainder of the charge are recorded in a form which makes it difficult for us to know what was actually said.

In dealing with the evidence of identification there were several points which deserved careful treatment. There was the relationship between the parties, with the question of probability which it raised; there was the long delay in reaching the Thana; there was the fact that only Abdul Jabbar pretended to recognise Kala Chand, and Abdul Jabbar is a mere boy, and the defence suggested that he had hidden himself in a place from which he could not see the dacoits; there was the absurd story of Alekjan that she recognised Chotu Khan by his feet: there was the contradictory evidence about Mushim's pretended recognition; there was the evidence of neighbours about what they did and did not learn when they came on the scene—all of it coupled with the fact that not a word was reduced to writing for nearly thirty-six hours.

I do not mean that the learned Judge did not refer to these points, for he did, but, in my opinion, his comments, so far as we can guess what they were, did not give the Jury the help that they needed.

It would be tedious to deal with this matter at greater length. For the reasons given, I think the charge is vitiated by misdirection.

It remains to consider what order we should pass. Against the first appellant there is nothing but the evidence of Abdul Jabbar, and against the second appellant nothing but the evidence of Abdul Jabbar and his mother, after eliminating, as we must, the evidence of Alekjan and Mushim. In the strained relations between the parties it seems to me very doubtful whether those two witnesses should be believed when there is not a scrap of independent evidence to support them, and my distrust is increased by the extraordinary delay that took place in going to the Thana. In these circumstances, I think the case is one in which there ought not to be a re-trial. Accordingly, I set aside the verdict of the Jury and acquit the two appellants.

Suhrawardy, J.—I agree.

B. N. *Appeal allowed: Accused acquitted.*

(1) 23 W. R. Cr. 32.

SARJU PRASAD *v.* EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 66 OF 1922.

July 20, 1922.

Present :—Mr. Wazir Hasan, A. J. C.

SARJU PRASAD—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—

BABU RAM—COMPLAINANT

—OPPOSITE PARTY.

Pledge—Pledgee, rights of—Sub-pledge.

A pledgee has a perfect legal right to deal with the pledged property in any manner he chooses, so long as he is within the rights that a bailee can exercise as regards bailed property. (p. 59; cols. 1 & 2.)

In the absence of a condition to the contrary in the contract of pledge, it is quite open to a pledgee to make a sub-pledge of the pledged property. (p. 59, col. 2.)

Application against the order of the Additional Sessions Judge, Sitapur, dated 7th June, 1922, confirming that of the Magistrate of the First Class, Sitapur, dated 6th May 1922.

Messrs. *M. Wasim, Ali Mohammad* and *R. F. Bahadurji*, for the Applicant.

The Government Pleader, for the Crown.

Messrs. *H. C. Dutt* and *Ghulam Husain*, for the Complainant.

JUDGMENT.—The applicant has been convicted of the offence of criminal breach of trust under section 406 of the Indian Penal Code and sentenced to six months' rigorous imprisonment. The charge as originally framed stood under section 409 of the same Code.

On the 12th December 1921 one Babu Ram filed a complaint under section 409 of the Indian Penal Code in the Court of a First Class Magistrate at Sitapur against Sarju, the applicant in this Court. The story in the petition of complaint is to the following effect :—

In the month of May 1921 the complainant had pawned some ornaments of the value of Rs. 1,500 with the applicant for Rs. 630 carrying interest at the rate of 1 per cent. per mensem. On the 27th November 1921 the complainant took Rs. 670 with him for payment to the applicant with the object of redeeming the pawned jewellery. The applicant put off the redemption from day to day for some time. On the 5th December 1921 the complainant made a grievance of the conduct of the applicant to Pandit Deodat. Pandit Deodat thereupon took the Rs. 670 from the complainant and himself paid the amount to the applicant and wanted him to return the ornaments to the complainant without any further delay. The complainant accompanied the applicant to receive the delivery of the jewellery. In the way to the applicant's house the applicant left the complainant and proceeded by himself saying that he would fetch the jewellery at once. The complainant waited for him for some time but the applicant did not return and since then the complainant made several attempts to meet the applicant but without any avail. Finally, on the 10th December 1921 the complainant in the company of Pandit Deodat went again to the applicant's shop and met him there. The applicant said that he had pledged the jewellery with Chhotelal Baburam. In the final portion of the complaint it was stated that the applicant had dishonestly pawned the pledged jewellery and was consequently guilty of the offence of criminal breach of trust.

The Magistrate, who tried the case, after having recorded the evidence for the prosecution, framed the charge with regard to the offence under section 409 of the Indian Penal Code. In view of the arguments in the case before me, it is necessary that I should quote exactly the language contained in the charge-sheet which runs thus :—

"That you on or about the 10th day of December 1921, at Sitapur, as a banker, committed criminal breach of trust in respect of some gold and silver ornaments pawned with you by Babu Ram and thereby committed an offence punishable under section 409 of the Indian Penal Code, etc."

The charge distinctly refers to acts of the applicant on or about the 10th day of December but what those acts were which constituted the offence for which he was charged are not stated in the charge-sheet. That defect, however, does not, in my opinion, in any manner affect the propriety of the proceedings taken against the applicant.

The allegations made in the petition of complaint distinctly raise two questions of fact—(1) that there was a pledge of the orna-

ments by the complainant with the applicant, (2) that money was not only offered but paid to the applicant by the complainant with a view to redeem the pledge, and that the applicant refused redemption. The Magistrate and the learned Additional Sessions Judge have both come to the conclusion as regards the first question that there was a pledge of the ornaments by the complainant with the applicant. They are also agreed in their conclusion as regards the second question of fact stated above. Their finding is that the story set out in the complaint and tried to be supported by the prosecution witnesses that the complainant paid Rs. 670 to the applicant for the purpose of redeeming the pledge and that the applicant after having received the money dishonestly refused to effect redemption is a "pure fabrication." There is one more matter which must be mentioned before I come to deal with the merits of this application. The Courts below have found that the applicant made a sub-pledge of these ornaments with the firm of Chhotelal Baburam. These are all the facts on which the applicant was convicted by the Magistrate and his conviction has been upheld by the learned Additional Sessions Judge.

I am happy to observe that the learned Counsel, who appeared in this case before me, have not challenged the conclusions of fact arrived at by the Courts below and I am, therefore, called upon to decide the pure question of law in this matter. According to the learned Additional Sessions Judge the gravamen of the offence for which the applicant has been convicted lies in the fact that he denied the pledge altogether. The case is not approached either by the Courts below or by the learned Counsel in this Court from the point of view that the contract of pledge involved any express or implied contract other than a simple contract of pledge by one with the other; in other words, that the ornaments would be redeemable on payment of the money advanced to the complainant by the applicant together with the interest agreed upon. It is clear, therefore, that there were no further conditions attached to the contract of pledge with which I am concerned in this case. It follows that the applicant had a perfect legal right to deal with the pledged property in any manner he chose so long as he was within the rights that can be exercised by a bailee with regard to the property which is the subject-matter of bail. It cannot be doubted and the learned Additional Sessions Judge has not doubted that in the absence of any express condition to the contrary it was quite open to the applicant to make a sub-pledge of the jewellery. This act of the applicant, therefore, proves no intention of dishonesty at all and the Courts below have not treated it as such. As I have said before, the judgment of the learned Additional Sessions Judge is mainly founded upon the fact that the applicant denied having received any articles by way of pledge at all. Whether such a denial would be evidence of dishonesty I am not called upon to discuss in this case. I do concede in the present case that if the denial on the part of the applicant of there ever having been a pledge with him of the complainant's jewellery is established it may furnish a sufficient ground for an inference on a question of fact which the Courts below would be perfectly justified to draw and I, as a Court of Revision, shall be extremely reluctant to interfere with such an inference. But the contention put forward on behalf of the applicant before me is that there never was such a denial by him at any time prior to the framing of the charge against him. The judgment of the learned Additional Sessions Judge does not specifically refer to any piece of evidence in support of the conclusion that the applicant "denies having received any articles at all." I take it that it would be absolutely fair to the complainant if I find out his case from his petition of complaint and from his statement on oath in Court in support of his complaint. I have given the purport of the petition of complaint at some length already. There is not a word in it which will bear the meaning of a denial of the pledge on the part of the applicant. On the contrary, it winds up by saying that the applicant said that he has sub-pledged those ornaments. In his statement before the Court the complainant stated that on the 10th December 1921 he went to the shop of Sarju Prasad and said to him that he had cheated him in-

asmuch as he did not return the ornaments but took the money all the same and that Sarju Prasad said in reply "what do you mean by money? I never received any money. If you pay me the money I will deliver to you your goods." That he never received any money is found by the Courts below; that he had not denied the pledge to him on the 10th December is also clear from the portion of the complainant's statement which I have given above. I am not prepared to assume that the Courts below were ignorant of this aspect of the case. What I mean is that I am not prepared to accept any suggestion that the Courts below have made a wrong supposition to the effect that it was established by the evidence tendered on behalf of the prosecution that the applicant on or about the 10th of December 1921 had denied the pledge of the ornaments to him. I am, therefore, led to the conclusion that the finding of dishonest intention as against the applicant rests on the denial of the pledge contained in his statement in answer to the charge. That he pleaded not guilty to the charge is clear, that he in his written statement tendered in his defence also denied the pledge is equally clear, but is this denial evidence to establish the charge for which he was tried? I have no hesitation in saying that it is not. The applicant was not being tried for anything that he might have said or done subsequent to the charge. The offence as against him must rest on events which happened on or about the 10th of December.

The learned Counsel for the complainant strenuously argued before me that in a case where the Court has to come to a finding as to the intention of a person his statement or conduct after the charge is as much relevant evidence to find out the intention as his conduct or statement previous to the charge would be. The proposition may be put somewhat in this form. If a man makes a statement on a certain day which would be good evidence of his dishonest intention on that day it may be presumed that he had that intention even before. This proposition may or may not be sound but it certainly raises a pure question of presumption on a matter of fact and I would be prepared to make it if it were open to me to do so. But in the present case the door is shut against any such presumption for the simple reason that there is direct evidence contained in the statement of the complainant himself as to what happened at the shop of the applicant on the 10th December. That evidence, which I have already referred to, clearly proves that all that the applicant said or did on that day was to make a demand for his money which he had advanced on the pledge and his readiness to effect redemption and a statement made by him to the effect that he had made a sub-pledge of those ornaments. There is, therefore, no room whatsoever for presumptions in face of this direct evidence.

This practically finishes the case, but I cannot part with it without referring to a remark in the judgment of the learned Additional Sessions Judge. The remark is as follows:—

"In the present case the fact of a sub-pledge by the appellant only proves that there was a change in the mental attitude or, in other words, that he appropriated or converted to his own use the articles pledged with him."

The learned Counsel for the applicant, Mr. Muhammad Wasim, expressed his inability in the course of his arguments to grasp the sense of the foregoing remark. I may say at once that I do not share the learned Counsel's inability at all. I think the meaning of the remark is perfectly clear. The learned Judge means to convey by the words which he has used the idea that the fact of sub-pledge is an element in the chain of proof in respect of dishonest intention. This sense is borne out by the sentence immediately following remark quoted above, "the further element of dishonesty is established by his denial of the pledge." With the legal effect of the sub-pledge I have already dealt and need say no more on this subject. I am, therefore, of opinion that the offence for which the applicant has been convicted was not proved.

I set aside the order of conviction passed by the lower Courts against the applicant and direct the bail on which he stands released be cancelled.

Application accepted.

N. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES Nos. 97 AND 98 OF 1922.
(CRIMINAL REVISION PETITIONS Nos. 90 AND 91 OF 1922).
September 28, 1922.
Present:—Mr. Justice Oldfield and Mr. Justice Devadoss.

KANDASWAMI MUDALI AND ANOTHER —PETITIONERS IN CR. REV. CASE NO. 97 OF 1922
PARTHASARATHI MUDDALI—PETITIONER, IN CR. REV. CASE NO. 98 OF 1922
versus
GURUSWAMI PILLAI—RESPONDENT, IN BOTH.

Workman's Breach of Contract Act (XIII of 1859), as amended by Act XII of 1920, scope of — Joint contractors.

The Workman's Breach of Contract Act is not confined in its scope to cases of advances to individuals, it also applies to cases of advances to more persons than one jointly. (p. 62, col. 1.)

Bhau Abaji v. *Rama Maruti*, 2 Bom. L. R. 545, dissented from.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the District Magistrate, Chittoor, in Criminal Revision Petition No. 17 of 1921, against the order of the Court of the Second Class Magistrate, Kalhasti, in Miscellaneous Case No. 15 of 1921.

Mr. *C. S. Venkatachariar*, for the Petitioners.

Mr. *V. L. Ethiraj*, (Public Prosecutor), for the Crown.

ORDER.—These cases come before us on application for revision of the order of the District Magistrate of Chittoor, directing further enquiry into a complaint under the Workman's Breach of Contract Act, XIII of 1859, as amended by Act XII of 1920. The whole proceedings having been brought before us in order that their propriety may be considered, it will serve no useful purpose to consider whether the District Magistrate had the power to make such an order in proceedings under the Act.

We, therefore, turn at once to the merits of the question raised. That question is, whether the contract on which the respondent, the employer, relies, being a contract made with the two petitioners, the artificers jointly can be the subject of proceedings under the Act at all. The Sub-Magistrate who originally dealt with the case, held, with reference to *Bhau Abaji* v. *Rama Maruti* (1) that the Act deals only with cases of advances to individuals and not with cases of advances to more persons than one jointly. We think that this statement of the purview of the Act is too wide and cannot be sustained, if regard is had to the wording employed. Section 1 of the Act XIII of 1859 provides, to quote the material portion, that "when any artificer shall have received from any employer or from any person acting on behalf of such employer an advance of money, if such artificer shall wilfully and without lawful or reasonable excuse, neglect or refuse to perform such work according to the terms of his contract" certain specified consequences shall follow. There is nothing explicit in this section to exclude joint contracts. No doubt the singular is used. But the first question is, whether there is before the Court any artificer who has received an advance.

It is quite possible that, even where a joint contract is in question, proof may be forthcoming that of the contracting persons both or either have actually or constructively received all or part of the advance, for which it provides. We cannot see any reason in section 92 of the Evidence Act why this should not be proved, since the fact that one of two joint contracting parties actually receives the consideration does not necessarily involve that he does not receive it, as regards part or whole, as the agent of the other, and a finding to that effect will not necessarily involve any variation of the terms of the contract. That joint contracts, which are not expressly excluded by the wording of section 1, may be contemplated in it, results further from section 5 of the Amending Act XII of 1920 which provides that the word "contract" in the original Act shall extend to all contracts within the meaning of the Indian Contract Act. It seems to us that what the lower Court has to do in dealing with cases under the Act is to see whether as a matter of evidence and as a matter of fact the artificer

(1) 2 Bom. L. R. 545.

or any of the artificers before it has received an advance of money.

The question so far is one of fact, with which the Sub-Magistrate in his order has not dealt, because he adopted (no doubt quite properly) the general rule sanctioned by the authority of *Bhau Abaji* v. *Rama Maruti* (1). Turning to that decision, we observe first that it was given before the amendment of the Act by Act XII of of 1920. The material portion of the judgment is short and the main ground of decision is contained in the sentence: "It cannot be said that any one of the joint recipients of the money has received an advance of money." With all deference, it is impossible to be certain whether that can be said or not, until evidence on the point has been taken and the materials for a decision whether any one of the joint contractors did receive an advance in the particular case are available. It is said then:

"It would be impossible for the Court, under section 2, if the complainant exercised the option of requiring re-payment, to order the defendant to re-pay the money advanced to him, for it is impossible to say how much each received."

That again will be a matter of evidence. We are, with all respect, unable to follow this authority.

It has then been urged that the intention of the Legislature cannot have been to render a joint contractor liable to imprisonment when, as often may be the case, it is by the default of his joint contractor that the work is not done. Such cases are, however, sufficiently provided for by the requirement of proof of wilful default and by the provision introduced in section 2 (1), Act XII of 1920, for the exercise of the allowance in Magistrate's discretion as to the nature of the penalty to be imposed.

Taking this view, we decline to interfere with the District Magistrate's order, our reasons for so deciding being, to put them shortly, that the general principle enunciated by the Sub-Magistrate as the ground of his decision is not sustainable, and that each case must be dealt with on a consideration of the evidence available in it and of the applicability of the actual wording of the Act to the cases of the individuals before the Court.

V. N. V.

W. C. A. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 3 OF 1922.

January 25, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

EMPEROR—COMPLAINANT

versus

SHANKAR DAYAL AND OTHERS—ACCUSED.

Public Gambling Act (III of 1867)—Criminal Procedure Code (Act V of 1898), s. 562, applicability of—Warrant of arrest and search not addressed to any person—Irregularity.

Section 562, Criminal Procedure Code, has no application to offences committed under the Public Gambling Act, III of 1867.

A warrant issued under the Public Gambling Act, for search and arrest which does not contain the name of the person to whom it is issued, and to whom authority to make the search and arrest are given, is irregular.

Criminal reference made by the District Magistrate, Lucknow.

The Government Pleader, for the Crown.

JUDGMENT.—The accused Shankar Dayal and 32 other persons, were found gambling on the night of the 31st October last in a certain room situated adjacent to a temple. They were arrested under a warrant issued by the City Magistrate on the same date. The warrant was not addressed to any Police Officer by name. It recited that credible information had been received that the house, belonging to Shankar Dayal, Brahman, son of Ganesh Prasad, resident of Ahata Sher Khan, and Manni Lal, Kayastha, resident of Dugawan, was being used as a common gaming house and it authorised the seizure of the instruments of gaming found therein and of the persons found in it. The warrant was executed by Sub-Inspector, Hari Singh, but it did not bear his name on it. He found gambling going on in the room with *kauris* and Rs. 90-7-3 lying on the ground and another sum of Rs. 15-5-3 in a certain pot placed before Shankar Dayal. The latter amount is supposed to be the commission, which Shankar Dayal was to take for allowing the gambling in his premises. Kali Charan was one of the persons gambling there. He states that at Diwali times a sum is set apart for waterman, Police Officers, etc., by every one present and that he could not say whether the money which was being put in the earthen pot was intended for commission or presents. Sobha Ram, who went with the Sub-Inspector at the time of the search

and arrest, states that when he went inside gambling was going on with *kauris*, each man paying one pice in the rupee as commission, but he does not say that he saw anything being paid in his presence or from what source the information about the payment of the commission was derived. Kali Charan did say that one man put a pice in his presence into that cup; but as he admitted that he could not say whether it was intended to be commission or presents, his statement did not go far enough. Shankar Dayal denied that the room was in his occupation.

The Trying Magistrate thought it immaterial to determine who was the owner or occupier of the room. Finding that the room was in fact being used as a common gaming house he convicted Shankar Dayal under section 3 and the other persons under section 4 of the Gambling Act (III of 1867) and directed their release on probation of good conduct subject to their entering into a personal bond in Rs. 100 each for good behaviour for a period of one year.

The learned District Magistrate reports that section 562 of the Code of Criminal Procedure has no application to offences committed under Act III of 1867, because section 18 of that Act was repealed by Act XII of 1876, which in turn was repealed by a subsequent enactment. The effect of the repeal, however, is not to restore the operation of section 18, because sections 6 and 7 of the General Clauses Act (X of 1897) lay down that the effect of the repeal is not to revive anything not in force or existing at the time at which the repeal takes effect. The order directing the release of the accused on probation of good conduct cannot, therefore, be upheld.

The warrant, issued by the learned Magistrate, was, however, irregular, as it did not contain the name of the person to whom it was issued and to whom authority to make the search and arrest was given. The evidence of the Magistrate, who signed he warrant or of the Sub-Inspector might have supplied the omission, but if the room the search of which was made did not belong to Shankar Dayal or Manni Lal or was not occupied by either of them, it could not be covered by the warrant. The evidence on which the learned Magistrate has proceeded is, moreover, vague and indefinite, and on that evidence it is not possible to say that the room was being used as a common gaming house for the profit or gain of the person using or occupying it within the meaning of the Act. As pointed out in *Ram Shanker* v. *Emperor* (1), it is not unusual for persons to gamble on the occasion of the Diwali festival by way of a common friendly amusement rather than for the purpose of making any profit or reaping a commission. The presumption raised by the Act is not as strong or can be more easily displaced when the gambling takes place openly on the Diwali occasion as or than when it takes place at other times in a private house. Shankar Dayal stated that the money found in the earthen pot contained his winnings, but whether that was so or not, considering the fact that Kali Charan, who was one of the persons gambling at the place, states that he was unable to say whether it was intended for commission or for presents or perquisites given to attendants, it is not possible to uphold the conviction or the order demanding the security passed in the case.

The order of the Court below is, therefore, set aside, and the accused acquitted of the offence charged. The security bonds filed, if any, will be discharged.

W. C. A. *Order set aside.*

(1) 39 Ind. Cas. 334; 20 O. C. 4; 4 O. L. J. 88; 18 Cr. L. J. 494.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 363 OF 1921.
(CRIMINAL REVISION PETITION No. 288 OF 1921).
February 1, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Krishnan.

In re MATTAM SHINNA VIRAIAH AND OTHERS—ACCUSED NOS. 1 TO 5—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Deputy Tahsildar.

In re MATTAN SHINNA VIRAIAH.

whether "Court"—Document, forged, produced before Deputy Tahsildar—Sanction, whether necessary.

A Deputy Tahsildar is a Revenue Court, and the sanction of that Court is necessary for parties to proceedings before him to be proceeded against with reference to a forged document filed before that Court, even though the inquiry in those proceedings was conducted through the Revenue Inspector.

Queen-Empress v. *Munda Shetti*, 24 M. 121 ; 2 Weir 170, followed.

Petition, under sections 315 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to quash the order of commitment, dated the 2nd of December 1920, passed by the Court of the Taluq Magistrate of Gooty, in P. R. Case No. 1 of 1920, directing the accused therein to take their trial before he Court of Session for offence under sections 467 and 471 of the Indian Penal Code.

Mr. *V. S. Narasimhachar*, for the Petitioners.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

ORDER.

Krishnan, J.—In this case the petitioners before us were committed to the Sessions Court of Anantapur, accused Nos. 1 and 2 charged under section 476, Indian Pena Code, for using as genuine a forged document, a Will, which he knew to be forged or had reason to believe to be forged in certain proceedings for the transfer of *patta* with regard to certain landed properties and accused Nos. 3, 4 and 5 under section 467, Indian Penal Code, with forging of that document. The petitioners contend before us that the case cannot be proceeded with against them without a proper sanction being obtained under section 195, clause 1 (*c*), Criminal Procedure Code. It is clear from the record that the Will was produced by accused Nos. 1 and 2 in certain proceedings for the transfer of *patta* before the Revenue Authorities and that though the Deputy Tahsildar had the enquiry in these proceedings conducted through the Revenue Inspector, he passed the final orders refusing mutation of names in the *pattah*. In circumstances like this it has been already held by this Court in *Queen-Empress* v. *Munda Shetti* (1) that the Deputy Tahsildar constitutes a Revenue Court and the sanction of that Court is necessary for the parties to the proceedings to be proceeded against under section 471 of the Indian Penal Code with reference to the document filed before that Court. Following that ruling I must hold that, so far as accused Nos. 1 and 2 are concerned, the commital order must be quashed for want of sanction.

As regards the other accused Nos. 3, 4 and 5, their case stands on a different footing. They were not parties to the proceedings before the Revenue Court and what is more they are not charged with the same offence as accused Nos. 1 and 2. They are charged with one kind of offence under section 467 while accused Nos. 1 and 2 are charged with another under section 471 as already pointed out.

The Vakil for the petitioners has drawn our attention to the ruling in *NarayanDhondev Risbud, In re* (2), and has asked that we should read section 195, clause 1 (*c*) as meaning that if an offence has been committed with reference to any document produced or given in evidence in any proceeding before a Court no person who is a party to that offence whether he be a party to the proceeding or not can be proceeded against criminally without the necessary sanction being obtained under the section. That question, however, we need not decide, for even assuming that the Bombay ruling is correct on which I express no opinion at present, it could not apply to the present case as the offences charged here are two different offences. Therefore, so far as accused Nos. 3, 4 and 5 are concerned, there is no ground for setting aside the committal order and against them the trial must go on.

Schwabe, C. J.—I agree and have nothing to add.

V. N. V. *Judgment varied.*

W. C. A.

(1) 24 M. 121 ; 2 Weir 170.

(2) 6 Ind. Cas. 529 ; 12 Bom. L. R. 383 ; 11 Cr. L. J. 368.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 366 OF 1921.
(CRIMINAL REVISION PETITION NO. 291 OF 1921).

August 30, 1922.

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

NARANTAKATH AVULLAH—COMPLAINANT—PETITIONER

versus

PARAKKAL MAMMU AND OTHERS—ACCUSED—RESPONDENTS.

Muhammadan Law—Muhammadans, who are—Ahmadiyas, whether Mussulmans—Penal Code (Act XLV of 1860), ss. 79, 494—Bigamy—Muhammadan joining Ahmadiya sect, whether becomes apostate—Wife of convert re-marrying, whether commits offence of bigamy—Good faith, plea of—Mens rea, *absence of, whether good defence—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Acquittal, order of—Revision, powers of High Court in.*

The Ahmadees are a sect of Mussulmans, and a Mussulman who joins the Ahmadee faith does not become a *murtad* or apostate. (p. 76, col. 2.)

Khalil Ahmad v. *Malik Israfil*, 37 Ind. Cas. 302; 2 P. L. J. 108; 1 P. L. W. 284; (1917) Pat. 73, followed.

Ameer Ali's Muhammadan Law, 4th Edition, Volume II, page 36, Abdur Rahim's Muhammadan Jurisprudence, page 249, *Queen-Empress* v. *Ramzan*, 7 A. 461; A. W. N. (1885) 117; 4 Ind. Dec. (N. S.) 722, *Ata Ullah* v. *Azim Ullah*, 12 A. 494; A. W. N. (1890) 179; 6 Ind. Dec. (N. S.) 1059 (F. B.) and *Maula Bakhsh* v. *Amir-ud-din*, 57 Ind. Cas. 1000; 1 L. 317, referred to.

The wife of a person who joins the Ahmadiya sect and re-marries during the lifetime of her first husband without obtaining a divorce from him commits the offence of bigamy punishable under section 494, Indian Penal Code. (p. 74, col. 1.)

The plea of good faith and absence of *mens rea* is not a proper defence to a charge of bigamy. The fact that the accused acted in good faith and ignorance of law is no answer to the charge, though it may be considered in mitigation of sentence. (p. 74, col. 1)

Reg. v. *Tolson*, (1889) 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 16 Cox C. C. 629; 54 J. P. 4, distinguished.

Abdul Gani v. *Azizul Huq*, 14 Ind. Cas. 641; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257; 39 C. 409, dissented from.

Reg. v. *Sambhu Raghu*, 1 B. 347 at p. 352; 1 Ind. Jur. 380; 1 Ind. Dec. (N. S.) 231 and *Bai Ganga* v. *Emperor*, 39 Ind. Cas. 308; 19 Bom. L. R. 56 at P. 60; 18 Cr. L. J. 468, followed.

The High Court has power to interfere, in revision, with orders of acquittal, sections 435 and 439, Criminal Procedure Code, placing no such restriction. Such powers are not ordinarily exercised at the instance of private parties, save in exceptional cases involving important questions of law or relating to the personal status of particular communities. (p. 75, col. 1.)

Per *Krishnan, J.*—The Ahmadiyas are only a reformed sect of Muhammadans. (p. 76, col. 2.)

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 Session, North Malabar Division, in Case No. 12 of the Calendar for 1920.

[OLDFIELD, J.—(Addressing the Public Prosecutor) what is your attitude in the case?]

Mr. *J. C. Adam* (Public Prosecutor), for the Crown.—I have been instructed by Government to remain neutral in the matter.

[OLDFIELD, J.—Yes, as to the religious question involved. But there is a very important question of law in the case, as to whether good faith is a valid defence to a charge of bigamy. What have you to say as to that?]

Mr. *J. C. Adam*.—I can argue the question if your Lordships desire it, but my instructions are to remain neutral in the case.

Mr. *Zafrulla Khan*, of the Lahore Bar, appearing by special permission of the Chief Justice (with him Messrs. *M.C. Parthasarathy Aiyangar* and *P. V. Venugopala Aiyar*), for the Petitioner, after reciting the facts of the case submitted:—The learned Sessions Judge has based his order of acquittal on two grounds. First, that the complainant by becoming an Ahmadee became an apostate from Islam and his marriage with 5th respondent had, therefore, been *ipso facto* dissolved, so that she was free to marry anybody she pleased. Secondly, that in any case, inasmuch as she believed in good faith that her marriage with the complainant had been dissolved she could not be held to have committed an offence. It will be necessary to discuss this last question first. I submit that the 5th respondent did not act in good faith, and, even if she did so, that is no defence to the charge. She purports to have relied upon the opinion of the then Government Pleader, and that opinion refers to a decision of the Patna High Court, *Khalil Ahmad* v. *Malik Israfil* (1), in which it was held that Ahmadees are Mussulmans. So that she must be presumed to have had knowledge of the fact that one

(1) 37 Ind. Cas. 302; 2 P. L. J. 108; 1 P. L. W. 284; (1917) Pat. 73.

of the High Courts in India had declared the Ahmadees to be Mussulmans. She cannot now plead that she acted in good faith.

[OLDFIELD, J.—That is a question of fact and we must accept the finding of the Sessions Judge that she acted in good faith.]

Mr. *Zafrulla Khan.*—Assuming that she acted in good faith, that is no answer to the charge. Section 494, itself, while laying down other exceptions, does not recognise "good faith," as a ground for exemption from punishment. The language of the section is perfectly clear and no considerations of good or bad faith can arise. The learned Sessions Judge has relied upon a *dictum* of Mr. Justice Holmwood contained in *Abdul Gani* v. *Azizul Haq* (2), that case was decided really on the ground that the complainant having embraced Christianity he had become an apostate from Islam and his marriage with the accused had been dissolved. So that the *dictum* of Holmwood, J., on the question of good faith was a mere *obiter*. Sharf-ud-Din, J., who sat with Holmwood, J., does not base his judgment on considerations of good faith.

It has been held that the good faith, mistake, or ignorance of the accused person in a case under section 494 of the Penal Code, may be taken into consideration in mitigation of sentence, but do not affect the question of the guilt of the accused. *Reg.* v. *Sambhu Raghu* (3), *Bai Ganga* v. *Emperor* (4), *Nandi* v. *Emperor* (5).

[OLDFIELD, J.—These cases do seem to support you. You may go on to the question of apostacy.]

Mr. *Zufrulla Khan.*—The learned Sessions Judge admits that the mere fact that the accused and their witnesses regard the complainant as an apostate does not make him an apostate. He bases his finding on certain doctrinal differences which he finds exist between the Ahmadees and non-Ahmadees. These differences are detailed in a pamphlet called "What distinguishes Ahmadees from non-Ahmadees" by Maulvi Sher Ali, B. A. It is an exhibit in the case. (M. O. V.)

[OLDFIELD, J.—Do you accept this pamphlet as a correct exposition of the differences between Ahmadees and non-Ahmadees?]

Mr. *Zafrulla Khan.*—I do.

[OLDFIELD, J.—Is it in English?]

Mr. *Zafrulla Khan.*—Yes.

[OLDFIELD, J.—There is only one copy on the record. If you have an extra copy with you, you may put it on the record for our use.]

Mr. *Zafrulla Khan.*—I have sent for one.

My submission in the first place is, that the learned Sessions Judge had no jurisdiction to go into these matters.

[OLDFIELD, J.—If he had no jurisdiction to deicde the question of apostacy, we have no jurisdiction to decide it either and you cannot ask us to go into it.]

Mr. *Zafrulla Khan.*—I am afraid I have not been able to explain myself. I do not mean that the learned Sessions Judge had no jurisdiction to decide the question of apostacy. He was bound to do that. I submit that he had no jurisdiction to go into the details of the complainant's belief. That function is reserved for the Ecclesiastical Courts of Islam. It has been held that a British Court cannot enter into questions of orthodoxy and heterodoxy. When a British Court has to decide whether a person is a Mussulman or not, the only thing it has to see is whether he believes in the unity o God and the Prophethood of Muhammad. If a person professes a belief in these two doctrines, then so far as a British Court is concerned he must be held to be a Musulman.

[OLDFIELD, J.—But it seems to me it is not such a simple matter. What do you mean by belief in the Prophethood of Muhammad? Do you mean there has been no other Prophet than Muhammad?]

Mr. *Zafrulla Khan.*—Belief in the Prophethoood of Muhammad does not mean a rejection of any other Prophet. Muslims believe in all Prophets.

[OLDFIELD, J.—Then belief may mean different things In one sense everybody believes in Muhammad, I mean historically. Everybody believes that such a person lived, but that would not make them Muslims to my

(2) 14 Ind. Cas. 641 ; 15 C. L. J. 263 ; 16 C. W. N. 451 ; 13 Cr. L. J. 257 ; 39 C. 409.
(3) 1 B. 347 at P. 352 ; 1 Ind. Jur. 380 ; 1 Ind. Dec. (N. S.) 231.
(4) 39 Ind. Cas. 308 ; 19 Bom. L. R. 56 at p. 60 ; 18 Cr. L. J. 468.
(5) 59 Ind. Cas. 33 ; 1 L. 440 ; 22 Cr. L. J. 1 ;

mind. I should think belief in any person means a belief in his teachings.]

Mr. *Zafrulla Khan*.—Quite so. But British Courts have refused in such matters to enquire into the details of a man's belief. If a man says that he believes in the unity of God and he also believes that Muhammad was a true Prophet of God, a British Court would declare such a man to be a Muslim and would apply the Muhammadan Law to him.

[OLDFIELD, J.—Suppose such a man did not believe in a life after death, or denied a belief in angels, would he be a Muslim still?]

Mr. *Zafrulla Khan*.—A denial of any of the essential doctrines of Islam would make a man a *kafir*, but a man who professes to be a Muslim never denies any of those doctrines. He might interpret them differently from other Muslims, but he will not deny them.

[OLDFIELD, J.—What are those essential doctrines?]

Mr. *Zafrulla Khan*.—Islam enjoines a belief in the unity of God, in angels, revealed books, Prophets (whenever or wherever they might have appeared) and the life after death. On the practical side it enjoins the five daily prayers, the fasts of Ramzan, the legal alms, and the pilgrimage to Mecca.

[OLDFIELD, J.—Now take the case of a man who professes a belief in the unity of God and the Prophethood of Muhammad but does not believe in angels or in the life after death. Would you regard him as a Muslim?]

Mr. *Zafrulla Khan*.—Your Lordship has put this question to a man who believes in these things and according to whom a denial o any of these essentials renders a man a non-Muslim. As I have already submitted, nobody professing himself to be a Muslim will deny any of these things. He may, however, offer an explanation of them. For instance, Mr. Ameer Ali has put forward an explanation of his own with regard to angels.

[OLDFIELD, J.—But supposing a man does deny some of these things without any explanation.]

Mr. *Zafrulla Khan*.—Then to my mind he is not a Muslim. But so long as he professes a belief in the unity of God and the Prophethood of Muhammad he will be held to be a Mussulman by British Courts.

[OLDFIELD, J.—What is your authority for that?]

Mr. *Zafrulla Khan*.—Cited *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (6), *Queen Empress* v. *Ramzan* (7), *Ata Ullah* v. *Azim Ullah* (8), *Maula Bakhsh* v. *Amir-ud-din* (9), Ameer Ali's Muhammadan Law, Volume IV, pages 36 and 112, Abdur Rahim's Muhammadan Jurisprudence, pages 249, 253. Mr. Justice Mahmood in *Ata Ullah* v. *Azim Ullah* (8) goes so far as to say that anybody who calls himself a Mussalman must be held to be one.

In *Maula Bakhsh* v. *Amir-ud-din* (9) Mr. Justic Abdul Raoof has held that members of the sect known as *Ahl-i-Quran* are Mussalmans inasmuch as they believe in the unity of God and the Prophethood of Muhammad.

Mr. Amir Ali gives the definition of a Mussalman for the purposes of a British Court and points out the distinction between *Islam* and *Iman* with which he says British Courts have nothing to do.

Sir Abdul Rahim points out the distinction between heresy and unbelief.

[OLDFIELD, J.—Yes, they seem to support you.]

Mr. *Zafrulla Khan*.—I submit that that is all that is required in the case, and it is not denied that the Ahmadees believe in the unity of God and the Prophethood of Muhammad. I will go further, and ask the other side to cite a definition of Islam from some authorised book and I will show that the Ahmadees fall within that definition.

Apostacy, I submit, means the rejection of a doctrine which a man previously believed in. It has not been shown which essential doctrine of Islam the Ahmadees have rejected. The Ahmadees accept the Quran as the final revealed Book of God, and they believe that it can neither be added to nor subtracted from.

(6) 21 I. A. 56 ; 21 C. 666; 4 M. L. J. 131; 6 Sar. P. C. J. 389 ; 10 Ind. Dec. (N. S.) 1074 (P. C.).
(7) 7 A. 461 ; A. W. N. (1885) 117 ; 4 Ind. Dec. (N. S.) 722.
(8) 12 A. 494 ; A. W. N. (1890) 179 ; 6 Ind. Dec (N. S.) 1059 (F. B.).
(9) 57 Ind. Cas. 1000 ; 1 L. 317.

[OLDFIELD, J.—But you believe in a Prophet who has arisen after Muhammad.]

Mr. *Zafrulla Khan.*—Yes, and that very Prophet has taught that the Quran is the last revealed book of God, and that it is the final Code of law given by God to mankind for its guidance. He has brought no new law himself.

[OLDFIELD, J.—But if there can be a Prophet after Muhammad, why cannot there be a new law?]

Mr. *Zafrulla Khan.*—Our belief is that no Prophet can arise after Muhammad who is not a follower of his law. If a person claims to bring a new law we, as Muslims, cannot accept him, nor will such a person be himself a Muslim, not being a follower of the Prophet Muhammad. We accept Muhammad not merely as a Prophet but as *Khatam-an-Nabiyyeen.*

[KRISHNAN, J.—Then what is the difference between you and the other side on this point?]

Mr. *Zafrulla Khan.*—Both of us are agreed that Muhammad was *Khatam-an-Nabiyyeen* and both admit that this expression means "Seal of the Prophets." Our interpretations of it, however, are different. The Ahmadees interpret it to mean that no Prophet can now arise who does not bear the seal of Muhammad, *i.e.*, who is not his follower, and the non-Ahmadees interpret the expression to mean that no Prophet can arise at all after Muhammad.

[OLDFIELD, J.—I notice that one of your beliefs is that Jesus is dead, while you also believe that Ghulam Ahmad was the promised Messiah. Is this not contradictory? Or, do you believe in the doctrine of the transmigration of souls?]

Mr. *Zafrulla Khan.*—We believe that Jesus died a natural death, and we do not believe in the doctrine of the transmigration of souls. We believe that Ghulam Ahmad was the promised Messiah, not in the sense that physically he was the same man as Jesus, nor that the soul of Jesus had entered his body, but as John the Baptist claimed to have come in the power and spirit of Elias, and thus fulfilled the prophecy concerning the second advent of Elias, so Ghulam Ahmad claimed to have come in the power and spirit of Jesus and thus fulfilled the prophecies concerning the second advent of the Messiah.

[OLDFIELD, J.—I notice that you also believe in Ram Chandra and Krishna as the Messengers of God.]

Mr. *Zafrulla Khan.*—We do, and this is not opposed in the teachings of the Quran. The Quran expressly says that every nation has had its warner, meaning prophet.

[OLDFIELD, J.—Are these two prophets mentioned in the Quran?]

Mr. *Zafrulla Khan.*—Not by name. Very few prophets are mentioned in the Quran by name. We are taught, however, to beleve in all prophets. Even the non-Ahmadees believe in over three hundred thousand prophets in addition to those mentioned in the Quran.

[KRISHNAN, J.—The Hindus believe in Ram Chandra and Krishna as *auatars, i. e.*, the incarnations of God, do you also accept them as such.]

Mr. *Zafrulla Khan.*—No, we do not believe in the doctrine of incarnation. We accept Ram Chandra and Krishna only as prophets.

I submit further that the complainant has stated that he believes in the unity of God and the Prophethood of Muhammad. He also says that he believes in all the prophets (including Mirza Ghulam Ahmad, the Prophet of this age) and all revealed books and that he believes in the Quran. He says his prayers and keeps the fast of Ramazan. He accepts the liability to pay the *zakat* and believes in the pilgrimage to Mecca. What more is wanted? He says that by becoming an Ahmadee he has become a better Muslim.

The six points of difference on which the learned Sessions Judge has relied do not show that the Ahmadees are not Muslims. He merely recites those points and says that because of these differences the Ahmadees are not Muslims. He does not purport to decide whether the Ahmadees or the non-Ahmadees are right. He expressly disclaims this function. I submit that unless he could decide on the correctness or otherwise of the doctrines held by the Ahmadees he had no right to declare that because of those differences the Ahmadees had ceased to be Muslims.

[OLDFIELD, J.—Yes, we think the Sessions Judge has rather begged the question.]

Mr. *Zafrulla Khan.*—I submit that on all these points the doctrines of the Ahmadees

are in accordance with the Quran, and the other side cannot show that in any respect the Ahmadees have departed from the teachings of the Quran.

The question whether the Ahmadees are Muslims or not has already been decided in the affirmative by the Patna High Court. *Khalil Ahmad* v. *Malik Israfil* (1).

I am aware that your Lordships are dealing with an order of acquittal on the Revision Side and that it is not the practice of the High Courts in India to interfere with such orders in revision except in very exceptional cases. This I submit is a very exceptional case. It affects the status and rights of a very large community. If the order of the Sessions Judge were allowed to stand it would lead to many hardships and anomalies. It has been held in Patna and Lahore that Ahmadees are Musulmans. So that in Bihar and in the Punjab the marriage of an Ahmadee with a non-Ahmadee woman is valid and the children of such a marriage would be legitimate and would be the heirs of their father. If such a couple came to Madras their marriage would be dissolved, and a question would arise whether their children were legitimate. Again, if Ahmadees are held to be non-Muslims, what law is to be applied to them? They themselves claim to be Muslims. How can you apply any other law to them except the Muhammadan Law?

[OLDFIELD, J.—The question is certainly an important one. Had not that been so my learned brother would not have admitted this petition to a hearing.]

Mr. *Zafrulla Khan*.—In conclusion I submit that my object in preferring this petition is not to seek revenge. I desire only to indicate my rights. It is possible for your Lordships to take one of several views in this case. For instance, your Lordships might hold that good faith is a valid defence to a charge of bigamy. In that case I would request your Lordships to intimate in your judgment that the Sessions Judge should not have decided the question of apostacy and to leave that question open. If your Lordships hold that good faith is not a valid defence in this case, then it will become necessary for your Lordships to decide the question of apostacy. In that case I hope your Lordships will hold that Ahmadees are Muslims. In that view of the case it will be necessary for your Lordships to set aside the acquittal and to order a re-trial. But I beg to intimate to your Lordships that I do not desire a re-trial, for, as I have said, I am not seeking revenge, and in any case the authorities show that the woman having acted in good faith the sentence would only be nominal.

Mr. *C. Madhavan Nair*, for the Accused.—I submit that a revision petition against an order of acquittal is not competent. It is not the practice of this Court to interfere in revision with an order of acquittal. There is no question of public importance involved in this case and Government has refused to appeal.

[OLDFIELD, J.—Surely it is a question of public importance whether these people are entitled to retain their wives? We have jurisdiction to interfere even with an order of acquittal in a proper case. What have you to say on the merits?]

Mr. *C. Madhavan Nair*.—I submit that there are fundamental differences between the doctrines professed by the Ahmadees and the ordinary Musulmans. The learned Sessions Judge has given very good grounds for holding that they are not Mussulmans.

[OLDFIELD, J.—That is the very question to be decided. It seems to me the Sessions Judge has given no grounds for holding that these people are not Mussulmans.]

Mr. *Madhavan Nair*.—I am not personally acquainted with the doctrines held by the members of this sect, but the learned Sessions Judge has gone very exhaustively into the question and after a careful consideration of the evidence has come to the conclusion that Ahmadees are apostates from Islam.

[OLDFIELD, J.—Then you can support the Sessions Judge's judgment only by that judgment?]

Mr. *Madhavan Nair*.—There is the defence evidence, if your Lordships would permit me to read it.

(Reads defence evidence.)

[KRISHNAN, J.—You cannot ask us to accept the opinion of these witnesses as final. They are partisans.]

Mr. *Madhavan Nair*.—There are very eminent theologians among them. One of them is the *Kazi* of Osmanabad in the Nizam's Dominions, and is the son of the Government *Kazi* of Madras. Surely their opinions are entitled to weight. I submit that the

question whether the Ahmadees are Mussulmans or not should be decided by the view which the great majority of Mussulmans take of the matter. The majority of Mussulmans have declared the Ahmadees to be infidels.

[KRISHNAN, J.—There is always prejudice against a new sect.]

Mr. *Madhavan Nair*.—Then there is Exhibit I. It is a *fatwa* issued by the *Kazi* of Osmanabad and endorsed by the Government *Kazi* of Madras. It gives reasons for holding that the Ahmadees are infidels. It is based on the *Fatawa Alamgiri*, a book of pre-eminent authority. (Reads Exhibit I).

[OLDFIELD, J.—You say that Ghulam Ahmad claims that the verse "I give you glad tidings of a prophet who shall come after me whose name shall be Ahmad," refers to him?]

Mr. *Madhavan Nair*.—Yes.

[OLDFIELD, J.—Do you deny that that verse is in the Quran?]

Mr. *Madhavan Nair*.—No, but we say that Ghulam Ahmad is not that man to whom the verse refers.

[OLDFIELD, J.—That is not the point. This verse clearly contemplates the appearance of a prophet. So the mere fact that a person claims to be a prophet would not make him a *kafir*.]

Mr. *Madhavan Nair*.—The Ahmadees do not except the Prophet Muhammad as *Khatam-an-Nabiyyeen*, whereas he is referred to in the Quran as such.

[KRISHNAN, J.—They accept him as *Khatam-an-Nabiyyeen*, meaning the seal of the prophets. They differ from your interpretation of the expression. You say that the expression means that there will be no prophet after Muhammad, and they say that it means that nobody can become a prophet except through Muhammad. I do not see that their interpretation is at all unreasonable.]

Mr. *Madhavan Nair*.—They accept Ram Chandra and Krishna as prophets. It is inconsistent with the Quran.

[OLDFIELD, J.—Did Ram Chandra and Krishna appear before Muhammad or after him?]

Mr. *Madhavan Nair*.—Before him.

[OLDFIELD, J.—Then it makes no difference. Muhammad appeared after them, and the Ahmadees say they accept him as a true prophet.]

Mr. *Madhavan Nair*.—They refuse to say their prayers behind us, and do not give their daughters in marriage to us. In fact they call us *kafirs*.

[KRISHNAN, J.—The question is not what they call you, the question before us is what are they themselves. We are not sitting here to decide whether you are *kafirs* or not, but whether they are Mussulmans or not.]

[OLDFIELD, J.—The other side have cited *Khalil Ahmad* v. *Malik Israfil* (1) in which the Patna High Court has held that the Ahmadees are Mussulmans. Can you cite any authority to the contrary?]

Mr. *Madhavan Nair*.—There is no authority to the contrary, the reason being that the Ahmadees are a very small community and there have been very few cases concerning them.

[KRISHNAN, J.—There are a large number of them in Malabar.]

Mr. *Madhavan Nair*.—In any case *Khalil Ahmad* v. *Malik Israfil* (1) does not help them much. There was no discussion of the question before the Judges. The case related to a mosque, and the Judges have remarked in passing that the Ahmadees are Mussulmans. On the contrary, it rather helps me. For it shows that they call us *kafirs*.

[OLDFIELD, J.—What have you to say on the question of good faith?]

Mr. *Madhavana Nair*.—There is the finding of the learned Sessions Judge that the accused acted in good faith. The woman believed in good faith that her marriage with the complainant had been dissolved. She obtained the opinion of the Government *Kazi* of Madras and an eminent lawyer, the then Government Pleader. If she was wrong, she was guilty of a mistake of fact. Section 79 of the Indian Penal Code applies to the case.

[KRISHNAN, J.—There is no question of a mistake of fact in this case. The question whether the complainant has become an apostate or not is a question of law, or at least a mixed question of law and fact.]

Mr. *Madhavan Nair*.—In *Reg.* v. *Tolson* (10) it was held that a person acting

(10) (1889) 23 Q. B. D. 168; 58 L. J. M. C. 97; 60 L. T. 899; 37 W. R. 716; 16 Cox C. C. 629; 54 J. P. 4.

in good faith could not be convicted of bigamy. *Abdul Gani* v. *Azizul Haq* (2) is clearly in my favour.

Mr. *Zafrulla Khan*, in reply.—My learned friend is not right in saying that this question was not discussed in the Patna High Court. It was in fact discussed at great length and the fact that the non-Ahmadees were represented by Mr. Mazhar-ul-Haq and eight other eminent Mussulman members of the Patna Bar is a guarantee of the fact that the discussion was exhaustive.

[OLDFIELD, J.—What have you to say to the *dictum* in the *Fatawa Alamgiri* ?]

Mr. *Zafrulla Khan*.—The original has not been produced before your Lordships, so that we cannot be certain whether there is any such *dictum* at all. Even if there is, we do not know what its context is, and what is the real sense of the passage. In any case my learned friend has admitted and Exhibit I assumes that according to the Quran a prophet can still arise. I place my reliance on the Quran as an answer to the *Fatawa Alamgiri*.

My learned friend has not pointed to a single doctrine held by the Ahmadees which is opposed to the Quran.

Our beliefs are stated clearly in Exhibit M. O. V, and I leave your Lordships to decide after a perusal of that pamphlet whether we are Muslims or not. I can only say that if Ahmadees are not Muslims, I do not know of anybody who is.

ORDER.

Oldfield, J.—We are asked to revise the acquittal of the 5th respondent on a charge of bigamy, punishable under section 494, Indian Penal Code, and of the other respondents on subsidiary charges. The petitioner is the complainant who prosecuted as 5th respondent's husband, and the Public Prosecutor, who has had notice, has under instructions taken no part in the proceedings. We should not ordinarily proceed at the instance of a private party in revision of an acquittal; and we do so here, only because we are satisfied that a question of public importance relating to the personal status of a substantial part of the Muslim community is raised.

That question is whether petitioner's adherence to Ahmadiya tenets made him a *murtad* or apostate from Muhammadanism. If it did, it had, it is not disputed, the effect of dissolving his admitted marriage with 5th respondent: and such dissolution prior to her marriage with 3rd respondent is her first and principal defence to the charge. The reply attempted is that Ahamadiyas are merely a sect of Muhammadans, their divergences from ordinary Muhammadanism not involving abandonment of that creed or making them schismatics. Some objection has been taken to our entering on this controversy in revision by petitioner on the ground that it is purely one of fact since only his religious views and their orthodoxy are in question, and by respondents on the ground that it relates only to degrees of orthodoxy, which the Court has no business to estimate. But, although I feel the difficulty involved in an attempt to deal with matters with which I am necessarily unfamiliar and although I appreciate the improbability that our decision can commend itself to those with whom personal associations and devotional sentiment must weigh more than the materials on which we have to proceed the issue cannot be avoided, for it is one of mixed law and fact inasmuch as it relates substantially and ultimately to the personal status, which petitioner's religious views determine; and to say that only degrees of orthodoxy are in dispute is to beg the question whether the Ahmadiya's deviation from Islam is such as entails abandonment of any essential thereof.

The lower Court has attempted very little by way of direct ascertainment whether that deviation does so, its conclusion appearing really to rest on the finding that the Ahmadiyas are regarded as apostates by orthodox Muhammadans and the principle that "what the doctrine and faith preached in the Quran are is to be decided, not according to the interpretation put on it by individual persons but according to the interpretation generally accepted and adopted by Mussalmans as a whole." And this test "*securus Judicat Orbis*" may in appropriate circumstances have its value. But to apply it fairly, we must make sure that the judgment relied on is really general and has been reached by the community as a whole and that it has been reached after due deliberation and the pass-

ing of sufficient time for the disappearance of the prejudice which new beliefs must always incur. Ahmad, whom the Ahmadiyas follow, died, we were told, in the Punjab in 1908, and in the fifteen years which have passed, it is difficult to suppose that Islam or even Islam in India can have come to any mature conclusion on his teachings. In fact, it has not been shown that it has done so. For, of Nos. 4, 6, 7 D. W.s whose evidence alone is relied on, the first is the son of the Government *Kazi* of Madras, was formerly an Assistant *Kazi* and Arabic Professor in a private Madrassa in this City and describes himself as now chief priest in a district in the Nizam's Dominions, whilst the other two are a *Kazi* and a *Musaliar* or religious leader in Malabar. The evidence of the second attracts suspicion to the extent of his acquaintance with Ahmad's writings and the third said that there was "no one in the Muhammadan world, whose opinion on religious matters was binding on the conscience of Mussalmans." These persons are not shown and do not appear to have more than a local influence and reputation and there is nothing before us except their assertions, in some instances of doubtful value. In the question propounded to P. W. s father in the Fatwa, Exhibit 1, "religious decrees of learned men of Arabia and India" declaring Ahmad and his followers apostates are referred to, but none is specified either in the question or answer and none was produced at the trial. In these circumstances, it has not been established that the Muslim community either generally or in India has reached any decision which we can regard as conclusive.

This failing, discussion has turned on the character of the divergences between the teachings of Ahmad and the orthodox creed. The former are enumerated, it is not disputed, correctly by the lower Court. But as regards the latter the parties are at variance, petitioner contending that the formula "There is one God and Muhammad is his Prophet" is exhaustive, respondents that we must take account of other doctrines sanctioned by the Quran or other authorities. Petitioner in support of his contention relies on the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* (7), those of Edge, C. J., and Mahmood, J., in *Aia Ullah* v. *Azim Ullah* (8) and on *Maula Bakhsh* v. *Amir-ud-din* (9) as showing that monotheism and belief in Muhammad as God's Prophet are the only essentials. But it is clear that the question in those cases was only between one sect and another or the general body of Muhammadans as to the right to worship in a mosque or the validity of a *wakf*, not as it is here, between orthodoxy and alleged schism. To decide between them something more is evidently required than the bare formula referred to above. For the latter portion of it cannot be taken as requiring a belief only in the history or legend of Muhammad without reference to acceptance of his message and ascertainment of its terms and of the legitimacy of the constructions placed on them later, of which in fact in the case of the Ahmadiyas respondents complain. The materials for a conclusion which the parties have provided are the evidence of the witnesses already mentioned, the Fatwa, Exhibit 1, a book M.O.1. "The Claims and Teachings of Ahmed" and a pamphlet M.O.V. "What destinguishes Ahmadees from Non-Ahmadees." No reliance was placed before us on the works exhibited as M.O.s II, III, IV.

It is first to be observed that the Ahmadiyas, statedly at least, emphasize their adherence to the Islamic formula. In M.O.V. Ahmad's principles are stated in his own words, beginning, "We are Muslims by the grace of God; Mustafa the Holy Prophet of Arabia, is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called the Quran. Every prophethood has found its culmination in that Messenger of God, whose name is Muhammad. The revelation and inspiration that we receive have not been granted us independently, but it is through him that we have received this gift" and the pamphlet goes on, like the manifestoes of other religious developments, to state the distinctive features of Ahmad's teaching as a return to the early favour of the recipients of the original revelation, an abandonment of worldly affairs and political greatness for the earlier more spiritual methods of propogating the faith and an eradication of the errors, into which Muslims from time to time have fallen. And, similarly, in M. O. 1 the first

chapter maintains monotheism and the supremacy of the Quran and there are (page 106) extracts from the latter under headings "The Almighty God declares that Islam is the perfect and chosen religion." The Almighty God commands every soul to follow no other religion than Islam; and "Muhammad is the Prophet of God for all the nations of the world. The form, moreover, to be signed on initiation (page 104) runs: "I bear witness that there is no God but Allah. He is one, having no partner, and Muhammad is the servant and Messenger of God."

All this would seem to involve a plenary acceptance of Muhammadanism; and in fact the respondents' objection is to the Ahmadiyan additions to it and their alleged inconsistency with it. But we have, in my opinion, been shown no distinct authority as to which doctrines of Islam are regarded as fundamental or the extent to which additions to them, deviations from them or inconsistencies with them are permitted. Seventh defence witness no doubt said generally that any Mussalman who took away from, added to or tampered with the Quran, was a *murtad*, and 4th defence witness that among sects the differences were not in matters of faith, but in ritual; and there is also the judgment of Mahmood, J. in *Queen-Empress* v. *Ramzan* (7) in this sense. But 4th defence witness also explained his description of some sects as *murtads* on the ground that their deviations from the teaching of the Quran were on fundamental points, refusing, however, to regard the Shiah's disbelief in the first three Caliphs as a deviation from the faith of all. That private judgment and analogical deduction are in appropriate circumstances and to a greater or less extent legitimate methods of ascertaining the law is recognized in the text books; (Ameer Ali's Muhammadan Law, 11-14, Abdur Rahim's Muhammadan Jurisprudence, 25); and we have not been shown how they are not also legitimate in theology, so long as fundamental principles are maintained and the question is only of the development, to which every creed must be subject so long as it retains life and growth and adapts itself to altered conditions. This is in fact enough to justify the Ahmadiyans in thier faith and six alleged deviations from orthodoxy as enumerated by the lower Court. For their abandonment of the sword for peaceful argument as the method of propagation of Islam has been inevitable since the cessation of militant conditions and the permeation by Muhammadans of countries to whose law they owe allegiance; and their refusal to acknowledge the spiritual supremacy of the Sultan of Turkey cannot, if only for chronological reasons, be fundamental.

The remaining four points of divergence, referred to by the lower Court, are set out in its judgment, the evidence and Exhibit-1, unfortunately in very general language which was not made more specific before us. But they amount, as I understand them, to assertions that Muhammad and other earlier recognized Prophets, for instance Jesus Christ, have not been the sole channels of communication between God and man; that others, for instance Buddha, Rama and Krishna, have been bearers of the divine message; and that the last of such messengers was Ahmad himself, who is to be identified with the Prophet "who will come after me and whose name will be Ahmad" referred to in the Quranic verse quoted in Exhibit 1; and there is also imputed to the Ahmadiyans a novel doctrine that "Jesus Christ is still dead and buried and not in heaven." As regards this doctrine it is sufficient that it is presented in Exhibit-V (page 49) the only source of information available, as founded on the interpretation of the Quran and tradition and that it has not been shown how rejection of any dogma, which is fundamental or affects the position and supremacy of Muhammad or has been defined by any final or general authority is involved. As regards the remaining points, it is obvious and the references in the latter part of the 4th defence witness's evidence indicates that much must depend on the sense in which the expressions used by Ahmad are understood and the significance of his teachings as a whole. If, for instance, he did (and we have not been referred to any particular passage) speak of Krishna and Rama as heavenly messengers or *autars*, the corrective is given in the far less definite claim at page 160 in Exhibit-V: "I do not say it to please anybody, but God has revealed to me that Karishna and Rama were also righteous servants of God and had true connection with him;" and, if he did identify himself

with the promised Messiah, he explained at page 143 that " the perfect follower of God's revelation cannot be called an independent prophet, for this is a disrespect towards the Prophethood of Muhammad" and in the note on page 144 that "no prophet, who is also a lawgiver, can appear after the Holy Prophet, even from among his followers. For this door is completely closed." That Ahmad identified himself with the Ahmad whose advent is foretold in the verse above referred to, can involve no unorthodoxy, much less rejection of any fundamental tenet unless, what we have not been shown, all speculation as to the fulfilment of Quranic prophecy is forbidden; and the quotation in Exhibit-I from the Alamgiri Fatwa must be inconclusive in the absence of information as to its context or the method by which its author would have reconciled it with the Quranic text. Reference has been made to the extent to which Ahmad statedly accepted and proceeded from the fundamental tenets of Islam. It was then for respondents to show that the additions to and divergences from them involve their abandonment; and it is not possible on the materials before us to hold that they do so. It is satisfactory that a similar conclusion was reached in *Khalil Ahmad* v. *Malik Israfil* (1). It follows that petitioner is not a *murtad* and his marriage with 5th respondent is subsisting.

This conclusion makes it necessary to consider the further defence, accepted in the alternative by the lower Court, that the respondents are entitled to acquittal, because they acted without *mens rea* and in the honest belief that the marriage was dissolved. This is unsustainable. For there is not really any question here of the doctrine of *mens rea* or of the application of section 79, Indian Penal Code, since the respondents acted under a mistake of law or under a mistake of mixed law and fact, *Reg.* v. *Tolson* (10) being distinguishable on that ground. I am with all respect unable to follow the authority relied on by the lower Court, the judgment of Holmwood, J., in *Abdul Gani* v. *Azizul Haq* (2) and must hold that, whatever weight the good faith of respondents might deserve if the proper sentences to impose were in question, it is irrelevant to their liability to conviction.

The case, however, is before us in revision and, with reference to the last clause of section 439, Criminal Procedure Code, the only course open to us is to order a re-trial. Mr. Zafrullah Khan for petitioner does not ask us to take this course, since he desires only to obtain an authoritative settlement of the questions argued. Further proceedings are, in my opinion unnecessary, since respondents acted in a mistaken, but honest, belief as to the law and only nominal sentences would be the result. In these circumstances, and for this reason, the petition is dismissed.

Krishnan, J.—This is a Criminal Revision Petition filed by the complainant against the order of acquittal, by the learned Sessions Judge of North Malabar, of the accused in Sessions Case No. 12 of 1920, of whom the 5th accused, a Mopla woman, was charged with bigamy under section 494, Indian Penal Code and the rest with abetment thereof. The Sessions Judge found that the 5th accused was lawfully married to the complainant but that he subsequently joined the new sect of Ahmadiyas and that thereupon after obtaining the opinions of certain Muhammadan theologians that his act amounted to apostacy and severed the marriage tie, she married a second time the 3rd accused in the case. She had also pleaded that the complainant had actually divorced her but that plea was found against by the Judge and has not been renewed before us. On these findings the question to be decided was whether her second marriage amounted to bigamy, and that depended on the further question whether the act of an orthodox Muhammadan in joining the Ahmadiyan sect amounted to apostacy under Muhammadan Law or not; for it is conceded on both sides that one of the recognized consequences of apostacy by a Muhammadan is to sever his marriage tie with his wife. All the authorities are agreed on that point. The learned Sessions Judge has upheld the contention of the accused that her husband did become an apostate by joining the Ahmadiyans. He has also held that even if that view was wrong, the woman acted with due care and caution and *bona fide* believed that her first marriage had come to an end in law and that she was free to marry again, and, therefore, she was not guilty as there was an absence of *mens rea*

or guilty intention. He thus acquitted all the accused on those two grounds and we have to consider in revision the correctness of his views on the two points.

Before doing so it is necessary to mention that a preliminary objection was taken by the learned Counsel for the accused to our hearing the petition on the ground that no revision lies against an order of acquittal. It cannot, however, be said that the High Court has no power to interfere in revision with the order of acquittal, for there is no such restriction in the sections of the Criminal Procedure Code which deal with our powers in revision, sections 435 and 439. On the other hand, clause (4) of section 439 contemplates orders of acquittal being revised, for it lays down a restriction on what the High Court can do on such a revision. It enacts that the Court cannot convert a finding of acquittal into one of conviction. This Court, however, as a matter of sound and recognised practice, has always refused to revise orders of acquittal at the instance of private parties except in very exceptional cases. This, however, is, in my opinion, one of those exceptional cases, as it raises two important questions of law, one of them of great interest to the new and growing class of Ahmediyas and to the Muhammadans in general, and the decision of the case turns entirely upon the decision of those two points of law and not on any appreciation of evidence. In these circumstances, we have decided to overrule the objection.

Turning now to the question of apostacy raised, it is undoubtedly a question of Muhammadan theology to say what deviation from the recognised doctrines of Muhammadanism would amount to apostacy; but as civil rights and legal status of parties are based on its decision, we must decide it ourselves. The accused has called 3 witnesses of the orthodox party who assert themselves to be men learned in Muhammadan theology and who say that the adoption by a Muhammadan of the tenets of Ghulam Ahmad Mirza, the founder of the sect of Ahmediyas, amounts to apostacy under that law; but we cannot accept their opinion as settling the question, as argued for the accused, particularly as they are interested as orthodox Muhammadans in denouncing the members of the new sect as unbelievers and as they have not given satisfactory reasons for their opinions. As pointed out by Sir Abdur Rahim in his Muhammadan Jurisprudence, page 250, some people are too prone to charge others with unbelief and treat them as heretics, but the correct law is that, when heretical doctrines are opposed to clear and indisputable texts, they would amount to unbelief and not otherwise. Consensus of opinion as a source of law or the doctrine of *Ijma* is not universally recognised among Muhammadans; but even if we take consensus of opinion as a proper source of law there has not been, as pointed out by my learned brother, such a lapse of time since the founding of the new sect of Ahmadiyas as to have developed any such general consensus of opinion regarding the status of its members. We must, therefore, consider the doctrines of Ahmadiyas and see whether their adoption by Muhammadans would amount to heresy and make them apostates or *murtads* and put them outside the pale of Muhammadanism. It may be observed that, in doing this, we must take the doctrines as propounded by Ahmad himself and accepted by his followers and not the distorted version of them as given by their opponents. It is accepted by the complainant that the Ahamadiya doctrines are correctly stated in a small pamphlet by Mr. Sher Ali, B.A., and published by Sadr Anjuman Ahmadiyya of Qadian, Punjab, entitled "What distinguishes Ahmadees from non-Ahmadees," filed as an exhibit in this case, M. O. V. The creed of Ahmad is set out in it on pages 2 and 3. It begins by saying: "We are Muslims by the Grace of God. Mustapha (the Holy Prophet of Arabia) is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called the Quran." A perusal of what is stated in the pamphlet shows clearly that the Ahmadees subscribe to the Kalma, that there is no God but one God and Muhammad is his Prophet and unreservedly accept the Prophethood of Muhammad and the supreme authority of the Quran. In fact, it would seem that they differ from the orthodox Muhammadans only in some 6 points which are set out in the pamphlet and also by the learned Judge in his judgment.

They are briefly stated as follows:—

1. While both parties believe that God had been speaking to his prophets in the past the non-Ahmadees hold that Muhammad was the last prophet with whom God spoke and since then He has not spoken to and will not speak to any one till the end of time. The Ahmadees, on the other hand, believe that God continues to hold communion with His holy servants now as in the past.

2. While both sides accept that Muhammad was *Khatamun Nabiyyin* (the seal of the Prophets) they differ as to its interpretation. Ahmadees say that it means that no new prophet can arise except as a follower of Muhammad and bearing his seal and not that no new prophet can arise at all as the non-Ahmadees hold.

3. Ahmadees admit into the list of prophets before Muhammad world-teachers such as Zoroaster, Budha, Krishna and Ramchandra and this they say is according to the Quran but non-Ahmadees refuse to acknowledge them as prophets. Of course, the Ahmadees hold that Ahmad was himself a prophet of God but unlike the earlier prophets he got his prophethood through Muhammad who was made a prophet-maker by God.

4. Ahmadees believe that Jesus Christ was actually crucified but he did not die on the cross. He came out alive and went to Kashmir and died and is buried there. Whereas the non-Ahmadees hold that Jesus was bodily carried away to heaven by God before crucifixion. The Ahmadees think that the prophecy of the second advent of Jesus is to be fulfilled not by Jesus coming back in person but by his spirit entering another man and they believe this has been fulfilled by the advent of Ahmad himself.

5. While the non-Ahmadees believe that the promised Mahdi will carry on a holy war or *Jihad* and spread Islam by the sword, Ahmadees repudiate this doctrine and hold the promised Mahdi and the Messiah are the same and that he will spread Islam by arguments and heavenly signs and not by violence. They accept Ahmad as that Messiah.

6. Ahmadees deny the claim of the Sultan of Turkey to the Caliphate and hold that every Muslim is bound to remain loyal to the Government under which he lives and which protects him.

These are said to be the main differences. I agree with my learned brother in thinking that these differences are not sufficient to justify us in holding that the Ahmadees are not Muhammadans but apostates. As already stated, they accept the Kalma, the Prophethood of Muhammad and the authority of the Quran. These undoubtedly are the essential conditions for a person to be a Muhammadan, and they are complied with by the Ahmadees, that would seem to make them Muslims governed by the Muhammadan Law. Sir Ameer Ali says in his book on Muhammadan Law, 4th Edition, Volume II, page 36 that, "Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Muhammad is a Muslim subject and is subject to the Mussalman Law. So long as the individual pronounces the Kalma of Tauhid, the creed of Islam, it is not necessary for him or her to observe any of the rights and ceremonies or to believe in particular doctrines which imply *Iman* or belief" and again on page 112, "Every person who acknowledges the Divine Unity and the messengership of the Arabian Prophet is regarded as within the pale of Islam; nothing more is required." To the same effect is the opinion of Sir Abdur Rahim in his Muhammadan Jurisprudence, page 249, where he says the Islamic faith consists in acknowledging the authority of one God the Lawgiver and the truth of Muhammad's mission as his prophet. Similar expressions of opinion are found in the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* (7) and in *Ata Ullah v. Azim Ullah* (8) which was a case relating to the sect of Wahabis; though the decisions in those cases referred to worship in a mosque, they are of value to show how eminent Muhammadan Lawyers have looked upon the question as to who are Muhammadans. Besides those cases, the learned Counsel for the petitioner has brought to our notice one recent decision in which the very question raised before us as to the status of Ahmadees seems to have been raised, *viz.*, the case of *Khalil Ahmad* v. *Malik Israfil* (1). It was expressly ruled there that the sect known as Ahmadees are Muhammadans notwithstanding their pronounced dissent on several important matters of doctrine from the orthodox Muhammadan faith. In view of these authorities, which I accept, it follows that a Muhammadan does not become an apostate by merely accepting the doctrine of Ahmadees. The Ahmadiyans are, in my view, only a reformed sect of Muhammadans.

If we examine the 6 points of difference set out above between the Ahmadees and the non-Ahmadees none of them seem to refer to any essential principles of Muhammadanism or to conflict with the Quran. The point that has been most pressed before us is that Ahmad having set himself up as a prophet has by that very act become an

apostate and his followers as followers of an apostate are also apostates. No authority has been cited for this contention. We cannot act on what D. W. No, 4 says in his answer. Exhibit I is stated in the Fatwa Alamgiri. The original passage has not been shown to us nor has it been shown that it applies to a case like the present where the Prophethood of Muhammad is unreservedly accepted.

For the above reasons, I have come to the conclusion that the complainant never became an apostate and that his marriage with the 5th accused was subsisting at the time of her second marriage. We have now to consider whether the plea of good faith and absence of *mens rea* is established in the case and is a proper defence to the charge. It is said that the accused acted in good faith because she obtained the opinion of D. W. No. 4 and others that she was entitled to re-marry and her learned Counsel has relied on *Reg* v. *Tolson* (10) and on section 79 of the Indian Penal Code. Now, in this matter I think we must be guided more by the wording of the section of the Code than on the English Law. Section 79 only excuses a person who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing the act in question. So far as I can see, there is no question of fact on which the 5th accused made any mistake. It was purely one of law whether the fact of her husband becoming an Ahmadee made him an postate in law and severed her marriage tie. Her acting on the opinion of others is thus no answer to the charge against her, though, as observed by my learned brother, it may be considered in mitigation of sentence. The English case cited is distinguishable on the ground that there the mistake was one of fact. The opinion of Holmwood, J., in *Abdul Gani* v. *Azizul Haq* (2) relied on by the Sessions Judge cannot, with all respect, be accepted as an authority, as the learned Judge has not discussed the question or referred to any authority and has not noticed the difference between the effect of a mistake of law and of a mistake of fact. Sharfuddin, J., who sat with him put the case on the ground that the marriage which was broken by the husband becoming a Christian could not be held to be subsisting during the period of *iddut* when the 2nd marriage was contracted and, therefore, no charge for bigamy would lie. On the other hand, it has been held in Bombay in *Reg.* v. *Sambhu Raghu* (3) and again in *Bai Ganga* v. *Emperor* (4) that believing in good faith that the accused was justified in re-marrying is not a defence to a charge of bigamy but can be considered only in mitigation of sentence. This same view has been taken in Punjab [see *Nandi* v. *Emperor* (5) I hold, therefore, that the second ground of defence of the accused also fails. In the result, the acquittal must be set aside, but, in the circumstances of this case, I agree that it is not necessary to order a re-trial.

M. C. P.

Acquittal set aside.
Re-trial not ordered.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 617 OF 1922.
September 19, 1922.
Present:—Mr. Justice Broadway,
and
Mr. Justice Martineau.
EMPEROR—APPELLANT
versus
MAUJ DIN AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 89—Criminal proceeding—Death of injured party—Abatement.

The principle laid down in section 89 of the Probate and Administration Act has no application to a criminal prosecution. (p. 78, col. 2.)

A criminal prosecution cannot abate merely on account of the death of the injured party. (p. 78, col. 2.)

Ishar Das v. *Emperor*, 10 P. R. 1908 Cr.; 112 P. L. R. 1908; 8 P. W. R 1908 Cr., 7 Cr. L. J. 290, *Rama Nand* v. *Teja Singh*, 40 Ind. Cas. 1008; 26 P. R. 1917 Cr.; 18 Cr. L. J. 688; 31 P. W. R. 1917 Cr., *Labhu* v. *Emperor*, 52 Ind. Cas. 797; 25 P. R. 1919 Cr.; 20 Cr. L. J. 717. dissented from.

Imperator v. *Nur Mahomed*, 8 Cr. L. J. 190; 1 S. L. R. 72, *Muhammad Ibrahim Sahib* v. *Shaik Dawood*, 65 Ind. Cas. 549; 44 M. 417; 40 M. L. J. 351; 13 L. W. 379; (1921) M. W. N. 227; 23 Cr. L. J. 117; 30 M. L. T. 349, *Hazara Singh* v. *Emperor*, 59 Ind. Cas. 918; 2 L. 27; 22 Cr. L. J. 166; (1922) A. I. R. (L.) 227, relied upon.

Appeal from the order of the Sessions Judge, Jhelum, dated the 19th April 1922, reversing that of the Magistrate, First Class, Pind Dadan Khan, District Jhelum, dated the 28th March 1922.

EMPEROR *v.* MAUJ DIN.

Mr. *D. C. Ralli*, Assistant Legal Remembrancer, for the Appellant.

JUDGMENT.

Broadway, J.—Mauj Din, Mohammad Afzal, *Musammat* Sabhrai and *Musammat* Jawai were proceeded against on a complaint filed by Mangal Sain under section 498, Indian Penal Code, in which he charged the four persons with having abducted his wife, *Musammat* Bhagwanti.

Apparently after the trial had come to an end and judgment alone remained to be pronounced Mangal Sain died. The Magistrate convicted the four persons above named and passed various sentences on them.

These persons appealed to the Sessions Court and their appeal was accepted on the ground that a complaint under section 498, Indian Penal Code, was a personal action and the right to continue the case came to an end on the death of the complainant. Mauj Din and his three companions were, therefore, acquitted. Against this acquittal the Local Government has preferred an appeal under section 417, Criminal Procedure Code.

The learned Sessions Judge proceeded on *Ishar Das* v. *Emperor* (1), an authority that was followed in *Rama Nand* v. *Teja Singh* (2) and *Labhu* v. *Emperor* (3) but was dissented from in *Hazara Das* v. *Emperor* (4).

In *Ishar Singh* v. *Emperor* (1) the criminal proceedings were for defamation and it was held by a Division Bench of the Chief Court that such proceedings terminated on the death of the complainant, a prosecution for defamation being essentially a personal action. Reliance was placed on section 89 of the Probate and Administration Act and *Krishna Behari Sen* v. *Corporation of Calcutta* (5) by way of analogy. In *Rama Nand* v. *Teja Singh* (2) the complainant had instituted criminal proceedings under section 323, Indian Penal Code, and I held that just as a prosecution for defamation was a personal action so was a prosecution, for causing simple hurt, and applying the same analogy and following *Ishar Das* v. *Emperor* (1) I held that the prosecution could not be carried on after the death of the complainant.

This view was accepted by Rattigan, C. J., in *Labhu* v. *Emperor* (3). In *Hazara Singh* v. *Emperor* (4) four persons had been sent up by the Police for trial under section 304, Indian Penal Code. Two were convicted under section 304, Indian Penal Code, and the two others under section 325, Indian Penal Code. On appeal the learned Sessions Judge altered the conviction of all four to convictions under section 323, Indian Penal Code. They then moved the High Court on the Revision Side contending that as the injured man had died the prosecutions had abated.

The case came before a Division Bench of this Court when three decisions above quoted were considered and it was held that section 89 of the Probate and Administration Act had no application to a criminal prosecution.

A reference to that section will show that this view is undoubtedly correct and the same view has been expressed by the Madras High Court in *Muhammad Ibrahim Sahib* v. *Shaik Dawood* (6) in which the circumstances were very similar. Indeed the previous authorities did not lay down that section 89 of the Probate and Administration Act governed criminal prosecutions, but that section was relied on as laying down certain principles that by way of analogy might be applied to criminal proceedings, having regard to the narrowness of the line between a prosecution and a suit for damages.

After a careful consideration of the judgment of Scott-Smith, J., in *Hazara Singh* v. *Emperor* (4). I have no doubt that the later view is preferable and that a criminal prosecution cannot abate merely on account of the death of the injured party [see also *Imperator* v. *Nur Mahomed* (7)].

(1) 10 P. R. 1908 Cr.; 112 P. L. R. 1908; 8 P. W. R. 1908; 7 Cr. L. J. 290.
(2) 40 Ind. Cas. 1008; 26 P. R. 1917 Cr.; 18 Cr. L. J. 688; 31 P. W. R. 1917 Cr.
(3) 52 Ind. Cas. 797; 25 P. R. 1919 Cr.; 20 Cr. L. J. 717.
(4) 59 Ind. Cas. 918; 2 L. 27; 22 Cr. L. J. 166; 1922) A. I. R. (L.) 227.
(5) 31 C. 993; 8 C. W. N. 745.
(6) 65 Ind. Cas. 549; 44 M. 417; 40 M. L. J. 351; 13 L. W. 379; (1921) M W. N. 227; 23 Cr. L. J. 117; 30 M. L. T. 349.
(7) 8 Cr. L. J. 190; 1 S. L. R. 72.

I would, therefore, accept this appeal and as the learned Sessions Judge has given no finding on the merits I would set aside the order of acquittal and return the appeal to him for disposal.

Martineau, J.—I coucur.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 216 OF 1922.

May 2, 1922.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Coutts.

HIRANAND OJHA—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 192—Transfer of proceeding under s. 110 —Information, receiving of.

Inasmuch as a proceeding under section 110 of the Criminal Procedure Code is a case, the transfer of such a proceeding from the Court of one Magistrate to that of another is authorised by section 192 of the Code. (p. 80, col. 2.)

The law in no way limits the method in which a Magistrate is to receive information under section 110 of the Criminal Procedure Code. Where information addressed to one Magistrate is sent on by him to another, there is nothing in section 110 of the Criminal Procedure Code to preclude the latter from acting on the information so received. (p. 80, col. 2.)

Criminal revision against an order of the Judicial Commissioner, Chota Nagpur, dated the 26th January 1922, modifying that of the Deputy Magis rate, Palamau, dated the 28th Nov.mber 1921.

Mr. *K. N. Chaudhury* (with him Mr. *Devaki Prasad Sinha*), for the Petitioners.

Mr. *H. L. Nandkeolyar*, Assis.ant Government Advocate, for the Crown.

JUDGMENT.

Coutts, J.—This is an application made in revision against an order of the Judicial Commissioner of Chota Nagpur on the ground that the Magistrate who passed the order under section 110, Criminal Procedure Code, acted without jurisdiction. The facts of the case, so far as they are necessary for the disposal of this application, are that certain tenants of the petitioner, Hiranand Ojha, filed an application before the Commissioner of the Chota Nagpur Division while he was on a visit to Palamau, complaining about extortion and oppression alleged to have been committed by Hiranand Ojha. The Commissioner forwarded the application to the Deputy Commissioner of Palamau, who, in his turn, forwarded it to the Superintendent of Police for enquiry. Under the orders of the Superintendent of Police, the Inspector made an enquiry and submitted a report on the 2nd June 1921, in which he stated that there was sufficient evidence against Hiranand Ojha and some of his servants for a proceeding under section 110, Criminal Procedure Code. This report was received by Mr. Chatterji, Senior Deputy Magistrate in charge, who forwarded it to another Deputy Magistrate, Babu Bishundeo Narain Sinha, with the following order:—

"To Babu Bishundeo Narain Sinha for disposal. He will please draw up proceedings and summon the accused for a date convenient for him."

On receipt of this order Babu Bishundeo Narain Sinha directed that the case be put up on the following day. After going through the Inspector's report on the following day (14th June) he passed an order to the effect that he had read the report of the Inspector of Police, and from the report it appears that Hiranand Ojha and others were in the habit of committing mischief, extortion and other offences involving a breach of the peace. He finally passed an order directing that Hiranand Ojha, Dharam Deyal Missir and Maheswar Dubey should give security to be of good behaviour.

On a reference made to the Judicial Commissioner under section 123, Criminal Procedure Code, Dharam Deyal Missir was released altogether and the security which was demanded from the other two accused, who are the petitioners now before us, was reduced.

HIRANAND OJHA *v.* EMPEROR.

The contention of the petitioners now is that the order is without jurisdiction because the Senior Deputy Magistrate having taken cognizance of the case, he could not transfer it to Babu Bishundeo Narain Sinha. There are two points of view, either Mr. Chatterji took cognizance of the case or he did not. If he did take cognizance of the case he was empowered to transfer it under section 192 (2), Criminal Procedure Code, to Babu Bishundeo Narain Sinha, who was also empowered under section 110 to dispose of the case. It has been contended by the learned Counsel for the petitioners that section 192 (2) does not apply to proceedings under section 110, but he seems to be under some misapprehension as to the scope of section 192. Section 192 deals with the transfer of cases. A proceeding under section 110 is undoubtedly a case, although the section does not deal with particular offences and the cognizance that is there taken is not cognizance of an offence but cognizance of a case. To say that section 192 does not apply to proceedings under section 110, is taking a very narrow view of the section which, in my view, is not authorized by the wording of that section. It has been held that section 192 applies to proceedings under section 145 and there is no reason why it should not also apply to proceedings under section 110.

The other view is that Mr. Chatterji had not taken cognizance and it is suggested that he is the only Magistrate who could have done so under section 110. I am unable to accept this contention. Section 110, runs as follows :—

"Whenever a Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate or a Magistrate of the First Class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction is by . . . . . such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix."

Now, it is not denied that Babu Bishundeo Narain Sinha is a First Class Magistrate specially empowered by the Local Government and it is also not denied that he in fact received the information; but it is contended that the information was sent to him through Mr. Chatterji, Senior Deputy Magistrate, and that, therefore, he could not take cognizance. The law in no way limits the method in which the Magistrate who is empowered by the Local Government is to receive the information; and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is received by Babu Bishundeo Narain Sinha, there is nothing in the section which would preclude him from acting on the information so received. It may be that there are executive orders preventing any Magistrate, except the Deputy Commissioner, from acting on information, but the section makes no such restriction, and this being so the action taken by the Deputy Magistrate in this particular case is certainly not without jurisdiction.

In the result, then, I see no reason to interfere and I would dismiss this application.

Mullick, J.—I agree. In the absence of evidence to the contrary it must be assumed that Mr. Chatterji had power under section 192 to transfer the case to Babu Bishundeo Narain Sinha.

N. K. *Rule discharged.*

EMPEROR *v.* RAJANI KANTA BOSE.

CALCUTTA HIGH COURT.

SPECIAL BENCH.

REFERENCES NOS. 4, 7, 8 AND 9 OF 1921.

February 6, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

EMPEROR—PETITIONER

versus

IN NO. 4 OF 1921

Babus RAJANI KANTA BOSE AND ANOTHER—OPPOSITE PARTIES.

IN NO. 7 OF 1921

Babus RAJANI KANTA NAG AND ANOTHER—OPPOSITE PARTIES.

IN NO. 8 OF 1921

Babu ANNADA CHARAN ROY—OPPOSITE PARTY.

IN NO. 9 OF 1921

Babu SURENDRA KUMAR NAG—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), ss. 13, 14—Civil Procedure Code (Act V of 1908), O. III, r. 4—Unprofessional conduct—Boycott of Courts—Vakalatnama, acceptance of—Pleader, obligations of—Fees, non-payment of—Pleader, whether can decline to conduct case—Special agreement entitling him to do so—Onus—Non-attendance—Justifying reasons—Discharge of Pleader—Notice to client—Permission of Court—Proceedings for unprofessional conduct—Quasi-criminal proceedings.

Where a Pleader, after accepting a *vakalatnama*, fails, without justifying necessity, to appear on behalf of his client on the date fixed for the hearing of the case, he is guilty of unprofessional conduct within the meaning of section 13 of the Legal Practitioners Act and proceedings can be drawn up against him accordingly. (p. 97, col. 2)

A Pleader is not justified to abstain from the Court under threat of social boycott and in pursuance of a resolution passed at a public meeting to boycott the Courts to express dissatisfaction with Public Administration. Where a Pleader accepts a *vakalatnama* in general and common terms, he is not justified to decline to attend the Court merely because no fee is tendered or paid to him. (p. 101, col. 2.)

Per *Sanderson, C. J.*—The acceptance of a *vakalatnama* in a suit by a Pleader entails a duty upon the Pleader to attend the Court on the day fixed for the hearing of the suit, unless it is proved that his obligations towards his client entailed by the acceptance of the *vakalatnama* were limited by a special arrangement, accompanying the acceptance of the *vakalatnama*. The *onus* of proving such special arrangement lies on the Pleader concerned. (p. 91, cols. 1 & 2)

In the absence of proof of any special agreement to that effect, the mere fact that no fee is tendered or paid is no justification for the Pleader's refusal to attend to the client's interests. (p. 91, col. 2.)

A Pleader, who does not intend to appear for his client, is bound to give the latter reasonable notice so as to afford him an opportunity of obtaining other legal assistance. (p. 93, col. 2.)

A Pleader has a duty not only towards his client but also towards the Court, and it is his duty to co-operate with the Court in the orderly and pure administration of justice. (p. 97, col. 2.)

Per *Woodroffe, J.*—If a person becomes a legal practitioner, and holds himself out for and accepts employment, he becomes an officer in a judicial system in which his position, rights and duties and the authority to which he is subject are determined. He cannot act or combine with others to act against such authority. He cannot join in an action to boycott the Court or any particular Judge because of any grievances, real or alleged, whether touching the Courts or of a political or other character. (p. 98, col. 1.)

It is open to any legal practitioner for reasons personal to himself, to refuse to practise in a particular Court or before a particular Judge. But he can only adopt this course either by refusing briefs in such Court, or before such Judge, or if he has accepted a brief or *vakalatnama*, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct of the administration of justice generally is not permissible, because the Bar in any such case cannot constitute itself an authority to adjudge on such greivance and its duty is not to impede the administration of justice by collective abstention from Court, but to make its representation through (if there be one) its Association to the High Court which has superintendence in such matters. (p. 98, col. 2.)

A Pleader cannot be charged with grossly improper professional conduct because by reason of circumstances not under his control, he was prevented from doing a duty towards his client. (p. 98, col. 2.)

It would not be possible to charge a legal practitioner with grossly improper conduct if he omitted to carry out his duty to his client by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor would it make any difference if such fear were in fact, unfounded if, in fact, it was sincerely entertained. (p. 99, col. 1.)

Proceedings against Pleaders under section 13 of the Legal Practitioners Act are *quasi*-criminal in the sense that they may result in penalties. (p. 100, col. 2.)

Quasi-criminal proceedings are not criminal proceedings in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a *quasi*-criminal proceeding. (p. 100, col. 2.)

Where it is shown that a Pleader has accepted a *vakalatnama* in a general and common form and refused to act, this is sufficient to start a proceeding against him under the Legal Practitioners Act. (p. 101, col. 2.)

If a Pleader stipulates for payment of fees before he does any work he is not bound to do such work without such payment. If, however, he accepts a *vakalatnama* without such stipulation, that is, gives credit to his client he must proceed to represent

EMPEROR *v.* RAJANI KANTA BOSE.

him, even though unpaid his fees until either his client discharges him or he properly discharges himself. (p. 101, col. 2.)

Per *Mookerjee, J.*—The failure of a Pleader to appear to conduct the case before he has discharged himself in the manner prescribed by law, unless such failure can be justified, renders him liable to disciplinary action by the Court. It is not practicable to have a complete enumeration of justifying circumstances which must necessarily depend upon the facts of each case. It may be successfully urged as a justifying reason for failure to attend to a case, that the absence was in fact due to overriding pressure of circumstances beyond the control of the Pleader, notwithstanding an honest desire on his part to perform his duty towards his client and towards the Court. (p. 105, cols. 1 & 2.)

A Pleader is more than a mere agent or servant of his client. He is also an officer of the Court, and as such he owes the duty of good faith and honourable dealing to the Courts before which he practises his profession. (p. 105, col. 2.)

Any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device, constitutes ground for disbarment or suspension. (p. 106, col. 1.)

Proceedings against a Pleader under the Legal Practitioners Act are not of a criminal nature. They are neither civil suits nor criminal prosecutions. They are special proceedings resulting from the inherent power of the Courts over their officers. (p. 106, cols. 1 & 2.)

A Pleader against whom a charge of unprofessional conduct is brought must be allowed an opportunity of making his defence unless he does not choose to make any. (p. 107, col. 1.)

When in answer to a charge made against a Pleader, a written statement has been filed in a proceeding under section 14 of the Legal Practitioners Act, it is not obligatory on the Court to rule out all conceivable hypothetical grounds, which could have been, but had not been, set up in answer. The justice of the case may ordinarily be met, if the enquiry proceeds on the basis of the charge and the answer. (p. 107, col. 2.)

References under section 14 of the Legal Practitioners Act, 1879, made by the District Judge, Noakhali, in the matter of Miscellaneous Cases Nos. 54, 55, 159, 161, 162 and 322 of 1921.

Mr. *B. L. Mitter*, Standing Counsel (with him Babus *Dwarkanath Chakravarty*, Senior Government Pleader, and *Surendra Nath Guha*), for the Government, in No. 8. —In this case there was a Rent Suit No. 318 of 1920. In that suit there were three plaintiffs—Prasanna, Jasoda and Sashi. Prasanna alone gave a *vakalatnama* (Exhibit 2). There was a second *vakalatnama* given by Jasoda and Sashi which was accepted by Babu Annada Charan Roy on 10th January 1921 (Exhibit 3). This gentleman also accepted the other *vakalatnama* (Exhibit 2). So that he was retained for all the three plaintiffs. The case was fixed for hearing on 2nd June 1921. Mr. Roy is the Secretary of the Local Bar Library. He called an informal meeting to consider whether the Pleaders should or should not obey the *hartal* in view of the public feeling. The opinion of the majority was that it was not safe to disobey. On 2nd June 1921 plaintiff Jasoda, who is a cousin of Mr. Roy living in the same house, went to the Pleader and asked him to move for an adjournment. On his refusal he filed a petition (Exhibit 1) which was granted and the case was postponed.

[SANDERSON, C. J.—The petition states that the adjournment was necessary on account of the *hartal* of the Pleaders. Is that a correct translation ?]

In his explanation the Pleader states that he informed his client of his inability to come to Court and that he was working gratis by reason of relationship. The Government Pleader, the Public Prosecutor, and a *Mukhtear* attended on that day.

[WOODROFFE, J.—We should proceed on the basis of legal evidence.]

In the meeting it was also resolved that the people would punish those who would disregard the resolution. Subscriptions were being raised and any one who refused to pay was to be afraid of the consequences of non-payment. Social ostracism could be made only in a caste meeting and not in a meeting of motley crowd like the present one which consisted of Hindus, Muhammadans and all sorts of people. Six witnesses were examined on behalf of the Pleaders. At first proceedings were drawn up against the present gentleman and another Jatin Babu. But it having been proved that he was lying ill at the time, the case against him was dismissed. There was, firstly, a public meeting at Noakhali. Secondly, an informal meeting of the Local Bar Association that it was not safe to attend Court. From that it is to be inferred that the Pleader intended to absent himself from Court. Thirdly, there was an actual strike of the Pleaders who re-

appeared in Court after the period. From that I would ask you to infer that there was a common object to boycott the Court.

[WOODROFFE, J.—Is that one of the charges ?]

Yes. The next point is that the risk is illusory. Lastly, the extent of the punishment meted out to Jasoda Babu, the Government Pleader, was only Rs. 25. Under these circumstances it is clear that the Pleader never intended to appear in Court.

Babu *Monmotha Nath Mukerjee* (with him Babus *Bepin Chandra Bose* and *Radhika Ranjan Guha*), for the Opposite Party.—The reference ought to be discharged in the interests of all—the public, the litigants and the Pleaders. Charges framed against me are, (1) joining the *hartal* and the non-co-operation and not attending in furtherance of boycott of Courts resolution; (2) wilfully absenting from Court and neglecting client's work under section 13 (*f*) of the Legal Practitioners Act, and (3) misconduct under section 13 (*b*) of the Legal Practitioners Act. These charges raise a very important issue, *viz.*, whether a Pleader is bound to attend merely because he accepts a *vakalatnama*. Apart from the special contract itself a Pleader has no duty to attend Court in connection with the case. If a brief is offered to a Pleader he will be bound by the special terms of the contract. The mere acceptance of a *vakalatnama* does not require a Pleader to attend in connection with the case on every day. In other words, a *vakalatnama* does not contain all the terms of a contract. There is hardly any mention of fees in the *vakalatnama*. It is filed in Court simply to let the Court know that a certain person has appeared for a certain party. Mere non-appearance is not a thing upon which a Court can hold a Pleader guilty of neglect of duty unless the client is injured thereby.

[SANDERSON, C. J.—In this case the Pleader, on account of the *hartal*, declined to come and did not come. There is no question of injury.]

The client does not feel aggrieved. He took the advice of his Pleader to apply for adjournment. The client evidently has a right to damages against the Pleader. I submit the Court cannot hold me guilty of neglect of duty. It is absolutely a matter as between the Pleader and his client and not the Court. A proceeding under the Act is of a *quasi*-criminal character. Refers to *Nil Kunt Biswas, In re* (1). Strict proof of the charges should be given in accordance with law.

[SANDERSON, C. J.—In that case the *Mukhtear* was charged with criminal offence.]

But the principle remains the same. The charge must be strictly and legally proved.

[MOOKERJEE, J.—Whether the case be civil or criminal ?]

Yes, my Lord, in either case. Refers to *Government Pleader* v. *Raghunath S. Sule* (2). In the petition for postponement it was prayed that ten days' time might be granted to procure witnesses. The reason given was on account of the *hartal* of the Pleaders. That petition was not on oath. It was a general petition. In his cross-examination he says that he did not approach any of the Pleaders on that day. That is the only sworn testimony. And on that you are asked to hold me guilty of the neglect of duty.

[SANDERSON, C. J.—But your client said that his client approached him.]

Then the position is this. The Pleader is guilty of breach of duty because he tells his client to make arrangements as he would not be able to appear before the Court. Therefore, the general question comes in whether, irrespective of the contract between a Pleader and his client, the former would be guilty of breach of duty if he does not attend Court on all days in connection with the case. It would not be safe to infer from these statements that the Pleader refused to attend Court on the request of his client.

[WOODROFFE, J.—How many days before did he inform his client ?]

It is stated that he informed beforehand.

[SANDERSON, C. J.—Supposing the client approached him on the 1st when he declined, then he did not approach on the 2nd?]

That would raise the question whether that would be a breach of duty.

[MOOKERJEE, J.—We do not know what the contract was.]

It is the duty of the other side to prove the contract apart from the *vakalatnama*.

(1) 9 W. R. 29 Cr.
(2) 4 Ind. Cas. 266; 10 Cr. L. J. 526; 11 Bom. L. R. 1150.

They have failed to prove it. The terms of the actual contract have got to be proved by the other side in a proceeding of this sort. The plaintiff got his work done by me according to his choice and convenience. If that be the contract then where is the breach? If a Pleader satisfies his client with his reasons for non-attendance, then there can be no breach of duty. The other side will have to show that I joined the *hartal* and the non-co-operation with reference to the first charge. There is no evidence on that point absolutely. All that they have proved is that I did not attend during the period and that I did not attend on the particular date.

[SANDERSON, C.J.—They have proved the resolution of the Bar Association and that only two Pleaders attended Courts during the period of the *hartal*.]

The evidence is that after the resolution of the public there was an informal gathering of the Pleaders in the library and the opinion of the majority was that it would not be safe to come to Court in disregard to the public feeling which was running high. One of the gentlemen had to suffer indignities for attending Court. It may be that the Pleaders lacked in courage and high sense of military duty in attending Court. I am concerned only with what operated on my mind. I stated that I asked other people to attend Court. That statement has been proved. I succeeded in inducing the client to apply for postponement. I did not risk to appear in Court. That does not show that I was acting in combination or in furtherance of the common object to boycott Courts. That phrase has received judicial interpretation by a Full Bench of this Court in a case under section 149 of the Indian Penal Code. Refers to *Queen* v. *Sabid Ali* (3). There must be some plausible evidence on which you should proceed. The position would have been different if they could show that I joined the *hartal* and the non-co-operation movement. The terms of the contract have got to be proved. I submit in every case there is a special contract between a Pleader and his client. The *vakalatnama* is not a contract at all. Every contract must have a consideration. The consideration is not there. The *vakalatnama* does not contain all the terms of the contract. The mere fact of filing a *vakalatnama* does not mean that the terms of a contract have been fully set out there.

[MOOKERJEE, J.—It stated "and we shall pay Pleader's fee later on."]

Where is the evidence that I undertook to appear on any occasion in connection with the case. What was the duty? To determine that you shall have to look to the contract. You cannot merely look to the *vakalatnama*.

[SANDERSON, C. J.—If the client approached him on the 1st June that is the contract. It is a finding of fact.]

I submit it is not a finding of fact. It is merely a report of the District Judge to your Lordships.

[WOODROFFE, J.—If you go out of the one charge you bring yourself under the other charge.]

I simply advised the client to make arrangements as I would not be able to attend Court. What improper conduct is there?

I am not bound to prove those things which the other side is bound to prove. Refers to *Governor of Bengal* v. *Moti Lal Ghosh* (4). You cannot apply a part of my explanation as a missing link and reject the other. The proceedings are of a *quasi*-criminal character.

[MOOKERJEE, J.—Have you got any authority on the point?]

See *Government Pleader* v. *Raghunath S. Sule*(2), *Kotha Subba Chetti* v. *Queen* (5), An oath should not be administered to me.

[MOOKERJEE, J.—He can be lawfully examined?]

Reads section 14, Legal Practitioners Act. There is no provision about taking a statement from the Pleader. That shows that the intention of the Legislature was not to embarass the person. Refers to the General Rules and Circular Orders of the High Court, Volume I, p. 55. In cases of appeals the Pleader is required to give an undertaking to appear and support the appeal. That also shows that in other cases where there is no undertaking like that a Pleader is not bound to

(3) 20 W. R. 5 Cr.; 11 B. L. R. 347 (F. B.).

(4) 20 Ind. Cas. 81; 41 C. 173 at p. 198; 17 C. W. N. 1253; 18 C. L. J. 452; 14 Cr. L. J. 321.

(5) 6 M. 252; 7 Ind. Jur. 247; 1 Weir 116; 2 Ind. Dec. (N. S.) 454.

appear on all occasions. The *vakalatnama* is not considered to be binding enough. Refers to *Buldeo Misser* v. *Syud Ahmed Hossein* (6). As regards the evidence I submit the petition is wholly inadmissible. Refers to sections 145, 157 of the Indian Evidence Act. The petition cannot be made use of except for purposes of contradiction or corroboration. That petition is wholly irrelevant.

[WOODROFFE, J.—That petition incorporates the evidence of the witnesses.]

[SANDERSON, C. J.—Why cannot it be used under section 157 ?]

It cannot be made use of to prove that I refused to attend on account of *hartal*. Refers to *Queen* v. *Bishonath Pal* (7). The incorporation as in cases of medical or chemical reports are done under section 513, Criminal Procedure Code. The witness is there only to be cross-examined by the other side. The relevant point is not whether the statement was true or not but whether certain facts happened or not.

[SANDERSON, C. J.—Was any objection taken to this petition ?]

No. That is not material as the evidence is inadmissible.

[MOOKERJEE, J.—It might have been inadmissible if certain procedure was followed ?]

Then my not taking objection at the time would have precluded me from objecting now.

[SANDERSON, C. J.—Your client stated that he intimated his client his inability to attend Court.]

But that does not show and it has got to be proved that there was a request and I refused to come to Court. There is no evidence as to my joining the *hartal*.

[SANDERSON, C. J.—How could you prove it ? The Pleaders as a body stood away.]

You have to gather it from his conduct. There was no resolution passed by the Association that they would join the *hartal*. They simply were of opinion that it would no be safe to attend Court. On the other hand, he, with other Pleaders, requested others to attend Court. There is no evidence at all that I wilfully neglected my duty. I state that I am not a non-co-operator. There was fear of social boycott.

[SANDERSON, C.J.—Those were idle threats according to the Subordinate Judge.]

But actually these threats were carried into effect. The idea would be ridiculous to say that these people who attended Court before and after the *hartal* wanted to paralyse the work of the Court. It was fear that operated on their minds. No grossly improper conduct on my part has been proved. My statement ought to be charitably accepted by you.

Mr. *B. L. Mitter*, in reply.—As to the point that the *vakalatnama* does not contain all the terms of the contract and that the contract not having been proved it cannot be said that he was guilty of breach of duty. If there was any special term then it was incumbent on him to prove it. His own statement that he warned the client beforehand, negatives the suggestion of a special contract. I submit request or no request, either of these two gentlemen is expected to be present on all the dates of hearing.

[WOODROFFE, J.—There is the practice to call in Pleaders. Would not the Pleaders be entitled to rely on it ?]

That is ordinarily the practice. But whether the practice extends to a case that the client has got to call in his Pleader when the case is up for hearing, the exact practice has got to be proved.

[WOODROFFE, J.—In this case the Pleader warned the client that he would not be attending Court. Would not that amount to a discharge ?]

Yes, that would be discharge.

[WOODROFFE, J.—Does he then come under the Act ?]

Yes. In case where the client has no option but to submit he would be guilty of unprofessional conduct. Because he ought to give sufficient opportunity to his client. If the client consents then also he would be guilty because the Court's work would suffer by reason of the sudden discharge. The foundation of professional or unprofessional conduct is that proper administration of justice is impeded. Injury to the client is not the sole test. All rules of evi-

(6) 15 W. R. 143.
(7) 12 W. R. 3 Cr.; 3 B. L. R. 2 Cr.

dence are not applicable as in criminal cases in proceedings of this nature. The undertaking has got nothing to do with a client. The undertaking as required in the High Court Circular Orders is a matter between the Court and the Pleader. As regards evidence of intention, it is to be gathered from overt acts. The theory of fear cannot be accepted as the threats were not yet put into effect. He himself does not say that he kept away out of fear. Refers to *Barindra Kumar Ghose* v. *Emperor* (8). The petition is admissible in evidence not only as a petition but also as to its contents. Refers to section 58 of the Indian Evidence Act. A *quasi*-crime is an offence which is not declared to be a crime but is met with some penalty.

Mr. *B. L. Mitter*, Standing Counsel (with him Babus *Dwarkanath Chakravarty*, Senior Government Pleader, and *Surendra Nath Guha*), for the Government, in No. 9.—The facts of this reference are shortly these. An illiterate cultivator retained the Pleader Babu Surendra Kumar Nag. The client was a petitioner in an application under O. XXI, r. 90, Civil Procedure Code. He came to Noakhali in 1920. That application was registered as Miscellaneous Case. No. 419 of 1919. On 28th May 1921 the date of hearing was fixed. The man went to his Pleader's house on that date and instructed him to file a petition. The Pleader refused to come or to sign the petition. His clerk also refused to write out the petition. No fee was asked for. The man went to Court himself and the Court adjourned the case to 30th May. On that date his petition was dismissed. On 14th June 1921 he filed a petition through his Pleader for re-hearing of the case and applied for restoration. In that application he was examined and the above facts were elicited from him and upon these facts the present proceedings were drawn up. In this case the Pleader did not file any new *vakalatnama* when the application was filed. The evidence is that he was engaged in the original case. That *vakalatnama* has not been made an exhibit in the present case. In his explanation the Pleader says that his client saw him in his house and he intimated his inability to attend Court and asked the client to take care of his case.

Babu *Amarendranath Bose* (with him Babu *Radhika Ranjan Guha*), for the Opposite Party, in No. 9.—This reference is not proper under section 14 of the Legal Practitioners Act and ought to be discharged. On the merits this reference is not maintainable by reason of certain facts which they are bound to prove and which they have not proved and also by reason of the facts found by the Court. My client having refused to act has discharged himself and, therefore, no steps could be taken under the Legal Practitioners Act. It is not grossly improper conduct and no sufficient cause has been made out. In the notice the case has been misdescribed as Miscellaneous Case No. 419 of 1921 which ought to have been of 1920. This was subsequently corrected. The first charge is under section 13 (*b*) of the Legal Practitioners Act. Refers to paragraph 4 of section 14 of the Legal Practitioners Act. The District Judge ought to have referred the matter back, inasmuch as he differed in the matter of the charge from the Munsif. According to him the charge against me under section 13 (*b*) of the Legal Practitioners Act was not maintainable. Section 14 contemplates that the report and the opinion of the District Judge should agree. If I am wrong in my contention I do not know what to meet. As regards my second point I do not know what I had to do on the 28th May. There is no evidence on the point. I admit that I was Pleader in the original suit but I deny that I filed the petition. First fix my duty and then say that I had not done it. He never asked me to file *hazirah*. It has not been proved what order was made on 28th May 1921 and why the case was fixed for 30th May 1921 on which day the client never approached me. The *vakalatnama* has not been proved. They must prove the terms of the *vakalatnama* so as to bring my refusal to act within the meaning of "grossly improper conduct." I submit the reference ought to be discharged as no case has been made out against me.

Mr. *B. L. Mitter* replied in brief.

(8) 7 Ind. Cas. 359; 37 C. 467 at p. 507; 14 C. W. N. 1114; 11 Cr. L. J. 453.

EMPEROR *v.* RAJANI KANTA BOSE.

Mr. *B. L. Mitter*, Standing Counsel (with him Babus *Dwarkanath Chakravarty*, Senior Government Pleader, and *Surendra Nath Guha*), for the Government, in No. 4.—This reference arises out of non-appearance of two Pleaders, Rajani Kanta Bose and Durga Prasanno Chakraburtty, when the case was called on, in sympathy, with certain local disturbances in connection with the coolie strike at Chandpur. There was a resolution to cease all work in Court. In their written statements they state that even if it was their duty to go to Court they could not go safely on account of the *hartal*.

[MOOKERJEE, J.—What is the derivation of *hartal*?]

We do not know. There is no question of service of notice. In their explanation they say that they had no mind to cause inconvenience to the Court but they felt bound to bow down to the popular will when public feeling was running so very high. The *hartal* began on 23rd May and ran up to 3rd June. It appears from the evidence that there was no physical prevention. They could have attended Court if they liked. The charge was drawn up on the 2nd of July. The Pleaders then applied for transfer and for time to move the High Court. Both these applications were refused. The learned Judge has found that inconvenience was caused to the Court inasmuch as it had ample time to dispose of the appeal after the conclusion of the Sessions case on that day. So far as Rajani Babu is concerned, it is intolerable that Pleaders should join in such political meetings. A man cannot possibly serve two masters. There is sufficient evidence to deal with him under the Legal Practitioners Act. He does not appear to show cause. As regards Durga Babu he does not come within the scope of the Act as he was retained only for one particular day. In that view there was no neglect of duty on his part. Rajani Babu was retained for his whole appeal. He did not give any notice to the client discharging himself from the case. The client was anxious to have him. He took part in meetings which advocated boycott of law Courts. He has not renewed his license this year and does not care to appear in this Court.

No one appeared to show cause.

Mr. *B. L. Mitter*, Standing Counsel, (with him Babus *Dwarkanath Chakravarty*, Senior Government Pleader, and *Surendra Nath Guha*), for the Government, in No. 7.—On the facts as in the previous case the Pleaders have been reported under section 14 of the Legal Practitioners Act. In this case the opposite party got every opportunity to cite witnesses and defend himself. He has been charged with breach of duty in not attending to his client's case and of improper conduct in joining the non-co-operation movement and the meetings in connection with the *hartal*. In his explanation he said that it was not possible for him to attend Court against the strong current of public feeling and that the proceedings were instituted against him maliciously by the District Judge. In the *vakalatnama* the Pleaders have been given general power to do every thing necessary in connection with the Case No. 1083 of 1920. It was accepted on 11th January 1921 by these two gentlemen and two other gentlemen. It can hardly be said that a retainer of this sort would be discharged without a notice to that effect to the client. Babu Rajani Ch. Mitra was the seniormost of the four gentlemen. As a matter of practice a Pleader would not attend unless he is requested by his client to do so. The evidence is that the client did not go to his Pleader's residence on the 25th.

[SANDERSON, C. J.—When a Pleader accepts *vakalatnama*, is he bound to attend Court?]

I have spoken of the practice obtaining in the Mofassil. I submit, inspite of the practice, the Pleaders ought to have given some warning to the clients in view of their inability to attend Court on account of the *hartal*. The Pleaders cited three shopkeepers and one Pleader to prove the general condition of Noakhali. There is no case of actual prevention. Apart from any risk they were really in sympathy with the movement. If they thought, rightly or wrongly, that they would not be able to attend Court on the 25th they ought to have given sufficient time to the client to take necessary steps.

[SANDERSON, C. J.—Did they take any step for the protection of the interests of the client?]

No. They say it was the practice with

Pleaders not to appear unless instructed by the clients to do so on a particular day. I submit it was their duty to do so.

[MOOKERJEE, J.—When was the *hartal* to take place ?]

On and from the 23rd May to the 3rd June. It is not open to suggestion that the Pleaders can join any movement to boycott the Courts.

[WOODROFFE, J.—Is that the charge ?] Yes, my Lord.

[WOODROFFE, J.- There is nothing further in the evidence except that they did not appear in Court on that day.]

Yes.

[MOOKERJEE, J.—What are the authorities in support of your point ?]

The earliest case on the point is to be found in *Gopeenath Mudduck, In re* (9). Then there are the later cases in *Munireddi* v. *Venkata Rao* (10), *Muthu Krishna Yachendra Bahadur* v. *Nurse* (11), *Prabhu Lal* v. *Kumar Krishna Dutt* (12), *Prabhu Lal* v. *Kumar Krishna Dutt*(13). In *Muthu Krishna Yachendra Bahadur* v *Nurse* (11) it was held that the position of a Pleader was equal to that of a Solicitor. That case also discusses the duration of a Pleader's retainer. In the case of *Gopeenath Mudduck, In re* (9) it was laid down that the acceptance of a *vakalatnamah* is to be unconditional. In *Munireddi* v. *Venkata Rao* (10) it was held by the Full Bench that a Vakil is bound to appear and conduct the case even if he is not paid unless there is an agreement to the contrary or at least sufficient notice to that effect is given to the client. It is not one of the defences in the present case that the Pleaders were not paid or that the clients refused to pay. Refers to 26 Halsbury's Laws of England, pages 737-8. There it has been said that a retainer is *prima facie* an entire contract.

[MOOKERJEE, J.—There is another in Law Magazine a judgment of Mr. Justice Louis Jackson.]

(9) 14 W. R. 7.
(10) 17 Ind. Cas. 544 ; 37 M. 238 ; 23 M. L. J. 447 ; 12 M. L. T. 615 ; (1912) M. W. N. 1029 ; 13 Cr. L. J. 800.
(11) 69 Ind. Cas. 695; 44 M. 978 ; 14 L. W. 154 ; 41 M. L. J. 213 ; (1921) M. W. N. 562.
(12) 33 Ind. Cas. 78 ; 23 C. L. J. 473 ; 20 C. W. N. 443.
(13) 33 Ind. Cas. 73 ; 23 C. L. J. 326 ; 20 C. W. N. 437.

Dr. *Sarat Chandra Basak* (with him Babus *Bepin Chandra Bose* and *Radhika Ranjan Guha*), for the Opposite Party, in No. 7.—I shall first take up the case of Babu Rajani Kanta Nag. The charges against him are two. (Reads). There is absolutely no evidence that I had taken part in the boycott meeting. There is no evidence that I boycotted the Court in furtherance of the common object.

[SANDERSON, C. J.—Is it not a fact that only two Pleaders attended Court during the period ? Is not that some evidence of a common object ?]

I submit it is not so. We do not know what is the common object.

[SANDERSON, C. J.—I said *a* common object.]

There may be a reason common to all but that would not form a common object. There is no evidence to show that I joined the non-co-operation movement and the *hartal*. There was no resolution of the Bar Association in this connection. The Government Pleader ought to have been the best man to speak on the matter. He was present for attending Court.

[MOOKERJEE, J.—Did the Pleaders make the statements on oath?]

The oath was wrongly administered. No oath should have been given. Refers to *Kotha Subba Chetti* v. *Queen* (5). We say that we did not attend Court for fear of being put to humiliation by reason of the highly irritated public feeling. If evidence were available to prove that there was suspension of practice by reason of the resolution then that would have been against me.

[SANDERSON, C. J.—Why is it incompetent to administer oath to a Pleader ?]

In that case, the Pleader was in the position of an accused—a *quasi*-criminal. With regard to the first charge there is absolutely no evidence on the record. This charge, I submit, should, therefore, fall through. There is also evidence to show that the Noakhali Pleaders did not pass any resolution with a view to boycott the Courts of Law there. There was fear of social punishment in disregarding the public mandate. There is evidence to show the sort of humiliation the Government Pleader was put to. There is no objection on a Pleader to attend Court on any particular day when he has no business. As regards the second charge that I abstained from attending Court on 25th May

and neglected the interests of the client, I submit, according to defendant himself, no other work except filing of written statement was done by Rajani Babu. The reason given is that Babu Rajani Ch. Mitter is the retained Senior Pleader. I did my work. I was not asked to do any other work. The client did not in his application for time state to which of the four Pleaders did he go on that date. The petition is not on oath. In his evidence the man says that he went to his retained Pleader. The *peshkar* also advised him to make a note in his petition that all the Pleaders were absent, as on that ground an adjournment would be granted. You will have to take into consideration all these circumstances, and I submit the circumstances are clearly in my favour.

Mr. *B. L. Mitter*, in reply.—There is no direct evidence of combination but it can be safely inferred that they combined. The terror of social boycott is no valid excuse at all specially in a place which has been connected with Railways.

JUDGMENT.

REFERENCE No. 4 OF 1921.

Sanderson, C. J.—In this reference it appears that the Pleader D. P. Chakrabortty was retained to make an application on one day only (in the absence of the Pleader who filed the appeal).

This duty he duly performed and his retainer was discharged.

He was not further retained in the case, and, consequently, in our opinion there was no professional misconduct on his part.

In the case of D. P. Chakrabortty, therefore, the reference is discharged.

The case of R. K. Bose is different.

He was the Pleader for the appellant whose appeal was fixed for hearing on the 2nd June 1921. The Pleader did not appear. Notice under the Legal Practitioners Act was served upon him, but he did not appear to show cause.

He apparently was present at the public meeting where the *hartal* was declared and took part in moving one resolutions.

The resolutions involved a boycott of the Court by the Pleaders.

In his case there can be no doubt that he deliberately took part in the '*hartal*' of the Pleaders. We have, however, been informed that R. K. Bose has ceased to practice as a Pleader and has not taken out a certificate this year.

Consequently, in our judgment, it is not necessary for us at present to enquire further into the case of R. K. Bose, or to take any steps in connection with this reference.

REFERENCE No. 7 OF 1921.

Sanderson, C. J.—This is a reference by the learned District Judge of Noakhali forwarding a report made by the Officiating Subordinate Judge under the Legal Practitioners Act, 1879, with respect to two Pleaders of that Court, Rajani Kanta Nag and Preo Nath Roy Chaudhuri.

The Subordinate Judge reported that the Pleaders committed grossly improper conduct in the discharge of their professional duty by not attending Court on the date in question and neglecting to do the necessary work on behalf of their client in the suit mentioned in the report on the 25th May 1921 though asked by their client: he further reported that they were guilty of misconduct within the meaning of section 13 (*f*) of the Legal Practitioners Act. The learned District Judge confirmed the report of the learned Subordinate Judge.

The charges against the Pleaders were in similar terms and the charge against Rajani Kanta Nag may be taken for the purpose of ascertaining the terms thereof: That charge is as follows:—

"Whereas you being a Pleader of this Court joined the *hartal* and non-co-operation movement and did not attend the Court along with other members of the Local Bar in furtherance of the common object of the said movement and the boycott of Courts from 23rd May 1921 to 3rd June 1921 and whereas you were engaged as a Pleader for the defendant in the marginally noted suit pending in this Court that was fixed for hearing on the date mentioned against it and whereas you wilfully neglected your client's work and acted to the prejudice of his interest by absenting yourself from the Court on that date you thereby committed grossly improper conduct in the discharge of your professional duty by neglecting your client's work and acting to the prejudice of his interest ((section 13 (*b*)) and you have further been guilty of misconduct by joining the said movement started to boycott Courts and paralyse the work of the Courts and absenting yourself from the Court on those dates (23rd May 1912 to 3rd June 1921) without any lawful excuse."

O. C. No. 1033 of 1920.
Bhagaban Chandra Rai Chaudhuri—Defendant No. 2.
25-5-21.

EMPEROR *v.* RAJANI KANTA BOSE.

On the hearing of the charge the Pleaders filed written explanations. Rajani Kanta Nag, among other allegations, said that he was only instructed to file the written statement along with several other Pleaders for the defendant No. 2, on the 17th February, 1921, and that since the filing of the written statement the said defendant neither consulted him on any date about his case nor made any *tadbir* for him. Further allegations are contained in paragraphs 3, 6, 9, 10 and 13 which are as follows :—

"(3) That on 25th May 1921 the said defendant No. 2 did neither pay me any fees nor did he even come to me to ask for my legal advice, nor did he instruct or ask me to make any *tadbir* in his case, nor did the defendant No. 2 even inform me that this case was fixed for hearing on 25th May 1921 and that I did not know what *tadbir* he actually made on that date. This defendant No. 2 did not enter his case in my *sherista*, he himself took all the previous dates and looked after the case."

"6. That in the matter of not attending Courts during *hartal* there was no combination or common object amongst the members of the Bar, that I did not, with a view to the furtherance of the alleged common object of the *hartal* or non-co-operation movement, absent myself from Court from 23rd May 1921 to 3rd June 1921. No such *hartal* or non-co-operation movement was started by me or the Local Bar; non-co-operation movement was started long before the period in question and it has no connection with my absence from Court."

"9. That consequent upon the cooly affairs at Chandpur, public feeling in this town ran so very high that the people, in one voice, resolved in sympathy for them, to suspend all works for a time and desired the Pleaders, the *Mukhtears*, merchants, *ghariwallas* and others to follow their decision under threat of social punishment and humiliation, and that it might be in obedience to this resolution that none of my clients asked me to appear in Court from 23rd May 1921 to 3rd June 1921."

"10. That the resolution referred to above was enforced so strictly that no gentlemen could dare disobey it with impunity, that men of position and honour had to suffer much inconvenience and humiliation during this period and that it was, in no way, possible for me to attend Court against such strong current of public opinion."

"13. That as a matter of fact I did not join any non-co-operation movement, I am not a member of any Congress Committee and I do not mix in any politics."

Preo Nath Ray Chaudhuri's written explanation contained the following paragraphs.

"1. That non-co-operation movement had nothing to do with the general *hartal* declared by the Noakhali public out of sympathy for tea-garden coolies stranded at Chandpur. The non-co-operation movement was started long before the said *hartal* and has no connection with the keeping away from the Court by your petitioner."

"2. That a general *hartal* in all departments of public life was decided upon in a public meeting held at Noakhali and that no one could safely ignore or disregard the resolution of the indignant public and in fact the clients did not come to me on account of *hartal* during those days. Your petitioner also considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so your petitioner did not attend Court during the period of the same *hartal*, that is, from 23rd May 1921 to 3rd June 1921."

"3. That in the matter of not attending the Court during the *hartal* there was no combination or common object among the members of the Bar, and, in fact the Bar Association passed no resolution at all in the matter."

"4. That it is not correct to say that the petitioner joined the non-co-operation movement alleged to have been started to boycott Courts and paralyse their work. As a matter of fact your petitioner had been and is working as Pleader both before and after the *hartal*."

"5. That the client in question did not instruct me to attend the Court on the date fixed nor did he pay me for the same."

"9. That in Original Civil Suit No. 1083 of 1920, pending in your Honour's Court I was only instructed to file objection against the plaintiff's prayer for temporary injunction and to take time for filing written statement on 11th January 1921; that since the filing of that objection I was not further instructed to do any other work for him, that on 25th May 1921 the said defendant No. 2 did not pay me any fees nor did he even ask my legal advice."

"10. That defendant No. 2 did not even inform me that his suit was fixed for hearing on 25th May 1921, he himself making *tadbir* in his cases and having not entered this case in my *sherista*."

These two Pleaders and two others accepted a *vakalatnama* from the defendant No. 2 in a Suit No. 1083 of 1920, on the 11th January 1921. The hearing of the suit was fixed for the 25th May 1921. Neither of the Pleaders attended the Court on that day, and the defendant No. 2 filed a petition asking for a month's adjournment on account of the *hartal* which had begun on the 23rd May 1921 and which continued until the 3rd June 1921, and in consequence of which the Pleaders did not attend the Courts.

The petition is as follows :—

"To-day is the date of the abovementioned suit. To-day I went to Pleader's *basha* with copy of issue to file list of witnesses: making *hartal* in the course of non-co-operation no Pleader looked into any papers. I pray for one month's adjournment in order to enable my Pleaders to consult with reference to suit papers as to what evidence should be adduced on my behalf and to file list

of witnesses. Be it known that for the reasons stated above none of the Pleaders not having signed the petition I file this petition signing it myself. Dated 25th May 1921."

The defendant, when cross-examined, said that Rajani Mitter was his retained Pleader, and that he did not go to the houses of the two Pleaders concerned in this reference, nor to the house of his Pleader, meaning thereby, as I understand, Rajani Mitter, and that he did not instruct the two Pleaders to work for him on the 25th May 1921.

The learned Judge, however, said that he was unable to accept this evidence, as the witness was, in his opinion, evidently trying to save the Pleaders; and he found as a fact that the Pleaders were asked to do the necessary work on behalf of the defendant No. 2 on the 25th May 1921.

I see no reason for disagreeing with this finding of fact and in my judgment it must be taken for the purpose of this case that the Pleaders were asked to attend Court on the 25th May 1921 and that they refused to do so. The question, therefore, arises whether they were justified in so refusing. I have no doubt that the reason for their refusal was the *hartal* which was then in force. On account of an incident in connection with some coolies at Chandpur, resolutions had been passed at a public meeting in Noakhali, one of which was to the effect that the Pleaders should not attend the Courts. In consequence of this the Pleaders in a body with one or two exceptions, abstained from attending the Courts.

Each of the two Pleaders, as already mentioned, stated in his explanation that he had been instructed only in respect of particular matters in the suit and it was argued that they were under no duty to attend the Court on the day in question.

I cannot accept that contention. The Pleaders had accepted the *vakalatnama* and it is proved, in my opinion, that they were asked by the defendant No. 2 to go to Court and protect his interests, and that they refused. In my judgment it was their duty to do so, unless it is proved that their obligations towards their client, entailed by the acceptance of the *vakalatnama* were limited by a special arrangement accompanying the acceptance of the *vakalatnama*. No such special arrangement has been proved by the Pleaders, upon whom the *onus* of proving it lay.

It was then said that no fees were paid for their attendance at Court on the 25th May 1921. No proof has been given that any fee was asked or that there was any arrangement that a fee should be paid before the Pleaders would attend Court. In the absence of such proof the mere fact that no fee was tendered or paid is, in my judgment, no justification for this refusal to attend to their clients' interests.

Further, having regard to the facts of the case and the statements in the written explanations of the two Pleaders, I have no doubt that even if a fee had been offered, they would not have accepted it or attended the Court.

It was then argued that there was no evidence of the common object alleged in the charge.

I agree that it has not been strictly proved that the Pleaders took part in what has come to be called the "non-co-operation" movement.

In my judgment, however, it has been proved that the Pleaders did join in the *hartal*, one object of which was to boycott the Courts.

The excuses put forward in the written explanations of the Pleaders, in my opinion, cannot be accepted. In the one case, the Pleader stated that he did not attend the Court for fear of being put to great inconvenience and humiliation by the irritated public. In the other case the Pleader stated that he considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so he did not attend Court during the period of the *hartal*.

The Pleaders must be judged by their conduct. The facts of the case do not show that there was any real risk of physical danger to them if they had attended the Court. They never made any attempt to do so. The learned Subordinate Judge has found that the plea that they were threatened with social punishment was a lame excuse. One Pleader allowed the fear of "inconvenience and humiliation" to override his duty to his client and to the Court. The other considered it "safe and desirable to bow down to the popular will",

rather than do his duty to his client and to the Court. There being no adequate reason for the abstention from the Courts, I regret to have to come to the conclusion that the Pleaders willingly acquiesced in, even if they did not actually sympathise with, the boycott of the Courts. By so doing they lent support to the movement, which was calculated to paralyse the administration of justice.

In my judgment, therefore, the Pleaders concerned in the reference were guilty of grossly improper conduct within the meaning of clause (*b*) of section 13 of the Legal Practitioners Act, and of such misconduct as would bring their case within clause (*f*) of the same section.

REFERENCE No. 8 OF 1921.

Sanderson, C. J.—This is a reference by the learned District Judge of Noakhali forwarding a report of the Subordinate Judge under the Legal Practitioners Act. The charge was as follows:—

"Whereas you being a Pleader of this Court joined the *hartal* and non-co-operation movement and did not attend the Court along with other members of the Local Bar in furtherance of the common object of the said movement and the boycott of Courts from 23rd May 1921 to 3rd June 1921 and whereas you were engaged as a Pleader for the plaintiff in the marginally noted suit pending in this Court that was fixed for hearing on the date mentioned against it and whereas you wilfully neglected your client's work and acted to the prejudice of his interest by absenting yourself from the Court on that date you thereby committed grossly improper conduct in the discharge of your professional duty by neglecting your client's work and acting to the prejudice of his interest (section 13 (*b*)) and you have further been guilty of misconduct by joining the said movement started to boycott Courts and paralyse the work of the Courts and absenting yourself from the Court on those dates (23rd May 1921 to 3rd June 1921) without any lawful excuse ((section 13 (*f*)))."

O. C. No. 318 of 1920.
Prasana Kumar Rai, Plaintiff.
2-6-21.

The report of the Subordinate Judge was that the Pleader was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of clause (*b*) of section 13 of the Legal Practitioners Act and of misconduct within clause (*f*) of the said section.

The learned District Judge concluded his reference as follows:—

"The opposite party, as such Pleader, is liable to some punishment, however light, under section 14 of the Legal Practitioners Act; as he, in my opinion, has brought himself within the disciplinary jurisdiction of the High Court and his misconduct which falls within clause (*f*) of section 13 of the Legal Practitioners Act, is grave enough to deserve it. But I cannot say that his conduct deserves severe punishment."

Notice of the charge was given to the Pleader on the 12th July 1921, and on the 30th July 1921 the Pleader filed an explanation to which reference will be made later.

The material facts in this case are as follows: one Jashoda Kumar Roy and two of his brothers filed a mortgage suit in the Court at Noakhali. In this suit the Pleader Annada Charan Roy and another Pleader, A. M. Bose, accepted a *vakalatnama* from Jashoda Kumar Roy, in January and February 1921, respectively. The 2nd June 1921 was fixed for the hearing of the suit; on that day Jashoda Kumar Roy filed a petition in the Court, which was as follows:—

"On account of *hartal* of the Pleaders the witnesses or the Pleaders of the plaintiffs in the above suit decline to attend the Court. The plaintiffs are, therefore, unable to prove their case or to conduct it otherwise. So it is humbly prayed that the Court be pleased to adjourn the suit to some other date and grant the plaintiffs 10 days' time to produce witnesses."

The result was that the hearing of the suit had to be adjourned.

At the hearing of the charge against the Pleader, Jashoda Kumar Roy gave evidence and said that the contents of his petition were true to his own knowledge.

It was argued by the learned Vakil for the Pleader that though it was permissible to prove the fact of the filing of the petition, the contents of this petition were inadmissible in evidence; and that the case must be decided upon the verbal evidence of Jashoda Kumar Roy, and that as he said he had suffered no loss and had no complaint to make against his Pleader the reference should be refused.

Jashoda Kumar Roy is a cousin of the Pleader Annada Charan Roy and the learned District Judge has held that apparently interest for his cousin had made him forget what he had said in his petition.

In my judgment, the contents of the petition were admissible in evidence. In my opinion it was admissible under section 157 of the Evidence Act in corroboration of the evidence which the witness had already

given at the time when his attention was directed to the contents of the petition and when he said that the contents were true to his own knowledge. It is also to be noted that the petition was the foundation of the proceedings and that no objection was raised to the admission of the evidence.

In my judgment it is clear that in this case the Pleader declined to attend the Court on account of the *hartal* of the Pleaders.

In the course of the argument, the learned Vakil for the Pleader informed us that *hartal* meant "strike".

This conclusion is not based upon the statements in the petition only. There is other evidence in this case.

It appears that on the 22nd May 1921, a meeting was held in the town and resolutions were passed, one of which was that Pleaders and *Mukhtears* should not attend the Courts. This meeting was held to show sympathy in respect of an incident which had occurred at Chandpur. The object of such a resolution could only be to boycott the Courts and so interfere with the administration of justice. On the 23rd May 1921 the Pleaders in a body with the exception of the Government Pleader and Public Prosecutor, abstained from attending the Courts. This abstention lasted until the 3rd June 1921. There was an informal gathering of some Pleaders in the Bar Library called by the Pleader Annada Charan Roy, whose conduct is now under consideration, at which meeting the opinion was expressed by the majority that "as the public feeling is very high it is not safe to disobey."

These facts show conclusively that it was in consequence of the *hartal* that Annada Charan Roy did not attend to Jashoda Kumar Roy's suit on the 2nd June and unless good cause can be shown for his abstention, in my judgment, he must be held guilty of grossly improper conduct in the discharge of his professional duty to his client.

It was urged by the learned Vakil for the Pleader that the Pleader was under no duty to appear in the Court on the 2nd June 1921. He argued that the *vakalatnama* was no more than an authority to the Pleader to act. I cannot accept this contention. In this case the Pleader has not proved any special arrangement and in my judgment the acceptance of the *vakalatnama* in the suit by the Pleader, entailed a duty upon the Pleader to attend the Court on the day fixed for the hearing of the suit or at least, to make arrangements with the other Pleaders, who had accepted the *vakalatnama*, to protect the interests of the client, even if the client had not specially requested the Pleader's services for the 2nd June. There is no question in this case of whether a proper fee was tendered by the client, because the Pleader in question, being related to the client, was working "gratis" for him.

It is not, however, necessary to pursue the consideration of the point further, for on the facts of this case I am satisfied that the client did request the Pleader to attend the Court on the 2nd June 1921 and that the Pleader declined on account of the *hartal*.

It was then urged that the client was satisfied that the Pleader should not act and, consequently, it was a matter between the client and his Pleader and not a matter for the Court.

I cannot accept this contention. In the first place I am not prepared to hold that the Pleader can divest himself of his duty, arising by the acceptance of the *vakalatnama*, without the leave of the Court.

The provisions of O III, rr. 3 (1) and (2) of the Civil Procedure Code support the view that unless and until the conditions specified in that rule are complied with, the duties and obligations of the Pleader will remain.

But it is not necessary to decide this point now, for on the facts of this case, in my judgment, it cannot be said that the Pleader discharged himself with the consent of the client.

The Pleader was bound to give the client reasonable notice so as to afford the client an opportunity of obtaining other legal assistance.

In this case, the Pleader must have known that it was impossible for his client to obtain such assistance on the 2nd June 1921; all the Pleaders were observing the *hartal* except the Government Pleader and Public Prosecutor, and the client had no option except to bow to the inevitable and to present his petition himself.

It was then urged that although the Pleader absented himself from Court, and although his absence was in consequence of

the *hartal*, there was no evidence of his joining the *hartal*.

I put aside the question of the "non-co-operation movement" as there is no evidence against the Pleader in this respect. I am satisfied, however, that there was a *hartal*; one of the objects of that *hartal* was to boycott the Courts; there is no evidence that the Pleader took part in promoting the *hartal*: but to my mind it is clear that he abstained from going to the Court on the 2nd June in consequence of the *hartal*; he took part in the discussion in the Bar Library, and he acquiesced in the *hartal*, the result of which was that not a single Pleader, except the two already mentioned, attended the Courts. He must have known that the observance of the *hartal* would result in a boycott of the Courts, and in a grave interference with the administration of justice. His intention must be gathered from his acts, and in my judgment he must be held to have intended to take part in the *hartal* to boycott the Courts.

It was, however, said that he did this through fear of the consequences which would ensue if he did attend to his duties as Pleader. The material statements in his explanation in this respect are paragraphs 2 and 3, which are as follows:—

"2. That a general *hartal* in all departments of public life was decided upon in public meetings held at Noakhali and that no one could safely ignore or disregard the resolution of the indignant public. I also considered it safe and desirable to bow down to the popular will when public feeling was running so very high and so I did not attend Court during the period of the said *hartal*.

"3. That in the matter of not attending the Court during the *hartal*, there was no combination or common object among the members of the Bar and in fact the Bar Association passed no resolution at all in the matter."

I am by no means satisfied that the conditions in Noakhali were such as to render the Pleader's attendance to his duties unsafe during the *hartal*. There is no suggestion that he made any attempt to attend the Court, though he was able to go to the Bar Library which, we were told, is adjacent to the Court. Other people, as already mentioned, did attend the Courts and the learned Subordinate Judge characterised the threat of social punishment as an "empty threat".

The town meeting was held on the 22nd May 1921 the very next day all the Pleaders, except those two already mentioned, abstained from attending the Courts. We were informed that there are about 70 Pleaders in Noakhali. I cannot believe that they were all so devoid of courage that no one of them dared to venture to attend to his work and duties as a Pleader.

The facts of this case point to the conclusion that there was a common object, *viz.*, the boycott of the Courts, and that in persuance of that object the Pleader in this case deliberately abstained from discharging his professional duty. In my judgment, therefore, the Pleader failed in his duty both to his client and to the Court and he was guilty of grossly improper conduct in the discharge of his professional duty within clause (*b*) of section 13 and of such misconduct as would bring his case within the meaning of clause (*f*) of the said section.

REFERENCE NO. 9 OF 1921.

Sanderson, C. J.—This is a reference by the learned District Judge of Noakhali under section 14 of the Legal Practitioners Act, 1879.

The learned Judge forwarded with his reference a report of the learned Munsif of the Third Court.

The charge was:—

Mis. Case No. 419 of 1920. (O. XXI, r. 90, C. P. C.) Azam-ud-din—Petitioner v. Md. Ibrahim Bhuiya—Opp.-Party.

"Whereas you being enrolled as a Pleader and authorised to act as such in this Court, absented yourself from Court, contrary to the wishes of your client and to the prejudice of his interests, on 28th and 30th May 1921 when the case noted in the margin, in which you were engaged for the Petitioner was called on, you are guilty of grossly improper conduct in the discharge of your professional duties within the meaning of section 13 of the Legal Practitioners Act and have rendered yourself liable to be reported to the High Court under section 14 of the said Act."

The learned Munsif held that the charge had been established and reported the case to the High Court.

The learned District Judge concluded his reference by saying:—

"The opposite party as such Pleader is liable to some punishment, however light, under section 14 of the Legal Practitioners Act, as he, in my opinion, has brought himself within the disciplinary jurisdiction of the High Court, and his

misconduct which falls within clause (*f*) of section 13 of the Legal Practitioners Act is grave enough to deserve the punishment."

"But I cannot say that his conduct deserves severe punishment."

A preliminary point was taken by the learned Vakil appearing for the Pleader. He pointed out that the learned Munsif had found the Pleader to be guilty of "grossly improper conduct" within the meaning of section 13 (*b*) and the learned Judge had held the Pleader to be guilty of misconduct within section 13 (*f*) and that, therefore, as the report of the Munsif and the reference of the Judge did not agree, the reference should not be acted on by the High Court. In my judgment there is no ground for such a contention.

It is clear from the terms of section 14 that the report of the learned Munsif is to be made to the High Court. The section, however, provides that the report of the learned Munsif should be made through the District Judge and that such report should be accompanied by the opinion of the District Judge through whom it is made. This was probably provided for the purpose of giving the High Court the benefit of the District Judge's opinion, and also as an additional protection to the person, whose case might be under consideration.

The report of the learned Munsif, having been made, had to come to the High Court, with the addition of the opinion of the District Judge, through whom it had to be made, and it rests with the High Court to decide what action, if any, is to be taken in respect of the learned Munsif's report. In my judgment the proceedings are in order in this respect, and the point taken by the learned Vakil has no foundation.

Notice of the charge was given to the Pleader on the 12th July 1921 and on the 1st August 1921. The Pleader filed an explanation to which I shall refer later.

The material facts which led up to these proceedings were as follows:—

One Azam-ud-Din, an illiterate agriculturist, had made an application to the Court for setting aside a sale. On the evidence it is clear, in my judgment, that S. K. Nag acted as Pleader for Azam-ud-Din in connection with that application. The 28th May 1921 was fixed for the hearing of that application. On the morning of that day Azam-ud-Din went to Noakhali and to the house of S. K. Nag and asked him to sign and move a petition in Court on his behalf.

The evidence of Azam-ud-Din is that

"The Pleader said he would not come to Court or sign my petition or a *hajirah*. His clerk said he would not write my petition. I am an illiterate man, I could not write a petition or a *hajirah*. They told me to come to Court. I came to Court but could not take any steps. I found no Pleader or Pleader's clerk in Court that day. I had engaged no other Pleader in my case except Surendra Babu. I had requested my Pleader to come to Court. I could not know the result that day."

It appears that Azam-ud-Din went to the Court and waited about until 3-30 P. M. He asked the *peshkar* to give him the adjourned date of the case. The *peshkar* wanted the number of the case and said he could not find the case without the number; this Azam-ud-Din was not able to supply: the number was noted in the diary of the Pleader's clerk, but neither the Pleader nor his clerk had even taken the trouble to give Azam-ud-Din the number of his case. The result was that the case was called on and as no one appeared it was adjourned until Monday the 30th May, 1921. This was without the knowledge of Azam-ud-Din, and he returned to his home without knowing what had been done about his case.

On Monday, the 30th May, the case was again called on, and as no one appeared the application was dismissed.

On the Wednesday or the Thursday following, Azam-ud-Din again went to Noakhali and learnt from the Pleader's clerk that his case had been dismissed for default.

On the 14th June, 1921, a petition was filed praying for the restoration of the application which had been dismissed on the 30th May, 1921.

This petition was signed by the Pleader S. K. Nag.

The petition is as follows:—

"1. The petitioner filed in this Court against the opposite party Miscellaneous Case No. 419 of 1920 for setting aside sale. But that case having been struck off on 30th May 1921 for default on account of the absence of both the parties, the petitioner has sustained a heavy loss.

"2. The petitioner himself came to Noakhali on the date fixed the 28th May 1921, but as *hartal* prevailed at that time in the town and as Pleaders and clerks did not attend Court and as the petitioner himself does not know how to read and write he colud not take any step. and having loitered the whole day in the Court went home without knowing the date. It is now seen that

the above case was adjourned to 30th May 1921 and struck off for default in the absence of both the parties. The petitioner could not comprehend that the date would be adjourned after two days. If the petitioner could know that the case would be fixed for 30th May 1921 he would surely have attended the Court and the case would be granted *ex parte*.

"So the petition for revival is fit to be granted.

"3. The cause of action has arisen from 30th May 1921 when the case was struck off.

"4. So it is prayed :—

"(*Ka*). That on taking evidence the prayer for revival be granted and Miscellaneous Case No. 419 of 1920 be restored to its original number and justice done."

It is to be noted that the Pleader by signing the petition makes himself responsible for two material statements :—first that, in consequence of the application to set aside the sale being dismissed, the petitioner (Azam-ud-Din) had sustained a heavy loss, and, secondly, that the cause of this heavy loss was that *hartal* prevailed at the time and Pleaders and clerks did not attend Courts, and that as the petitioner could neither read nor write he could not take any step. I am not aware whether the matter was set right as neither side was able to inform the Court what had been the result of the petition.

In my judgment it is clear that on the 28th May 1921 S. K. Nag was the sole Pleader for Azam-ud-Din in connection with the application to set aside the sale ; that was the day fixed for the hearing of the sale ; Azam-ud-Din requested him to go to Court and file a petition : the Pleader refused. He was asked to sign a petition, the Pleader refused ; the Pleader's clerk would not even write out the petition.

The Pleader must have known that Azam-ud-Din was illiterate ; he must have known that unless he complied with Azam-ud-Din's request, Azam-ud-Din's application to set aside the sale would be in jeopardy, and Azam-ud-Din's interests might be seriously prejudiced ; further, he must have known that as there was a *hartal* no other Pleader or *Mukhtear* would be available ; and unless, some valid excuse can be found, in my judgment, his conduct was most reprehensible.

Several technical points were raised by the learned Vakil for the Pleader, all of which, in my judgment, had no substance in them, and the fact that such points were taken on his behalf is a strong indication that the Pleader must have felt that on the facts there was no justification for his conduct and it is a matter of surprise to me that no word of regret for the unfortunate position, in which he placed his client, was forthcoming.

It was first argued that the *vakalatnama* was not produced : to my mind that is immaterial ; it was proved by Azam-ud-Din that S. K. Nag was his Pleader in the "original case for setting aside the sale" and the learned Vakil for the Pleader admitted in this Court that on the 28th May he was Azam-ud-Din's Pleader in that matter.

It was next argued that there was no evidence of the Pleader's duty on the 28th May : in my judgment, it is not necessary in this case to define the duties of a Pleader generally. I merely mention this, so that I may make it clear that I do not adopt the suggestion which has been made that a *vakalatnama* is merely an authority to act ; in my judgment it is much more than that, and the acceptance of it entails duties on the part of the Pleader to his client. In this case it is not necessary to say more.

On the facts of this case, in my judgment, there can be no doubt it was the duty of the Pleader to give his assistance on the 28th May when asked by Azam-ud-Din so to do, and to take such steps as were necessary to protect his client's interests.

Another argument was raised that no fee was paid by Azam-ud-Din to the Pleader on the 28th May and, therefore, he was not bound to act as Pleader. In my judgment this argument was without any foundation : in the first place, Azam-ud-Din's evidence was that the Pleader did not ask for any fee on the 28th : the real reason why the Pleader refused to act, was undoubtedly the *hartal* which was then going on, and the learned Vakil when asked by one of my learned brothers if the Pleader would have accepted a fee, if it had been offered to him, had to admit that "probably" he would not have accepted it. I think instead of using the word "probably" he might have used the word "certainly."

It was then argued that the Pleader had discharged himself on the 28th May and that the client agreed to such discharge. It is difficult to treat such an argument

seriously: if the Pleader wished to discharge himself, he was bound to give his client reasonable notice: his refusal to act was on the morning of the 28th May: the case was fixed for that day: the Pleader knew his client could get no other advice on that day because of the *hartal*, and that he was an illiterate man, who could neither read nor write: it cannot possibly be held that the notice was reasonable.

It is then said the client agreed to the discharge. There is no evidence of such agreement by the client: on the contrary the evidence is all the other way and it is clear that Azam-ud-Din wanted the Pleader to go to Court: when the Pleader refused Azam-ud-Din had no alternative but to go to Court himself, and to my mind there is no ground for the suggestion that he agreed to the discharge of the Pleader.

Then it was said that there was no evidence that the Court made any order on the 28th May that the Pleader should take action on the 30th. That is true, but, in my judgment, it is immaterial: the facts show that the Pleader's absence on the 28th May was responsible for the dismissal on the 30th May.

There remains to be considered the explanation of the Pleader.

It appears that public meetings were held at Noakhali in respect of an incident at Chandpur, and resolutions were passed; one being to the effect that Pleaders and *Mukhtears* should not attend the Court.

The learned Munsif said in his report that the Pleaders in a body, with the exception of the Government Pleader, did not attend Court.

The Pleader in paragraph 9 of his explanation stated as follows:

"That a general *hartal* in all departments of public life was decided upon in public meetings held at Noakhali as a token of sympathy for the ill-treated stranded coolies at Chandpur, and no one could safely ignore or disregard the resolution of the indignant public. I also considered it safe and desirable to bow down to the popular will when public feeling was running so very high, and so I did not attend Court during the said *hartal*."

The learned Munsif, who was himself on the spot, held that he was not satisfied that the conditions were such as to render the Pleader's attendance at Court unsafe during the *hartal*; and, as far as I can judge from the evidence, I entirely agree with him. The Government Officers, including the Ministerial and menial staff, and the District Board and Municipal Officers regularly attended their offices during the *hartal*. The learned Munsif further held that the alleged threats were of no practical consequence and that the Pleaders could really have no apprehension of danger in attending Courts. I agree with this finding also. In my judgment it is clear that the Pleader acquiesced in the *hartal*: he made no effort to go to Court: he said "he considered it safe and desirable to bow down to the popular will when the public feeling was running so very high and so he did not attend Court during the said *hartal*."

The facts as found were no justification of his conduct, and the fact that he went so far as to refuse to sign the client's petition, which he could have done in his own house, shows that he was acquiescing in, if not sympathising with, the *hartal*, one object of which was that the Pleaders should boycott the Courts and so bring the administration of justice to a standstill.

The Pleader had a duty not only towards his client but also towards the Court and, it was clearly his duty to co-operate with the Court in the orderly and pure administration of justice.

The Pleader has failed altogether in showing any justification for his refusal to act for his client, and to attend the Court and in my judgment, he was guilty of grossly improper conduct in the discharge of his professional duty within clause (*b*) of section 13 and of such misconduct as would bring his case within clause (*f*) of the same section.

REFERENCES NOS. 4, 7, 8 & 9 OF 1921.

Woodroffe, J.—These references have been heard separately but they have certain points in common to which I address myself. The Pleaders concerned are charged with furthering a *hartal* or strike by abstaining from Court in breach of their duty towards their clients and the Court. The *hartal* was proclaimed by a public meeting as an expression of public feeling regarding the treatment of certain tea-garden coolies at Chandpur near Noakhali. There is no evidence to show that this *hartal*

was part of or connected with the political movement known as the non-co-operation movement, though as a method of expressing public opinion it may have had the actions of some of those who call themselves followers of this movement as an examplar.

No one is obliged to be a legal practitioner or (if he qualifies himself as such) to practise. But if he becomes a legal practitioner, and holds himself out for and accepts employment, he becomes an officer in a judicial system in which his position, rights and duties and the authority to which he is subject are determined. A person may stand out of such a system but if he enters it he is bound by the rules and must submit to the authority to which that system subjects him. It is obvious that he cannot act or combine with others to act against such authority. If the legal practitioner has a grievance and such grievance arises out of matters with which the Court is concerned he must seek the remedy from the judicial authority appropriate to the particular case just as the remedy for other grievances should be sought from the administrative authority concerned. It follows that a legal practitioner cannot join in an action to boycott the Court, or any particular Judge, because of any grievance, real or alleged, whether touching the Courts or of a political or other character.

Action to boycott may be manifested either by initiating, preaching, or otherwise furthering the boycott, such as (to deal with the matter before us) refusing, without justifying reason to attend Court when bound to do so. The statement is so qualified because there is no obligation to attend the Courts provided that the legal practitioner is not bound to his client and the Court to do so. The issue, therefore, which arises in the cases is whether there is any overt act proved of the alleged intention to boycott the Courts which is the gravamen of the charge. And the chief question again here is whether an obligation to attend Court is established and, if so, whether there was lawful excuse for the non-attendance which is admitted. For the Pleaders charged may either show, as they attempt to do, that they were not bound to attend Court and, that if they were, the promulgation of a public *hartal* directed, amongst others, against the Courts was a sufficient excuse for such non-attendance.

I think it is open to any practitioner for reasons personal to himself to refuse to practise in a particular Court or before a particular Judge. But he can only adopt this course either by refusing briefs in such Court, or before such Judge, or, if he has accepted a brief or *vakalatnama*, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong to one of its members or in respect of its conduct of the administration of justice generally is not permissible, because the Bar in any such case cannot constitute itself the authority to adjudge on such grievance and its duty is not to impede the administration of justice by collective abstention from Court, but to make its representation through (if there be one) its Association to the High Court which has superintendence in such matters. In the present case, moreover, the abstention is alleged to have been due to causes wholly extrinsic to the administration of justice, namely, the action of the civil administration in regard to some tea-garden coolies, a matter in which the Pleaders concerned and others may have been rightly interested in their personal capacity, but with which, *qua* Pleaders, and as a body of legal practitioners, they were not concerned.

The common form of defence in all the cases is that since "public opinion was running so high in sympathy with the stranded tea-garden coolies at Chandpur, no one could safely ignore or disregard the united voice of the indignant public," and, therefore, the Pleader in question "considered it safe and desirable to bow down to the popular will" and did not dare to attend Court. Now, assuming that a Pleader was otherwise under an obligation to attend Court on behalf of his client he could successfully plead as a lawful excuse that he was by circumstances, not under his control, prevented from doing so. Thus a Pleader could obviously not be charged

with grossly improper professional conduct because he did not work for his clients at the risk of receiving physical injury to himself. Nor might such excuse be, in my opinion, limited to such injury. We are not concerned in this case, nor likely to be concerned in others, with outcasting strictly so called, because outcasting takes place in consequence of breach of caste rules which in no way touch such a matter as that before us. But the consequences of the ancient outcasting have been in recent times extended to cases of difference of political opinion. That is, a party may say that if another person or party does not do, or does not abstain from doing what the first party wants or does not want done, then the second party will be subject to the penalties of the old outcasting or ex-communication. The penalties may remain the same, though the motive differs, in one case being of a caste and in the other of a political nature. To these penalties others may be added such as humiliation or insult. It may be true, as the learned Standing Counsel said, that so far as the old outcasting is concerned, the effect of it is much diminished in modern life in the large cities and it may be true that the effect of a political boycott is less in those cities than in the towns such as Noakhali and in the villages. But in these smaller towns and villages the menace conveyed by the threat of a boycott may be very great and might, in my opinion, exempt a legal practitioner from a charge of misconduct if he feared to brave it. To hold otherwise would be to make unwillingness to face a real danger or lack of courage grossly improper conduct in the discharge of professional duty, which is not, in my opinion, the law. In my opinion, it would not be possible to charge a legal practitioner with grossly improper conduct, whatever his liability to his client might be, if he omitted to carry out his duty to his clients by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor, in my opinion, would it make any difference if such fear were, in fact, unfounded if, in fact, it was sincerely entertained. And this for the reason that the Courts cannot punish a legal practitioner for grossly improper conduct because his apprehensions were beside the mark or he was devoid of courage. In such a case his client might have a remedy against him for neglect of a duty which his apprehensions did not excuse. But it would not be grounds for the Court's action by way of punishment for grossly improper conduct. It might, of course, be that the apprehensions were so little founded as to give rise to the inference that they could not have been sincerely entertained. But if sincerely entertained then no case of professional misconduct would be, in my opinion, made out.

The question then, which, in my opinion, we have to determine in these cases, is whether the Pleaders did not attend Court (assuming for the moment that they were bound to do so) because they were really afraid of the consequences which they thought might follow. This we must ascertain from the statements of the Pleaders in showing cause, their own conduct and the other evidence. In the first place these statements say that it was considered safe and "desirable" to bow down to the popular will. The latter word evidences an intention to adopt the resolutions of that will and a sympathy with it. The unanimity as regards the danger suggests the same conclusion. I think that the Pleaders were in sympathy with the *hartal*, evidenced by, amongst other things, their failure (though being a considerable and important body of the general public) to oppose it. It is easy under such circumstances to understand that the alleged consequences of disobedience was considered as being of no account. If it were a matter of safety only and not also desirability it might well have been expected (I speak of the circumstances disclosed in these cases) that varying opinions would have been entertained in respect of the dangers to be incurred as the result of disobedience to the popular will. I have referred to the circumstances of this case because it might, as an abstract proposition, be argued that the general consensus of opinion was evidence of a real peril. In the present case it is denied that the boycott was part of the widespread, permanent and organised non-co-operation movement, but the strike arose out of a passing and local incident. The strike is said to have been an expression of the popular will. But the consider-

able body of Pleaders at Noakhali were leading members of the community, whose non-co-operation with the movement might have checked it, if not brought it to an end. It does not seem to me open to a considerable body of leading citizens to say that they were in fear of the consequences of disobedience to the popular will, when, instead of opposing as they might have done successfully the menace of it, they gave it further weight by rendering it an unnecessary obeisance. We find that, notwithstanding that it is reasonable to expect some difference of opinion as to the reality of the menace, a difference which might be due both to judgment and degree of courage, practically all the Pleaders abstained from attendance at Court. In one of the references (No. 9) the Pleader charged declined even to sign a petition in his own house, showing that it was not in that particular instance a case of apprehension of danger in going out and attending Courts. And in other cases it seems to me that the refusal to attend was due to sympathy with the objects of the *hartal* and not to fear of the consequences of disobeying it. And what were these consequences in fact? One person was molested by having his bicycle taken from him in attending Court, the Government Pleader, who with the Public Prosecutor attended Court, was fined Rs. 25 by the "public" (whether it was paid or not does not appear) and has some night-soil thrown into his compound, another man was fined by the "public" Rs. 5 and the like. Large number of people carried on, and amongst these the Municipal *mehtars* made more decent and mannerly disposal of night-soil, doing, as did others, their service in the ordinary way. The whole affair was over within a fortnight. On these facts the conclusions at which I arrive is, firstly, that, whatever may have been the risk involved, it was not sufficient to exempt the Pleaders from the performance of their duty, and might have been nothing at all had the whole body of Pleaders (who appeared to be all East Bengal men—a people not deficient in courage) attended Court instead of furthering and strengthening the boycott by their absence; and, secondly, that such risk, if any, was not the operative cause on the minds of the Pleaders in inducing them not to attend. They did not, in my opinion, attend not because they were in fear of any penalties for doing so, but because they were in sympathy with the cause of and object of the *hartal*. To put the matter concisely they bowed to the popular will not because they were afraid of it but because they approved of it.

That will was an expression of public feeling as regards the treatment of the stranded coolies. Now, here we have no concern with the question of such treatment. I will, however, assume for the purposes of this judgment that the sympathy which the Indian public showed for the coolies was well-founded, still that is obviously no excuse. Whatever sympathy these Pleaders may have had for the coolies should not have been allowed to override their duty towards their client and towards the Court. If then their engagement to their clients so demanded, they were obliged to attend Court.

The next question is whether they were so bound?

I have hitherto dealt with certain general principles affecting all the cases and to these I will limit my observations on this second part of the case. The details peculiar to each case are dealt with in the judgment of the learned Chief Justice whose final conclusions on the facts I adopt. I add only some observations on the general principles involved and which have been referred to before us.

I am of opinion that these proceedings are (as it has been contended and conceded) *quasi*-criminal in the sense that they may result in penalties. I am not prepared, however, without further argument to hold with the decision of the Madras High Court cited to us that a Pleader cannot be examined on oath if he so wishes. I mention the point without discussing or deciding it, for that is not here necessary.

Quasi-criminal proceedings are not (as the word shows) criminal proceedings in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a *quasi*-criminal proceeding. This question is not of much moment here for reasons next stated. Thus: I think that in such a proceeding as this it is open to the Pleader charged to say nothing, to give no explanation, to adduce no evidence,

to refuse to be examined on oath or otherwise and to say to the Court proceeding against him "prove your case." This is a course legally open to him, though, seeing that the Pleader is an officer of Court, I cannot say it is a proper course and certainly not a wise one, if the Pleader has any de ence. I cannot conceive that a legal practitioner who has a real defence on the merits will not disclose every fact and take every step to prove it. When there is no defence or the defence is doubtful, it may be that a legal practitioner may adopt the course taken by a guilty accused in a criminal trial. Anyhow the prosecuting party must prove its case. If, however, (as here) the Pleaders charged do offer an explanation, the Court may take it into account in ascertaining whether the charge is made out. This is of some importance in the present case, as in deciding whether the case is made out against each Pleader the latter's statement may be considered. The onus again is undoubtedly on the party making the charge, though I think that if the Pleader does offer an explanation or evidence, the Court may, in considering whether the charge is proved, take into account such explanation and must consider such evidence. A point of evidence was taken in the Reference No 8 against the admissibility of the previous petition of the client which it was said was only admissible in contradiction or corroboration of previous testimony and that there was nothing in the evidence to corroborate. I think the petition was improperly used, for the question by which it was made evidence was a leading one. But this rather goes to the weight of the evidence so elicited than its admissibility. And the matter of weight I have considered, for it may be that the question was put in this form to bind a witness who was disposed to go back on what he had previously said. But in law the effect was the same as if, without the petition being put in or shown the witness was asked whether he did not make each of the statements in it. An affirmative answer made the petition, though improperly elicited, substantive evidence in the case It became incorporated with and part of the evidence taken on oath. The petition was of course evidence of a step taken in the proceeding and would be corroborative to the extent that there was evidence on the record which it might corroborate.

The evidence must doubtless establish the practitioner's guilt beyond all reasonable doubt. If it be said that the trial being of a *quasi*-criminal character the evidence must be incompatible with any theory as the innocence of the accused, the answer, I think, is that we may in this case consider, as I have said, both the evidence offered against the Pleader and his answer to the charge. Further, it may be (as urged) that the mere acceptance of a *vakalatnama* does not bind the Pleader to appear on every day of the proceeding in which it is given, for the giving of the *vakalatnama* may be accompanied by special terms, or other circumstances may affect the matter. But I am of opinion that all that the prosecution has to prove is a *prima facie* case and that when as here (except in Reference No. 9 where it was unnecessary) it is shown that a Pleader has accepted a *vakalatnama* in a general and common form, this is sufficient to start the case against him, and if it be desired to show that there was any special contract accompanying the acceptance of the *vakalatnama*, the burden of proving this, as a matter specially within his knowledge, is on the Pleader. If again it is alleged that the Pleader who has accepted a *vakalatnama* has discharged himself, he must show that he has properly done so with sufficient notice to his client and with intimation to the Court.

If again a Pleader stipulates for payment of fees before he does any work he is not bound to do such work without such payment. If, however, he accepts a *vakalatnama* without such stipulation, that is, gives credit to his client, he must proceed to represent him, even though unpaid his fees, until either his client discharges him or he properly discharges himself.

Applying these general principles to the present case, I am of opinion that the obligation to attend Court as charged is *prima facie* established, that no special contract affecting the general inference to be drawn from the acceptance of the *vakalatnama* has been established, nor any valid self-discharge.

I am of opinion that the Pleaders, other

than D. P. Chakraburtty in Reference No. 4 who is shown to have been engaged for one application, only abstained from attendance at Court when there was a duty upon them to attend and that the abstention was without lawful excuse from motives of sympathy with the *harta.*, and that they, therefore, in fact acted in furtherance of it, in breach of their duty towards their client and the Court. This follows from the finding which rejects the defence of fear. It was by public resolution expressed to be a common object of the *hartal* movement to boycott the Courts. A meeting of Pleaders called by the legal practitioner in Reference No. 8 was then held at which it was resolved to bow to the popular will. And in fact all the Pleaders against whom proceedings are taken abstained from attendance, though they had business in Court which properly called for it. If we exclude, as I do, the theory of fear, the only inference to be drawn is that the intention of the Pleaders by their overt act of non-attendance when bound to attend was in furtherance of the *hartal*. There is no evidence that the *hartal* was part of the non-co-operation movement and that the Pleaders charged are not non-co-operators is shown by their appearance before us.

There is, I think, a stronger case in favour of the Pleader in Reference No. 8 on the question whether the evidence establishes duty to attend Court, seeing the nature of the relations between him and his client, the explanation given and the evidence. But on the other point in this case it is shown that the Pleader, who is Secretary of the Bar Library, convened the meeting to determine whether the *hartal* was to be obeyed, a meeting which was followed in fact by obedience to the *hartal* resolution.

Such action is not permissible because the question whether a resolution declaring a *hartal* directed against the Courts is to be approved and obeyed or not is not a question which can be at all considered by a legal practitioner. There is no question for discussion since the answer must necessarily be a disapproval of the boycott, though it would be of course lawful to meet to consider measures of self-defence or means of combating it.

As regards the question whether these cases fall under clause (*b*) or clause (*f*) of section 13 of the Legal Practitioners Act, I am disposed to think they fall under both clauses, that is under clause (*b*) in so far as they involve neglect of duty towards the client in accepting a *vakalatnama* and without excuse not fulfilling the duties involved in such acceptances ; and under clause (*f*) in so far as the practitioners' conduct was directed against the Court by abstention from attendance on account of the *hartal*. In the present case the two are closely connected, because one and the same act constitutes the neglect and furtherance of the *hartal*. It is plain on the view of the facts here taken that one or other section applies. The matter is of no practical importance in any event, particularly having regard to the order which we are about to pass in these cases.

REFERENCES Nos. 4, 7, 8 & 9 OF 192.

Mookerjee, J.—These are four references made by the District Judge of Noakhali under section 14 of the Legal Practitioners Act in respect of six Pleaders. Reference No. 4 relates to Babu Rajani Kanta Bose and Babu Durga Prosanna Chakraburtty, Reference No. 7 to Babu Rajani Kanta Nag and Babu Priya Nath Rai Chaudhuri, ReferenceNo.8 to Babu Annada Charan Roy, and Reference No. 9 to Babu Surendra Kumar Nag. The references raise important questions of principle, which are of first impression and affect a large section of the legal profession in this Presidency ; they may be conveniently considered together, though the investigation by the Subordinate Court proceeded, in each case, on evidence separately recorded.

It appears that in the month of May last, there was considerable excitement in the town of Noakhali, due to sympathy for tea garden coolies stranded at a neighbouring place called Chandpur. At a public meeting, convened in the Town Hall by the Local Congress Committee, a resolution was carried that complete *hartal*, that is, cessation of public activity of every description, should be observed as an expression of the indignation of the community. At a second public meeting, it was resolved that those who might not loyally follow

the previous resolution, should be punished with social boycott or in some equally deterrent manner. Subsequently, an informal meeting was held in the Bar Library, at the instance of Babu Ananda Charan Roy, one of the Pleaders whose cases have been reported to us, and the opinion was expressed by the majority that it was not safe to disobey the public feeling which ran very high. It may be added that there is no evidence to show that the *hartal* thus proclaimed, though possibly inspired by the method adopted by non-co-operators, was in any way connected with that political movement. But it cannot be disputed that the object was to paralyse the work of the Courts and to bring judicial administration to a standstill. This result was in fact achieved, for all the Pleaders except two, ceased to attend the Courts during the period of the *hartal* from the 23rd May to the 3rd June. The consequence was that cases, when they were taken up for disposal on the appointed dates, had either to be postponed or decided *ex parte* or dismissed for default. On the reports of the Judicial Officers presiding over the Courts where this took place, the District Judge has submitted the matter to this Court for disciplinary action against the Pleaders concerned. Apart from the special facts of each case, which will be considered later, three fundamental questions emerge for consideration, namely, first, when a Pleader has accepted a *vakalatnama*, is he bound to appear to conduct the case in its various stages; secondly, if he is so bound, does the liability continue till he has discharged himself by recourse to the appropriate procedure; and, thirdly, does failure to appear to conduct the case before he has so discharged himself, render the Pleader liable to disciplinary action by the Court?

As regards the first question, it is essential to point out that a Pleader must be duly appointed before he can appear, act and plead in a case. Reference may be made to r. 1 and rr. 4 (1) and 4 (2) of O. III of the Code of Civil Procedure, 1908.

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

"Provided that any such appearance shall, if the Court so directs, be made by the party in person."

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

"Every such appointment, when accepted by a Pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the Pleader, as the case may be, and filed in Court, or until the client or the Pleader dies or until all proceedings in the suit are ended so far as regards the client."

It has been argued in this Court that although when a Pleader has accepted a *valakatnama* and filed it in Court, he thereby becomes authorised to act and plead on behalf of his client, it does not follow that he is under an obligation to do so on a particular occasion. In my opinion, this contention has been too broadly formulated. A Pleader who has accepted a *vakalatnama* and filed it in Court is ordinarily bound to appear and conduct his case, in the absence of an agreement to the contrary. It is conceivable that the *vakalatnama* may not set out explicitly all the terms of the engagement between the Pleader and his client, and amongst these there may be implied terms sanctioned by well-known and well-established usage of the profession. To take one example, at the time the *vakalatnama* is accepted and filed, there may be an understanding, express or implied, that the Pleader will appear to conduct the case only on one occasion, or only after he has been paid the fees settled, or only after he has been furnished with the requisite papers. Reference may in this connection be made to the judgment of Mr. Justice Phear delivered with the concurrence of Mr. Justice Dwarka Nath Mitter in *Gopeenath Mudduck, In re* (9) (Rule 359 of 1870). In that case, a litigant who was respondent in an appeal from appellate decree in this Court, which had been decreed *ex parte*, had engaged Babu Hari Mohan Chakraverty, a Vakil of this Court, to apply for re-hearing. On the 26th May 1870 the petitioner moved the Court to compel the Vakil to appear and argue his case, alleging that the Pleader had been paid his fees, and yet had declined

to attend and plead his case. The Court accordingly called upon the Vakil to answer the allegation. The Vakil stated that he had been paid only one-half of the fee agreed upon. The Court thereupon directed the Vakil to return the amount paid to him, and ruled that the acceptance of a *vakalatnama* by a Vakil of the High Court should in all cases be unconditional. But it is plain, that notwithstanding this expression of opinion, *vakalatnamas* have been accepted by Vakils in this Court, subject to conditions implied by well-known usage, as is clear from the decision in *Ram Koer* v. *Puna Koer* (14). I am bound to add, however, that the true import of the observations made by Mr. Justice Phear was not, it seems to me, correctly appreciated by Sir Richard Garth, C. J. The view indicated by Phear, J., that if once a legal practitioner accepts a brief, he is bound to plead the cause of his client, whether he is paid his fee or not, is not in conflict with the opinion maintained by Garth, C. J., that a legal practitioner may, both as a matter of right and of professional propriety, insist upon the payment of his fee before he reads his brief or pleads his client's cause. As Garth, C. J., himself points out, if a legal practitioner takes a brief without a fee and without informing his client that the fee must be paid before he attends to the case, he cannot with propriety recede from it, without due notice to his client, upon the ground that the fee is not paid. To my mind, the true position is that the acceptance of a *vakalatnama* with the usual terms, which is filed by the Pleader in Court, *prima facie* places him under an obligation to appear and act on behalf of his client; and, if he fails to perform what is thus *prima facie* his duty, he must be ready to justify his conduct by proof that the client had failed to fulfil an implied term of the engagement, such as the advance payment of fee or the supply of the requisite papers or such like circumstances, which perhaps, cannot, at least need not for our present purposes, be exhaustively enumerated. This view is identical with that adopted by Mr. Justice Sankaran Nair and Mr. Justice Sundara Aiyar in *Munireddi* v. *Venkata Rao* (10), where the principle was enunciated that a Vakil is bound to appear and conduct his case, even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary, or at least, notice to the effect to the client in sufficient time to enable him to make other arrangements, see the statement by Mr. Justice Sundara Aiyar in his luminous lectures on Professional Ethics, page 270, and *Kally Churn* v. *Carapiet* (15). Reference may also be made to the observations of Lord Westbury in *Solicitor, In re* (16), which favour a strict view of the duties of a Solicitor; and a similar opinion was expressed by Tottenham and Trevelyan, JJ., in *Satis Chunder* v. *Saroda Prasad* (17). But, as was pointed out by Wallis, C. J., in *Muthu Krishna Yachendra Bahadur* v. *Nurse* (11), the decisions of Lord Tenterden in *Rowson* v. *Erle* (18), of Tindal, C. J., in *Vansandau* v. *Browne* (19) and *Lawrence* v. *Potts* (20) and of Lord Esher in *Underwood* v. *Lewis* (21) favour a less stringent view of the duties of a legal practitioner. It is not necessary, however, for the decision of the cases now before us, to investigate in further detail this and correlated aspects of the matter, such as that raised in *Moheshpur Coal Company* v. *Jotindra Nath Gupta* (22).

As regards the second question, it is clear that when a Pleader has accepted a *vakalatnama* with or without implied conditions his liability continues, till he has discharged himself by recourse to the appropriate procedure. It is a mistake to suppose, however, that this is a matter solely between the Pleader and his client. The statutory provisions on the subject leave no room for doubt that the appointment of a Pleader, when filed in Court, with his acceptance, continues in force until determined with the leave of the Court by a writing signed by the client or the Plea-

(14) 3 Shome 75.

(15) 2 Shome 124.

(16) 4 B. L. R. P. C. 29; 2 Sat. P. C. J. 533 (P. C.).

(17) 25 Ind. Cas. 510; 19 C. L. J. 432.

(18) (1829) Mood. & Mal. 538.

(19) (1832) 9 Bing. 402; 2 Moo. & Sc. 543; 1 D. P. C. 715; 2 L. J. C. P. 34; 131 E. R. 667; 35 R. R 571.

(20) (1834) 6 C. & P. 428.

(21) (1894) 2 Q. B. 306; 64 L. J. Q. B. 60; 9 R. 440; 70 L. T. 833; 42 W. R. 517.

(22) 18 Ind. Cas. 315; 40 C. 386; 17 C. W. N. 278.

der, as the case may be, to this rule, there are two exceptions, namely, first, the death of the client or the Pleader, and, secondly, the termination of the proceedings in the suit so far as regards the client. An instance of the application of this rule is furnished by the decision of Harington, J., in *Atul Chandra Ghose* v. *Lakshman Chunder Sen* (23). See also *Prabhu Lal* v. *Kumar Krishna Dutt* (13) *Prabhu Lal* v. *Kumar Krishna Dutt* (12). The principle has been recognised for more than half a century, as is clear from section 18 of Act VIII of 1859 and section 39 of Act X of 1877 and Act XIV of 1882, which were applied in the cases of *King* v. *King* (24) and *Watkins* v. *Fox* (25). It is not difficult to realise that serious uncertainties and inconveniences might arise in the conduct of judicial proceedings, if the appointment of a Pleader, made in writing and lodged in the Court where the case was to be tried, could be revoked without the knowledge and sanction of the Court. It is further well-settled that the legal practitioner must always give reasonable notice of his withdrawal from the case to his client; *Hoby* v. *Built* (26), *Harris* v. *Osbourn* (27), *Nicholls* v. *Wilson* (28), *Whitehead* v. *Lord* (29).

As regards the third question, it is plain that the failure of a Pleader to appear to conduct the case before he has discharged himself in the manner prescribed by law, unless such failure can be justified, renders him liable to disciplinary action by the Court. It is neither practicable nor necessary to have a complete enumeration of justifying circumstances which must necessarily depend upon the facts of each case. In view of the arguments addressed to the Court, I may, however, state that, in my opinion, it may be successfully urged as a justifying reason for failure to attend to a case, that the absence was in fact due to overriding pressure of circumstances beyond the control of the Pleader, notwithstanding an honest desire on his part to perform his duty towards his client and towards the Court. No formula can be framed to enable us to measure accurately the nature and extent of such pressure, but, to my mind, it is essential that the Pleader, in full appreciation of his duty as the representative of his client and as an officer of the Court, should have been sincerely anxious to protect the former and to assist the latter. The relation of Pleader and client has been described by some as that of principal and agent, and by others as that of master and servant, in a limited and dignified sense, *Maruga Chetty* v. *Rajasami* (30). It may be a matter for controversy how for these analogies hold good; but, in any event, the relation involves the highest personal trust and confidence, so much so that it cannot be delegated without consent. The Pleader by his obligation is bound to discharge his duties to his client with the strictest fidelity and is answerable to the disciplinary jurisdiction of the Court for dereliction of duty. A Pleader, however, is more than a mere agent or servant of his client. He is also an officer of the Court, and as such he owes the duty of good faith and honourable dealing to the Courts before which he practises his profession. His high vocation is to inform the Court as to the law and facts of the case and to aid it to do justice by arriving at correct conclusions. The practice of the law is not a business open to all who wish to engage in it; it is a personal right or privilege limited to selected persons of good character with special qualifications duly ascertained and certified: it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the Pleader holding the license unfit to be entrusted with the powers and duties of his office. Generally speaking, the test to be applied is whether the misconduct is of such a description as shows him to be an unfit or unsafe person to enjoy the privileges and to manage the business of others in the capacity of a Pleader, in other words, unfit to discharge the duties of his

(23) 2 Ind. Cas. 830; 36 C. 609; 13 C. W. N. 1172.
(24) 6 B. 416 at p. 429; 3 Ind. Dec. (N. S.) 733.
(25) 22 C. 943; 11 Ind. Dec. (N. S.) 626.
(26) (1832) 3 B. & Ad. 350; 1 L. J. (N. S.) K. B. 121; 110 E. R. 131; 37 R. R 444.
(27) (1834) 2 Cr. & M. 629; 4 Tyr. 445; 3 L. J. (N. S.) Ex. 182; 149 E R. 912; 39 R. R. 872.
(28) (1843) 11 M. & W. 106; 2 Dowl. (N. S.) 1031; 12 L. J. Ex. 266; 152 E. R. 734; 63 R. R 523.
(29) (1852) 7 Ex. 691; 21 L. J Ex. 239; 155 E. R. 1126; 19 L. T. (O. S.) 113; 86 R. R. 797.
(30) 14 Ind. Cas. 823; 22 M. L. J. 284; (1912) M. W. N. 332; 11 M. L. T. 280.

office and unsafe because unworthy of confidence. His office is a very badge of respectability, a patent of trustworthiness, derived from his position on the Court's roll of Counsel; consequently, he ought not to be suffered to pass for what he is not. Amongst various types of misconduct, there is none more reprehensible than such conduct as tends to impede, obstruct, or prevent the administration of the law or to destroy the confidence of the people in such administration; and any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device, constitutes, in my opinion, ground for disbarment or suspension.

Before we pass on from these general observations to a consideration of the special facts of each case, it is necessary to notice an argument which was advanced in all the cases. It was contended that the proceedings under section 14 of the Legal Practitioners Act are *quasi*-criminal in character and must be based on evidence cogent and conclusive, such as is deemed necessary for a conviction in a criminal case; in support of this proposition reliance was placed upon observations in the decisions in *Nilkunt Biswas, In re* (1), *Kotha Subba Chetti* v. *Queen* (5), *Government Pleader* v. *Raghunath S. Sule* (2). In my opinion, it is plain that the proceeding is not of a criminal nature; see *Government Pleader* v. *Bhagubhai* (31), though, as pointed out in *Nando Lal Roy* v. *Baserali* (32) and *Nallasivan Pillai* v. *Ramalingam Pillai* (33), it is undoubtedly a judicial proceeding. It was ruled in the cases of *Hardwick, In re* (34) and *Eede, In re*; *Davy, Ex parte* (35) that as the Court in making an order striking a Solicitor off the rolls for misconduct does so in the exercise of its disciplinary powers over its own officers and not in the exercise of its criminal jurisdiction, an appeal lies from such order to the Court of Appeal. The same principle was recognised by Lord Mansfield in *Brounsall, Ex parte* (36), when he overruled an objection to disciplinary proceedings against an Attorney who had been convicted of felony, on the ground that the only misconduct imputed to him was the very offence which had formed the basis of his conviction. The same view has been affirmed by the Supreme Court of the United States in *Randall* v. *Bringham* (37), and *Wall, Ex parte* (38). The true position appears to be that these proceedings are neither civil suits nor criminal prosecutions: *Janak Kishore, In the matter of* (39). They are special proceedings resulting from the inherent powers of the Courts over their officers. Their object is to preserve the purity of the Courts and the proper and honest administration of the law. The purpose of suspension and disbarment is to protect the Court and the public from legal practitioners who, disregarding the sanctity of their office, pervert and abuse the privileges annexed to the responsible office they have secured from the Court. The form of procedure, consequently, is not of controlling importance, so long as the essentials of fair notice and opportunity to be heard are present: *Ganapathy Sastri, In re* (40). Section 14 of the Legal Practitioners Act, which describes the procedure for investigation when a charge of unprofessional conduct is brought in a subordinate Court against a legal practitioner, provides that the presiding officer shall send him a copy of the charge and also a notice that on an appointed day the charge will be taken into consideration. This section does not make it obligatory on the Pleader to submit a written defence and does not even provide for his compulsory presence or oral examination: [*A Pleader, In re* (41)] but it does lay down that

(31) 16 Ind. Cas. 788; 36 B. 606; 14 Bom. L. R. 700; 13 Cr. L. J. 913.
(32) 50 Ind. Cas. 806; 23 C. W. N. 560.
(33) 41 Ind. Cas. 305; 32 M. L. J. 402; (1917) M. W. N. 303; 6 L. W. 364; 18 Cr. L. J. 785.
(34) (1883) 12 Q. B. D. 148; 53 L. J. D. Q. 64; 49 L. T. 584; 32 W. R. 191.
(35) (1890) 25 Q. B. D. 228; 59 L. J. Q. B. 376; 38 W. R. 683.
(36) (1778) 2 Cowper 829; 98 E. R. 1385.
(37) (1868) 7 Wallace 523; 19 Law. Ed. 285.
(38) (1882) 17 Otto 265.
(39) 37 Ind. Cas. 484; 1 P. L. J. 576; (1917) Pat 60; 18 Cr. L. J. 132.
(40) 3 Ind. Cas. 344; 19 M. L. J. 504; 6 M. L. T. 253; 11 Cr. L. J. 274.
(41) 18 M. L. J. 184; 3 M. L. T. 237; 7 Cr. L. J. 333.

the presiding officer shall receive and record all evidence properly produced in support of the charge or by the Pleader presumably in answer to the charge. The essence of the matter, consequently, is that the Pleader must be allowed an opportunity of making his defence: *Southekal Krishna Rao, In the matter of* (42), *Golab Khan, In re* (43), *Second Grade Pleader, In the matter of* (44), *Government Pleader* v. *Maganlal* (45). The Pleader need not make any defence if he so chooses, though I am emphatically of the opinion that he should be absolutely candid with the Court in such a proceeding. He may, howsoever, unwisely decline to render any assistance to the Court, maintain a stolid silence and take up the position that the case against him must be completely proved. But if he does adopt such an attitude, he obviously runs a grave risk, for even in a criminal case section 342 of the Criminal Procedure Code provides that if an accused person refuses to answer a question put by the Court, the Court and the Jury, if any, may draw such inference from such refusal as it thinks just; see section 114, Ill. (*b*) of the Indian Evidence Act; *Emperor* v. *Dwijendra Chandra* (46). On the other hand, if the Pleader does submit a written statement in anwser to the charge, the Court is bound to take it into consideration and may draw such inference as legitimately arises from its contents. To take an example, if the Pleader in his written statement seeks to justify his conduct on certain allegations of fact, it may well be inferred that the conduct was not justifiable on other hypothetical or imaginable grounds. A singular illustration of such a contingency was furnished in the course of argument in one of the cases now before us. It was urged with considerable insistence that the failure of the Pleader to appear in Court on the appointed day did not render him liable to disciplinary action, inasmuch as it had not been affirmatively established that he had been offered his fee for the day by the client. But in answer to a question put by the Court, the reply was given that even if the fee had been tendered, it would not have been accepted, as the Pleader had decided not to attend the Court on account of the *hartal*. In my opinion, when in answer to a charge made against a Pleader, a written statement has been filed in a proceeding under section 14, it is not obligatory on the Court to rule out all conceivable hypothetical grounds which could have been, but had not been, set up in answer. The justice of the case may ordinarily be met, if the enquiry proceeds on the basis of the charge and the answer.

In one of the cases, an additional point was urged with some emphasis. It was contended that no disciplinary action can be taken by the High Court when the District Judge and the Judge of the Subordinate Court are not agreed as to the specific provision of section 13 which covers the misconduct attributed to the legal practitioner concerned. This argument is manifestly untenable and is based upon a misapprehension of the scope of the authority of this Court in the exercise of its disciplinary jurisdiction. Section 14 contemplates an enquiry and report by the Subordinate Court. This is forwarded by the District Judge with his opinion thereon. As pointed out in *Rasik Lal Nag, In the matter of* (47), the ultimate decision rests with the High Court and the authority of this Court is not taken away by any divergence of opinion between the Judge of the Subordinate Court and the District Judge, either as to the facts, or as to the law applicable. It is consequently immaterial that while the Judge of the Subordinate Court thought that the facts attracted the operation of section 13 (*b*), the District Judge deemed the case governed by section 13 (*f*). I am further of opinion that the case is really comprehended within the scope of both the clauses of section 13 just mentioned; the conduct of the Pleader was reprehensible not only because he neglected his duty towards his client, but also because he sympathised with and acquiesced in a boycott of the Courts; the former makes

(42) 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 11; 5 Sar P. C. J. 96; 7 Ind. Dec. (N. S.) 685 (P. C.)
(43) 15 W. R. 171; 6 B. L. R. 83.
(44) 24 M. 83.
(45) 9 Bom. L. R. 966.
(46) 31 Ind. Cas. 164; 19 C. W. N. 1043; 16 Cr. L. J. 724.
(47) 38 Ind. Cas. 980; 44 C. 639; 20 C. W. N. 1284; 24 C. L. J. 190; 18 Cr. L. J. 420.

clause (*b*), the latter makes clause (*f*), applicable.

In Reference No. 4, we are called upon to consider the cases of Babu Rajani Kanta Bose and Babu Durga Prosanna Chakraburty. As regards Babu Rajani Kanta Bose, it is plain that his conduct was reprehensible. He was present at the public meeting where the *hartal* resolution was carried and took an active part in the proceedings. He then absented himself from Court and did not appear in the case in which he had been engaged. He has not shown cause, and we have been informed that he has retired from the practice of his profession. It is, consequently, not necessary to discuss this matter further. As regards Babu Durga Prosanna Chakrabarty, the evidence indicates that his services were engaged by the client for only one occasion, consequently his failure to appear on another occasion does not support the charge of professional misconduct.

In Reference No. 7, we are concerned with the cases of two Pleaders, Babu Rajani Kanta Nag and Babu Priyanath Rai Chaudhri. The evidence makes it abundantly clear that these Pleaders had accepted a *vakalatnama* and yet did not appear in Court when their case was taken up. There can be no doubt that they acted in this manner, because they were in sympathy with the *hartal* resolution, and it is idle for them to urge that they had no intention to boycott the Court or paralyse the administration of justice. I feel no doubt that they could have attended the Court, as the Government Pleader and the Public Prosecutor had done, and that the risk of consequent inconvenience and possible humiliation by an irritated public has been unduly magnified. I consider that their conduct in not attending to the case in which they had been engaged was unjustifiable, and they have rendered themselves liable to disciplinary action by this Court.

In Reference No. 8, we have to deal with the case of Babu Annada Charan Roy. In his written defence, he has urged that no one could safely ignore or disregard the *hartal* resolution adopted by an indignant public, but he has also added that he considered it safe and desirable to bow down to the popular will. The evidence shows that he had convened the meeting at the Bar Library where the opinion was expressed by the majority that it was not safe to disobey the strong public feeling. I think there is no reasonable doubt that he acquiesced in the *hartal* resolution and neglected to perform his duty towards his clients and towards the Court. This, in my opinion, makes him liable to disciplinary action by this Court.

In Reference No. 9, we have to consider the case of Babu Surendra Kumar Nag. In my opinion, his conduct was far more reprehensible than that of the other Pleaders, and the line of defence adopted in the lower Court as also in this Court has placed him in a position of great peril. He was engaged by one Azam-ud-Din as Pleader in a suit which resulted in a sale of the property of his client. He then applied to have the sale set aside; the matter was fixed for hearing on the 28th May 1921. The client saw him at his house in the morning and requested him either to file a list of the witnesses present or to make an application to the Court for adjournment. The Pleader refused the request. The client then went to the Court but as he was illiterate and ignorant of the number of the case, he could not take steps to apply for adjournment. The case appears to have been postponed along with other cases till the 30th May. The client, however, was not apprised of this, and the case was dismissed for default, as on the adjourned date neither he nor his Pleader was present. On the 14th June the Pleader presented an application for restoration of the case, which recites that as *hartal* prevailed at the time and as Pleaders and clerks did not attend Court and as the petitioner himself could not take steps by reason of his illiteracy, he could not appear on the date to which the case was adjourned without his knowledge. In view of the statement contained in this petition, which was signed by the Pleader himself, it is difficult to understand how the charge of unprofessional conduct could be seriously met. It has been urged, however, that as no *vakalatnama* was filed along with the application for reversal of sale, the Pleader was not liable to attend on the appointed date. There is no foundation whatever for this contention, for it is well-settled that no

fresh *vakalatnama* is necessary to entitle the Pleader to appear in proceedings subsequent to the decree, *Shah Mukhun* v. *Sreekishen Singh* (48), *Sutto Churn* v. *Suroop Chunder Doss* (49), *Gopal Jayachand* v. *Hargovind Khushal* (50), *Sadashiv Ganpatrao* v. *Vithaldas Nanchand* (51). The Pleader did not, in fact, present the application for reversal of the sale, and, subsequently the petition for restoration of that application, on the strength of his appointment as Pleader in the suit; and no weight can be attached to the fact that a fresh *vakalatnama* was not filed. There is also no force in the contention that he was not paid his fees, he did not demand his fees and would not have attended the Court even on payment. The truth is he sympathised with the movement for boycott of the Court and considered it safe and desirable to bow down to the popular will. His conduct is, in my opinion, not capable of justification on any imaginable ground and can only be characterised as amounting to a deliberate and reckless disregard of the interest of the illiterate and ignorant litigant who had the misfortune to engage his services. As observed by the Special Bench of seven Judges in *Roopnath Banerjee, In re* (52) his case has undoubtedly not been improved by the sophistical arguments put forward to sustain an indefensible position, and he has clearly rendered himself liable to disciplinary action by the Court.

I desire to add that the conduct and attitude of the Pleaders whose cases we have been called upon to consider, appear, in my judgment, to be lamentably deficient when tested from the standpoint of the honour and dignity which we are accustomed to associate with gentlemen who claim the position and privileges of members of the legal profession. As observed in *Government Pleader* v. *Jagannath* (53), their position as a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice, their special training and their responsible practice gave them influence with the public, and it was their duty to use that influence so that the administration of justice might not be brought into contempt: *Jivanlal Varajrai Desai, In re* (54). They should have been actuated by a keen sense of duty and loyalty to the Courts and to their clients. They should have made a strenuous endeavour to resist and defeat the ignoble attempt to boycott the Courts and to imperil the administration of justice. Their paramount duty was, in the language used by Lord Shaw [*Krishnasawmy Aiyar, In the matter of* (55) affirming *Krishnasawmi Aiyar, In re* (56)] to co-operate with the Court in the orderly and pure administration of justice. It is thus a matter of the deepest concern that they passively acquiesced in, if not actively sympathised with, the movement to paralyse the Courts, and, what is most deplorable, they did not hesitate to cast baseless aspersions on the judicial officers who instituted these disciplinary proceedings solely with a view to vindicate the authority and maintain the dignity of the Courts.

REFERENCES Nos. 4, 7, 8 & 9 OF 1921.

Sanderson, C. J.—After due consideration we have decided to take no further action in respect of the References No. 4 of 1921, No. 7 of 1921, No. 8 of 1921 and No. 9 of 1921. Some of the reasons which have actuated us in coming to this conclusion, are:—

(1) that these are the first cases of the kind which have been brought before this Court;

(2) that the Pleaders concerned, with the exception of one, who has ceased to practise, have resumed work and attended the Courts;

(3) that there was undoubtedly a strong feeling in Noakhali on the occasion in question;

(48) 8 W. R. 92.
(49) 12 W. R. 465.
(50) 5 B. H. C. R. (A. C. J.) 83.
(51) 20 B. 198; 10 Ind. Dec. (N. S.) 691.
(52) 1 Shome 125.
(53) 2 Ind. Cas. 264; 10 Bom. L. R. 1169; 33 B. 252.
(54) 54 Ind. Cas. 679; 44 B. 418; 22 Bom. L. R. 13; 21 Cr. L. J. 151.
(55) 16 Ind. Cas. 328; 23 M. L. J. 114; 16 C. W. N. 1081; 13 Cr. L. J. 680; 12 M. L. T. 396; 35 M. 543; 14 Bom. L. R. 1079; 16 C. L. J. 634; (1912) M. W. N. 963; 39 I. A. 191 (P. C.).
(56) 14 Ind Cas. 965; 22 M. L. J. 276; (1912) M. W. N. 348; 11 M. L. T. 296; 13 Cr. L. J. 421.

(4) the Pleaders may have acted in haste and without due consideration of the serious nature and effect of their conduct.

We have,therefore, decided to treat as leniently as possible the Pleaders concerned in the references now before us, in the hope and belief that the warning, which we now give, will have the effect of preventing a repitition of such conduct.

It must be recognised, however, that the Court takes a very serious view of this matter.

The Pleaders in Noakhali were a considerable body in point of numbers, and were persons whose influence and action must have had a considerable effect on the *hartal*. It is, perhaps, not too much to say that if the Pleaders had abstained from observing the *hartal*, it might have failed altogether, or at any rate it would have had much less effect. But, apart from this, the Pleaders are a privileged body, with duties not only towards their clients but also towards the Courts of which they are Pleaders, to co-operate in the orderly and pure administration of justice.

The Pleaders in question failed to perform their duties in both respects, and they joined in a *hartal*, one of the objects of which was to paralyse the administration of justice.

Such conduct cannot and will not be permitted, whether it be on account of some alleged grievance in connection with the administration of the Courts or in furtherance of some movement, political or otherwise. Therefore, while deciding to take a lenient course in these cases, the first of the kind brought before us, we desire to make it clear that if such conduct is repeated in the future, it may entail serious consequences to those concerned.

N. H. *References answered.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 404 OF 1922.

August 3, 1922.

Present:—Mr. Justice Stuart.

CHATURBHUJ—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 384, 385, —Picketting of shop Levy of fine Loss in trade and profits - Offence Picketting, when criminal.

Where a person causes loss in trade and profits to a trader by picketting his shop and forces him to pay a fine for persisting in the sale of foreign goods, he is guilty of extortion and may be convicted under section 384 or 385 of the Penal Code. (p. 11, col. 1.)

Picketting is not only harmless but even laudable where a certain number of well-intentioned and law-abiding persons wish to argue in a legitimate and peaceful manner with a man pointing out to him that in his own advantage he should not follow a certain course and the fear of it would not be fear of injury within the meaning of the law. But when the word "picketting" is associated with another word "boycotting" and when the boycotting is apt to proceed from ostracism to active annoyance and when the active annoyance has been known, in many instances, to culminate in bodily injury, a man who is threatened with picketting is put in fear of injury within the meaning of section 385 of the Penal Code. (p. 112, col. 1.)

Criminal Revision from an order of the Sessions Judge, Farrukhabad.

Mr. *Anandi Prasad Dube*, for the Petitioner.

JUDGMENT.—This application in revision arises out of the following facts. On the 29th April 1922 which was market day in the town of Chibramau, in the Farrukhabad District, Bachan Lal, a cloth merchant, was carrying on business in his shop. The applicant and another person came to the shop of Bachan Lal and said to him that if he continued to sell foreign cloth, they would put pickets on to his shop to prevent his doing so. Bachan Lal replied that as long as foreign cloth was available, he would sell it. The applicant and his companion then told him that, if he did so, he would be fined 5 per cent. of the value of his stock. He refused to pay the fine and pickets were accordingly put upon his shop who, apparently without using actual violence, prevented effectively any customer reaching the shop of Bachan Lal for a matter of two hours. Owing to this circumstance he lost two hours' trade and the consequent profit. After two hours he paid the fine, obeyed the order not to sell foreign cloth and was

left unmolested for the time. He made complaints to the Police and the Tahsildar. During the days following the incident of the 29th April he was molested by certain persons and threatened by one or more in respect of his having made complaints. There are other circumstances but I need not deal with them. These facts have been found by the Magistrate who tried the case and by the Sessions Judge. Now the applicant approaches this Court in revision upon the ground that on the facts no offence is disclosed. He has been convicted under section 385 and sentenced to nine months' imprisonment and a fine.

The words of section 385 are these :—

"Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The definition of "extortion" is given in section 383 as follows :—

"Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed, which may be converted into a valuable security, commits "extortion."

The word "injury" is defind in section 44:

"The word 'injury' denotes any harm whatever illegally caused to any person in body, mind, reputation or property."

The first point is what injury, if any, might have been apprehended by Bachan Lal. I am leaving out of account the loss of profit. It is an arguable point whether such loss of profit was or was not an injury under section 44. I express no opinion on that point. There is next the more important factor in this case of the fine which Bachan Lal was compelled to pay. There can be no doubt to my mind that injury in a legal sense was not only apprehended by him but caused to him by paying that fine. There was further a reasonable apprehension of personal violence. What then did the applicants do? They intentionally put Bachan Lal in fear of injury. Their action would clearly suggest to Bachan Lal that if Bachan Lal did not do what they wanted, Bachan Lal would not only suffer in business and in pocket but might suffer in person. No other common sense view is possible. The learned Counsel for the applicant addressed me on the subject of what he called peaceful picketting and referred to what he stated was the practice in England. I do not consider that a discussion of the English practice, even if correctly stated by him, would assist me at arriving at a decision. In India any man who is told that he is going to be picketted peacefully has every reason for apprehending possible physical discomfort as a not unlikely result. It is clear that Bachan Lal was put in fear of injury to his person. He was also put in fear of injury to the actual money in his till, for if he did not pay the fine at once, he had every reason for supposing that the fine might be increased. It is clearly made out on facts that the applicant intentionally put him in fear of that injury. What was the result ? Bachan Lal was thereby induced to pay up the fine. Was he dishonestly induced? He was clearly dishonestly induced within the meaning of the law, for the word "dishonestly" is defined in section 24 of the Code as follows :—

'Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'."

Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled. These are the definitions in section 23. Now it is clear that the applicant or anybody else was not entitled to that fine which was taken from Bachan Lal, and it is equally clear that Bachan Lal was legally entitled to the money which he paid, as that fine and the means used being threats directed against the man's business explicitly and impliedly against his person, were unlawful. So I find that every ingredient in the offence of extortion was made out and the conviction might very well have been under section 384 for the actual commission of the offence. The conviction under section 385 is equally good. Bachan Lal was put in fear of injury in order to the commission of extortion. The conviction is thus a good conviction.

I wish to be clearly understood upon the subject of picketting. The point is not whether picketting in itself is illegal. I do not propose to discuss this large subject exhaustively. "Picketting" is not, as

far as I know, a word that has ever been legally defined. It may have been, but I am not aware of it. The word means different things to different people. If all that is meant by picketting is that a certain number of well-intentioned and law-abiding persons wish to argue in a legitimate and peaceful manner with a man, pointing out to him that in his own advantage he should not follow a certain course, there can be no doubt that such a proceeding is not only harmless but, in many cases, it may be laudable, and if picketting to the ordinary mind meant nothing more than that, the fear of picketting would not be fear of injury within the meaning of the law. But when unfortunately the word "picketting" has come to be associated with another word "boycotting" and when the boycotting is apt to proceed from ostracism to active annoyance and when the active annoyance has been known, in many instances, to culminate in bodily injury, then I take it that a man who is threatened with picketting and knows that picketting can be of such a nature, is put in fear of injury within the meaning of section 385. It could never be suggested that a man had legally been put in fear of injury because he had been told that a respectable gentleman, who was the exponent of advanced religious views was coming to discuss his views with him. That would not put anybody in fear of injury legally. But when a man is told that certain men are going to watch his shop and he knows that, in many instances, the watching of shops not only leads to loss of business but has frequently led to loss of actual money and occasionally to personal injury to the shop-keeper, he legally must apprehend injury. If I consider that the matter were otherwise than perfectly plain, I should have admitted this application upon the point of law, but, to my mind, the matter presents no difficulty. With regard to sentence, I see no reason to interfere. I dismiss the application.

N. K.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 40 OF 1922.
(CRIMINAL REVISION PETITION NO. 40 OF 1922).

May 5, 1922.

Present:—Mr. Justice Ramesam.

VIRAPPA CHETTIAR—PETITIONER

versus

KATHAYEE AMMAL AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Magistrate, duty of, to complete enquiry.

After proceedings are started and a preliminary order is passed under section 145 of the Criminal Procedure Code, it is the duty of a Magistrate to complete the inquiry.

Velayuda Kone v. *Narayana Kone*, 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and under section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-Divisional First Class Magistrate, Mannargudi, dated 16th August, 1921.

Mr. *R. Rajagopala Aiyangar*, for the Petitioner.

Mr. *V. C. Seshachariar*, for the Respondents.

ORDER.—There is no finding by the Magistrate that any party was in possession before the locking of the building by the counter-petitioners. Nor could he give such a finding, as there were no materials which could properly be the basis of such a finding as no enquiry was made. It is the duty of the Magistrate to complete the enquiry under section 145 of the Criminal Procedure Code in the proceedings started under it and a preliminary order passed [see *Velayuda Kone* v. *Narayana Kone* (1) , and the cases cited therein]. If the petitioner was not ready with his evidence, and showed no good cause for an adjournment, the Magistrate ought, at least, to have taken the evidence of the counter-petitioners. The order of the Magistrate is vacated and the case will be sent back to be disposed of according to law. It will be open to the petitioner also to file a written statement and to adduce evidence at the new enquiry and the Magistrate will be bound to record and consider it.

V. N. V. *Case sent back.*

(1) 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789.

PATNA HIGH COURT.

CRIMINAL APPEAL NO. 71 OF 1922.
June 15, 1922.
Present:—Mr. Justice Coutts and
Mr. Justice Das.
RAM PRASAD SINGH AND OTHERS—
ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 149—Unlawful assembly—Principal offender convicted of one offence—Remaining members whether can be convicted of another offence.

Where the principal offender of an unlawful assembly is convicted of one offence, the remaining members of that assembly cannot be convicted of another offence. (p. 115, col. 1.)

Criminal appeal from convictions and sentences passed by the Sessions Judge, Monghyr, dated the 5th April 1922.

Mr. Gour Chandra Pal, for the Appellant.
Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.

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

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

The accused persons set up a counter-case alleging that Daroga had been killed during a fight at a hut belonging to Ajwa where Daroga had gone with ten or twelve men during the night for the purpose of looting. No evidence has been adduced in support of the defence story and the learned Sessions Judge has entirely disbelieved it. To establish the prosecution case the evidence of the prosecution witnesses, Jagrup Singh, Kishori Singh and Mahabir Singh, has been relied on. Jagrup's evidence is to the effect that at the time of the occurrence he was looking after his buffalo which was grazing in a *gachhi* near by and he saw the whole occurrence which he describes very much in the same way as I have already stated it. Kishori Singh and Mahabir Singh depose to the same effect and they say they saw the occurrence because they were out watching their field which was close by.

If we believe the evidence of these witnesses, as the learned Sessions Judge has done, there can be no doubt that the prosecution case has been fully established. But we have been asked to disbelieve the evidence on account of various circumstances. It is urged that it is curious that the accused persons should have arrived on the spot as soon as Ajwa called out, and that they should have been armed—Ram Prasad with a spear and the rest with *lathis*. It is also suggested that rather than attack, Daroga who had gone

to take the cattle to the pound they would have rescued the cattle and taken them off It is further pointed that there were no blood marks at the place of occurrence, that there were several injuries on Ajwa, although the prosecution case is that he was only struck twice with a *lathi*, and that there was a denial by the prosecution witnesses that Ajwa had a hut in the neighbourhood.

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

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

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

There remains the question of the other appellants. There can be no possible doubt that these accused persons are guilty of the offence of rioting with the intention of

assaulting Daroga who was driving to the pound cattle belonging to Ram Prasad and Bhuso, but it has been urged that their conviction under sections 304-149 cannot be sustained and, with this view I am inclined to agree. Section 149 of the Indian Penal Code runs as follows:

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

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

Dass, J.—I agree.

W. C. A. *Order modified.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 331 OF 1922.

July 27 1922.

Present:—Mr. Justice Stuart.

BECHU CHAUBE AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 342, 537—Examination of prosecution witness after statement of accused—Irregularity, whether curable.

An error which in no way prejudices a person convicted and is not fatal to the validity of the decision and is concerned with the proceedings, rather than the mode of trial may be condoned under the provisions of section 537 of the Criminal Procedure Code. (p. 116, col. 2.)

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61 at pp. 96, 98; 11 M. L. J. 233; 3 Bom. L. R. 540 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), referred to.

The examination of a witness for the prosecution after recording the statement of the accused is an error, but if the case has been decided correctly on the merits, the error in no way affects the result so as to vitiate the trial: (p. 117, col. 1.)

Criminal revision from an order of the Additional Sessions Judge, Allahabad, at Mirzapur.

Mr. *Anandi Prasad Dube*, for the Applicants.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—The first point raised by the learned Counsel for the applicants is one upon which there has been divergence of opinion in Courts in India. It appears from the record that the witnesses for the prosecution against the applicants were examined-in-chief up to the 10th April 1922, and on that date the applicants were questioned generally on the case by the Trying Magistrate under the provisions of sec-

tion 342 before they were called on for their defence. After that the witnesses for the prosecution were cross-examined, and further, one witness, a head constable, Ram Gopal Singh, was examined for the first time for the prosecution. The evidence which he gave was to the effect that he had arrested the applicants. The point taken by the learned Counsel is that by examining this head constable after the statement of the accused had been taken, the Trying Magistrate acted contrary to the provisions of section 342. The learned Counsel is undoubtedly right in that contention. Under the provisions of section 342 all the prosecution witnesses should have been examined-in-chief before the final questions were put to the applicants. The applicants were not examined again after the 10th of April. The provisions of this portion of section 342 are imperative. The words are :—

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court ..... *shall*, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence."

But it remains to be considered whether the provisions of section 537 of the Code are not applicable. The apposite portion of that section is this :—

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial .. .. unless such error, omission, irregularity, want or misdirection has in fact occasioned a failure of justice."

It certainly appears that in many High Courts it has been held impliedly that section 537 has no application in these circumstances, but in this High Court it has been decided that an omission to comply with the provisions of section 342 does not involve a setting aside of the conviction. The main authority upon the subject is to be found in the well-known decision of their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1). Their Lordships did not, in that case, however, distinguish between an "error" and an "irregularity". The two words clearly do not mean the same thing. I regard the failure to apply correctly the provisions of section 342 as an error and not as an irregularity, and I do not understand their Lordships to have laid down that an error which has not in any way prejudiced a person convicted may not be condoned under the provisions of section 537 if it is not fatal to the validity of the decision, and is concerned with the proceedings rather than the mode of trial. Their Lordships in that particular case were considering neither an error, nor an omission, nor an irregularity but an illegality. In that case the trial was vitiated in its inception. A provision of the Criminal Procedure Code had been transgressed, and the result of the transgression was that the Court had actually no jurisdiction to hear the case. The Court had only jurisdiction to try in one case a person for three offences of the same kind committed within a period of 12 months and it actually had tried a person for 41 offences committed during a period of two years. Their Lordships held that the course pursued was plainly illegal, and continued :

"Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done."

They said afterwards :

"The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity ",

and in quoting the decision in *Smurthwaite* v. *Hannay* (2) reference was made to the pertinent observation of Lord Russell :

"Such a joinder of plaintiffs is more than an irregularity ; it is the constitution of a suit ... in a way not authorised by law and the rules applicable to procedure."

The tests to be applied in considering whether a particular infringement of the provisions of the Criminal Procedure Code is one which does or does not come

(1) 25 M. 61 at pp. 96, 98 ; 11 M. L. J. 233 ; 3 Bom. L. R. 540 ; 28 I. A. 257 ; 5 C. W. N. 866 ; 2 Weir 271 ; 8 Sar. P. C. J. 100 (P. C.).

( ) (1894) A. C. 494 at p. 506; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.

within the purview of section 537 appears to me to be this: Does the error go to the whole root of the trial? Does it in fact vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature the proceedings are vitiated in their very inception and section 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings. In fact it might very well be argued that in order to create an error there must be some breach of an imperative rule, for if the matter were discretionary, it would appear that no opportunity for error could arise. What I have to consider is the simple point. Were the proceedings vitiated? In my opinion they were not vitiated.

I come now to the second point: "were the applicants prejudiced?" Now, the case against them in respect of the matters to which this head constable deposed had already been disclosed in the previous evidence and in their examination on the 10th of April, they were actually asked to explain away the very circumstances to which the head constable subsequently deposed. Furthermore, they did not deny their arrest, and with regard to the possession of the property said to have been the subject of theft, their case was that property had been given to them by the complainants. It is thus clear that they were not prejudiced by this error. There was an error undoubtedly and the Magistrate should be careful to avoid the error in future. But as the case has been decided correctly on the merits, this error has in no way affected the result.

The third point argued was that on the facts the conviction under section 457 was not made out. I cannot accept this contention. On the facts the appellants were rightly found guilty of lurking house trespass by night with intent to commit theft.

The last point taken is the question of sentence. There I see no reason to interfere.

I dismiss the application.

N. K. *Application dismissed.*

PATNA HIGH COURT.

CRIMINAL APPEAL No. 98 OF 1922.

June 28, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

JAGDEO SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Witness—Examination-in-chief—Cross-examination—Reply, admissibility of—Hostile witness.

The evidence elicited from a prosecution witness under examination-in-chief in answer to a question which could only be put in cross-examination is inadmissible, unless before the question was put, the prosecution declared the witness to be hostile. (p. 117, cols. 1 & 2.)

Criminal appeal from a conviction and sentence passed by the Sessions Judge, Shahabad, dated the 18th May 1922.

Mr. *Gour Chandra Pal*, for the Appellant.

Mr. *H. L. Nandkeolyar*, (Assistant Government Advocate), for the Crown.

JUDGMENT.

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

The case for the prosecution is that on the morning of that day Matadin Singh was working at his *kaluhar* (place where sugar-cane is pressed). At about noon one Beni Singh met Jagdeo Singh going towards the *kaluhar* carrying a gun and a haversack. Shortly afterwards he met Barhamdeo Singh, a cousin of Jagdeo, running towards the *kaluhar*, he asked him why he was running and Barhamdeo told him that there had been a quarrel between Jagdeo and his father and that Jagdeo had gone and got his gun. He asked Beni to join him in running after Jagdeo which he did. When they came near the *kaluhar* they saw Thakur Singh "trying to stop" Jagdeo. Matadin called out: "Jagdeo is always troubling me; if he kills me he will suffer for it afterwards". Thereupon Jagdeo pointed his gun at Matadin, fired it and Matadin fell down wounded in the chest. At this time Bachli Ahir, Thakur Singh, Garjan Dusadh and Rekha Ahir

had come to the *kaluhar*, Jagdeo re-loaded his gun and went off towards the south. Matadin was then found to be dead. Beni told Dwarka Ahir, *chaukidar*, what had happened and Dwarka after going to the place and finding Matadin dead went off to the *thana* and laid a first information. The Sub-Inspector went to the spot and after making the inquest and sending the dead body for *post mortem* examination he began his enquiry. Jagdeo was not to be found and when his house was searched there was no trace of the gun or the haversack, but on the 30th of January a gun and a haversack were found by one Bali Koiri, a resident of Chaugain, six miles from the accused's village, in his sugar-cane field. A warrant and subsequently proclamation and attachment were issued against Jagdeo and he eventually surrendered. I may mention that Jagdeo had apparently served in the army. The reason assigned by the prosecution for the commission of the crime is that Jagdeo objected to his father keeping a woman in the village.

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

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

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

For reasons which will presently appear I do not propose to discuss the first point. The second ground for disbelieving Beni's evidence is that he stated in his evidence in Court that he was one *rassi* away from the *kaluhar* at the time the shot was fired, whereas to the Police he stated that he was at a distance of 10 *bighas* or about 400 yards, and it is urged that as there were crops, bushes and trees round the *kaluhar* it is impossible that Beni could have seen the occurrence. It appears from the map which has been prepared in the case that there were crops, bushes and trees round the *kaluhar*, but the learned Sessions Judge does not appear to have considered the question of the place from which Beni is supposed to have seen the occurrence or whether it was possible for him to have seen it. There is no evidence on this point

and the map prepared by the Sub-Inspector is useless. There is also nothing on the record to show where Beni is supposed to have met Barhamdeo. These are very important points which are essential to a proper decision of the case.

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

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

to which the witness replied,

"No."

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

"I did not tell the Police that I had seen Jagdeo."

and the reply of Garjan was,

"I did not tell the Police that I saw Jagdeo Singh going towards south with a gun."

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

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

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

Das, J.—I agree.

W. C. A. *Case remanded for re-trial.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 227 OF 1922.
June 1, 1922.
Present:—Sir Lancelot Sanderson, KT., Chief Justice and Mr. Justice Panton.

RADHA NATH KARMAKAR AND OTHERS —ACCUSED—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 233, 235—Charge—More than one distinct offence included—Offences arising out of same transaction—Trial, whether vitiated.

A charge which relates to more than one distinct offence, is a bad charge under the law. But where in a trial the distinct offences included in the charge were one series of acts so connected together as to form the same transaction, and the accused could have been charged with, and tried at one trial for, each such offence, the fact that the charge contravened the law, would not vitiate the trial. (p. 120, col. 2, p. 121, col. 1.)

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar P. C. J. 160 (P. C.), distinguished.

Revision against an order of the Sessions Judge, Chittagong, dated the 7th February 1922, confirming that of the Additional District Magistrate, Chittagong, dated the 28th November 1921.

Babus *Dasarathi Sanyal* and *Debendra Narayan Bhattacharyya*, for the Petitioners.

Mr. *Orr*, for the Crown.

JUDGMENT.

Sanderson, C. J.—This is a Rule calling upon the District Magistrate to show cause why the convictions of and sentences passed upon the petitioners should not be set aside on the first ground mentioned in the petition; and the first ground is, that "the trial of the petitioners on charges framed in contravention of section 233, Criminal Procedure Code, was without jurisdiction and void and the convictions bad and sentences and orders under section 106 of the Criminal Procedure Code passed on such trial are illegal and fit to be quashed."

The charges, (as they appear from the petition) against the petitioners, who are 14 in number, were, first, under section 147 of the Indian Penal Code, secondly, under section 149 read with sections 325 and 323, and, thirdly, against some of the petitioners under section 353 of the Indian Penal Code. The learned Vakil for the petitioners raised no objection to the charge under section 147 of the Indian Penal Code and that is the section under which the petitioners have been sentenced. Some of the petitioners have been convicted in respect of the other charges, but no separate sentences have been passed in respect thereof.

The objection, which the learned Vakil for the petitioners, has raised on this rule, may be illustrated by way of reference to the charge under section 149 of the Indian Penal Code. It was stated in the petition as follows:

"That you on or about the 25th May or July 1921 at the same place were members of an unlawful assembly and in prosecution of the common object of that assembly, as stated in the first charge, several members of the said assembly caused grievous hurt to *havildar* Raghubir Raut and simple hurt to constable Prem Lal Ghose, constable Har Kishore Barua, constable Mohendra Chundra De, Yar Ali Matbar, Abdul Rashid and Oli Mia Doctor and you are thereby under section 149 of the Indian Penal Code guilty of causing the said offences which are punishable under sections 325 and 323 of the Penal Code."

The learned Vakil for the petitioners has argued that that charge is a bad charge for the reason that it contains more than one distinct offence and he has relied upon section 233 of the Code of Criminal Procedure. That section provides, "for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239."

That charge, in my judgment, did relate to more than one distinct offence, and, consequently, it is a bad charge under the law. For that reason, in my judgment, the learned Vakil's argument to that extent is well founded. But when he went further and argued that because that particular charge was in contravention of section 233, the whole trial was vitiated, I, with great respect to the learned Vakil's argument, was unable to agree with it. The distinct offences, which were included in that particular charge, were one series of acts so connected together as to form the same transaction and, consequently, the accused

could have been charged with and tried at one trial for each such offence, see section 235 of the Criminal Procedure Code, and the evidence relating thereto could have been presented to the Court by the prosecution if those distinct offences had been contained in separate charges. It seems to me to be an entirely different case to that which was decided by the Judicial Committee of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1) upon which the learned Vakil relied. That was a case where the accused was tried on an indictment, in which he was charged with no less than 41 acts, these acts extending over a period of years. This was clearly in contravention of section 234 of the Criminal Procedure Code which provides that a person may only be tried for three offences of the same kind if committed within a period of 12 months. The Judicial Committee held that the whole trial was vitiated, and the reason for holding that the whole trial was vitiated was set out by the Lord Chancellor in his judgment. The Lord Chancellor referring to section 234 observed: "The reason of such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the Jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrasment both to Judges and accused." But, here, as I have already pointed out, the alleged offences were a series of acts arising out of one and the same transaction and there was nothing to prevent all these matters being put before the Court if they had been contained in separate charges instead of their being included in one charge. Consequently, there is a great difference between the present case and the case which was decided by the Judicial Committee. The same remarks apply to the charge under section 353. It seems to me that the charge as framed did relate to distinct offences, because, there the allegation was that the accused referred to in that charge did assault the *havildar* and several constables who are named in the charge. Strictly speaking, there should have been separate charges in respect of these distinct offences. Consequently, in my judgment, we shall be on the safe side in setting aside the convictions under section 149 read with sections 325 and 323, and the convictions under section 353 of the Indian Penal Code. But there is no reason, in my judgment, why the conviction under section 147 of the Indian Penal Code should not stand.

Then, the only other point to which I need refer is the question of sentence. The learned Vakil has drawn our attention to the fact that the learned Magistrate, who tried the case, based his decision, as regards the sentences, to some extent at all events, upon the fact that some of the accused persons had been convicted of offences other than the offence under section 147, and, consequently, the sentences ought to be re-considered. It seems to me that if there had been one charge only framed against the accused under section 147, all the facts which were proved at the trial in relation to this matter would have been material. The learned Vakil agreed that the Magistrate, in imposing the sentences, would have been justified in taking into consideration the various parts which were played by the accused persons respectively. In my judgment, if he had done so, there is nothing to show that he would have come to any conclusion different from that at which he has arrived. For these reasons, in my judgment, there is no ground for interfering with the sentences, which, having regard to the nature of the case, are not unreasonable.

The result is that this Rule is made absolute to this extent, namely, that the convictions under section 149 read with sections 325 and 323 of the Indian Penal Code, and the convictions under section 353 of the Indian Penal Code, are set aside. The convictions under section 147 of the Indian Penal Code and the sentences imposed thereunder must stand.

Panton, J.—I agree.

W. C. A.

Rule partly made absolute.

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar P. C. J. 160 (P. C.).

MATHURA PRASAD, *In the matter of.*

PATNA HIGH COURT.

REFERENCE UNDER THE LEGAL PRACTITIONERS ACT.

May 31, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

In the matter of MATHURA PRASAD.

Legal practitioner—Dismissal from profession—Re-instatement—Procedure - High Court, inherent powers of.

When a legal practitioner is debarred from further practice by a High Court, the latter has jurisdiction to rescind the order and re-instate him under its inherent powers. But before exercising such powers, the Court should be clearly convinced, not by mere protestations of repentance and regret, but by actual facts that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession. (p. 122, col. 2; p. 123, col. 1.)

Abiruddin Ahmed, In re, 8 Ind. Cas. 1108; 12 C. L. J. 625; 15 C. W. N. 357; 38 C. 309; 12 Cr. L. J. 22 and *Hara Kumar Chatterjee, In re*, 11 Ind. Cas. 997; 14 C. L. J. 113; 16 C. W. N. 237; 12 Cr. L. J. 461, referred to.

In such a case, the legal practitioner should apply to a Bench presided over by the Chief Justice and ask for a rule in the matter. The Bench may, if a *prima facie* case is made out, direct that a rule be issued and call upon the Government Advocate to show cause why the applicant should not be re-instated. The matter will then come up before, and be determined by, a Bench specially constituted. (p. 123, col. 1.)

Mr. *Manohar Lal*, for the Petitioner.

JUDGMENT.

Miller, C. J.—The petitioner, Mathura Prosad Sinha, formerly practised as a *Mukhtar* in the Criminal Courts of this Province, but was debarred from further practice by an order of the Court, dated the 12th March 1917. He now presents a petition asking that he may be re-instated and allowed to resume his practice as a *Mukhtar*. The first question which arises is whether the Court which debarred him from further practice has any jurisdiction to rescind the order made under the provisions of the Legal Practitioners Act and re-instate him. No provision is made either in the Legal Practitioners Act or in the rules of the Court giving the Court power to exercise such jurisdiction, and, if it can be done at all, it must be either under the inherent powers of the Court or under the powers given by the Legal Practitioners Act to enrol *Mukhtars*. Two cases have been referred to in support of the contention that the Court has jurisdiction in such cases. The first is *Abiruddin Ahmed, In re* (1), in which the High Court at Calcutta, on the petition of a *Mukhtar* who had been dismissed from practice for an offence under section 363 of the Indian Penal Code, reviewed at length the English authorities on the subject and held that the Court had power to re-instate a legal practitioner who had been dismissed for misconduct of any description. The test applied in that case was whether by his conduct in the interval between his dismissal and his application for re-instatement the petitioner had satisfied the Court that he had conducted himself honourably and that no objection remained as to his character and capacity. In the particular case the Court was not satisfied that the case came within the requirements laid down and dismissed the petition. The other case was that of a Pleader, *Hara Kumar Chatterjee, In re* (2). There the offence, for which the petitioner was dismissed, was that of mis-stating his age in an application for enrolment as a candidate for the Provincial Judicial Service. The offence was less serious than in the previous case cited and the petitioner appears to have satisfied the Court that since his dismissal he had been employed in positions of responsibility and had conducted himself honourably. His good character was vouched by *zamindars* and others of respectability and position, and the Court, following the principle laid down in the previous case, restored the petitioner to the rolls taking the view that his punishment had awakened in him a higher sense of honour and duty and that his subsequent conduct had been so irreproachable that notwithstanding his delinquency in early life, he might safely be admitted to an honourable profession without degradation to that profession. In so far as those cases recognized the Court's jurisdiction to re-instate legal practitioners who have been dismissed from their profession, I have no doubt that they were right and that in proper cases the Court

(1) 8 Ind. Cas. 1108; 12 C. L. J. 625; 15 C. W. N. 357; 38 C. 309; 12 Cr. L. J. 22

(2) 11 Ind. Cas. 997; 14 C. L. J. 113; 16 C. W. N. 237; 12 Cr. L. J. 461.

should exercise that power. I agree also that before any Court should exercise such powers it should be clearly convinced, not by mere protestations of repentance or regret, but by actual facts, that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession.

The next question which arises is as to the procedure which should be adopted in cases of this nature. No procedure has been laid down in this Court for dealing with such cases, but, as it is within the power of the Chief Justice to direct which Judges shall deal with particular cases and the constitution of the Bench which should deal with such cases, I think the proper course is for the petitioner to apply to a Bench presided over by the Chief Justice and ask for a rule in the matter. The Bench, over which he presides, can then, if a *prima facie* case is made out, direct that a rule be issued and call upon the Government-Advocate to show cause why the petitioner should not be re-instated. The matter would then come up before a Bench specially constituted and the case would be determined by that Bench.

The petitioner in the present case was dismissed from practice five years ago by a Bench of three Judges for an offence of so grave a character in one of his profession that no less a punishment than that of dismissal would have been adequate. It consisted in tampering with a petition of complaint filed in the Magistrate's Court and conspiring with the *peshkar* of the Court and another *Mukhtar*, to the detriment of his own client, to substitue a spurious document in its place after transferring the stamp thereto from the original. Anyone who could take part in such a fraud, when acting in a position of trust and responsibility towards his client and the Court, is manifestly unfitted to be entrusted with the duties of a *Mukhtar*.

The petitioner now produces a number of certificates which, with two exceptions, are from Pleaders or *Mukhtars* practising at Muzaffarpur and Motihari where he formerly practised. They are all to the effect that they have known him for the last few years or the last three or four years and that his conduct and behaviour have been in every way satisfactory. They are all couched in more or less the same terms. Some are rather more positive and say they have known him as a man of exemplary character. Others are less positive and are to the effect that they have heard no complaints against him. But in none of them are any particulars given as to the opportunities they have had of associating with him or the capacity in which they have had any dealings with him. Nor does it appear whether the petitioner was residing either in Motihari or Muzaffarpur during the last few years. It appears, however, by a certificate given by the proprietors of the Dulichand Prabhudayal Coal Company carrying on business at Jharia in Manbhum that he has been in their employment for two years before January 1922, and his petition states that he is still engaged there. This certificate does not say in what capacity he is engaged but states he has all the responsibility of their business, including cash and contract transactions, and they have a very good opinion of his morality, truthfulness and loyalty and that they find him trustworthy and straightforward.

It would appear, therefore, that for two years at least he has given satisfaction to his employers in some capacity or other and that they consider him honest and straightforward.

The only other certificate is that of Mr. Ambica Prosad Upadhyay, a Vakil of this Court, who states that the petitioner worked in his *zamindari* for about a year—but which year is not stated—and during that time he proved very diligent, honest and trustworthy in the discharge of his duties. I have no doubt that this conveys Mr. Upadhyay's honest opinion but it does not give the Court much information as to the nature of the petitioner's duties or wether he was employed in a position of trust or what opportunities the petitioner had for acting otherwise than honestly.

I am willing to believe that the petitioner is endeavouring to rehabilitate his character, but I cannot ignore the fact that the offence for which he was dismissed was

one which it is the duty of the Court jealously to guard against by every means in its powers. I think we should be failing in our duty if, upon the material before us, we were to accede to this petition merely because the petitioner can produce satisfactory reports of his conduct from his employers for the last 2½ or possibly 3½ years. A *Mukhtar* exercises an office of trust towards his clients and towards the Court. He has many opportunities of betraying that trust and he may frequently abuse his trust without being discovered. It is, therefore, essential that flagrant abuses, such as the petitioner was guilty of, should not be lightly passed over or regarded as capable of expiation by a short probationary period during which they have not been repeated. If we considered that the case was at all doubtful or that a larger tribunal might properly take a more lenient view we might issue a rule and call upon the Government-Advocate to appear and show cause against the application before a Special Bench, but I am satisfied that no *prima facie* case has been established and I have no doubt that the course we should adopt is to reject the application.

MULLICK, J.—I agree.

N. K.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL, No. 193 OF 1922, June 28, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

ABDUL GAHUR SIKDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR.—RESPONDENT.

Jury trial—Charge to Jury—Defective charge—Proposed amendments in law, reference to—Penal Code (Act XLV of 1860) ss. 372, 373—Age of girl kidnapped—Prosecution, duty of.

Where in delivering his charge to the Jury the Judge omits to set out all the questions that require decision, and the charge offers extremely little guidance for arriving at a decision, the charge is defective. (p. 125, col. 1.)

Proposed amendments in the law, where they have not become part of the law, ought not to be referred to in charging a Jury. (p. 125, col. 2.)

Queen-Empress v. *Sukee Raur*, 21 C. 97; 10 Ind. Dec. (N. S.) 697. referred to.

In a trial upon charges under sections 372 and 373 of the Penal Code, it is the duty of the prosecution to prove that the girl is under the age of 16 years. (p. 124, col. 2.)

Criminal appeal against an order of the Assistant Sessions Judge, dated the 27th January 1922.

Maulvi *A. K. Fazlal Haq* and Babu *Radhika Ranjan Guha*, for the Appellants.

Mr. *Orr*, for the Crown.

JUDGMENT.

Walmsley, J.—The three appellants were all charged under section 366, Indian Penal Code, and there were separate charges, against Abdul Gohur under sections 372, 109, Indian Penal Code., against Erfan under section 373, Indian Penal Code, and against Sarojini under section 372, Indian Penal Code. They were found guilty on all the counts, and the learned Judge sentenced Abdul Gohur to three years' rigorous imprisonment, and the other two to four years' rigorous imprisonment each, all under section 366, Indian Penal Code, but did not pass any separate sentences on the other charges.

The girl in the case is Sukhoda, the daughter of Sarojini, and briefly stated the story is that Sarojini took her to Abdul Gohur's house and afterwards made her over to Erfan for purposes of cohabitation. The defence is that the woman became a Mussalman, and that Erfan wanted to marry the girl.

So far as the charges under sections 372 and 373, Indian Penal Code, are concerned, the age of the girl is an essential point. It was necessary for the prosecution to prove that she was under the age of 16 years. For this purpose the Assistant Surgeon was examined, and he expressed a definite opinion that she was below sixteen years.

The first objection taken to the learned Judge's charge is that he has not dealt properly with the question of minority. In explaining the law he said that for kidnapping the girl must be under sixteen years, and in explaining the terms 'disposing of' and 'immoral purpose' he used the word minor, but he nowhere said that if the girl was not proved to be under sixteen, there could be no offence under section 372 or 373, Indian Penal Code. Further on the question of fact, he merely referred to the medical evidence, said that the defence tried to make out that she was

sixteen, and left it to the Jury to decide. That seems rather a summary treatment of an important matter, but looking at the evidence on the record I am not prepared to hold that the verdict is vitiated by the defects. Secondly, it is said that the learned Judge did not explain to the Jury that the burden of proof lay on the prosecution. It is pointed out that at the beginning of the summing up, he said, "It is for the gentlemen of the Jury to decide which hypothesis the better fits the facts and the probabilities—that of guilt or innocence," and that his conclusion is in similar words, "The Jury must ask themselves which view of the facts they find the more consistent and the more probable, and which seems to them the better supported by the evidence they have heard and should return a verdict accordingly." On the other hand, the charge began with general remarks on the burden of proof and the benefit of the doubt and the earlier of the two passages which I have quoted is immediately followed by the words, "The question which the Jury will have to answer is this: Did the accused either kidnap or abduct the girl, etc." In the absence of details as to what the learned Judge said about the burden of proof I think this criticism is well-founded, for when the Jury was asked to decide which hypothesis suited the facts better, they were in effect told that the prosecution would discharge its *onus* by producing the better hypothesis. That was the last instruction they received from the Judge, and I think it is very probable that in consequence they looked at the evidence from a wrong point of view.

Thirdly it is said that the learned Judge has expressed his own views very emphatically with nothing more than a conventional direction that the responsibility of deciding questions of facts rests with the Jury. This criticism does not commend itself to me, for I find it difficult to understand what view of the facts as a whole the learned Judge did take. He certainly takes it for granted that Erfan was cohabiting with the girl to the knowledge of Sarojini, but those are facts not in dispute, for the appellant's story is that the mother and daughter were married to Abdul and Erfan respectively. So far from taking from the Jury the duty of determining questions of fact, I think the charge is defective rather because it does not set out all the questions that required decision, and because it offers extremely little guidance.

Another criticism, affecting only Abdul Gohur, is that he is not said to have taken the girl to his house, and that he was not at home when she was brought there. The learned Judge has not said anywhere in his charge what act on the part of Abdul Gohur could render him liable to a charge under section 366, Indian Penal Code: he took no part in bringing the girl to his own house: the removal on the first night to Sabi Molla's house does not appear to have been in furtherance of any scheme for abducting the girl, so that if Abdul Gohur participated in any abduction it must have been when he escorted the girl to Erfan's house. The learned Judge has not dealt with this matter, although he should have told the Jury when and where the abduction was said to have taken place, and asked them to say whether Abdul Gohur took any part in it.

In regard to the exposition of sections 372 and 373, Indian Penal Code, I wish to point out that the learned Judge was wrong in referring to the amendments proposed in 1914, for they have not become part of the law, and also to say that the meaning of the sections has been discussed in the case of *Queen-Empress* v. *Sukee Raur* (1). If the Judge had studied that authority his explanation of the terms 'dispose of' and 'use' would have been very different.

As I have indicated, the charge is defective in several respects, particularly in the manner in which the burden of proof was treated. The case is a very perplexing one, and I cannot say that in spite of misdirections the Jury has arrived at a right decision.

The course which we must adopt is to set aside the convictions and sentences, and leave it to the authorities to decide whether there should be a fresh trial or not. The appellants will be released.

Suhrawardy, J.—I agree.

W. C. A. *Appeal allowed*;
Convictions and sentences set aside.

(1) 21 C. 97; 10 Ind. Dec. (N. S.) 697.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 25 OF 1922.
April 12, 1922.
Present :—Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts-Trotter.

K. V. MUNISWAMI MUDALIAR—PLAINTIFF—APPELLANT
versus
RAJARATNAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195 (6), (7)—Sanction to prosecute—Order of Single Judge of High Court—Appeal to Bench if lies.

For the purpose of section 195, sub-section (6), Criminal Procedure Code, a Judge sitting on the Original Side is subordinate to the Bench hearing appeals from him. (p. 127, col. 2.)

An appeal lies to a Division Bench of the Appellate Side hearing appeals from the Original Side of the High Court, Madras, from an order of a Single Judge sitting on the Original Side giving, under section 195, Criminal Procedure Code, sanction for prosecution for an offence committed in relation to proceedings before him. (p. 127, col. 1.)

Per *Schwabe, C. J.*—An order granting sanction is made in the exercise of criminal jurisdiction and is not a judgment within the meaning of clause 15 of the Letters Patent. (p. 126, col. 2.)

The expression "that is to say" in section 195, clause (*a*), is not comprehensive but is only illustrative and to some extent limits the effect of the preceding words. The correct construction of the section is that power to revoke sanction is granted to a Court which ordinarily hears appeals from the sanctioning Court, and where there are two Courts having the function of hearing appeals, or where there is no Court, power to revoke is given to that Court to which the sanctioning Court is subordinate. (p. 127, col. 1.)

Per *Coutts-Trotter, J.*—The expression "that is to say" in section 195, sub-section (7), means "in particular." (p. 127, col. 2.)

Appeal from an order and judgment of Mr. Justice Phillips, dated the 21st December 1921, granting sanction to prosecute the appellant (plaintiff) in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 522 of 1920.

Mr. *Nugent Grant*, instructed by Mr. *M. P. Sundararaja Iyar*, for the Appellants.

Mr. *C. P. Ramaswami Aiyar*, Advocate-General, and Mr. *N. Swaminatha Iyar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The question raised by the preliminary point taken in this appeal is whether an appeal lies to the Division Bench of the Appellate Side hearing appeals from the Original Side of the High Court, Madras, from an order of a Single Judge sitting on the Original Side giving under section 195, Criminal Procedure Code, sanction for prosecution in respect of an alleged offence committed in relation to proceedings before him. It has been fully argued before us by the learned Advocate-General that no such appeal lies on three grounds, first that under the Letters Patent, clause 15, no appeal lies to the High Court from the decision of a Judge of that Court in the exercise of criminal jurisdiction; secondly, that under the same clause no appeal lies from anything at all except judgments and that the order sanctioning this prosecution is not a judgment. On both these points there would be some conflict of authorities; but not having heard the other side on this point we cannot give any decision upon that. But, I think it right to say that my present view is that the Advocate-General is right on both points, that this is a matter in the exercise of criminal jurisdiction and that the order is not a judgment. The third point is that under section 195, Criminal Procedure Code, apart altogether from the Letters Patent, there is no right of appeal, the right of appeal being confined to what is given by that section. Under section 195 (1) (*b*), no prosecution can take place under certain sections of the Indian Penal Code, including the section in question in this case, without the previous sanction or on the complaint of the Court in which the proceedings took place or of some other Court to which such Court is subordinate. For the purposes of that sub-section it is not necessary to consider whether the Court which gives the sanction is subordinate to this Bench, or not because sanction can be given by such Court itself. Such Court having given the sanction it is immaterial whether this Bench could or could not give similar sanction.

When it comes to the question of appeal, the matter is dealt with by sub-section (6) and (7). Sub-section (6) says "Any sanction given or refused under this section may b

revoked. . .by any authority to which the authority giving or refusing it is subordinate." The power to give sanction under the various clauses of this section and sub-section is given to various persons as well as to Courts, and sub-section (6) when it deals with the authority to which the authority giving or refusing the sanction is subordinate is dealing with persons other than Courts who have the power under the section to give sanction as well as with Courts. The position of the Courts giving sanction is dealt with also in sub-section (7) and that is in these words: "For the purpose of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." Pausing there, I read that to mean that for the purpose of saying whether a Court can revoke an order made, we have to see whether that Court is the Court to which appeals ordinarily lie from the Court which made the order. Now, appeals ordinarily lie to a Division Bench of the Appellate Side of this Court from a Judge sitting alone on the Original Side, and, therefore the power of this Court to revoke, if any interpretation is correct, is given by that sub-section.

Some little difficulty is introduced by the addition of the words to that sub-section:— " that is to say" (*a*) where appeals lie to more than one Court, (*b*) where appeals lie to a Civil as well as to a Revenue Court and (*c*) where no appeal lies, certain rules are provided prescribing to which Court the First Court is deemed to be subordinate. In my view, the words, "that is to say, " are not comprehensive at all. They are merely illustrating and to some extent limiting the words that go before and the true way of reading that section is that the power to revoke is granted to the Court which ordinarily hears appeals from the Court sanctioning, but as there may be difficulty in applying that rule, where two Courts have ordinarily the function of hearing appeals or where no Court has that function provision is made by the rest of the section for those cases. If it were a question whether the Judge sitting on the Original Side is subordinate to this Bench within the meaning of sub-section (6) as, at present advised, I incline to the view that he is properly described as subordinate; but I particularly wish not to commit myself on that matter for I think it unnecessary for the decision of this case. I think it is sufficient to base my judgment on the words of sub-sections (6) and (7) and to say by reason of what I think is the proper interpretation of those sub-sections the preliminary point fails.

Oldfield, J.—I agree.

Coutts-Trotter, J.—I agree and only desire to add that I am not to be taken as expressing any opinion at all as to the validity of the points taken by the learned Advocate-General under the Letters Patent. But I think it is clear that on a reasonable construction of section 195-(6) of the Criminal Procedure Code we have the power, I will not say, of hearing appeals but of revoking the sanction given by the learned Judge. In my opinion all that it is necessary to say is that a Single Judge sitting on the Original Side and sanctioning or refusing sanction under this sub-section is subordinate to a Bench of this Court for the purpose and in the sense of sub-section (6) as explained by sub-section (7). I wish to guard myself from expressing any opinion as to whether such a Judge is subordinate to a Bench of this Court in any other sense and for the purpose of any other section or any other Act. The first part of sub-section (7) is plain to my mind but some difficulty is created by the use in that sub-section of the words "that is to say " which looks as if it is introducing an exhaustive enumeration of all the possible cases that could arise under the first part of sub-section (7). I am satisfied that these words are mere inartistic draftsmanship and mean no more than if the draftsman had said "in particular" and that he used the words to introduce illustrations in the manner so common in Indian legislation. To my mind the words of sub-section (7) are absolutely clear. " Every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." It seems to me impossible to hold that a Division Bench of this Court can be held to be other than a Court to to which appeals from a Single Judge sitting as a Judge of first instance on the Original Side ordinarily lie.

I am, therefore, of opinion that we are empowered to entertain this application

to revoke the sanction granted by the learned Judge.

V. N. V. *Appeal accordingly.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 600 OF 1921.
(CRIMINAL REVISION PETITION NO. 484 OF 1921.)
April 12, 1922.

Present:—Justice Sir William Ayling, KT.,

PALANIANDI SERVAI AND OTHERS.—COUNTER-PETITIONERS NOS. 4, 5, 6, AND 10—PETITIONERS

versus

SAMMANDI AMMAL.—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Costs to successful party—Notice.

Mere delay in applying for costs in proceedings under section 145 of the Criminal Procedure Code does not affect the jurisdiction of the Magistrate to award costs, but no order as to costs can be made without notice to the party affected.

Vythianada Tambiran v. *Mayandi Chetty*, 29 M. 373 : 4 Cr. L. J. 232, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Usilampatti, dated the 29th April 1921, in M. C. No. 23 of 1920, on its file.

Mr. *F. S. Vaz*, for the Petitioners.

The Public Prosecutor, for the Crown.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondent.

ORDER.—In this case the Magistrate has passed an order making all the counter-petitioners in a possession case liable for petitioner's costs in the shape of Vakil's fee.

This order was passed some six weeks after the possessory order, apparently immediately on the presentation of a petition by the successful party to the possession case and the counter-petitioners seem to have had no opportunity of being heard.

I am not prepared to say that the delay in passing the order necessarily affected the jurisdiction of the Magistrate, but it certainly could not be passed without notice to the other side affected by it, and the present petitioners who did not claim possession had a special case for exemption from liability for costs which called for consideration.

The Magistrate's order dated 29th April 1921, awarding costs is set aside ; he will restore the petition (presented under section 148 of the Code of Criminal Procedure bearing order of 29th April 1921) to file and dispose of it according to law, bearing in mind the decision in *Vythianada Tambiran* v. *Mayandi Chetty* (1).

The costs, if paid, should be refunded.

V. N. V.

Order set aside.

(1) 29 M. 373; 4 Cr. L. J. 232.

SHEORAM *v.* TIKARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 482 OF 1921.
November 6, 1922.

Present:—Mr. Hallifax, A. J. C.

SHEORAM AND ANOTHER—DEFENDANTS —APPELLANTS
versus
TIKARAM AND OTHERS—PLAINTIFFS —RESPONDENTS.

C. P Tenancy Act (XI of 1898), ss. 45, 46, 47—Tenant right—Sir *land—Alienation of ownership—C. P. Land Revenue Act (II of 1917), s. 2 (17), proviso*—Sir *right, analysis of.*

The tenant right in his *sir* land left in a proprietor after alienation of his ownership is a constituent part of the right he held in the *sir* land and is not something new which is created by the law. (p. 130, col. 1.)

The *sir* right is made up of two parts, one the proprietary and the other occupancy, and it can accrue synthetically by the union of these two parts in the same person and not in different persons. (p. 129, col. 2.)

Appeal from the decree of the District Judge, Bhandara, dated the 7th July 1921, in Civil Appeal No. 33 of 1921.

Mr. *G. L. Subhedar*, for the Appellants.
Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—Dewaji, the father of the defendants, and his brother Shivaji held a one-sixth share in the village of Thana to which certain *sir* land appertained. The *sir* land was partitioned, and on Shivaji's death without issue his widow Sayitri inherited his one-twelfth share and the *sir* land attached to it. This was sold by auction under a decree to Rao Sahib Munnalal Sao and Sayitri was recorded as an occupancy tenant of the *sir* from 1906-07 onwards. On the 11th of March 1913 the plaintiffs bought from Rao Sahib Munnalal Sao all the interest purchased by him from Sayitri. She died on the 2nd of March 1914 and the defendants then took possession of her occupancy holding as heirs of their uncle Shivaji. The plaintiffs sued for possession of it and have succeeded in both the Courts below.

(2) As I understand the judgment of the learned District Judge, he holds that though the plaintiffs are permanent residents of the village and held land in it and though their grandfather Saddu did occupy the holding, he held it as *sir*, and this is not "occupying" it within the meaning of section 46 of the Tenancy Act, 1898, which requires that a common ancestor of the last male tenant and the heir should have held it as occupancy tenant.

(3) The learned Counsel for the appellants has advanced an argument on their behalf based on the somewhat difficult doctrine of "dormant *sir* right," mentioned in *Tulsa* v. *Dasoda* (1) and *Bhuray Brahmin* v. *Lala Vishwanath* (2). That the *sir* rights in this land are now entirely extinct is clear from the fact that at a Settlement which took place a year or two after the death of Sayitri it was not recorded as *sir*. But the learned Counsel has urged that what the defendants inherited through Sayitri Bai in 1913 was this "dormant *sir* right" and they are at least entitled to continue in possession as occupancy tenants, though they subsequently lost the full right at the next Settlement when they were mistakenly recorded as holding the lesser right of occupancy tenants. The *sir* right is undoubtedly made up of two parts, one the proprietary and the other the occupancy and it can accrue synthetically by the union of these two parts in the same person, as is made clear in the proviso to section 2 (17) of the Land Revenue Act, 1917. But it must be in the same person, and here the proprietary right in that particular land was never in the defendants; it passed from Sayitri Bai to the purchaser from her and from him to the plaintiffs, who still hold it.

(4) The only real question in this case is this. Is the occupancy right a right which was held by Sayitri Bai as part of the estate which she inherited from her husband, or is it an entirely new right which arose for the first time in her by the operation of section 46 of the Tenancy Act, 1898? If she had voluntarily sold her share in the village with the express exception of the occupancy rights in the *sir* land, it must be admitted that that would have been a reservation of a portion of the estate which she had inherited from her husband, and I cannot see any

(1) 15 C. P. L. R. 173.
(2) 2 N. L. R. 170.

difference in this respect between a voluntary and nvoluntary alienation.

(5) The words of section 45 of the Tenancy Act, 1898, and of section 49 of the p esent Act o: 1920, which refer to both fo c d and voluntary ali nations, seem to me to make it still mor clear that the tenant right in his *sir* land left in a proprietor after alienation of his ownership was all along a constitu nt pait of the right he held in the *sir* land and is not something new which is created by the law. Both sections speak of his loss of the right to occupy *sir* land *as a proprietor* in antithesis to his right to occupy it *as a tenant* indicating clearly that the right is the same at both times, though it is held in different ways. They also speak throughout of *reservation* of the tenant right in an alienation of the proprietary right; unless the tenant right is there already it certainly could not be reserved. In this view the appeal must succeed. The decree of the lower Appellate Court will be set aside and the plaintiff's suit will be dismissed. The respondents must pay all the costs in all three Courts.

S. D.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 246 OF 1920.

September 15, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

C. S. VADAMALAI PILLAI AND OTHERS DEFENDANTS—NOS. 3, 4 AND 6—APPELLANTS

versus

P. SUBRAMANIA CHETTIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 7, 8 AND 1—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (2) (v)—Equitable mortgage—Memorandum—Registration—Hindu Law—Joint family property—Ancestral property—Self-acquisitions—Nucleus—Burden of proof—Alienation—Mortgage—Antecedent debt—Sons, liability of.

An equitable mortgage is created only by the act of deposit of title-deeds, and any memorandum accompanying, preceding or contemporaneous with the deposit, is only evidence of the *factum* of deposit and a memorandum which contains no words purporting to pass any interest in immoveable property does not require registration; (p. 134, col. 2.)

Rajangam Ayyar v. *Rajangam Ayyar*, 69 Ind. Cas. 123; 31 M. L. T. 136; 4 U. P. L. R. (P. C.) 85; 16 L. W. 615; (1922) A. I. R. (P. C.) 266 (P. C.), *Muthiah Chetty* v. *Kothandaramaswami Naidu*, 35 Ind. Cas. 864; 31 M. L. J. 347; (1916) 2 M. W. N. 221; 4 L. W. 472, *Bhairab Chandra Bose* v. *Anath Nath De*, 57 Ind. Cas. 686; 31 C. L. J. 375; 24 C. W. N. 599, *Kedarnath Dutt* v. *Sham Lall Khettry*, 20 W. R. 150: 11 B. L. R. 405, referred to.

Chunilal Someshvar Bhatt v. *Vithaldas Karsandas*, 68 Ind. Cas. 1005; 24 Bom. L. R. 502, dissented from.

Per *Spencer, J.*—Under the Hindu Law, a personal covenant whether contemporaneous or previous, if it is part of a mortgage executed by a Hindu father, is not an antecedent debt, so as to validate the mortgage as against the sons. (p. 133, col. 2.)

Chet Ram v. *Ram Singh*, 67 Ind. Cas. 569; 49 I. A. 228; 43 M. L. J. 98; 3 P. L. T. 363; 31 M. L. T. 50; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; 44 A 368; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; (1922) A. I. R. (P. C.) 247 (P. C.) and *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W 213 (P. C.), relied on.

Ram Dei v. *Suraj Baksh*, 60 Ind. Cas. 177; 23 O. C. 204; 7 O. L. J. 509; 2 U. P. L. R. (J. C.) 156, dissented from.

Whether there is an antecedent obligation dissociated in time and fact from the sale or mortgage in any particular case is a question of fact to be decided on the facts of each case. (p. 133, col. 2.)

A negotiable instrument does not lose its character as such by the mere fact that title-deeds are deposited as collateral security. (p. 134, col. 1)

Ramachandra Row v. *Sesha Aiyangar*, 3 M. L. J. 225, followed.

Where the accounts show that money was first advanced, pro-notes executed and later on security taken, the debts are sufficiently dissociated in time and fact from the mortgage to constitute an "antecedent debt." (p. 134, col 1.)

Where a father transfers property intending to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being self-acquired is not suffi ient to invalidate an otherwise proper transaction. (p. 134, col. 1.)

Sabapathy Chetty v. *Ponnusawmy Chetty*, 28 Ind. Cas. 365, followed.

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.), distinguished.

Per *Devadoss, J.*—If there is a large family nucleus and if the property in the possession of a member of the joint family can be traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was

acquired without the help of, and without detriment to, the family nucleus. The question of *onus* is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family nucleus and fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus. (p. 136, col. 2; p. 137, col. 1.)

Gooroochurn Doss v. *Goluckmoney Dossee*, (1843) Fulton 165 at p. 182; 1 Ind. Dec. (o. s.) 743, *Akkaraju Narayana Rao* v. *Akkaraju Seshamma*, 26 Ind. Cas. 33; 27 M. L. J. 677, *Ram Kishen Das* v. *Tanda Mal*, 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 72, *Kundan Lal* v. *Shankar Lal*, 21 Ind. Cas. 13; 35 A. 564; 11 A. L. J. 910, *Luximon Row Sadasew* v. *Mullar Row Bajee*, (1831) 2 Knapp 60; 5 W. R. P. C. 67; 1 Norton's L. C. 169; 12 E. R. 401, *Tottempudi Venkataratnam* v. *Tottempudi Seshamma*, 27 M. 228, *Amar Nath* v. *Firm of Hukam Chand- Nathu Mal*, 60 Ind. Cas. 379; 2 L. 40; 19 A. L. J. 249; 40 M. L. J. 327; 2 P. L. T. 208; 33 C. L. J. 355; 29 M. L. T. 258; (1921) M. W. N. 175; 25 C. W. N. 534; 3 U. P. L. R. (P. C.) 12; 23 Bom. L. R. 671; 14 L. W. 435; 42 P. W. R. 1921 (P. C.), referred to.

Obiter.—A personal covenant to pay which is outstanding in a mortgage document can sustain a subsequent alienation as an antecedent debt, though no decree has been passed to enforce it. (p. 140, col. 1.)

Appeal against the dec ee of the Additional Subordinate Judge, Cuddalore, in Original Suit No. 27 of 1919.

Messrs. *A. Krishnaswami Iyer* and *A. C. Sampath Iyengar*, for the Appellants.

Messrs. *V. Visvanatha Sastry* and *T. L. Venkatarama Iyer*, for the Respondents.

JUDGMENT.

Spencer, J.—This suit was brought on the strength of an equitable mortgage made by 1st defendant in favour of the plaintiff. Defendants Nos. 2 to 6 are the sons of first defendant. Defendants Nos. 7 and 8 are puisne mortgagees. Defendants Nos. 1, 2 and 5 are now dead and defendants Nos. 3, 4 and 6 prefer this appeal.

The evidence on record shows that the plaintiff was lending money to the 1st defendant in a series of transactions commencing from the 24th of August 1907. Every time that accounts were settled between he parties a promissory-note was execut d. On the 13th of October 1910 the 1st defendant deposited title-deeds of landed property to secure a debt of Rs. 10,900 carrying interest at 12 per cent. due on the 12th October 1913. On the 1st of October 1912 there was a consolidation of intermediate loans and on the 4th October 1913 there was a fresh consolidation for which a promissory-note, Exhibit C, for Rs. 13,900 was executed. This was followed on the 7th of October 1913 by a letter, Exhibit E, giving particulars of the title-deeds deposited for the debt of Rs. 13,900. Exhibits C (1) and C (2) are promissory-notes for the interest that subsequently accrued. They are dated 17th February 1915 and 20th September 1915 respectively. Finally, Exhibit E (2), a letter dated the 20th September 1915, was written by the 1st defendant to the plaintiff stating that he consented to the title-deeds and other documents already deposited being held as security for interest amounting to Rs. 812 and odd lent upon a promissory-note of the same date, *viz.*, Exhibit C (2). The deposit of title-deeds having been made in the Presidency Town of Madras was quite regular and valid according to section 59 of the Transfer of Property Act.

In appeal the following contentions have been raised. First, that the loan is not true, that the transactions between the plaintiff and the 1st defendant were brought about in order to shield the property from his unsecured creditors and that being pressed by them he filed a petition to be declared an insolvent on the 23rd of March 1916. Secondly, the son's interest is not affected by this equitable mortgage, as the father did not contract it for an antecedent debt in the sense that these words have been used in recent Privy Council decisions. Thirdly, as the father purported to be dealing with his own property, he did not make the mortgage in his capacity of manager of the joint family and, therefore, it cannot bind the son's share. Fourthly, if the mortgage is partially effective over the father's interests, the plaintiff can only proceed against the son's shares after exhausting his remedies against he father's share. Fifthly, Exhibits E and E (2), which are letters referring to the deposit of title-deeds, are invalid for the purpose of creating a mortgage as they have not been registered. In the lower Court an attempt was made to prove that the debts were incurred for illegal and immoral purposes. Mr. A Krishnaswami Aiyar for the appellant

frankly stated that he could show that the 1st defendant was leading an immoral life, but he admitted that he could not connect any particular debt with immorality. Therefore, the defence which formed the subject of the 4th issue in the lower Court has not been pressed in appeal.

On the first point it is not necessary to say much. We have been referred to all the evidence on the subject to prove or disprove the existence of debts. The Subordinate Judge observed in paragraph 11 of his judgment that he was convinced from the documentary evidence beyond a shadow of doubt that the plaintiff's accounts were correct, that the promissory-notes were executed for value and that the plaintiff's claim was true. Before coming to this conclusion he referred to the entries in the plaintiff's account-books, Exhibits A and B series, to the correspondence between the parties, Exhibit K series, to the counterfoils of receipts for payment of interest, Exhibit G series, and to the entries in the despatch register, Exhibit H series; and we have compared some of the counterfoils of these receipts with the entries in Exhibit H to prove that they were received by the 1st defendant and we find that they correspond. The fact that interest was paid from time to time upon these loans is a strong circumstance to prove the existence of the loans. It is argued that the plaintiff having been declared insolvent in 1904 could not have had means to lend so much money to the 1st defendant. But the plaintiff in his evidence stated that he received Rs. 20,750 between 1st November 1906 and 6th September 1912 from his father who was Receiver of several estates under this High Court. This statement is borne out by the entries in his accounts, Exhibit A series, and by the statement of his 3rd witness who knows that plaintiff's father gave him about Rs. 20,000, as he used to get the cheques cashed at the Bank for the plaintiff. The absence of correspondence between the parties from 1916 to 1918 and the delay in instituting this suit is explained by the fact that plaintiff was engaged in prosecuting a suit against the 1st defendant upon a registered mortgage on the 1st defendant's house and after he got Rs. 1,421 and odd through that suit, as the accounts show, on 19th April 1917, he then brought this suit finding that the 1st defendant would not discharge his debt without being put into Court. The plaintiff and the 1st defendant were friends in their youth, as the plaintiff was cashier and the 1st defendant was Dubash's clerk in Messrs. Carl Simon and Co.'s office. The suggestion that the 1st defendant deposited these title-deeds with the plaintiff in order to shield his property from creditors is rendered improbable by the fact that the 1st defendant did not try to get back the documents after the pressure from creditors had diminished. It is very unlikely that the 1st defendant would have left documents of title for a number of years even with a friend without making any effort to recover them unless they were deposited as security for a loan. Exhibits E and E (2) show that the plaintiff's case is true as put forward in his plaint, that these title-deeds were deposited as collateral security for promissory-notes executed by the 1st defendant. There is evidence that the 1st defendant had heavy debts to discharge in consequence of his purchase of lands in the South Arcot District. Also D. W. No. 4 states that he spent Rs. 5,000 on a religious ceremony. There is no reason to doubt the fact of his having been indebted at the time when he was taking these loans.

The respondent's answer to the second objection is three-fold; first, he contends that the mortgage properties were in fact the self-acquisitions of the 1st defendant and, therefore, no question arises as to the existence of an antecedent debt. Secondly, he relies on the personal covenant given by the 1st defendant at the time when the mortgages were created, if it be held that the properties mortgaged were really ancestral properties; and thirdly, he has referred to the documentary evidence to show that in each case promissory-notes evidencing the father's liability, existed before the equitable mortgage on the family property was created. In the present case all the evidence is before us and upon that evidence it appears probable that the properties mortgaged were in reality the self-acquisitions of the 1st defendant. Although when the 6th issue was before the lower Court, the Subordinate Judge observed that no attempt was made by the plaint-

iff to prove that the properties in the plaint schedule were the self-acquisitions of the 1st defendant, as alleged in the plaint and as recited in Exhibit E, Exhibit E clearly states that the title-deeds, a list of which is contained in the letter, related to self-acquired immoveable properties, and there is no particular reason why the 1st defendant should have made this statement if, in fact, it was not true. There is evidence that he was earning from Rs. 300 to 400 a month when he was Dubash to Haji Jamal Moideen and Co. and Messrs. Wilson & Co. and that he was living on the rice which he got from his village lands (*vide* statement of D. W. No. 1). On the other hand, it has not been proved that a sufficient nucleus of ancestral property existed, out of the income of which he might have acquired the lands which he subsequently mortgaged. The only family property which he appears to have possessed was survey No. 61 valued at Rs. 200 and a house site No. 44 upon which there was a debt of Rs. 500. Exhibit E contains a reference to item No. 7, a property worth Rs. 800, which was divided between the 1st defendant and his brothers, and Exhibit D (6) is a deed of exchange relating to a house site worth Rs. 200. It has not been shown that any other ancestral properties existed and thus by a process of exclusion it may be inferred that there was no source of income for the purchase of property of the value of the property concerned in this suit. On the 6th issue, I, therefore, find that the plaint properties were self-acquisitions of the 1st defendant.

On the second part of this issue I am of opinion that even if they were not self-acquisitions, the mortgage is binding on the shares of defendants Nos. 2 to 6. The respondent's Pleader relies on the personal covenant of the 1st defendant contained in the mortgages and he has argued that, if there is such a personal covenant, it will form a basis for a mortgage being effected by the manager of a Hindu family so as to bind the interests of the other members. In *Sahu Ram Chandra* v. *Bhup Singh* (1) their Lordships of the Privy Council laid down that to effectively bind the father's issue there must be "an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate," and in the subsequent case *Chet Ram* v. *Ram Singh* (2) their Lordships say that the debt must be "disconnected with the mortgage in fact as well as in time." I do not consider that a personal covenant given by a father at the time of entering into a mortgage could be described as "disconnected in fact as well as in time." Even if the personal covenant be contained in an earlier mortgage, as that earlier mortgage is an alienation and not a debt, there is no antecedency on the principle of *Chet Ram's case* (2). Thus, whether the personal covenant be contemporaneous or previous if it is part of a mortgage it is not antecedent in the legal sense and thus *Ram Dei* v. *Suraj Bakhsh* (3) [a decision of the Oudh Judicial Commissioner's Court given before the Privy Council had decided *Chet Ram* v. *Ram Singh* (2)] does not appear to be sound law.

Whether there is an antecedent obligation dissociated in time and in fact from the sale or mortgage in any particular case is a question of fact. In the present case, the accounts produced by the plaintiff show that money was first advanced and afterwards security was taken. The learned Subordinate Judge in paragraph 18 of his judgment has referred to the fact that the promissory-notes, which might have been enforced against the 1st defendant, who executed them, were in existence before the title-deeds were deposited under Exhibits E and E (2). Exhibit C, which consolidated previous debts upto 1913, was dated the 4th October 1913. Exhibit E, the letter referring to the deposit of title-deeds, was dated three days later.

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 39 A. 437; 6 L. W. 213 (P. C.).

(2) 67 Ind. Cas 569; 49 I. A. 228; 43 M. L. J. 98; 3 P. L. T. 363; 31 M. L. T. 50; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; 44 A. 368; 3 P. L. R. 1922; 24 Bom. L. R. 123; 27 C. W. N. 150; (1922) A. I. R. (P. C.) 47 (P. C.).

(3) 60 Ind. Cas. 177; 23 O. C. 204; 7 O. L. J. 509; 2 U. P. L. R. (J. C.) 156.

In *Ramachandra Row* v. *Sesha Aiyangar* (4) it was held that a promissory-note did not lose its character of being a negotiable instrument by the fact that the title-deeds were deposited as a collateral security. In my opinion, the debts were, in the present case, sufficiently dissociated in time and in fact from the mortgages to constitute antecedent debts. It follows that the suit mortgage is valid against the interests of defendants Nos. 2 to 6 if they had any interest in the mortgage properties.

It is unnecessary to discuss the fourth point, as I have found that the son's interests are liable upon the footing of the suit transactions being mortgages.

On the third point the appellant's learned Vakil quotes the case of *Balwant Singh* v. *Rev. Rockwell Clancy* (5). In that case the mortgage made by Deoraj Singh was held to have been made not as manager of the family or as representing Maharaj Singh who was a minor, and, therefore, the mortgage-deed was void against Maharaj Singh and his interest in the estate. In the present case the 1st defendant did not purport to be mortgaging only his own share in the lands described in Exhibit E, and, therefore, it must be taken that he mortgaged such interest as he was capable of mortgaging thereby. If a father transfers property and it is clear that he intends to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being self-acquired property is not sufficient to invalidate an otherwise proper transaction. *Vide, Sabapathy Chetty* v. *Ponnusawmy Chetty* (6).

The last point relates to the registration of Exhibits E and E (2). In *Chunilal Someshvar Bhatt* v. *Vithaldas Karsandas* (7) it was held that a document creating a charge by deposit of title-deeds required registration and could not take effect if unregistered. So far as this case decides that a writing which only gave the plaintiff a right to obtain a mortgage-deed should be duly registered, I am not inclined to follow it, as no reference has been made to the terms of section 17 (2) (*v*) of the Registration Act, which exempts from registration, a document which does not of itself create a right over immoveable property, but merely creates a right to obtain another document which will create or extinguish such right or interest. It is clear from a recent decision of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar* (8) that such a document would not require registration and would not be bad for want of registration. In *Muthiah Chetty* v. *Kothandaraswami Naidu* (9) it was pointed out that, in cases of equitable mortgages, the act of deposit of title-deeds created a mortgage and not any letter accompanying, preceding or contemporaneous with the deposit which did not of itself purport to create a mortgage right. *Bhairab Chandra Bose* v. *Anath Nath De* (10) is another case in point. There it was held, quoting the words of Couch, C. J., in *Kedarnath Dutt* v. *Sham Lall Khettry* (11), that if there is a memorandum accompanying an equitable mortgage and if without such a memorandum there would have been a complete equitable mortgage by the deposit of the deeds, the memorandum in such a case is only evidence of the fact of the deposit which might be proved by any other evidence. In Exhibits E and E (2) there are no words purporting to pass an interest in immoveable property and, therefore, I hold that they do not require registration.

The appeal thus fails on all points and is dismissed with costs of 1st respondent.

Time for redemption is extended for six months from this date.

Interest to be at the contract rate till the date fixed for payment and six per cent. thereafter.

Devadoss, J.—Defendants Nos. 3, 4 and 6 are appellants. The plaintiff brought a suit, Original Suit No. 27 of 1919, in the Additional Subordinate Judge's Court of Cuddalore against th first defendant and

(4) 3 M L. J. 225.
(5) 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 39 I. A. 109 (P. C.).
(6) 28 Ind. Cas. 365.
(7) 68 Ind. Cas. 1005; 24 Bom. L. R. 502.
(8) 69 Ind. Cas. 123; 31 M. L. T. 136; 4 U. P. L. R. (P. C.) 85; 16 L. W. 615; (1922) A. I. R. (P. C.) 266 (P. C.).
(9) 35 Ind. Cas. 864; 31 M. L. J. 347; (1916) 2 M. W. N. 221; 4 L. W. 472.
(10) 57 Ind. Cas. 686; 31 C. L. J. 375; 24 C. W. N. 599.
(11) 20 W. R. 150; 11 B. L. R. 405.

his sons, defendants Nos. 2 to 6, and two other persons for a mortgage-decree in respect of a sum of Rs. 10,000 and odd due on a mortgage by deposit of title-deeds. The 1st defendant was *ex parte* and died pending this appeal, defendants Nos. 2 and 5 are dead. Defendants Nos. 3, 4 and 6 pleaded that the debt was not contracted for purposes binding on the other members of the joint family than the 1st defendant; that the 1st defendant had no power to alienate family properties for his own extravagant purposes, that the letter by which the title-deeds were deposited required registration, that no mortgage-decree could be given in favour of the plaintiff and that the suit should be dismissed as against defendants Nos. 2 to 6. The 7th defendant a puisne mortgagee, filed a written statement in support of the defence of defendants Nos. 2 to 6. The 8th defendant, another puisne mortgagee, also filed a similar written statement. The Additional Subordinate Judge held that the amount sued for was really due to the plaintiff, that the debts were contracted for purposes which could bind the other members of the joint family of which the 1st defendant was the managing member, that the letter evidencing the deposit of the title-deeds did not require registration and that the plaintiff was entitled to have priority over the 7th and 8th defendants and gave a decree to plaintiff. Defendants Nos. 3, 4 and 6 have preferred this appeal.

The first point raised by the appellants is that no money was due to the plaintiff and that there was no mortgage in his favour but that some documents were brought into existence for the purpose of saving the 1st defendant's property from his creditors and that Exhibit C, the promissory-note evidencing the loan, is a nominal or sham transaction.

The 1st defendant filed his petition in insolvency on the 23rd of March 1916. Before he filed his petition a decree was obtained against the 1st defendant by the plaintiff in the City Civil Court on a registered mortgage dated the 12th of October 1907 and the decree amount was realised by sale of a house in George Town. The 1st defendant got into difficulties and was obliged to file his schedule in insolvency in 1916. The plaintiff and the 1st defendant are members of different castes and there is no evidence to show that the plaintiff was interested in helping the 1st defendant to cheat his creditors. The plaintiff's case is supported by his accounts, a letter, delivery book, press copy-books, and number of letters written to the 1st defendant by the plaintiff and by the 1st defendant to the plaintiff. It was conceded by Mr. Krishnaswami Ayyar who appeared for the appellants that, if these documents were held to be genuine, then the plaintiff's case as regards the loan must be held to be proved. But he attacked the capacity of the plaintiff to lend a large sum of money to the 1st defendant. The plaintiff became an insolvent in 1896 and he got his discharge in 1904. The plaintiff is the son of the Dewan Bahadur Ramaswami Chettiar, a very well-known man in Madras. There is satisfactory evidence on record to show that in 1904 Ramaswami Chettiar gave large sums of money to the plaintiff wherewith the plaintiff carried on money-lending business. His account-books which are in Court appear to be genuine documents, and there is no reason why the plaintiff should have concocted elaborate accounts for the purpose of helping the 1st defendant in whom he was not interested in such a way as to make a man in the plaintiff's position get up forged documents and commit forgery. The letters, Exhibit K series, show clearly that the 1st defendant often wrote letters begging for time and offering to pay the amount due to the plaintiff. Some of the recitals in Exhibit K series are supported by the entries in the account-books, as for instance, Rs. 300 which is mentioned in Exhibit K (31) was paid to the plaintiff and there is an entry to that effect; and in Exhibit K (20) the defendant says that he sent Rs. 100 in currency notes which amount also finds a place in the plaintiff's books. The Subordinate Judge had an abstract of the dealings prepared which he says he carefully compared with the original accounts, and that abstract shows that interest was paid from time to time by the 1st defendant on the amounts due by him to the plaintiff. The transactions began so far back as 1907. We find from the books that interest was paid month after month on the amounts due. The plaintiff's system of business was to collect interest monthly

for which purpose he prepared every month an account showing the amounts of the interest due to him from his various constituents, and entered such amounts in a book of receipts and gave the receipts as soon as they were paid. The plaintiff has produced a number of books, Exhibit I, series, containing counterfoils of the receipts for interest paid and there is no reason to doubt their genuineness or the entries relating to the 1st defendant. His despatch register, Exhibit H, shows that the receipts for payment of interest and letters addressed to the 1st defendant were delivered to him and he has initialled in token of having received them. Exhibit H, which contains the signatures of numerous persons, could not have been fabricated recently either for the purposes of this case or for any other ulterior purpose.

The sum of Rs. 13,900 evidenced by Exhibit C was not lent on one day but it was the balance found due on a settlement of accounts on the 4th of October 1913. The 1st defendant has not ventured into the witness-box to deny the plaintiff's claim, although he was said to have been living with his sons at the time when the trial went on in the lower Court. It is not suggested that his interests were adverse to those of his sons, and that was why he did not want to help the defendants. He evidently kept out of the way for fear of being confronted with the various documents to which he was a party. The Subordinate Judge has rightly come to the conclusion that the debt sued for is due and that Exhibit C evidences a real transaction.

The next point urged for the appellants is that Exhibit E, which was written about the time of the deposit of the title-deeds, speaks of the properties as the self-acquired properties of the 1st defendant, and that as the plaintiff took from the 1st defendant what he considered to be self-acquired properties, and as the 1st defendant did not purport to mortgage the properties as the father of the defendants Nos. 2 to 6 or the managing member of the joint Hindu family the 1st defendant's share alone is liable for the mortgage-debt and not the shares of his sons. It is true that Exhibit E says: "I leave with you herewith the title-deeds and other documents of some of my self-acquired immoveable properties situate in the village * * *." Granting that the contention of the learned Vakil is correct, in view of my finding on issue No. 6 it would be unnecessary to consider whether the 1st defendant mortgaged the properties as the managing member of a joint Hindu family or as an individual member hypothecating his own share of the property. The Subordinate Judge, for reasons which are not quite clear, says, in regard to Issue No. 6, *viz*, "Are the plaint properties the self-acquisitions of the 1st defendant, even if not, is the equitable mortgage not binding on the shares of defendants Nos. 2 to 6?" "No attempt was made by the plaintiff to prove that the properties of the plaint schedule are the self-acquisitions of the 1st defendant as alleged in the plaint and as recited in Exhibit E, and hence the first portion of the issue is found in the negative and against plaintiff." I cannot accept the finding of the Subordinate Judge in the light of the evidence that has been adduced. The 1st defendant got, by partition with his brothers in 1897, a piece of land worth Rs. 200 and a house worth Rs. 200 with a debt of Rs. 500 to be discharged. It is admitted that the 1st defendant came to Madras and was employed in 1886 as clerk to the Dubash of Carl Simon Soehne, that for about 7 or 8 years from 1896 he was Dubash to Messrs. Wilson & Co., that his income was from Rs. 300 to 400 a month and that he was earning about Rs. 100 a month till the date of his insolvency in 1906. It is contended by the appellants that the *onus* is upon the plaintiff to make out that the properties mortgaged to him are the self-acquisitions of the 1st defendant and that he has not discharged the *onus* and that it cannot be said in the circumstances that the properties mortgaged are the self-acquisitions of the 1st defendant. The family property, which is said to be worth Rs. 200 in 1897, is said to be worth Rs. 800 in 1901. Whatever might have been the value of that plot of land, it could not have yielded any appreciable income from which it could be said that the plaint properties as well as other properties of the 1st defendant have grown up The principle in all these cases is that if there is a large family nucleus and if the property

in the possession of a member of the joint family can be traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of, and without detriment to, the family nucleus. The question of *onus* is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family uncleus and the fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus. Mr. Mayne quotes with approval the observations of Grant, J., in *Gooroochurn Doss* v. *Goluckmoney Dossee* (12):

"Where the property descended is incapable of being considered as the germ whose improvement has constituted the wealth ultimately possessed, this wealth must evidently be deemed acquired—an ancestral cottage never converted or capable of conversion to an available amount into money, in which the maker of the wealth had the trifling benefit of residing with the rest of the family when he commenced turning his industry to profit—so of other things of trifling nature.

(Mayne's Hindu Law, 8th Edition page 363). In a recent case reported in *Akkuraju Narayana Rao* v. *Akkaraju Seshamma* (13) the learned Chief Justice and Seshagiri Iyer, J. quote with approval the observations of Chamier, J., in *Ram Kishen Das* v. *Tanda Mal* (14), and lay down the law thus:

"Under the Hindu Law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilised for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into hotch-pot with the intention of giving up their individual rights in them."

Chamier, J., examines all the previous rulings on the subject in *Ram Kishen Das* v. *Tanda Mal* (14) and says that

"there is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property."

In another place the learned Judge says that it is only when there is

"Ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. We entirely agree with these propositions."

The appellants rely on *Kundan Lal* v. *Shankar Lal* (15), *Luximon Row Sadasew* v. *Mullar Row Bajee* (16), *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (17) and *Amar Nath* v. *Firm of Hukam Chand-Nathu Mal* (18) for the position that the mere fact that there is a family nucleus is sufficient to make out that all the acquisitions of a member belonging to the family are joint family property, and that the *onus* is heavily on any one who asserts that it is his self-acquisition to show that no part of the family nucleus went to help the member in the acquisition of such property. In the Lahore case the salary and acquisitions of a Civil Servant were considered joint family property as he was educated in England for several years at considerable expense to the family, and as the costly education he received enabled him to get into the Civil Service. Their Lordships of the Privy Council observe at page 49*

"If he desired to give evidence to show that his specialised education in England was obtained by 'the presents of a friend,' the charitable benefactions or the educational foundations of strangers or by his own self-taught efforts this should have been done by him at the trial."

In *Kundan Lal* v. *Shankar Lal* (15) it was held that property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. Richard, C. J., observes at page 568†:

"The normal and natural condition of the family being one of complete unity of interest, I cannot hold that any presumption arises from the mere fact that the property has been acquired in the name or names of one or more members of the joint family."

(12) (1843) Fulton 165 at p. 182; 1 Ind. Dec (o. s.) 743.
(13) 26 Ind. Cas. 33; 27 M. L. J. 677.
(14) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J 72.
(15) 21 Ind. Cas. 13; 35 A. 564; 11 A. L. J. 910
(16) (1831) 2 Knapp 60; 5 W. R. P.C. 67; 1 Norton's L. C. 169; 12 E. R. 401.
(17) 27 M. 228.
(18) 60 Ind. Cas. 379; 2 L. 40; 19 A. L. J. 249; 40 M. L. J. 327; 2 P. L. T. 208; 33 C. L. J. 355; 29 M. L. T. 258; (1921) M. W. N. 175; 25 C. W. N. 534; 3 U. P. L. R. (P. C.) 12; 23 Bom. L. R. 671; 14 L. W. 435; 42 P. W. R. 1921 (P. C.).

*Page of 2 L.—(*Ed.*)
†Page of 35 A. 564—(*Ed.*)

If this view be correct, the plaintiff ought to have proved that the property was acquired with the separate property of Mohan Lal or at least that after the acquisition he held it as separate property excluding the other members. The decision in *Kundan Lal* v. *Shankar Lal* (15) is no authority for saying that whenever property is acquired by a member of a joint Hindu family, it must necessarily be presumed to be joint. Where it is proved that there is no family nucleus which might in the ordinary course of things have helped him substantially in acquiring it, there is no warrant in any of these cases for the position that, where the family nucleus is so small that it could not by any stretch of imagination have been the means of acquiring any portion of the property standing in the name of a member such property should be held to be joint family property. In *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (17) the facts were: one Subayya died in 1897 leaving two sons and four daughters and he bequeathed by his Will certain legacies. In the Will he stated that the properties were his self-acquisitions and that he had a right to dispose of them. A suit was brought for a declaration that the Will was invalid, as Subayya could not dispose of joint family property to the prejudice of his sons. The Subordinate Judge held that the property was joint family property and could not be disposed of by Will. On appeal the District Judge reversed the Subordinate Judge's decree on the ground that the property was self-acquisition of Subayya. The High Court reversed the decree of the District Judge and restored that of the Subordinate Judge. Sir Arnold White, C. J., and Moore, J., in the course of their judgment observed as follows:

"Eliminating then the matters upon which the District Judge based his conclusion, what is left to rebut the presumption that the property was family property except the fact that from small beginnings the property became something considerable, worth about Rs. 20,000, This is not enough. As the Subordinate Judge points out, the growth of the property was the work of over half a century and was partly at least the product of the skill and labour of Subbayya's father; and, admittedly, there was a considerable nucleus of joint property to start with."

Here there is clear finding that Subbayya's father acquired considerable property and the family nucleus was large. That case can have no application to the facts of the present case where it is admitted that the family nucleus at the time of partition was worth only about Rs. 400 burdened with a debt of Rs. 500. Cases can be conceived where the family nucleus is mortgaged and the money raised on the security of it with which a trade is started and acquisitions made out of the savings of the trade profits; or where the family nucleus is given as security for an appointment, such as that of Dubash or cash keeper, and but for such security the member could not have secured the appointment, in such cases it may reasonably be held that the family property was the means or the foundation of the fortune that was acquired afterwards. Can it be said that Srinivasa Pillai, the 1st defendant, ever raised any money on the security of the family property? Is there any evidence that such property was offered as security for getting employment in Madras? In the partition-deed of 1900, Exhibit D (6), there is a recital that Srinivasa Pillai had gone to Madras for employment. It is in evidence that he was employed as clerk to a Dubash in 1886 and that he rose to the position of a Dubash in another firm in 1896 and continued to be so for 7 or 8 years. Srinivasa Pillai, who evidently was a man of business, was able to acquire in the course of 10 or 15 years property worth Rs. 30,000 to 40,000. When it is remembered that he borrowed large sums of money from the plaintiff ostensibly for the purpose of buying property, one cannot but come to the conclusion that the property standing in the name of the 1st defendant was his own self-acquisition and was not the outcome of any family nucleus. In one of his letters Srinivasa Pillai tells the plaintiff that he was arranging for the purchase of a land and that he was going to get the document registered in Chidambaram. That evidently shows that he borrowed money for buying property. It is not an unusual thing for people who are in receipt of a good income to buy property in their own native village by borrowing money in the hope of discharging the debt from their earnings. There is no reason why the plaintiff's evidence as to what 1st defendant told him at the time when he borrowed money for buying properties in his village should not

be accepted. I hold in the circumstances that it has been clearly proved that the properties are the self-acquisitions of the 1st defendant.

The next point urged by the appellant is that Exhibit E is a document which requires registration, and, therefore, no mortgage-decree could be given in plaintiff's favour. If Exhibit E is itself the only evidence of the transaction, or if by itself creates any rights, then, no doubt, the appellant's contention would be good. But we find here that the documents of title were deposited as security from the very beginning of the dealings between the plaintiff and the 1st defendant. The plaintiff maintains what is known as security register book. It appears that some documents were deposited with him so far back as 1897 and as properties were acquired very probably other documents were deposited and finally in 1913 accounts were settled and a list of the documents in deposit was prepared. I consider Exhibit E not as a mortgage transaction itself but as a list showing the items of properties mortgaged and the number of documents left with the plaintiff. The words in Exhibit E are important :

"As you have paid me the sum of Rs. 13,900 on my simple promissory-note of the 4th instant I leave with you herewith the title-deeds and other documents of some of my self-acquired immoveable properties situated in the village of Uttamasolamangalam, Chidambaram Taluk, South Arcot District as per particulars below to be held by you in deposit as collateral security for the said loan until its re-payment to you."

When there is clear evidence that documents were deposited from time to time and monies were advanced from time to time it cannot be said that the deposit of title-deeds was made by this document. This document gives particulars of the title-deeds left with the plaintiff. Though the present tense is used it cannot be said that the documents were left only after the date of this document or on the date of this document. The appellants rely upon *Chunilal Someshvar Bhatt* v. *Vithaldas Karsandas* (7). With great respect, it is very difficult to follow the reasoning of the learned Judges of the Bombay High Court. Section 17, sub-section (2), clause (v) of the Registration Act is quite clear.

"Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest need not be registered."

In the face of that the learned Judges hold that though a document creates only a right to get another document, still it requires registration. The recent decision of the Privy Council in the Tinnevelly case, Privy Council Appeal No. 113 of 1921 [*Rajangam Ayyar* v. *Rajangam Ayyar* (8)] is clearly against the decision in *Chunilal Someshvar Bhatt* v. *Vithaldas Karsandas* (7). The deposit of title-deeds could be proved even though a letter accompanying it cannot be proved, unless it be that the letter itself is the only evidence of the transaction. This was held in *Muthiah Chetty* v. *Kothandaraswami Naidu* (9). Seshagiri Iyer, J. observes at page 353* :

"There is clear authority which I am prepared to follow that if the letter made a bare reference to the *factum* of deposit and to the creation thereby of the equitable mortgage, no question of stamp or registration would arise."

I hold that Exhibit E does not require registration and that the mortgage by deposit of title-deeds is proved by the evidence of the plaintiff and the account-books, which he has produced, which clearly show that the documents of title were given as security.

In the light of my finding on issue 6, *viz.*, that the properties were the self-acquisitions of the 1st defendant, it is not necessary to consider the contentions urged by the appellants that the debt is not binding upon the other members of the family, defendants Nos. 2 to 6 and that there being no antecedent debts for which the father could alienate the family property, the mortgage itself being the only transaction, the alienation could not bind them. The question whether a mortgage in which there is a personal covenant to pay, can be considered to be antecedent debt is an interesting question and has not arisen for consideration by the Privy Council. In the three cases decided by the Privy Council, *Sahu Ram Chandra* v. *Bhup Singh* (1), *Chet Ram* v. *Ram Singh* (2), *Jogi Das* v. *Ganga Ram* (19), there was no personal

(19) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. N. 739 (P. C.).

* Page of 31 M. L. J.—(*Ed.*).

remedy against the father outstanding. The mortgage properties alone were security for the debts. That a mortgage-debt without a personal liability of the father cannot sustain a subsequent alienation is quite clear from the three cases; but it is not quite clear whether a subsequent alienation in order to prevent the personal remedy in a mortgage-deed being enforced against a father would bind the sons and is a matter which requires consideration. In the case of a simple mortgage or even in the case of usufructuary mortgage where there is a personal covenant to pay, it is open to the mortgagee to give up his security and ask for a personal decree, and a personal decree could sustain a subsequent alienation by the father. Again, where there is a personal covenant and the mortgagee obtains a mortgage-decree and the mortgage property is not able to satisfy the decree amount, the father would be personally proceeded against, in which case also the unsatisfied portion of the mortgage-decree by the sale of the mortgaged property would sustain a subsequent alienation. Where the personal covenant to pay is outstanding in a mortgage document I cannot see why that covenant cannot sustain a subsequent alienation as an antecedent debt, even though no decree has been passed to enforce it. It is unnecessary to pursue this enquiry further, as any conclusion that can be arrived at might be considered *obiter* in the light of the finding on Issue No. 6.

In the result the appeal is dismissed with costs of the plaintiff. Time for redemption extended to six months from this date. Interest at contract rate upto date of payment fixed, thereafter at 6 per cent.

V. N. V.
S. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 19 OF 1921.
October 30, 1922.
Present:—Mr. Hallifax, A. J. C.
SHANKERGIR GURU MOTIGIR—PLAINTIFF—APPELLANT
versus
CHINNUJI AND OTHERS—DEFENDANTS-RESPONDENTS.

Evidence Act (I of 1872), ss. 32, 159, 160—Statement of date of birth in horoscope or deed of adoption—Relevancy—Proof of date of birth.

A statement of date of birth in a horoscope is not relevant under section 32 of the Evidence Act. (p. 140, col. 2)

A horoscope can be used to help in proving the date of birth stated in it only under section 159 or 160 of the Evidence Act, if the person who wrote it or a person who read it soon after it was written, is examined as a witness. Very nearly the same remark applies to other documents in which the age of a person is stated such as a deed of adoption or of initiation as a *chela*. (p. 140, col 2.)

Appeal from the decree of the First Subordinate Judge, Nagpur, dated the 26th November 1920, in Civil Suit No. 40 of 1918.

Sir *B. K. Bose*, Messrs. *V. Bose*, *W. H. Dhabe*, and *P. N. Rudra*, for the Appellants.

Mr. *M. R. Indurkar*, for the Respondents.

JUDGMENT.—It was for the plaintiff to prove that he was born on or after 4th May 1894 and it has been held that he has failed to do this. He alleged himself that he was born on 24th July 1895, the date given as Sawan Sudi 2nd 1817 in the *patrika* or horoscope produced as his. Very great confusion of thought or rather lack of thought is frequently shown in Civil Courts in regard to the admission in evidence of horoscopes and similar documents. A horoscope is often accepted as substantive evidence of the date of the birth of the person mentioned in it, perhaps with a vague idea of reference to section 32 of the Evidence Act. No part of that section can make any statement of a date in such a document a relevant fact. As far as I am aware a horoscope can be used to help in proving the date of birth stated in it only under section 159 or section 160 of the Evidence Act, and then of course only if the person who wrote it or a person who read it soon after it was written is examined as a witness. Very nearly the same remarks will apply to other documents in which the age of a

person is stated, such as the deed of adoption or rather of initiation as a *chela* which is filed as Exhibit P.-1 in this case.

(2) In regard to the horoscope we have the deposition of Girdhari Brahman, P. W. No. 11, which must, I think, be accepted as perfectly true as far as it goes. He says that on the day following the plaintiff's birth his father told him the exact time at which he was born and eleven days later he prepared his horoscope. He says also that the horoscope filed in this suit is in his handwriting and he has no reason to suppose that it is not the one he prepared for the plaintiff, though no name is entered in it. He did not make a statement such as is mentioned in section 160 of the Evidence Act, in respect of the date given in the document, because its true character as evidence was not appreciated, but the whole of his deposition undoubtedly conveys such a statement.

(3) The deposition of this witness being accepted as true, it remains only to prove that the document shown to him in the course of that deposition is the horoscope he prepared for the plaintiff. Shiolal (P. W. No. 10) is the plaintiff's brother and he swears that the horoscope produced in Court is the one that has been in the house and has been regarded and treated as the plaintiff's all his life, and that the plaintiff's birthday is celebrated every year, presumably on the date mentioned in it. He admits that he knew nothing about this horoscope till thirteen or fourteen years ago, but he is himself not over thirty years of age. Ramkrishnapuri (P. W. No. 15), who was the plaintiff's guardian till he came of age, says, Exhibit P.-3 was shown to him as the plaintiff's horoscope about eighteen months after the adoption, which took place when the plaintiff was less than seven years old. The astrologer, Girdhari, (P. W. No. 11), also states that this was the horoscope shown to him by the plaintiff's father, Ganpatlal, whenever the plaintiff was ill.

(4) Considerable stress has been laid by the learned Subordinate Judge on the fact that the horoscope produced came from the custody of the plaintiff's natural father and not from that of his legally appointed guardian. But the plaintiff's adoptive father, or more properly his initiating Guru, died on the day following the adoption and the plaintiff who was then not more than six years old continued to live with his natural father. It would, therefore, be just as natural for the horoscope to be left with his father as for it to be handed over to the guardian of his property appointed by the Court. To consider that the horoscope produced is not the plaintiff's own, but is one with a fitting date manufactured or procured for the occasion, is to assume that a person in Ramkrishnapuri's position has joined in a conspiracy of forgery and perjury to bolster up a claim which was delayed a year too long for no reason whatever, for the sake of a person in whom he has no interest except that he was at one time his ward, and in doing so had not the sense to manufacture a horoscope containing the plaintiff's name and to see that it was produced from proper custody. I am quite satisfied that Exhibit P. 3 is the horoscope written by the astrologer Girdhari for the palintiff, and, therefore, that the plaintiff is proved to have been born on 24th July 1895.

(5) There is a considerable body of other quite convincing evidence to the same effect, particularly the satatement of plaintiff's brother-in-law, Nathuram (P. W. No. 12), though I do not consider it necessary to discuss it, and there is nothing at all to rebut it. Exhibit D-10, D-11 and D-13 have been treated in the lower Court as rebutting evidence, but they are no such thing, and would have practically no evidential value even if they could be regarded as evidence at all. The two first are written applications for mutation of names made on 7th December 1900 and 3rd January 1901 by two different agents of the plaintiff, in each of which he is stated to be six years old at the time. These cannot be called admissions by persons authorised to make them, as the agents had no authority to make any statement in regard to the plaintiff's age beyond that he was still a minor. The same may be said of the casual statement that the plaintiff was then seven years old made in the *mukhtiarnama* executed on his behalf by Ramkrishnapuri on 12th November 1900. These statements can be proved only to corroborate or contradict depositions given in the suit by the persons who made them, and neither of the two *Mukhtiars* appeared

as a witness. As for Ramkrishnapuri who did, a statement made by him in a *mukhtiarnama* in November 1900 as to the plaintiff's age is rather less likely to be accurate than a statement made in a deed of adoption on the same subject in August of that year which he read and knew to be true at the time, and anyhow it is not more so.

(6) But it will make no difference at all if we leave out of account entirely Ramkrishnapuri's statement to the effect that he remembers having seen the plaintiff in August 1900 and he then had the appearance of a child who has not completed his sixth year which is what that part of his deposition comes to. The evidence of the astrologer, Girdhari, (P. W. No. 11) supplemented by the horoscope produced (Exhibit P. 3) and the direct and convincing deposition of the plaintiff's brother-in-law, Nathuram, (P. W. No. 12) are sufficient in themselves to establish that the plaintiff was born on the 24th of July 1895. The suit would have been in time if it had been filed on any day before 25th July 1919 and it was actually instituted on 4th May 1918, nearly fifteen months earlier. I can find no substance in the argument advanced on behalf of the respondents to the effect that section 6 of the Limitation Act in its own terms applies only to periods of limitation prescribed by that Act itself and not to any period prescribed by a special or local Act. In any case Act II of 1917 came into force on 1st September 1917 and as the present suit was filed on 4th May 1918 limitation in it is, by vitue of section 160(2) of that Act, not governed by it but by the Limitation Act.

(7) The claim made in appeal in regard to the amounts paid or payable to the *mukaddam*, *kotwar* and *havildar* was expressly withdrawn in the course of the hearing, and is manifestly untenable. That leaves only the question of interest and *lambardari haqq*. The latter is claimed only for the last four years of the period in suit, and it is admitted that the plaintiff is entitled to get it for the first three of them under the old Land Revenue Act. As for the last of them, even if section 192 of the present Act does not entitle the plaintiff to get 5 per cent. of the revenue payable as costs of collection in the absence of any order by the Deputy Commissioner, a matter which is doubtful, the learned Pleader for the respondents was unable to deny that he is entitled to get it on general principles of equity or under section 70 of the Contract Act.

(8) The Subordinate Judge, who heard the first part of the case and decided all the main issues in it, held that the plaintiff was entitled to the interest claimed by him. His successor who took the accounts mentioned this in paragraph 5 of his final judgment, but seems to have forgotten about it later on, as in paragraph 18 of the same judgment he records the following finding: " Plaintiff has not proved that he demanded accounts from defendants and defendants were under no statutory or contractual liability to render accounts. No interest can, therefore, be recovered." It has to be remembered that the plaintiff was a minor during all except the last three of the twenty-two years in suit, and he cannot be penalised for the negligence of his guardian. It appears also that the plaintiff has paid the full land revenue since 1905, though till then each party seems to have paid half, and that he has been actually performing the duties of *lambardar* since 1913. These would, I think, be the special reasons entitling the plaintiff to interest which are mentioned in *Gopala Kunbi* v. *Ramkrishnapuri* (1), even if the circumstances of the two cases were the same. But in this case it is the plaintiff who is the *lambardar* and the defendants are in no sense his agents.

(9) The accounts will have to be examined afresh in the light of these findings, which are that no part of the plaintiff's claim is barred by time and he is entitled to the interest he claims and also to *lambardari haqq* at 5 per cent. on the land revenue. The decree of the lower Court will accordingly be set aside and the case will be remanded to that Court for that purpose under r. 23 of O. XLI of the Code of Civil Procedure. Th respondents must pay all the costs of this appeal. I can find no reason for granting any certificate for the refund of Court-fees.

S. D.

Case remanded.

(1) 50 Ind. Cas. 930 ; 15 N. L. R. 85.

SHEOGOBIND SINGH *v.* MAHABIR MISSER.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 108 OF 1921.

June 5, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

Choudhuri SHEOGOBIND SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHABIR MISSER AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 29, 147A—Ejectment suit between landlord and tenant holding over—Compromise—Tenant recognised as occupancy tenant—Enhancement of rent, legality of.

If a tenant, who holds over after the expiration of the term of his tenancy, is sued *bona fide* in ejectment as a trespasser and the suit is compromised by recognition of the tenant as occupancy tenant from the date of the compromise, the enhancement of rent is not illegal under sections 29 and 147 of the Bengal Tenancy Act, inasmuch as the suit was between a landlord and a trespasser and not between a landlord and a tenant as such.

Manindra Chandra Nandi v. *Upendra Chandra Hazra*, 2 Ind. Cas. 828; 36 C. 604; 9 C. L. J. 343, distinguished.

Appeal from a decision of the District Judge, Shahabad.

Mr. *Susil Madhab Mullick* for Mr. *S. N. Roy*, for the Appellants.

Mr. *Atul Krishna Roy* for Mr. *Jaigobind Prasad Singh*, for the Respondents.

JUDGMENT.

Coutts, J.—This appeal arises out of a suit to recover a sum of Rs. 2,573-0-9, principal, and Rs. 1,825-8-0, interest, on the basis of a compromise which had been entered into between the parties on the 18th of December 1914. The plaintiffs are the landlords of *Mauza* Mohania Najapore, Tauzi No. 1853, and they brought a suit against the defendants for ejectment and recovery of *khas* possession on the ground that the defendants, who had apparently been holding under a *kabuliyat* the term of which had expired, were trespassers. The suit went on for a long time and, finally, on the 18th December 1914 it was compromised. By the compromise the defendants were to stay in possession of the land and were to be recognized as tenants with occupancy rights at the rents which were mentioned in the compromise. It was also agreed that the defendants were to pay Rs. 2,573-0-9 in lieu of rents which were due to the plaintiffs up to the year 1921, the payment was to be made within three months, and if it was not made, interest was to be recoverable at 25 per cent. per annum. The suit was decreed in terms of this compromise and it is on the basis of this compromise that the suit with which we are now concerned was brought.

Several issues were raised by the defendants but the main points in the suit were that they had no knowledge of the previous litigation; that the compromise was fraudulent; that there was defect of parties; and that the compromise was not a good compromise. The suit was decreed in the Court of first instance but on appeal to the District Judge that decision was set aside on the ground that the compromise was in contravention of the terms of section 147A and section 29 of the Bengal Tenancy Act inasmuch as it involved an illegal enhancement of rent.

The plaintiffs have appealed and the only question which arises in the appeal is whether in fact the compromise is in contravention of the provisions of section 147-A and section 29 of the Bengal Tenancy Act. It has been found by the lower Appellate Court, and we must accept the finding which is a finding of fact, that if in fact there has been an enhancement of rent it will be illegal under the provisions of section 29 of the Bengal Tenancy Act. The question is, however, whether the provisions of section 147-A or section 29 of the Act apply; and, in finding that they do, I think, the learned District Judge has fallen into an error. Section 29 of the Act applies to the rent of an occupancy *raiyat* and section 147-A applies to a suit between a landlord and a tenant as such. Now the suit which ended in the compromise decree was not a suit between a landlord and a tenant as such, it was a suit between a landlord and trespasser, and although the compromise recognises the defendants as occupancy tenants from the date of the compromise it does not say they were occupancy tenants before that; consequently, neither section 147-A nor section 29 applies in the present case. It has been suggested that bringing a suit for ejectment was merely a device on the part of the landlord in order to

avoid the provisions of the Bengal Tenancy Act, but there is absolutely nothing to show that this was so. The suit was apparently a *bona fide* suit which was strenuously contested and it was in consideration of the plaintiffs' recognizing the defendants as tenants that a compromise was arrived at. Moreover, the present suit is not a suit for rent but a suit for money on the basis of a *bona fide* compromise. It has been strenuously argued by the learned Vakil for the respondents that a compromise which involves an illegal enhancement is void and we have been referred to several decisions. They are all of the same nature and I need only refer to thecase of *Maharaja Manindra Chandra Nandi* v. *Upender Chandra Hazra* (1) . That, however, was a suit between a landlord and a tenant as such and is clearly distinguishable from the present case; and I know of no decision nor have we been referred to any decision in which the provisions of section 147-A have been applied to a case which is not clearly a case between a landlord and a tenant as such. In the present case the compromise was not in such a suit and, in my opinion, there was nothing unlawful in the compromise, which was apparently *bona fide* and for consideration. That being so, the provisions of neither section 29 nor section 147-A apply in the present case and the plaintiffs are entitled to succeed.

I would accordingly decree this appeal with costs setting aside the decision of the learned District Judge and restoring that of the learned Subordinate Judge.

Adami, J.—I agree.

S. D. *Appeal decreed.*

(1) 2 Ind. Cas. 828; 36 C. 604; 9 C. L. J. 343.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 104 OF 1922.

October 23, 1922.

Present:—Mr. Batten, J. C.

Musammat DHAPU AND ANOTHER—DEFENDANTS NOS. 3 AND 5—APPLICANTS

versus

RAMAUTAR AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Legal representative, person allowed to continue suit as—Legal position.

The admission of a person as a legal representative for the purpose of prosecuting the suit does not conclusively establish his right to do so if his legal position is one of the main issues in the suit itself. Similarly, the decision that a person is a legal representative only to a limited extent does not preclude him from proving in the suit what his full rights are.

Balabai v. *Ganesh Shankar*, 27 B. 162; 4 Bom. L. R. 980, *Parsotam Rao* v. *Janki Bai*, 28 A. 109, A. W. N. (1905) 206, referred to.

Application for revision of the order of the Sub-Judge, Khandwa, dated the 14th February 1922, in Civil Suit No. 177 of 1919.

Mr. *G. L. Subhedar*, for the Applicants.

Mr. *Fida Hussain*, for the Non-Applicants.

ORDER.—The sequel to this Court's order in Civil Revision No. 25 of 1921 in the same case has been confusion. The original suit brought by Ramchandra was for partition. The lower Court has now allowed the present applicants to continue the suit as legal representatives of the deceased Ramchandra. It has held that they cannot get a decree for partition but can only get a decree for maintenance which was not a relief comprised in the original suit. Logically, on the findings of the lower Court, it should have been ordered that the applicants were not legal representatives of the deceased Ramchandra for the purpose of continuing his suit for partition. No one, however, has objected to the finding that they are legal representatives and can continue the suit in some capacity or other. What the applicants now object is not the finding that they can continue the suit as legal representatives but the finding that they have no right to a partition, because the first applicant is not the legitimate son and the second applicant is not the married wife of the deceased Ramchandra. What the lower Court has found is that the applicants can continue the suit, but in so doing

AYA RAM *v.* PARSHOTAM LAL.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 18-6 OF 1921.

June 2, 1922.

Present:—Mr. Pipon, J. C.

AYA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PARSHOTAM LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Properly misdescribed in sale-deed—Serai, *meaning of—Single building, whether divisible as pre-emptive and non-pre-emptive—Pre-emption, right to enforce, accrual of—Pre-emptor and vendee, rights of, how governed—Precedents—Punjab rulings, preference of, to those of other High Courts.*

Where in a sale-deed property is deliberately misdescribed with a view to defeating pre-emption, it is permissible to look outside the terms of the deed to ascertain its real character, and where the property is described as a house which is said to be a *serai*, the mere size of the property would not raise the presumption that it is a *serai*. (p. 146, cols. 1 & 2.)

The essentials of a "*serai*" are that there is general access to the interior by the public, and that it is used for the temporary accommodation of travellers. A building containing rooms let out to different persons for extended periods is not *prima facie* a "*serai*," and is, therefore, not excluded from pre-emption as being a "*serai*." (p. 146, col. 2; p. 147, col. 1.)

A single building ought ordinarily not to be divided into pre-emptive and non-pre-emptive portions. It must follow the main characteristics of the whole. If the principal use of the building is residential, the whole building will be pre-emptible, notwithstanding that a small portion may also be used as a shop. Conversely, if the main characteristic is the use of a portion of it for a shop the whole building will be non-pre-emptible. (p. 147, col 1)

Nur Jahan v. *Aziz-ud-din*, 108 P. R. 1895, *Dial Singh* v. *Bakshish Singh*, 21 P. R. 1907; 24 P. L. R. 1908; 129 P. W. N. 1907 and *Hannu Mal* v. *Atma Ram*, 27 Ind Cas. 799; 47 P. L. R. 1915; 239 P. W. R. 1915, relied on.

Where the shop is an insignificant portion of the whole building, and of an inconspicuous description, and its use as a shop is not a permanent feature of the building, the property is, for purposes of pre-emption, indivisible and must follow its main characteristics as residential premises, and the whole *including* the small shop is pre-emptible. (p. 147, col. 2.)

Where a sale-deed recites that ownership has actually passed from the date of the deed, the sale is complete on that date, and the postponement of payment of consideration, though it may give rise to equities and restrictions in favour of the vendor, does not operate to prevent the vendees' proprietary title being complete, as the mere omission to pay the whole of the consideration does not necessarily prevent ownership from passing. (p. 149, cols. 1 & 2.)

The right of pre-emption is an antecedent right and the rights of the parties are governed by their positions *inter se* at the time of a sale, and not by something which springs into being for the first time on a sale. (p. 147, col. 2.)

The right to *enforce* pre-emption arises immediately a sale takes place, subject to the restriction that the pre-emptor himself must maintain his quality as a pre-emptor up to the institution of his suit; he cannot be prejudiced by the action of the vendee subsequent to the sale. This rule, however, is subject to the exception where a vedee, prior to the institution of a suit for pre-emption re-transfers the property to a person who has equal rights with the plaintiff. (p. 150, col. 1.)

In the North-West Frontier Province there is invariably a presumption that Punjab rulings should be followed in preference to those of the United Provinces. (p. 150, col 1)

First civil appeal from the order of the District Judge, Bannu, dated the 13th December 1920.

Mr. *Saad-ud-din Khan*, K. S., for the Appellants.

Mr. *Diwan Chand*, R. S., for the Respondents.

JUDGMENT.—In this case Parshotam Lal and four others sued to pre-empt a building in Bannu City sold by Raizada Gopi Chand to the firm of Aya Ram-Vishan Das by a sale-deed executed on the 14th of October 1919 and registered on the 20th of October 1919. The deed in question included also another house, the total consideration for both properties being shown as Rs. 18,009. The smaller house has been the subject of another pre-emption suit and is not included in the present claim. It was originally contended by the defendants that Parshotam Lal, plaintiff, could not sue for a portion only of the property covered by the sale-deed, but this was not pressed in the First Court and is not argued on appeal. The plaintiffs are the owners of a house which adjoins the property now in suit to the north, and on the 14th of October 1919 the vendees were not owners of adjacent property. Up to that particular date the plaintiffs had admittedly a superior right of pre-emption, so far as the question of adjacency alone is concerned. On the 23rd of October 1919 a sale-deed was executed by which the present vendees, Aya Ram-Vishan Das, purchased from one Giyan Chand a shop which adjoins the property now in dispute on the east. That deed was registered on the following day, the 24th of October 1919. The body of the deed recited that the pur-

chase from Giyan Chand had been actually made a month earlier. On the 28th of October 1919, *i.e.*, four days after the registration of the purchase from Giyan Chand, the vendees applied for forcible registration of the sale-deed of the 14th of October 1919, which relates to the property now in suit. No order as to compulsory registration was passed, because registration was not objected to by the vendor's agent. It was completed, therefore, on the 29th of October 1919. The Trial Court gave the plaintiffs a decree for pre-emption of the property now in suit, holding that its sale had been completed on the 14th of October, and that the postponement of registration to the 29th of October 1919 was a mere device of the vendees in order to defeat pre-emption by pretending that they had acquired Giyan Chand's shop prior to their purchase from Gopi Chand, and in order to make out that, at the time of their purchase from Gopi Chand, their rights of pre-emption by adjacency were equal to those of the plaintiffs.

In the present appeal the defendants-vendees attack the decree for pre-emption on various grounds, which it will be convenient to take in the following order :—

(1) That the property in suit was a "*serai*" and was, therefore, not pre-emptible.

(2) That the property included a shop; that the shop was not pre-emptible and that the bargain was indivisible : that the vendees being, by the fact of the sale itself, the owners of the non-pre-emptible shop were thereby owners of the property adjacent to the remainder of the property in suit, and had, therefore, equal rights of pre-emption in respect of the latter.

(3) That the purchase of Giyan Chand's shop was prior to the completion of the purchase from Gopi Chand, and established the vendees as owners of property adjacent to that in suit before the sale of the latter was completed, giving them thereby pre-emptive rights equal to those of the plaintiffs.

(4) That, even if the purchase of Giyan Chand's shop was not prior to the sale now in suit, it was prior to the institution of the suit, and that the plaintiffs are legally obliged to show that their pre-emptive rights were superior to those of the vendees on the date of the institution of the suit.

I will deal with these points in order.

(1) The sale-deed describes the property as a house, which is said to be a *serai*. There is not the least doubt that the word "*serai*" was deliberately entered in the sale-deed with a view to defeating pre-emption, and that we must look outside the terms of the deed to ascertain its real character. It is never a very easy question to determine the character of a building for the purposes of pre-emption, inasmuch as the word "*serai*" has never been defined by the legislature. A number of deeds have been produced in which, at various times, prior to the present sale, the owner of the building leased it to various persons. All these deeds describe the building as a " house" and some of them as a " house with shop." In documents relating to abortive proposals for sale of the building to other persons, and in deeds mentioning the building as a boundary to other property sold, the word " house " is used. *Nur Jahan* v. *Aziz-ud-din* (1) is authority for the view that the mere size of the property does not raise a presumption that it is a "*serai*", and there is no real evidence in the present case to show that it ever was so used prior to the present sale. It was not recorded as a "*serai*" in Municipal records. The lessees appear to have let out portions of it on rent to various persons, but this would not necessarily make it a "*serai*". The essentials of a "*serai*" seem to be that there is general access to the interior by the public, and that it is used for the temporary accommodation of travellers. A building containing rooms let out to different persons for extended periods is certainly not *prima facie* a "*serai.*" There is evidence to show that persons with families were at times living in the interior. Since the sale now in suit the vendees have undoubtedly converted it into an actual "*serai*", but we are concerned solely with its character before this conversion. It is argued that the existence of the shop in the south-east corner tends to show that the whole building had the character of a "*serai,*" especially as the shop in question faces the main *bazar*. This very small building was admittedly used as a shop at the time of the sale. But I think it is also tolerably clear that it was not always so used, and, in any case, it is an infinitesimal portion of the whole premises.

(1) 108 P. R. 1895.

I do not think that any presumption arises that it has influenced the character of the whole building in the manner alleged. It is even suggested that the building may be described as a "*katra*," but this it obviously is not. Without going here into the exact meaning of the word "*katra*," it is sufficient to say that its main characteristics are that it constitutes a block of buildings used mainly for commercial purposes and of which the principal rooms are used as shops or for purely mercantile buisness. I agree, therefore, with the finding that the building in suit is not excluded from pre-emption as being a "*serai*."

(2) This point resolves itself into two portions:—(*a*) whether the above mentioned shop must be excluded from pre-emption and (*b*) whether, if so, the vendees, by retaining its ownership, become on an equal footing with the plaintiffs as regards pre-emptive rights to the rest of the building. It cannot be denied that the general tendency of judicial authority is that a single building should not ordinarily be divided into pre-emptible and non-pre-emptible portions. It must follow the main characteristics of the whole. That is to say, if the principal use of the building is residential the whole building will be pre-emptible, notwithstanding that a small portion may also be used as a shop. Conversely, if the main characteristics of the building is the use of a portion of it for a shop, the whole building will be non-pre-emptible. Authorities for this are: *Nur Jahan* v. *Aziz-ud-din* (1), *Diol Singh* v. *Bakshish Singh* (2) and *Hannu Mal* v. *Alma Ram* (3). A similar test has been adopted in the Judicial Commissioner's Court in this Province, notably in the case of *Musammat Ajab Sultan* v. *Ghulam Jan*, and in a recently decided case in Kohat, *Sardar Janak Singh* v. *Jiwan Das*. The latter was recently before me on review and is prehaps an extreme instance. No valid ground for reviewing my predecessor's order was apparent, but I am inclined to think that he perhaps went rather far in holding that an important and characteristic shop, situated in one of the main *bazars* of Kohat, was pre-emptible along with a courtyard and buildings situated behind it. It certainly might be argued in that case that the *bazar* shop was the dominant feature of the premises; in the pres nt case it certainly is not. The shop is an insignificant portion of the whole building, and of an inconspicuous description, nor is its use as a shop a permanent feature of the building. I have no hesitation, therefore, in holding that for the purposes of pre-emption the property is indivisible and must follow its main characteristics, residential premises, and that the whole including this small shop is pre-emptible. This being so, it is unnecessary to decide question (*b*). But I would remark that, on this question, I should have no hesitation in following the Punjab Full Bench ruling *Sanwal Das* v. *Gur Parshad* (4). It is true that the principle therein enunciated, that the rights of the parties are governed by their positions *inter se* at the time of the sale, has not been recognized by the High Court of Allahabad and some others. An important school of legal thought certainly exists which would allow a vendee to defeat by any lawful means the pre-emptive rights which existed a moment before the sale. It has even been argued that pre-emption is not an antecedent right, but comes into existence for the first time when the sale takes place. In my opinion the latter view is unsustainable. To take a very simple illustration, *A* and *B* are the owners of adjoining houses. *B* has given to *A* what is generally known as "the first refusal" of his house, if ever *B* contemplates selling it. This right then attaches to *A* from the moment that the promise was given, and he is able by it to shape his whole future conduct. He would say: "I know *B* to be an excellent neighbour, and, so long as he is owner of the property adjoining mine, I shall be able to live in comfort. I can embark upon expensive alterations and improvements to my own house, because I know that, even if *B* sells his house, I have the first refusal, and I can always prevent an undesirable person acquiring it." No one can deny that this right which *A* enjoys dates from the time when he obtained the promise, and that it is in existence long before *B* sells or proposes

(2) 21 P. R. 1907; 24 P. L. R. 1908; 129 P. W. R. 1907.

(3) 27 Ind. Cas. 799; 47 P. L. R. 1915; 239 P. W. R. 1915.

(4) 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909 (F. B.).

to sell his house, and that it is one which is both enjoyed by *A* and influences his conduct. Now, such an hypothetical case is clearly indistinguishable from one in which, not *B* himself but the law of the land informs *A* that it has given him a "right of first refusal" in the event of *B* ever selling his house. Any argument, therefore, which is based on the assumption that pre-emption is not an antecedent right, but some thing which springs into being for the first time on a sale, is clearly untenable. Now, the theory that the vendee, by simultaneously acquiring non-pre-emptible property by the very sale which is the subject of the pre-emption suit, can cancel the pre-emptor's antecedent right is almost the extreme degree to which that argument, which I believe to be untenable, can be pushed. I should hold in the present case that even if the shop were non-pre-emptible, plaintiffs would nevertheless have superior rights of pre-emption against the vendees in respect of the other property covered by the sale.

(3) The first question is whether the sale of Giyan Chand's shop to the vendees is to be considered as antecedent or subsequent to the sale of the house in suit to them by Gopi Chand. I agree with the District Judge's finding that the entry in the deed of the 23rd of October 1919, that the sale by Giyan Chand took place a month earlier than that date may be rejected at once. It is quite clear that we must date Giyan Chand's sale from the 23rd of October 1919 and no earlier. The question then arises as to whether on that date the sale of the property in suit had, or had not been, completed. The District Judge, in discussing the question of the priority of the two sales, seems to have been much impressed with the *mala fides* and trickery shown by vendees. He observes that the application for compulsory registration made on the 28th of October was put in simply to give the impression that the sale of the 14th of October had not by then been completed. He further alludes to the fact that, in that application, the vendees made the quite unjustifiable request that the boundaries of the property entered in the deed of the 14th of October should be amended, so as to show Giyan Chand's shop as conterminous with that in suit, with the object of establishing the priority of the purchase from Giyan Chand. He ascribes the very fact of the delay in registration to a similar course of trickery. As against this, of course, the time-honoured *dictum* is advanced by the learned Counsel for the appellants that pre-emption may be defeated by all lawful means. This *dictum* is no doubt often pressed to a point which its authors could never have anticipated. At the same time I think it may be said that the District Judge has perhaps gone rather far in imputing dishonesty to the vendees. There is really not very much proved except a feverish anxiety on their part to show that they had purchased Giyan Chand's shop and obtained equal pre-emptive rights before the sale of the property in suit was complete. There is no necessary *mala fides* or trickery in this. What I have to determine is whether or not, in actual fact, the sale of the property in suit was complete on the 14th October. The sale-deed itself certainly contains terms which are *prima facie* irreconcilable with each other. I quote the following from it :—

"From to-day the said vendees have become the absolute proprietors of the purchased property. They have acquired all the rights which I possess in the property sold." Again, lower down, "if any defect is found in the property I shall be responsible for the loss to the vendees; otherwise, I shall have nothing to do with it. From to-day the profit and loss in respect of the property sold shall be of the vendees." On the other hand, the first of the two passages, which I have quoted, is immediately followed by these words:—"From the date of registration of the sale-deed the vendees shall be considered to be in possession of the property as proprietors and the tenants of the property shall be under the vendees on the same terms which existed between me and them." Again, out of the consideration money Rs. 500 only was paid as earnest-money and Rs. 17,000 were to be paid before the Sub-Registrar. The document contains the following clause:—"The vendees shall get the deed registered on payment of the balance of the purchase-money by the end of the month of October. In case they fail, the transaction of sale shall be null and void, and the earnest-money shall remain with me as damages for breach of the contract." It is argued

for the appellants that the intention of the parties is clear that ownership of the property should not pass until the balance of consideration was paid. It is contended that *Bhagan* v. *Allah Ditta* (5) is a clear authority for holding that ownership does not pass if there is any intention common to both parties that ownership should not pass until payment of consideration, and that, in this case, the document itself lays down that practically the whole of the consideration must be paid by the end of October. The appellants would explain the very categorical declaration in the body of the deed that ownership has passed from "to-day" (*i.e.*, 14th October) as a mere routine entry which deed-writers have got into the habit of inserting in documents, without any special reference to their particular conditions. The principle, of course, cannot be contested that the mere omission to pay the whole of the consideration does not necessarily prevent ownership from passing. "Sale" is defined in 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." The respondents lay stress upon the wording of the deed, where it recites that ownership has actually passed from "to-day." They contend that the correct view of the clause which annuls the sale in the event of the full consideration not being paid at registration, is that the vendors retained possession, but not the title of ownership, as security for the payment of consideration. Stress is laid upon the ruling of the Allahabad High Court in the case *Shib Lal* v. *Bhagwan Das* (6) where it was held that non-payment of purchase-money does not prevent the passing of ownership from the vendor to the purchaser, and that the latter, notwithstanding such non-payment, can maintain a suit for actual possession (as opposed to mere specific performance of contract) subject to such equities, restrictions or conditions as the nature of the case require. It seems to me clear from that ruling that the case was completed where ownership actually passed, although the vendor still retained a certain lien on the property to enable him to extract full consideration. In the present case physical possession was held by tenants, and, therefore, it would have been impossible to describe the vendor's lien as one to retain physical possession against the vendees. But the lien which he retained does not appear to me to amount to more than this. I can see no other explanation of the very categorical and definite assertion in the body of the deed that full rights of ownership had completely changed hands at the time of execution. I do not think that, in the present case, it can possibly be argued that these terms represent a mere petition-writer's routine, which has no relation to the terms settled between the parties. Such an argument would have weight if the parties were illiterate or persons wholly unused to dealing with formal documents embodying business transactions. In the present case both parties to the deed were business-men of high position and wide business dealings, who must be assumed to be thoroughly conversant with the importance of the phraseology of legal documents and the necessity of careful and accurate drafting. I am unable to read into the sale-deed any other meaning than that the transfer of ownership or, in other words, the sale was complete on the 14th of October and that the postponement of payment of consideration, though it gave rise to restrictions and equities in favour of the vendor, did not operate to prevent the vendees' proprietary title being complete. The purchase of the property in suit from Gopi Chand was, therefore, prior to the purchase of the shop from Giyan Chand.

(4) It only remains to consider the question of law as to whether the position of the plaintiffs and the vendees must be regarded as it stood on the 14th October or as it stood on the institution of this suit. On this question the Allahabad High Court has held in *Bhagwan Das* v. *Mohan Lal* (7) and *Ram Hit Singh* v. *Narain Rai* (8) that the vendee may improve his position in respect of pre-emptive rights, during the period between the sale sought to be pre-empted and the institution of the suit. A

(5) 9 Ind. Cas. 547; 55 P. R. 1911; 27 P. L. R. 1911; 41 P. W. R. 1911.
(6) 11 A 244; A. W. N. (1889) 96; 6 Ind. Dec. (N.S.) 583.
(7) 25 A 421; A. W. N. (1903) 83.
(8) 26 A 389; A. W. N. (1904) 68; 1 A. L. J. 209.

contrary view was taken in the two important Punjab Chief Court rulings *Sanwal Das* v. *Gur Parshad* (4) and *Dhanna Singh* v. *Gurbakhsh Singh* (9). Both are Full Bench rulings, which deal with the whole question in a more exhaustive manner than has been undertaken, I think, by any High Court in India. The learned Judges were not unanimous and Mr. Justice Rattigan contended to the end that the vendee could improve his position after the pre-emptor's cause of action had arisen. I am asked by the learned Counsel for the appellants to follow the Allahabad view in preference to that taken by the Punjab Chief Court. I think that it is fair to assume that, in the North-West Frontier Province, there is invariably a presumption that Punjab rulings should be followed in preference to those of the United Provinces. It is hardly necessary for me to discuss in detail the reasons which have induced the learned Judges of the various High Courts to come to their conclusions. I have already, in discussing point (2) above, expressed my agreement with the view that the parties are bound by their positions at the time of the sale. The right to *enforce* pre-emption arises, therefore, immediately a sale takes place. It is undoubtedly qualified by the restriction that the pre-emptor himself must maintain his quality as a pre-emptor up to the institution of his suit, but he cannot be prejudiced by the vendee's action subsequent to the sale. There is, of course, one exception to this rule, *viz.*, in certain cases where a vendee, prior to the institution of the suit, re-transfers the property to a person who has equal rights with the plaintiff. But it is clearly understood that this exception rests upon one principle only, and that is that the law recognizes claims for pre-emption brought privately and out of Court, and that a vendee is entitled to satisfy such a private claim, just as much as he is bound to satisfy a claim brought against him in a Court of Law. In such a case it is not the plaintiff who has been prejudiced in respect of his pre-emptive rights by the vendee improving his own position, but it is a person equally entitled with the plaintiff who has enforced his right out of Court, and unless a re-transfer by the vendee is proved to be in satisfaction of such claims, a pre-emptor 's suit is not affected by any transfer. On the general principle I have no hesitation in following the Punjab Chief Court in holding that we must ordinarily take, for the purposes of pre-emption, the respective position of the plaintiff and vendee as they stood at the time of the sale, and not as they stood at the institution of the suit.

The plaintiffs' right to pre-emption in this case is, on the above findings, established. The price fixed by the Trial Court on pre-emption is not challenged and this appeal must, therefore, fail. It is dismissed with costs.

W. C. A. *Appeal dismissed.*

(9) 4 Ind. Cas. 337; 91 P. R. 1909, 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 277-B OF 1919.

September 16, 1922.

Present:—Mr. Kotwal, A. J. C.

Syed WAZIRUDDIN AND OTHERS—
—DEFENDANTS—APPELLANTS
versus
SHAHABUDDIN—PLAINTIFF—
RESPONDENT.

Berar Inam Rules, Class V, r. VII—Grant for maintenance and service—Service by any member of grantee's family sufficient—Resumption.

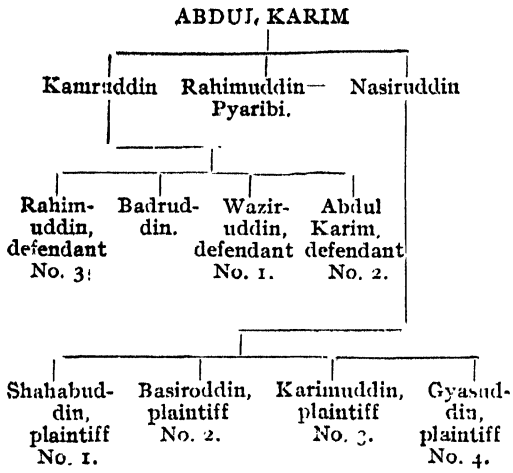
Where a grant is made for the purpose of service and maintenance and the tenure is stated to be in perpetuity conditional on service the grant falls under Class V and is governed by r. VII and is both a maintenance and service grant. Such a grant is not liable to be resumed so long as any member of the family of the first grantee renders the stipulated service. (p. 152, cols. 1 & 2.)

Appeal from the decree of the District Judge, Amraoti, dated the 28th March 1919, in Civil Appeal No. 158 of 1918.

Mr. *M. Y. Shareef*, for the Appellants.

Messrs. *R. R. Jaiwant* and *A. V. Khare*, for the Respondent.

JUDGMENT.—The relationship of the parties is shown in the following genealogical table:



The suit is in respect of certain *inam* fields situated in *Mauza* Darwah, of which the grant by the British Government is in the name of Abdul Karim. The sons of Nasiruddin clamied the following reliefs :—

(*a*) The Register containing the entry about *kabja* and *malki* regarding fields Survey Numbers 140 and 267 situated at *Kasba* Darwah, *Taluq* Darwah, District Yeotmal, be corrected and the name of the plaintiffs alone may be entered in the *inam* certificate.

The prayer for this relief is based on the ground that by a partition-deed, dated the 2nd February 1895 (Exhibit P-1) executed by Abdul Karim and his three sons, Kamruddin, Rahimuddin and Nasiruddin, these fields were awarded to Nasiruddin.

(*b*) The Register containing the entry about *kabja* regarding fields Survey Numbers 200, 150, 20 and 141 situated at *Kasba* Darwah, *Taluq* Darwah, District Yeotmal, may be corrected and orders may be passed for correcting the *inam* certificate.

Fields Nos. 150 and 120 were kept joint at the partition and Numbers 200 and 141 were given exclusively to Rahimuddin. Rahimuddin is dead and the plaintiffs appear to claim an eight anna interest in his share by inheritance and transfer from his widow.

(*c*) The Register containing the entry about *kabja* and *malki* regarding the undivided half share in pieces Numbers 2, 4 and 5 of Survey No. 6 situated at *Kasba* Darwah, *Taluq* Darwah, District Yeotmal, and the Register of *Wahiwat* of Piece No. 5 may be ordered to be corrected.

No. 6 was one of the fields kept joint at the partition.

As regards reliefs (*b*) and (*c*) the correction sought was that the plaintiffs should be recorded as *maliks* and *kabjedars* of an eight-anna undivided share and as *wahiwatdars* of *pot hissa* No. 5 of Survey Number 6.

The Trial Court held that the estate was a service grant and not divisible by metes and bounds. The claim as regards Survey Numbers 140 and 167 and *pot hissas* Nos. 2 and 4 of Survey Number 6 was wholly dismissed, as the defendants admitted that the plaintiffs were in actual possession of these numbers. As regards the other fields it was held that the estate was joint and the plaintiffs were held to be in joint possession. A declaration was, therefore, granted that "the name of the plaintiffs should be entered in column 11 of the *parchas* of Survey Numbers 200, 150 and 20 and 141 and *pot hissa* number 5 of Survey Number 6 at *Kasba* Darwah to the effect that they are entitled to eight-anna share of the profits of the fields and the defendents Nos. 1 to 3 are also entitled to remaining half share of the profits of the same." The rest of the plaintiffs' claim was dismissed.

Both parties appealed from this decree. The lower Appellate Court held that the grant was of Class IV mentioned in rule II, governed by rule VI of the Inam Rules. It held that the succession was governed by rule V and both parties were entitled to the benefit of the *inam*, though as a service grant it was indivisible. It held like the first Court that the defendants were estopped from disputing the arrangement as regards separate enjoyment under the partition-deed of 1895. It dismissed the defendants' appeal and on the plaintiffs' appeal modified the decree by ordering the names of the plaintiffs to be entered in column 13 instead of in column 11 of the Record of Rights Register and

further to be entered in column 9 as co-sharers.

The defendants appeal to this Court and it is urged on their behalf that the grant is a service grant of Class II mentioned in rule II and that no person other than the one entered in the *inam* certificate has the right to share in its income and that the plaintiff's claim should have been wholly dismissed.

The first point to be decided is under which of the classes mentioned in rule II of the *Inam* Rules does this grant fall? It is to be noted that the *inam* certificate itself does not mention the class. In column 19 of the certificate (Exhibit P-15) the purpose of the grant is stated to be the service of Kazi and maintenance, and the tenure to be in perpetuity conditional on service. On the face of the certificate the grant is both a maintenance and a service grant.

As a service grant the *inam*, in my opinion, does not fall under Class II. The grant cannot be said to be one for service in a religious or charitable institution, nor can it be said to be a grant under Class IV. This class is governed by rule VI. This rule makes it clear that the grants to which Class IV refers are grants in respect of services in the Military, Revenue or Police departments. The service of a Kazi is not one of these. The only class of service grants remaining is Class V and the Kazi's service *inam* may come under that class as an *inam* enjoyed for services as a priest. It would then be governed by rule VII. Under that rule the grant is confirmed to the holder and his heirs subject to the continued performance of the particular service for which the *inam* was granted. The grant in dispute is in perpetuity, a quality that, as admitted by the appellant, does not appertain to the office of Kazi. Such grants were always made by Government with the object of maintaining the family of the grantee in a suitable station of life: *vide* paragraph 7 of serial number 2, section 6, Revenue Book Circulars, Berar. Admittedly, the service of Kazi, so far as the Government is concerned, is now no longer required. Admittedly, also it is a service which, so far as the public is concerned, may be rendered by any male member of the grantee's family, as it has in fact been rendered in the past by members of this particular family other than the certificate-holders. It seems to me that the main purpose of the *inam* was the maintenance of the family, and the service stipulated for is not necessarily personal service by the particular person in whose name the certificate for the time being stands but is service by any member or members of the family of the first grantee from the British Government. I do not think that the failure by Waziruddin to render the service personally would render the *inam* liable to be resumed. If he got any member of the family to render it or if any member actually rendered it, the whole family would continue to get the benefit of the *inam*. The *inam* was in effect a grant to the family for their maintenance conditional on their rendering Kazi service. This interpretation of the purpose of the *inam* is supported by the partition-deed, the conduct of Waziruddin himself, and his previous statement in Suit No. 323 of 1916: see Exhibit P-16. The contention of the appellants that the respondents are not entitled to share even in the income of the *inam* must, in my opinion, be rejected.

In the view that I take of the grant the decree of the lower Appellate Court is correct. No objection is raised in this appeal as regards the extent of the share of the profits to which the plaintiffs are held entitled. As regards ground No. 4 which raises a point of limitation it is admitted that the order under section 145, Criminal Procedure Code, binds only the plaintiff Shahabuddin. However, the present suit not being a suit to recover property, Art. 47 of the 1st Schedule of the Limitation Act has no application and the suit is not time-barred.

Ground No. 6 is not pressed. The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

KURUKUNDI SAMA RAO *v.* FIRM OF MARWADI VANNAPI VAJINJI.

MADRAS HIGH COURT.

APPEAL NOS. 176 AND 177 OF 1920.

September 14, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

KURUKUNDI SAMA RAO—PLAINTIFF—APPELLANT

versus

THE FIRM OF MARWADI VANNAPI VAJINJI BY PARTNER LALCHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Son's liability for debts of father—Partition, effect of—Mortgage-deed—Execution, proof of.

So long as a Hindu family remains undivided, a creditor can proceed against the interests of the sons in the ancestral property for the debts of their father not contracted for illegal or immoral purposes without proving family necessity or antecedent debt. (p. 153, col. 2; p. 154, col. 1.)

(Case-law reviewed.)

Obiter (*i*) Per *Spencer, J.*—If the sons effect a *bona fide* partition at a time anterior to the date when the debt is contracted, their responsibility is different and the father's creditor cannot then proceed against their divided shares. (p. 154, col. 1.)

(*ii*) Per *Devadoss, J.*—It is open to the High Court to find that the execution of a mortgage was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. (p. 155, cols. 1 & 2.)

Modhu Sudan Das Mohant v. *Iswari Deyi Debi*, 61 Ind. Cas. 25; 48 C. 341; 24 C. W. N. 949, *Kandaswami Gounden* v. *Kuppa Moopan*, 55 Ind. Cas. 320; 43 M. 421 at P. 422; 38 M. L. J. 203; 11 L. W. 221; (1920) M. W. N. 181; 27 M. L. T. 96, considered.

Appeal against a decree of the District Court, Bellary, in Original Suits Nos. 40 of 1916 and 40 of 1918 respectively.

Mr. *Narayana Murti*, for the Appellant.

Messrs. *L. A. Govinda Raghava Aiyar*, *V. S. Narasimhachariar* and *W. Kothandaramayya*, for the Respondents.

JUDGMENT.

Spencer, J.—These are two suits upon mortgage documents executed by 1st defendant, whose sons are defendants Nos. 2 to 5. The appellant is a transferee from the 1st mortgagee, the plaintiff in Original Suit No. 40 of 1918 and the 6th defendant in Original Suit No. 40 of 1915, which is the 2nd mortgagee's suit. The 3rd mortgagee is the 7th defendant in both suits.

The District Judge dismissed Original Suit No. 40 of 1918, holding that the mortgage-deeds were not properly attested and, therefore, invalid. I think he was right in preferring the evidence of the two witnesses whose names appear on the documents as attestors when they say that the executant did not sign in their presence, to the evidence of the executant and the sister and the daughter of the mortgagee, the daughter being herself a mortgagee under one of the deeds, as the latter are likely to be interested in keeping the property in the hands of relations rather than allowing it to pass into the possession of the 2nd and 3rd mortgagees who are strangers.

No doubt the 5th plaintiff's witness, who is a Pleader practising at Bellary, is related to the executant, and Parikshita Rao, the other signatory who is now dead, was a friend of the executant and lived in his village, but they seem nevertheless to have spoken the truth on a matter which was necessarily within their knowledge, and the appearance of the document suggests that their signatures were affixed at a different time, as indeed they say they were

Though the suit documents are not valid as mortgages, they can be enforced as bonds against the 1st defendant personally and the family property in the hands of defendants Nos. 1 to 5.

It is argued by the Vakil for respondents Nos. 2 to 5 that their shares should not be made liable during the lifetime of their father, the 1st respondent, for the reason that sons are not bound by any pious obligation to pay off their father's debts so long as he is alive. He relies on the Privy Council decisions in *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Chet Ram* v. *Ram Singh* (2) as establishing this principle.

I do not think it necessary for the plaintiff to invoke the doctrine of "pious obligation" here. It has always been held in this Presidency since the Full Bench decision of *Ponnappa Pillai* v. *Pappuvayyangar* (3), in which *Girdharee Lall* v. *Kantoo Lall* (4) was considered, that so long as a Hindu family

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 67 Ind. Cas. 569; 43 M. L. J. 98; 3 P. L. T. 363; 31 M. L. T. 50; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; 44 A. 368; 3 P. L. R. 1922; (1922) A. I. R. (P. C.) 247; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A. 228 (P. C.).

(3) 4 M. 1; 1 Ind Dec. (N. S.) 839 (F. B.).

(4) 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 561; 3 Sar. P. C. J. 380 (P. C.).

remains undivided a creditor can proceed against the interest of the sons in the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. As has been pointed out by the learned Chief Justice in *Vinjanapati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (5), the prevailing judgment of Sir Charles Turner, C. J., in this Full Bench case received the approval of the Privy Council in *Muttayan Chetti* v. *Zamindar of Sivagiri* (6). This principle was again confirmed by another Full Bench of this Court in *Ramasami Nadan* v. *Ulaganatha Goundan* (7) and two Benches of this Court have taken the same view in *Subramania Aiyar* v. *Shaw Wallace & Co.* (8) and *Kandaswami Gounden* v. *Kuppa Moopan* (9) after considering *Sahu Ram Chandra* v. *Bhup Singh* (1) and deciding that the Privy Council did not intend to alter the existing law in this respect. The Bombay High Court has come to the same conclusion in *Hanmant Kashinath* v. *Ganesh Annaji* (10). In Mayne's Hindu Law in paragraph 307 the passage occurs :—

"This limitation of the son's liability (the learned Author is referring to a son's want of obligation to liquidate his father's debts during the father's lifetime) has, however, ceased to be of any importance in view of the recent decisions which enable a creditor during the life of the father to enforce his claims by decree and execution against the entire family property"; and reference is made in the footnote to *Khalilul Rahman* v. *Gobina Pershad* (11), *Ramasami Nadan* v. *Ulaganatha Goundan* (7) and *Govind* v. *Sakharam* (12).

The principle is explained in *Hanmant Kashinath* v. *Ganesh Annaji* (10) as due to a decree-holder's right being co-extensive with the power of a debtor-father to alienate ancestral immoveable property for the satisfaction of his antecedent debts, not being tainted with illegality or immorality. In the present case it is clear from Exhibit A that there was an antecedent debt of Rs. 2,000 incurred by the father for cultivation expenses.

If the sons effect a *bona fide* partition at a time anterior to the date when the debt is contracted, their responsibility is different and the father's crediror cannot then proceed against their divided shares. See *Krishnasami Konan* v. *Ramasami Ayyar* (13), *Vinjanapati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (5) and *Kurri Venkata Reddi* v. *Chelluri Satyanarayanamurthy* (14), but the present condition of the family of these respondents is joint. They are, therefore, all liable, the father personally and the sons in respect of the ancestral properties in their possession and the suit is in time.

In modification of the lower Court's decree in Original Suit No. 40 of 1918, a decree will be given accordingly with interest at 6 per cent. from date of plaint to date of realisation against the 1st respondent personally and against his share of the family properties and against the shares of respondents Nos. 2 to 5 to the extent that the decree remains unsatisfied by the father, with costs throughout.

In other respects Appeal No. 177 of 1920 is dismissed. Appellant to pay the costs of 6th and 7th respondents in Appeal Suit No. 177 (1 set). Appeal No. 176 is dismissed. No separate costs.

Devadoss, J.—Original Suit No. 40 of 1915 was brought by the plaintiff on a mortgage-deed executed in his favour by the 1st defendant, a prior mortgagee, and the 7th defendant, a subsequent mortgagee parties to the action. The defendants Nos. 2 to 5 are the sons of the 1st defendant. The District Judge of Bellary dismissed the suit and the plaintiff preferred Appeal Suit No. 102 of 1918. The High Court allowed

5) 43 Ind. Cas. 225; 41 M. 136 at p. 140; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.
(6) 6 M. 1; 9 I. A. 128; 4 Sar P. C. J. 354; 12 C. L. R. 169; 6 Ind. Jur 486; 5 Shome L. R. 57; 2 Ind. Dec. (N. S.) 279 (P. C.).
(7) 22 M. 49; 8 M. L. J. 312; 8 Ind Dec. (N. S.) 36.
(8) 58 Ind. Cas. 648; 38 M. L. J. 402; 12 L. W. 117; 28 M. L. T. 107.
(9) 55 Ind. Cas. 320; 43 M. 421 at p. 422; 38 M. L. J. 203; 11 L. W. 221; (1920) M. W. N. 181; 27 M. L. T. 96.
(10) 51 Ind Cas. 612; 43 B. 612; 21 Bom. L. R. 435.
(11) 20 C. 328; 10 Ind. Dec. (N. S.) 223.
(12) 28 B. 383; 6 Bom. L. R. 344.
(13) 22 M. 519; 9 M. L. J. 127; 8 Ind Dec. (N. S.) 371.
(14) 62 Ind. Cas. 980; 40 M. L. J. 473; 29 M. L. T. 265; (1921) M. W. N. 261; 13 L. W. 516.

the appeal and set aside the decree of the District Judge, and remanded the suit to the lower Court with directions to pass a proper decree after raising necessary issues on the claims of the 6th and 7th defendants. The District Judge of Bellary has allowed the claim of the 7th defendant and dismissed that of the 6th defendant on the ground that the mortgage-deeds relied on by him were not proved to have been properly executed as required by law.

The 6th defendant has appealed against that decree in Appeal Suit No. 176 of 1920. During the pendency of the said Appeal Suit No. 102 of 1918 the 6th defendant brought Original Suit No. 40 of 1918 impleading his mortgagor as 1st defendant and his undivided sons, as defendants Nos. 2 to 5, and the plaintiff in Original Suit No. 40 of 1915 as 6th defendant and the 3rd mortgagee as 7th defendant. The suit was dismissed on the ground that the execution of the mortgage-deeds was not proved according to law and the plaintiff has preferred Appeal Suit No. 177 of 1920. In both the appeals the same person Swami Rao is the appellant, and the questions involved are the same.

The appellant's case is that of the two mortgage-deeds relied on by him, one was executed to his adoptive father Venkoba Rao on 10th August 1912 by the 1st defendant and the other was executed in favour of Gundamma, the daughter of the said Venkoba Rao, on the same date by the 1st defendant and that he is the transferee of both mortgages. He contends that the execution of the documents was witnessed by two persons, and that the District Judge erred in disbelieving the evidence of the two witnesses who speak to the execution. Of the two attesting witnesses one is Mr. Govinda Rao, a Pleader practising in the Bellary District. His evidence is that the documents after execution by the 1st defendant were taken to him and he attested them and that he did not see the executant sign the documents. It is urged that the Pleader's evidence that he did not see the actual execution of the documents cannot be relied on, inasmuch as two witnesses, Gundamma and Tolasamma, speak to the execution of the document in the presence of the Pleader and the other attesting witnesses. It is quite open to this Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution, *vide Brahmadat Tewari* v. *Chandan Bibi* (15). But there is no reason why the Pleader, who appears to have no interest hostile to the appellant, should swear falsely that he did not see the actual execution but put his signature to the documents on the assurance that they had been signed by the 1st defendant. It must be remembered that before the date of the Privy Council decision which laid down that the execution of mortgage-deeds in the absence of attesting witnesses would not be fulfilling the requirements of the law, it was a common practice to take documents round after execution in order to get the attestation of a number of witnesses, and that this practice must have been resorted to in this case as well is clear from the way in which both Gundu Rao and the other attesting witness Parikshitha Rao were examined at the Original Trial in Original Suit No. 40 of 1915. They were examined-in-chief by the appellant's Pleade who evidently asked them whether they attested the documents, and when they replied that they were not present when the executant signed them, he contented himself by eliciting that the execution was admitted to them by the mortgagor. It is significant that the examination-in-chief stopped with the answer: "I asked if he had signed them and he said he had." Much reliance cannot be placed upon the evidence of Tolasamma, P. W. No. 6, who is a sister of Venkoba, the mortgagee, and it is not likely that she would have carefully noticed whether the mortgagor signed the documents after they were engrossed, even though she might have been aware that the documents were being written in the hall of the house of her brother, Venkoba Rao. The next witness, P. W. No. 7, is Gundamma, who is said to be 23 years of age in 1918, when she was examined as witness. She must have been a young girl of about 16 years of age on the date of the execution of the documents. She was then said to be a widow, and it is most unlikely that a young Brahmin widow would have been present at the place where the documents

(15) 34 Ind. Cas. 686; 20 C. W. N. 192.

were being written and where a number of men were present. I do not think that the evidence of these two women, can, in any way, outweigh the evidence of Govinda Rao, a Pleader, and Parikshitha Rao, a stranger. It has been urged that Parkshitha Rao was a man belonging to the same village as the 1st defendant and,therefore,interested in not speaking the truth. He is dead, and his evidence is marked Exhibit III and there is no reason why he should have said something which was not true. No doubt the 1st defendant swears that he signed the two mortgage-deeds,Exhibits A and B,in Original Suit No. 40 of 1918, in the presence of the two attesting witnesses. It is urged on behalf of the appellant that it is most unlikely that the 1st defendant would support the mortgagee against the interests of his sons, defendants Nos. 2 to 5, who hotly contested the validity of the appellant's mortgages. It is suggested by Mr. Govindaraghava Aiyar, hat the 1st defendant was anxious that the appellant who is his relation should get the benefit of the mortgages, as he feared that there would be nothing left after satisfying the mortgages in favour of the plaintiff and the 7th defendant in Original Suit No. 40 of 1915. The appellant's mortgages are prior in date to those of the other two mortgages. In these circumstances it cannot be said that the learned District Judge has not correctly appreciated the evidence in the case. The mortgage documents not having been proved to have been validly executed the appeals fail and must be dismissed.

Mr. Narayanamurthi, who appears for the appellant, asks for a personal decree against the 1st defendant and against the shares of the defendants Nos. 2 to 5 in the family property. The personal remedy against the 1st defendant is not barred.

On behalf of the sons it has been urged that such a decree could not be passed. The Vakil for the sons puts forward these propositions:—(1) The father in a joint Hindu family has no power to alienate the son's share unless there is family necessity. (2) The father's power to alienate is confined only to cases where there is an antecedent debt to be discharged. (3) A creditor cannot proceed against the shares of the sons in execution of a decree against the father. (4) In no case can the son's shares be made liable during the lifetime of the father if the debt was neither antecedent nor for necessity.

It has been very vehemently urged that the three decisions of the Privy Council reported in *Sahu Ram Chandra* v. *Bhup Singh* (1), *Jogi Das* v. *Ganga Ram* (16) and *Chet Ram* v. *Ram Singh* (2) support the contention, that, as long as the father is alive no decree can be passed against the son's share for a debt incurred by the father, and no execution can be levied against the son's share for a decree passed against the father. As the law stands at present a creditor can proceed against the share of the sons in the family property in execution of a decree obtained against the father without proving either family necessity or that the debt was incurred to discharge an antecedent debt. We have to see whether the three Privy Council decisions relied on by the Vakil have really altered the law on this point. In *Sahu Ram Chandra* v. *Bhup Singh* (1) the facts were one Bhup Singh the 1st defendant, father of defendants Nos. 2, 3 and 4, andthe grandfather of defendants Nos. 5 and 6, on the 21st February 1882 mortgaged the family property to Sahu Ram Chandra. The suit which gave rise to the appeal to the Privy Council was brought by Ram Chandra in July 1910 making Bhup Singh, his sons and grandsons, defendants. The question was whether Bhup Singh was justified in executing the mortgage-deeds so as to bind the sons. Their Lordships held that a loan made to the father on the occasion of a grant by him of mortgage on the family estate was not an antecedent debt. In the course of their judgment they quote the following passage from the judgment in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (17) :—

"That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for a 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, and that purchasers had notice that they were so contracted. Secondly, that the purchasers at an execution sale, being strangers to the suit, if they

(16) 42 Ind. Cas. 791 ; 21 C. W. N. 957 ; (1917) M. W. N. 739 (P. C.).

(17) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

have not noticed that the debts were so contracted are not bound to make inquiry beyond what appears on the face of the proceedings"

and observe:

"Their Lordships desire to record their adhesion to the following comment made on this pronouncement by Sir John Stanley in the case of *Chandradeo Singh* v. *Mata Prasad* (18), The learned Chief Justice stated: 'The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases and the words "antecedent debt" seem to have been used advisedly. Likewise, the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons.'"

It is quite clear from this passage that their Lordships did not intend to alter the law as it stood as regards the right of an execution creditor to proceed against the son's share in execution of a money-decree obtained against the father. At page 444* their Lordships further observe:

"Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

In order to justify an alienation by the father there should be an antecedent debt. But the contention of the sons is that, so long as the father is alive, the share of the sons cannot be proceeded against in execution of a decree obtained against the father and that the Court cannot pass a decree against the sons' shares also in a suit brought against the father and sons on a debt contracted by the father, and the learned Vakil relies very strongly upon the following passage of their Lordships in the case cited above:

"While the father, however, remains in life, the attempt to affect the son's and grandson's shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, the responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh who contracted the debt, is still alive and there is a concurrent finding by both the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate."

This case was followed in *Jogi Das* v. *Ganga Ram* (16). Lord Haldane, delivering the judgment of their Lordships of the Privy Council, referred to the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) in the following terms:—

"In that case it was laid down in effect that the joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in execution the transaction could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

In the recent case of *Chet Ram* v. *Ram Singh* (2) Lord Shaw in delivering the judgment of their Lordships quotes with approval the third passage in *Sahu Ram Chandra's case* (1) extracted above. There was no contention in that case that the sons were not liable during their father's lifetime for debts contracted by him. The only question in controversy was whether an alienation by a father could be supported on the ground that there was an antecedent debt when the debt was not really antecedent but only antecedent in point of time. Their Lordships held that in order to constitute an antecedent debt to justify an alienation the debt should not be merely antecedent in point of time but it should be antecedent in fact.

A careful examination of these cases shows that there is no warrant for saying that their Lordships intended to alter the law as regards the liability of the son's share for the father's debt. The law has been settled for over a generation as regards

(18) 1 Ind. Cas. 479; 31 A. 176 at p. 196; 6 A. L. J. 263.

* Page of 39 A.—(*Ed.*).

this point. In *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan* (19) it was laid down by the Privy Council that a father's debt could be impeached only on the ground that the debt was illegal or immoral, and the sons could not set aside a sale by the Court in execution of a decree obtained against the father. In *Khalilul Rahman* v. *Gobind Pershad* (11) the learned Judges of the Calcutta High Court stated the law thus :—

"In this case the mortgage-creditor sues, first, a mortgagor and his sons, and, second, the son of a deceased mortgagor, and seeks his remedy against the ancestral property of all members of a joint family. It is certain that he is entitled to a decree against the mortgagor in respect of his own share. It is also clear that the mortgage, so far as it was contracted to pay a debt not illegal or immoral, existing when the mortgage-debt was contracted, is good against the shares of the sons of each mortgagor. No authority need be cited for this. It is also now established that a decree for a personal debt of the father, not illegal or immoral, may be enforced by sale in execution in his lifetime of the entire joint family estate. *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan* (19). This is one of the advances lately made on the older law which made the son's share liable in respect of the pious duty to pay the father's debts, after his natural or civil death."

They quote the following passage from Mayne's Hindu Law, paragraph 283, page 309 of the 4th edition: "But I imagine that no suit could be brought directly against sons, based solely on their liability to pay the debt of their father, until he was either actually or civilly dead, so that the estate had legally vested in the sons," and remark, "Recent decisions in this Court are not quite in accordance with this opinion". So it may be taken to be settled law that the sons' share could be proceeded against in execution of a decree obtained against the father. It follows from that that a Court could pass a decree against the sons' share of the family property. It is now settled that the sons may be bound by proper proceedings taken by the creditor against the father to enforce a money-debt due to him, although the sons are not made parties to the suit. Mayne's Hindu Law, page 413, 8th edition. The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) has been considered in three recent cases by the Madras High Court. In *Vinjanapati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshalulu* (5) the learned Chief Justice and Kumaraswami Sastri, J. distinctly overruled the contention that the sons are not bound to pay the father's debt as long as he is alive. The learned Chief Justice (Sir John Wallis) observed at page 141,* "As it appears to me that the creditor's right to bring the son's shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question and not on any inference from the reason given by their Lordships in settling a conflict in the Indian Courts on another point." Kumaraswami Sastri, J. observes at page 142* :

"The second appeal should be allowed not on the broad question raised by Mr. Parthasarathi Aiyengar as to the non-liability of a son to pay his father's debts during the father's lifetime, a conclusion which according to appellant's Counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), but on the narrower one that a son is not after partition liable to be proceeded against in respect of simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint."

Saha RamChandra's case (1) was considered by the Full Bench in the case reported as *Arumugam Chetty* v. *Muthu Koundan* (20), and by a Division Bench in the case reported as *Kandaswami Gounden* v. *Kuppa Moopan* (9). In the latter case the learned Judges observe at page 423,† "We are bound by these views and must hold that the observations in *Sahu Ram Chandra's case* (1) do not alter the law on the point we are considering and we must follow the rule in the earlier cases. In fact, such a point was not raised at all before the Privy Council. The point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them." *Sahu Ram Chandra's case* (1) was considered by the

(19) 12 M. 142; 16 I. A. 1; 5 Sar P. C. J. 271; 3 Ind. Jur. 91; 4 Ind. Dec. (N. S.) 448.

(20) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

* Page of 41 M.—(*Ed.*).
† Page of 43 M.—(*Ed.*).

Bombay High Court in *Hanmant Kashinath* v. *Ganesh Annaji* (10). After discussing it and the case in *Vinjamapati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (5) the learned Judges observe :—" The judgment thus so far from throwing doubt on the well-established remedies of the creditor in execution impliedly recognises them." In that case a money-decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral property was attached. The sons having applied to raise the attachment on the ground that the money-debt in the decree against their father was tainted with illegality and immorality and that their shares could not be made liable in execution during the lifetime of their father. It was held that the decretal-debt of the father for breach of civil duty as trustee was not Avyavaharika and held further that the shares of the sons in the ancestral property could be attached and sold during the lifetime of the father for the satisfaction of his personal debt not tainted with illegality or immorality". In *Madhu Sudan Das Mohant* v. *Iswari Deyi Debi* (21), Richardson, J., observes at page 349* :

" As it appears to me, the language of their Lordships in *Sahu Ram Chandra's case* (1) shows that they did not intend to alter the law applicable to such a case as the present. Their Lordships' purpose was to dissipate the uncertainties which had gathered round the term 'antecedent debt' in conncetion with voluntary alienations by the father of immoveable family property. The case before their Lordships was that of a mortgage."

Both the learned Judges held that the judgment in that case did not alter the law and that a decree passed against the father personally could be executed against the family property including the shares of the sons. So it is quite clear from all these cases that a creditor who obtains a personal decree against the father could execute the decree against the shares of the sons and that the Court could pass a decree for a personal debt of the father against the sons' shares as well. In *Kandasami Goundan* v. *Kuppu Moopan* (9) Oldfield, J., and Krishnan, J., indicate how this is to be done. At page 424* they observe :

"In the present case, though the plaintiff prayed expressly for a decree under O. XXXIV, r. 6, against the ancestral property, the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is, therefore, entitled to a decree as he asks for under rule 6 against the 1st defendant personally and against the ancestral property of himself and his sons."

It is urged by the appellant that in the case of one document there was an antecedent debt in the case of the other, the debt was incurred to pay off some other debts. Exhibit A does mention that a debt of Rs. 2,000 had been previously incurred. But Exhibit B does not clearly make out that there was a previous debt. It is unnecessary to decide the question whether there were antecedent debts or not as no mortgage-decree is to be given.

The appellant will have a personal decree against the 1st defendant and for any unsatisfied portion thereof after selling the 1st defendant's share against the shares of the defendants Nos. 2 to 5. With this modification of the lower Court's decree the appeals are dismissed.

In the result Appeal No. 176 is dismissed without costs, the appellant has failed on a technical point. The plaintiff in Original Suit No. 40 of 1915 did not contest the validity of the mortgages. In the circumstances the respondents Nos. 6 and 7 are not entitled to their costs in appeal.

Appeal Suit No. 177 of 1920 is allowed only as regards the personal remedy against the 1st defendant and the liability of the son's shares in the family property. Defendant No. 1 will pay the suit amount with interest at 6 per cent. from the date of plaint to the date of realisation together with costs throughout, and defendants Nos. 2 to 5 will pay out of the family assets the portion of the amount of the decree not satisfied out of the 1st defendant's share. Appellant will pay the costs of this appeal. One set to respondents Nos. 6 and 7.

V. N. V.
S. D. *Appeal No. 176 dismissed.*
Appeal No. 177 allowed.

(21) 61 Ind. Cas. 25 ; 48 C. 341 ; 24 C. W. N. 949.

*Page of 48 C.—(*Ed.*)

*Page of 43 M.—(*Ed.*)

TOLA RAM *v.* CHANDU MAL-TOTA RAM.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 122 OF 1922.

August 2, 1922.

Present:—Mr. Justice Broadway.

TOLA RAM AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

THE JOINT HINDU FAMILY SHOP CHANDU MAL-TOTA RAM—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 114, 115—Review, order rejecting—Revision.

An order rejecting an application for review is not open to revision except in the case of an obvious injustice.

Ram Lal v. *Ratan Lal*, 26 A. 572 and *Sewa Dat Pershad* v. *Karm Chand*, 10 Ind. Cas 725; 35 P. W. R. 1911 referred to.

Petition, under section 44 of Act IX of 1919, for revision of an order of the Munsif, First Class, Khanewal, dated the 14th of December 1921, rejecting the application for review of an order of the Munsif, First Class, Khanewal, dated the 3rd March 1922.

Sheikh *Mohammad Iftikhar Ali*, for the Petitioners.

Lala *Anant Ram Khosla*, for the Respondents.

JUDGMENT.—The firm of Seth Prem Chand-Dharam Chand, acting through Seth Baldev Das, filed a suit against Chandu Mal and others carrying on business as a joint Hindu family. The suit first went to the Court of the Munsif at Multan who, after the case had proceeded up to a certain stage, sent it to the District Judge pointing out that the case fell within the jurisdiction of the Munsif at Khanewal. The learned District Judge accordingly, on the 9th February 1921, directed the transfer of the case to the Munsif at Khanewal. That officer on the 11th February 1921 caused notices to be issued to the parties for the 3rd March 1921. The notice to the plaintiff firm was sent to Baldev Das, who, however, had already died and his *Munshi* Asa Nand reported this fact on the back of the summons saying that the other partners were in Bikaner. On the 3rd March 1921, however, the learned Munsif passed an order dismissing the suit in default.

On the 30th May 1921, the sons of Baldev Das filed an application for review of the order of dismissal, dated the 31st March 1921. This application was dismissed on the 14th December 1921. The sons of Baldev Das have now come up to this Court through Mr. Iftikhar Ali under section 44 of Act IX of 1919, and I have heard Mr. Anant Ram Khosla for the respondent.

Mr. Iftikhar Ali contended that, while he was not asking for a revision of the order rejecting the application for review, he desired to have the order dated the 3rd March 1921 set aside as being illegal, and urged that, when that order was set aside, the order, dated the 14th December 1921, would be rendered of no effect. Mr. Anant Ram, however, urged, on the authority of *Sewa Dat Pershad* v. *Karm Chand* (1) and *Ram Lal* v. *Ratan Lal* (2), that an ordre rejecting an application for review was not open to revision.

This view appears to be correct but, nevertheless, I think that this Court would have power to interfere in the case of an obvious injustice. In the present case, however, it will be seen that the petitioners had two courses open to them. Firstly, they could move the Court to set aside the order of dismissal or they could prefer an appeal against that order, and had they adopted the latter course it seems to me that they would have had an excellent case for the extension of the period of limitation.

They, however, chose to adopt neither of those courses but proceeded to apply for a review. It seems to me that when the Legislature has given a right of appeal, which right of appeal has not been taken advantage of, this Court should not interfere on the revision side.

I, therefore, dismiss this petition but, in the circumstances of the case, leave the parties to bear their own costs in this Court.

Z. K.

Petition dismissed.

(1) 10 Ind. Cas. 725 : 35 P. W. R. 1911.
(2) 26 A. 572.

HURI *v.* ROSHAN KHUDABUX.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 46 OF 1917.

August 8, 1921.

Present:—Mr. Kennedy, J. C., Mr. Raymond, A. J. C., and Mr. Kemp, A. J. C.

*Musamma*t HURI *alias* ALIM KHATUN—PLAINTIFF—APPELLANT

versus

ROSHAN KHUDABUX AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Minor—False representation as to age—Innocent representation—Fraudulent representation—Specific Relief Act (I of 1877), s. 41—Suit to set aside contract by minor—Compensation—Restitution—Equity.

By *Full Bench*.—If a minor, representing himself to be of age, enters into a contract and subsequently sues to set it aside, he is not estopped from pleading that he was minor at the time of the contract. (p. 164, col. 1.)

Per *Kennedy, J. C.*—If a minor enters into an agreement by making a false representation as to his age—be the representation fraudulent or innocent—and the property which he has received in consideration of the agreement is in his possession, whether that property is in specie or even funds ear-marked, or otherwise easy of identification, the Court will compel him to restore such property before giving him the relief of setting aside the agreement. Where, however, there are no goods in specie or immoveables or ear-marked or easily identifiable funds in possession of the minor, the Court will not in all cases compel him to make necessarily compensation in part or in whole to the other contracting party. The Court will at least direct the restitution by the minor of such part of the consideration of a void agreement, as may be in his hands. Even in the case of innocent misrepresentation the minor is bound to refund the property over which he has control. (p. 164, cols. 1 & 2.)

Quære.—Whether the Court has power in a proper case to order compensation as distinguished from restitution. (p. 164, col. 2.)

Per *Raymond, A. J. C.*—The word "person" in section 115, Evidence Act, includes a minor. (p. 165, col. 2.)

The principle of estoppel cannot be invoked to defeat the plain provisions of the statutory law or to validate that which the law expressly declares to be void and unenforceable. (p. 165, col 2.)

Estoppel is a rule of evidence and creates no substantive rights. (p. 165, col. 2.)

The law relating to estoppel must be read with and subject to other laws in force, such as those relating to contracts. To allow the principle of estoppel to operate in the case of a minor so as to preclude him from proving his minority at the time of the contract is indirectly an attempt to bind him by a contract that is void. (p. 166, col. 1.)

There is no estoppel against an Act of the Legislature. (p. 166, col. 1.)

To constitute an estoppel it is necessary that the statement or conduct charged should be intentional with the object of inducing the other party to change his position in consequence. (p. 166, col. 2.)

As regards the application of the rule of estoppel to a minor there is no distinction in principle between a minor plaintiff and a minor defendant. (p. 166, col. 2.)

In the case of an innocent representation by a minor the party entering into a contract with him is not entitled to claim compensation if the contract is held to be void owing to minority, and, therefore, set aside by Court, but if the representation is found to be fraudulent and the property which the minor has obtained as a result of his fraud is traceable, then equity may order him, as a condition precedent to being granted relief, to make restitution on the principle that he who seeks equity must do equity. That is to say, if an infant is old and cunning enough to contrive and carry out a fraud, he ought not to be permitted to take advantage of his own fraud and if the property which he has obtained still exists in specie, he may be compelled to restore it, but if he has obtained money which has probably been spent, and there is no possibility of tracing it, and, therefore, of restoring the very thing obtained by the fraud, it would be enforcing a void contract if he were made to repay it. In other words, a distinction must be observed between restitution and repayment. (p. 167, cols. 1 & 2; p. 168, col. 1.)

Per *Kemp, A. J. C.*—The law of estoppel, as found in section 115, Evidence Act, is a provision in a Code of adjective law which regulates the proofs of rights and liabilities existing under the substantive law. No provision in the Evidence Act can operate to create a cause of action where none exists in law. The Court cannot ignore the fact of minority and by applying the law of estoppel bind itself to the real status of any party. (p. 169, col. 2.)

The minor would only be required to restore property which he still retains and not to repay money which has been lent to him and he has spent. To compel him to repay the money he has spent would be to compel him to perform the very obligation the law says is void. (p. 170, col. 2.)

A minor plaintiff praying for relief must perform equity if he seeks equity and the Court may, therefore, under section 41, Specific Relief Act, require him to restore any property in his possession, which he has obtained by his misrepresentation. Such compensation does not extend to moneys received and spent by the minor. (p. 170, col. 2.)

Failure to make such enquiries as an ordinary prudent man would make as to the age of a minor, may, under certain circumstances, be evidence of the fact that the person to whom the misrepresentation was made was not actually deceived. (p. 170, col. 2.)

Appeal against the decree of the Assistant Judge, Larkana.

ORDER OF REFERENCE.

Kennedy, J. C.—In this case *Musammat* Huri executed a sale-deed of certain property

to the respondents. It appears that consideration was paid, at any rate, to a certain extent. But the appellant now sues to set aside the sale on the ground that at the time she executed it she was a minor. It has been held that she was, as a matter of fact, a minor at the time she executed the sale-deed being under the age of 18. It appears also that she stated in the sale-deed that her age was 25. And it is now found, though this finding is perhaps open to challenge, that the vendee did actually believe that she was a major and that this belief was induced by her statements in general and not merely by the statement made in the sale-deed. It is, however, also stated that there was a source of information open to vendees from which they could have easily obtained the knowledge of her real age. The original Trial Court ordered cancellation of the sale-deed and directed the plaintiff to recover the possession of the land, etc. On the appeal to the District Court, the Assistant Judge of Larkana amended the lower Court's decree and awarded the said reliefs on condition that the plaintiff paid to the defendants consideration money paid by them with the interest at 6 per cent.

The case has now come up on appeal here. And the question as to the ultimate effect of a contract made by a minor on the parties thereto is again raised. The respondents have taken cross-objections to the effect that the lower Appellate Court should have held the plaintiff-appellant as estopped from pleading minority and the suit should be altogether dismissed.

The points now at issue are discussed by a Divisional Bench of this Court in the case reported as *Lunidomal Khilcomal* v. *Ghanumal Jamnadas* (1). It would appear that the result of the decision leads to certain difficulties in the disposal of this case. In that case De Souza, A. J. C., held that the doctrine of estoppel cannot be applied to these cases in full vigour, as that would lead to conflict between the substantive law and the law of evidence, and he held in such cases the equitable principle should be applied that a person shall not take advantage of his own fraud. And, therefore, when the minor has by fraudulent misrepresentation induced some person to deliver anything of value as consideration of a contract which proves to be void on account of minority of the other party thereto the minor cannot avoid the contract without compensating the person defrauded. No doubt, if this view of the law is correct it would be open to this Court in this case, if it finds there has been actually mispresentation, to set aside the sale, provided that the appellant compensated the respondents, as it has been decreed by the District Court.

On the other hand, Kincaid, J. C., held that these cases must be disposed of on the principle of estoppel, *i. e.*, that the minor in such a case must be deemed to be a major and he cannot be heard to say that he was at the time of the contract actually a minor. If this view of the law is correct, it would appear that the defendant's purchase must be held good and that no redress can be given to the minor even on full payment of compensation, *i. e.*, the suit must be dismissed *simpliciter* as prayed in the cross-objection.

The authorities appear to be all reviewed and considered in the judgment of De Souza, A. J. C., and it would appear that a considerable conflict of opinion both among the Indian High Courts themselves and between Indian Courts and the English Courts exists as to the principle applicable. It is desirable, I think, that the matter should not now be left in the state of uncertainty in which it had been left by the case of *Lunidomal Khiloomal* v. *Ghanumal Jamnadas* (1). And I think the following questions should be settled definitely:—

(1) In the case stated is it open to the appellant to plead that at the date of sale she was a minor or is she estopped from setting up the minority? And if so, whether any order can be made other than one dismissing the suit.

(2) Whether such an estoppel will operate when the minor is plaintiff only or whether it will also operate when the minor is the defendant?

(3) If the rule of estoppel is not to be applied to minors, whether persons entering into contracts with minors are entitled to claim compensation from the minors if the contract is proved to be void owing to minority and, therefore, set aside by the Court, but such contract was entered into under mispresentation made by the minor that he was a major?

(1) 62 Ind. Cas. 237; 14 S. L. R. 104.

(4) What is the nature of representation made by the minor which would make it equitable for the Court to refuse him relief or grant him relief only on payment of compensation *i.e.*, must such misrepresentation be fraudulent or, on the other hand, is there any correlative duty on the part of persons entering into contracts to make independent enquiries as to the minority of persons contracting with them ?

We, therefore, refer the above points to the decision of Full Bench under r. 3, Chapter 1, Rules of the Court.

Mr. *Rupchand Billaram*, for the Appellant.

Mr. *Tahilram Maniram*, for the Respondents.

OPINION.

Kennedy, J. C.—This case was referred to the Full Bench for the decision of certain points given in order of reference which also contains the facts of the case. The case briefly put is one of a person who was a minor at the time when she executed a sale-deed and she now seeks to regain possession of the property transferred by the sale-deed on the plea that at the time she executed the sale-deed she was a minor. The first point referred is the question whether she is estopped by the provisions of section 115, Evidence Act, from raising the plea of minority. As pointed out in order of reference, the difficulty has arisen in consequence of the various views of Courts on this point. The whole matter is dealt with in the judgment of Dr. De Souza, A. J. C., in the case quoted in *Lunidomal Khiloomal* v. *Ghanumal Jamnadas* (1), where the authorities are fully reviewed. I have much hesitation in differing from the learned Judicial Commissioner and the learned Judges of the Bombay High Court, who held that the principle of estoppel should apply in such cases and I was at one time inclined to hold that the doctrine was correct. On further consideration, however, I am of the opinion it is not. To put shortly the principle is as follows :—

"*A* sues *B* on a contract. *B* says that the contract is void, for *B* was a minor when he entered into the contract. *A* says that at the time he entered into the contract *B* said that he was major and deceived *A* into the belief that he was a major."

The Court then says *B* will not be allowed to prove that he was a minor. That is to say, for the purpose of the litigation *B* must be deemed to have been major. The Court has, therefore, no power to restore the minor to the position where he was before he entered into the agreement even on compensation. It seems to me that this will lead to dangerous consequence. It will open a wide door to the spoliation of minors, even of persons of very tender years. The matter is not one merely between party and party. It concerns the State to protect its future full citizens who are unable to protect themselves and this it has done positively by the provisions of the Contract Law. I very much doubt whether the Legislature intended these consequences and I observe that both the law protecting minors from the effect of agreements and the law of estoppel are drawn from the English law. It is not held in England that the minor is estopped from pleading his minority. It must, therefore, as pointed out by Dr. De Souza in his judgment, be the case that section 115, which is framed to express the English law, does not operate to estop the minor from pleading his minority. It is not apparently the case that the word "person" in the section does not include minor or certified lunatic or other person under a disability to contract owing to imbecility of judgment. But it might be held that such a person could not be held to have "intentionally" caused anything. It must be considered that the intention implied in the word "intentionally" is the intention formed by a person capable of forming a mature judgment *i. e.*, forming an intention with full knowledge of its consequence and this will not be the case in the case of a minor or lunatic. But what I should prefer to rest my opinion on is the sound principle where there is a direct provision of positive statutory law, that positive provision of substantive law cannot be over-ridden by an application of an adjective law. As judicially interpreted, the Contract Act makes contracts entered into by a minor void and the Court should not be compelled to pronounce them valid by the provisions contained in the Evidence Act. It may also be argued that a person who relies upon a contract has to show that he has a contract in his favour, a void agreement is not a

contract. And an agreement entered into by a minor is void, therefore, the other party to such an agreement has not contracted and the basis of his case is gone.

I, therefore, answer the first point referred by answering, that the minor is not estopped from setting up the minority. The question put in the second part of the first point of reference does not arise.

The question put in the second point of reference does not arise, the law of estoppel having no application.

Coming now to references Nos. 3 and 4, it would appear that the order of reference is too wide. At the time of making the reference it was not absolutely clear that there was no finding of fact binding us as to the misrepresentation being fraudulent. It is, however, now agreed that in this particular case fraud is not set up and, therefore, not found. Therefore, in this case the question what the Court should do if there has been fraudulent misrepresentation by the minor does not arise. I do not propose to consider it.

Coming now to the judgment of Dr. De Souza, A. J. C., it is, I apprehend, incorrect to say that the Court will direct restitution by the minor in all cases or set aside the contract only on the minor's making full compensation to the other party, for that, it seems to me, would practically render these contracts, which the law declares to be void, valid or voidable only. It is making the minor liable for a tort arising ultimately from a breach of contract, or a debtor in respect of money which he is not legally bound to pay. This would amount to amending the substantive law and saying that the Court will only set aside bargains enteredinto by minors when they are extremely unfavourable to minors, for it is only in such cases that the minor (if he knew that he had to pay full compensation) will institute or defend an action. This, as I have said before, would lead to the spoliation of the minors and, to all intents and purposes, do away with the protection which the law extends to them. It seems to me where there is any property in possession of the minor which he has received in consideration of the agreement whether that property is in specie or even funds earmarked or otherwise easy of identification, the Court will certainly compel him to restore such property before giving him the relief he asks for. And I apprehend that this will be the case whether the representation by the minor is fraudulent or innocent. Where, however, there are no goods in specie or immoveable's or ear-marked or easily identifiable funds in ear-marked possession of the minor, the Court will not in all cases compel him to make necessarily compensation in part or in whole to the other contracting party. Whether the Court has power in a proper case to order compensation, as distinguished from restitution, is a matter as to which I prefer to reserve my opinion.

I would, therefore, answer the 3rd point referred by saying that the Court will at least direct restitution by the minor of such part of the consideration of a void agreement as may be in his hands.

As regards the 4th point, as pointed out by me, this question does not really arise in this reference. It is not desirable to lay down any academic finding. It is sufficient to say, as above, that even in the case of innocent misrepresentation the minor is bound to refund the property over which he has control.

I do not, moreover, agree with the learned Additional Judicial Commissioner, Dr. De Souza, in the judgment referred to, that the Court must dismiss the suit of the plaintiff-minor seeking to avoid the agreement on the ground of minority, if the plaintiff does not in his plaint tender compensation or restitution. It seems to me that it is open to the Court to give the plaintiff a decree for less than he had demanded if the Court finds him entitled to less relief. I can see no reason why, where in a suit the minor is concerned, as the plaintiff and not as defendant, the Court should not decree restitution to the plaintiff, if necessary on terms.

Applying these principles in the case before us, the facts are that this young Muhammadan girl had for some years an account with one Ratanmal, the account starting when she was at the most 16 years of age. The accounts were never scrutinised and in 1914 she executed a mortgage-deed on very unfavourable terms to Choitharam, the partner of Ratanmal, the consideration being the balance of the account and some nominal cash payment. In this deed she stated her age as 20. Within 11 months she executed the sale-deed in suit, the con-

sideration being Rs. 1,500, namely, the amount of the old mortgage and Rs. 200 nominal payment in cash, which sum apparently was not paid, the balance was a mere transfer of her liability to Choithram from her name to that of the defendants. In this deed she states her age 25 it being actually less than 18. It is found that this misrepresentation was not fraudulent and that the defendants did not try to learn what her real age was, as they might easily have done. The whole transaction reeks of fraud on the part of Ratanmal and Choithram, and the defendants are clearly the tools or accomplices of Ratanmal, who has by this means conceived that he has been able to get his dealings with this young girl put beyond the reach of investigation. No funds reached the hands of plaintiff and there can be no question of restitution by plaintiff.

I would, therefore, set aside the order of the first Appeal Court and restore that of the Court of the first instance with costs throughout.

Raymond, A. J. C.—The first question referred to the Full Bench is " In the case stated is it open to the appellant to plead that at the time of sale she was a minor or is she estopped from setting up the minority ? And if so, whether any order can be made other than one dismissing the suit. "

In answering the above it must be borne in mind that in the first instance no fraud nor any fraudulent representation was alleged by the defendant-respondent as against the appellant in his written statement in the Trial Court. On the pleadings the issue that was raised on the question of estoppel was " Is plaintiff estopped from raising the plea of minority by reason of showing herself as 25 years old in the sale-deed ? "

Section 115, Indian Evidence Act is as follows: " When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." Now, in my opinion, there is no reason for excluding minors from the scope of this section, and restricting its application as was done in the case of *Brohmo Dutt* v. *Dharmo Das Ghose* (2). It is an elementary rule of construction that it is to be assumed that words are used in their popular meaning unless they have acquired a technical meaning and as said in Maxwell's Interpretation of Statutes, " the Legislature must be intended to mean what it has plainly expressed and consequently there is no reason for misconstruction ". In section 118, Indian Evidence Act, it is obvious that the words " all person " include minors and similarly in section 122, Indian Evidence Act, the words "no persons" would apply to minors. I would, therefore, read the word " person " in section 115, Indian Evidence Act, in its natural sense as including a minor. But, on the other hand, I cannot agree with the view expressed in *Dadasahcb Dasrathrao* v. *Bai Nahani* (3), where Beaman, J. remarked " Estoppel is a law of allegation and proof, and a minor, being a person within the contemplation of section 115, and having by direct declaration intentionally caused the plaintiff to believe that he is a major, is precluded absolutely from denying the truth of that assertion, that is to say, he might not plead,—much less prove,—that at the time the conveyance was executed he was in fact not a minor. " If a minor is to be absolutely precluded from proving the real state of things, and hence incapable of pleading, much less proving, that he was a minor at the time the contract was made by which he is sought to be bound, then virtually the principle of estoppel is invoked to defeat the provisions of the statutory law and to validate that which the law expressly declares to be void and unenforceable. Estoppel is a rule of evidence and creates no substantive rights. Now, it is a rule of substantive law, as finally settled by the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose* (4), that under the Indian Contract Act all contracts entered into by minors are void. Can a minor then be held liable by virtue of estoppel in respect of a contract which the Statute

(2) 26 C. 381 ; 3 C. W. N. 468 ; 13 Ind. Dec. (N. S.) 846.
(3) 41 Ind. Cas. 180 ; 41 B. 480 ; 19 Bom. L. R. 561.
(4) 30 C. 539 ; 30 I. A. 114 ; 7 C. W. N. 441 ; 5 Bom. L. R. 421 ; 8 Sar P. C. J. 374 (P. C.).

declares to be void. The law relating to the estoppel must be read with and subject to other laws in force, such as those relating to contract. *Golam Abdin Sarkar* v. *Hem Chandra Mojumdar* (5). And to allow the principle of estoppel to operate in the case of a minor so as to preclude him from proving his minority at the time of the contract is indirectly an attempt to bind him by a contract that is void. As was said by Ameer Ali in the case of *Brohmo Dutt* v. *Dharmo Das Ghose* (2), when the law of contract declared that an infant should not be liable upon a contract or in respect of fraud in connection with a contract he cannot be made liable upon the same contract by means of an estoppel. In other words, there can be no doubt about the general law that the principle of estoppel cannot be invoked to defeat the plain provisions of a Statute, *Sudhir Chunder Sett* v. *Syed Abdulla-ul-Musavi* (6). There is no estoppel against any Act of Parliament or in India against any Act of the Legislature, *Shridhar Balkrishna* v. *Babaji Mula* (7), *Sitarama Chetty* v. *Krishnasami Chetty* (8). In *Dadasaheb Dasratharao* v. *Bai Nahani* (3), Beaman, J. further remarked that " if the law of estoppel be correctly and strictly enforced the Court is not to know that defendant No. 2 was in fact a minor at all. The whole trial must proceed upon the footing of that being true which he represented and caused the plaintiff to believe to be true, *viz.*, that he was a major ". If this argument was pushed to its logical conclusion it will be seen how untenable it is. Suppose, an infant of 10 years of age residing in Bombay made a representation by letter to *A* at Karachi who was not previously acquainted with the infant, and who acted to his prejudice on the strength of the representation made believing the infant to be a major, in the case of any legal action the infant will be absolutely precluded from proving that he was 10 years old at the time that the representation was made, though a representation made by an infant of this age could hardly be deemed " intentional ". For, to constitute an estoppel it is necessary that the statement or conduct charged should be intentional with the object of inducing the other party to change his position in consequence. I am, therefore, unable to concur with the position that whenever a minor makes a representation as to his age, whether innocently or fraudulently, on which a third party acts to his prejudice, the minor is absolutely precluded in all circumstances from alleging or proving his minority. My answer, therefore, to question (1) would be that in the case stated it is open to the appellant to plead that at the time of sale she was a minor, and is not estopped from setting up her minority, and in view of this answer, question (2) " Whether such an estoppel will operate when the minor is plaintiff or whether it will operate also when the minor is defendant " does not arise. I may, however, add that I can conceive no distinction in principle between a minor plaintiff and minor defendant, and if in the case of a contract entered into by a minor, the principle of estoppel is to be applied to him, whether he is the plaintiff or defendant, it would be tantamount to binding him by an agreement which the Legislature has declared to be void and hence is unenforceable. The third question submitted is: "If the rule of estoppel is not to be applied to minors, whether the persons entering into contracts with minors are entitled to claim compensation from the minors if the contract is proved to be void owing to minority and, therefore, set aside by the Court but such contract was entered into under misrepresentation made by the minor that he was a major ? " The misrepresentation must be considered in two-fold aspect, whether it is innocent or fraudulent The present case affords an apt illustration of an innocent representation. The sale-deed, which is sought to be cancelled, describes the appellant as 25 years of age (for, I may mention here that the lower Appellate Court was in error in raising and discussing the question of fraud when it had not been pleaded and in travelling beyond the scope of the issue that was remanded to it for a finding) it may well be that the appellant was herself unaware of her true age, as the class of people to which she belongs often are, and hence her

(5) 32 Ind. Cas. 388 ; 20 C. W. N. 418.
(6) 48 Ind. Cas. 520 ; 22 C. W. N. 804.
(7) 28 Ind Cas. 134 ; 38 B. 709 ; 16 Bom L. R. 586.
(8) 21 Ind. Cas. 24 ; 38 M. 374 ; (1913) M. W. N. 676 ; 25 M. L. J. 264.

representation, assuming that she did make it, *but of which I am not at all certain*, would be quite innocent. Now in the case of an innocent misrepresentation it can hardly be said that justice requires that a minor should be compelled to re-pay money or make restitution in respect of a transaction which as against him the law has declared to be void. In the case of an innocent representation, therefore, particularly like the present one, I am of opinion that the minor cannot be required to make compensation, if the contract is proved to be void owing to minority. But if a fraudulent representation on the part of the minor is proved, different considerations arise. If an infant is old and cunning enough to contrive and carry out a fraud, he ought not to be permitted to take advantage of his own fraud, and equity does give relief against fraud perpetrated by infants. The principle to be adopted in granting equitable relief is set out in the case of *Leslie, Ltd. v. Sheill* (9). At page 618, the following passage in the judgment of Lord Sumner is pertinent to the point under consideration:

"I think that the whole current of decisions down to 1913 . . . . went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant even by means of a fraud. Restitution stopped where repayment began". And at page 626, Lawrence, J. remarked, "Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property, which he has obtained by his fraud, he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud." The case of *Leslie Ltd.* v. *Sheill* (9), from which I have cited the above passage, was a case where the defendant minor fraudulently representing himself as of full age induced the plaintiffs to lend him two sums of £200 each, and in an action to recover the amount of advance, it was held that the cause of action was in substance *excontractu*, that the plea of infancy was a good defence to the action and that the defendant was under no equitable liability to the plaintiff. The law on the subject is also thus stated in Pollock on Contracts, 6th Edition, page 73, "when an infant has induced persons to deal with him by falsely representing himself as of full age he incurs an obligation in equity, which, however, in the case of a contract, is not an obligation to perform the contract, and must be carefully distinguished from it." It is limited to this extent "that an infant is liable to restore any advantage he has obtained by such representation to the person from whom he has obtained it." And this liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take advantage of his own fraud. If, therefore, a contract has been induced by a minor's false representations, the contractual obligation is under no circumstances enforced against him but equity may compel him to restore any benefit received by him. If the property which the minor has obtained still exists in specie, he may be compelled to restore it, but if he has obtained money which has probably been spent, and there is no possibility of tracing it, and, therefore, of restoring the very thing obtained by the fraud, it would be enforcing a void contract if he were made to repay it. In other words, a distinction must be observed between restitution and repayment. My answer, therefore, to question 3 is that, in the case of an innocent representation by a minor the party entering into the contract with him is not entitled to claim compensation if the contract is held to be void owing to minority, and, therefore, set aside by the Court: but if the representation by the minor is found to be fraudulent—and this brings me to question No. 4 which is worded as follows: "What is the nature of representation made by a minor which would make it equitable for the Court to refuse him relief or grant him relief only on payment of compensation *i. e.*, must such representation be fraudulent

(9) (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 206; 58 S. J. 453; 30 T. L. R. 460.

or, on the other hand, is there any correlative duty on the part of persons entering into contracts to make independent enquiries as to the minority of persons contracting with them?" and the property which the minor has obtained as a result of his fraud is traceable, then equity may order him as a condition precedent to being granted relief, to make restitution on the principle that he who seeks equity must do equity. This would then be my answer to the first part of question No. 4. It would also be in consonance with the provisions of section 41, Specific Relief Act, which vests a discretion in a Court on adjudging the cancellation of a document, which it declares to be void, to impose terms on the plaintiff, who has moved it, to make such compensation to the other party as justice may require. It does not appear to me that the second part of question No. 4 needs any consideration in the circumstances of this case.

Kemp, A. J. C.—Plaintiff-appellant sued for cancellation of a deed of sale executed by her in favour of the defendants-respondents for recovery of the property sold with mesne profits on the ground that she was a minor at the date of the sale and received no consideration. Defendants asserted that plaintiff was 25 years of age at the date of the sale and pleaded estoppel, "as she had made the sale on getting her age to be entered as 25 years in the sale-deed."

The facts of the case are as follows: On 26th March 1914, plaintiff executed a deed of mortgage of her property for Rs. 1,300 in favour of Choithram, partner of one Ratanmal, with whom she had a loan account on which Rs. 1,125 were due by her, the consideration was the satisfaction of the amount and the payment to her of the balance in cash. In the recitals to that document her age is given as 20 years. On 24th February 1915, plaintiff executed the sale-deed in suit in favour of the defendant. The consideration is expressed as Rs. 1,500 of which Rs. 1,300 was the amount of the mortgage of 26th March 1914, and for the balance a *chithi* for Rs. 200 was passed. In this sale-deed the plaintiff represents her age as 25. It is to be noted that the purchasers proposed to pay the debt of Rs. 1,300 to the mortgagees by borrowing Rs. 1,000 from them and paying Rs. 300.

The result of these transactions, therefore, was that the minor parted with her land, and under the mortgage with a 10-annas share in the produce for the period between 26th March 1914 and 24th February 1915, in terms of the extinction of the balance of Rs. 1,125 due on the loan account between her and Ratanmal, a payment of Rs. 175 and a written promise to pay Rs. 200 up to the 26th March 1914, the claim against the minor being the moneys lent was unenforceable and that claim was satisfied by the mortgage and sale transactions by which she ultimately lost her land.

We are not told when the money account between Ratanmal began. Moreover, it is not improbable from the connection between the transactions that the purchasers under the deed of sale were *benamidars* for the mortgagees under the mortgage-deed. These facts are important, because the Court is asked in this case to weigh the equities if a decree be passed in plaintiff's favour. I have no hesitation in saying that the defendants have not shown any equities whatever in their favour and if the sale-deed be set aside the direction to that effect should be unconditional and not on terms for repayment of any sum the defendants may claim.

The learned Sub-Judge, Mehar, decreed plaintiff's claim unconditionally. On appeal the learned Assistant Judge, Larkana, holding that the plaintiff has fraudulently misrepresented her age, amended the lower Court's decree by directing that the plaintiff should pay defendants Rs. 1,500 and interest as a condition to her grant of the relief she sought. The plaintiff appealed and the learned Judges of this Court, holding that the terms of the defendants' plea on the issue of estoppel were not wide enough to cover a plea of fraud and that, therefore, fraud which had not been specifically pleaded could not be found, remanded for trial the issue whether plaintiff was estopped by virtue simply of her showing herself as 25 in the sale-deed. The form of the issue was as follows:—

"Is plaintiff estopped from raising the plea of minority by reason of her showing herself as 25 in the sale deed?"

The learned Acting District Judge, Larkana, to whom the issue was remanded for trial held that section 115, Evidence

Act, applied and the plaintiff was estopped by the recital in the deed of sale and because she gave out her age as 25 and led the defendants to act on that misrepresentation and the defendants were not put on any enquiry as to her age. On this finding the appeal came again before my brothers Kennedy, J. C. and Raymond, A. J. C., who have referred certain questions for decision to this Full Bench under R. 3, Chapter 1 of the Rules of the Court. That rule provides: "The Judges may refer any matter or question of law arising in any matter brought before them under this rule to a Full Bench if they are both agreed that the determination of the matter depends upon some question of law." Now, what is the "matter" or the "question of law arising in any matter" brought before the learned Judges? I take it the question of law arose in a concrete form on the existence of a state of facts which negatived fraud. Fraud not having been pleaded was excluded from consideration by the judgment of the Court which remanded the issue for trial. Our discussion is, therefore, limited to points of law arising from findings of fact that there was a misrepresentation by the minor made *bona fide* or without full knowledge or under error and without any intention to defraud. Although it is unnecessary to create an estoppel under section 115, Evidence Act, that there should be a fraudulent misrepresentation [*Sarat Chunder Dey* v. *Gopal Chunder Laha* (10)] still the exclusion of fraud from the discussion renders it beyond the scope of our conclusions to consider what different consequences, if any, arise in the case of an estoppel induced by a fraudulent misrepresentation and one induced by a non-fraudulent misrepresentation so far as the minor's claim to have the deed set aside without conditions is concerned. I, therefore, propose to limit my replies to the questions referred to the case of non-fraudulent misrepresentation. Even here I am, with respect, of opinion that the ambit of the question might with advantage have been limited by a finding as to whether there was even such a misrepresentation as to amount to an estoppel, because, I think, there is a strong suspicion that the defendants, who had before them a mortgage-deed giving plaintiff's age as 20 when less than a year later they accepted her statement as to age in the sale-deed as 25 and one of whom at any rate, *viz.*, Roshan (1st defendant) said in his evidence in a case before the Resident Magistrate, Larkana, that he knew the plaintiff's age when her father died, knew perfectly well that the plaintiff was a minor and disguised this knowledge with the formality of a sale-deed.

Now, there cannot any longer be any question that a minor's contract is absolutely void. The Privy Council decision in *Mohori Bibee* v. *Dharmodas Ghose* (4) to this effect is as much a part of the substantive law of British India as a provision in the Contract Act itself. The law of estoppel as found in section 115, Evidence Act, is a provision in a Code of adjective law which regulates the proof of rights and liabilities existing under the substantive law. I fail to see how any provision in the Evidence Act can operate to create a cause of action where none exists in law. The Court cannot ignore the fact of minority and by applying the law of estoppel bind itself to the real status of any party. With great respect, therefore I am unable to agree with the decisions in *Dada Saheb Dasrathrao* v. *Bai Nahani* (3) and *Wasinda Ram* v. *Sita Ram* (11). Nor do I find anything in the decision of Jenkins, J., in *Dhurmo Dass Ghose* v. *Brahmo Dutt* (12) against this view. I doubt whether first part of the head-note to that report to the effect that the general law of estoppel as enacted by section 115, Evidence Act, does not apply to an infant unless he has practised fraud operating to deceive is justified by the judgment where Jenkins, J., nowhere specifically says that section 115 applies at all. The judgment does not support the contention that estoppel can be pleaded against a minor, but merely states that the plea of infancy will not prevail when the infant is guilty of fraud. If

(10) 19 I. A. 203; 20 C. 296; 6 Sar P. C. J. 224; 10 Ind Dec. (N. S.) 201 (P. C.).

(11) 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920.

(12) 25 C. 616; 2 C. W. N. 330; 13 Ind. Dec. (N. S.) 405.

the protection of infancy is for this reason withdrawn from the minor it is because the Court will not listen to a party, whether a minor or not, who has to plead his own fraud. This is a different principle to that enacted in section 115 of the Evidence Act which does not require a misrepresentation to be fraudulent to raise an estoppel.

Nevertheless, in two later cases, *Golam Abdin Sarkar* v. *Hem Chandra Mojumdar* (5) and *Ram Charan Das* v. *Joy Ram Majhi* ((13), the Calcutta High Court have laid down the rule that section 115, Evidence Act will only apply to a minor practising fraud, but it is to be noted that these two cases are not to be found in the authorised Law Reports. That the real *ratio decidendi* of the Calcutta cases is the principle that a party shall not be heard to plead his own fraud is, I think, clear from the judgment of Jenkins. J., in *Saral Chand Mitter* v. *Mohun Bibi* (14), confirmed by a Bench of three Judges in appeal, when the learned Judges of the Appeal Court held that an infant cannot take advantage of his own fraud and in such a case the protection which the law throws round the infant is taken away. The distinction has been drawn clearly in the case of *Jagar Nath Singh* v. *Lalta Prasad* (15), where Banerji, J. held that the law of estoppel cannot be invoked in aid to validate that which is valid under the law, but that, as the minor could not take any advantage of his own fraud, and for false representation or fraudulent suppression or concealment was answerable in equity after his majority, he ordered refund of the purchase-money on *equitable grounds*.

In the case before us there is no question of fraud. In *Lunidomal Khiloomal* v. *Ghanumal Jamnadas* (1), there was a fraudulent misrepresentation by the minor as to his age and, as he prayed to set aside the mortgage-deed in that case unconditionally, the learned Additional Judicial Commissioner (Dr. De Souza) was of opinion that his suit should be dismissed. Whether the learned Additional Judicial Commissioner would have dismissed the suit had the minor plaintiff offered "to make good his fraudulent representation" as a condition precedent to the relief he prayed for is not clear.

According to the English cases, *Stocks* v. *Wilson* (16) and *Leslie Limited* v. *Sheill* (9), it would seem that the minor would only be required to restore property which he still retains and not to repay money which has been lent to him and he has spent. To compel him to repay the money he has spent would be to compel him to perform the very obligation the law says is void.

I would, therefore, answer the questions :

(1) She may plead she was a minor and is not estopped.

(2) The law of estoppel does not apply to the case.

(3) There being no fraud in this case and no equities in favour of the defendant-respondent, no compensation is awardable. I am of opinion that a minor plaintiff praying, as in this case, for relief must perform equity if he seeks equity and the Court, may, therefore, under section 41, Specific Relief Act (1 of 1877), require him to restore any property in his possession which he has obtained by his misrepresentation. Such compensation does not extend to moneys received and spent by the minor.

(4) The question of fraudulent misrepresentation does not arise in the appeal. Failure to make such enquiries as an ordinary prudent man would make may, under certain circumstances, be evidence that the person to whom the misrepresentation was made was not actually deceived.

S. D. *Order accordingly.*

(13) 16 Ind. Cas. 825 ; 17 C. W. N. 10 ; 16 C. L. J. 185.

(14) 25 C. 371 ; 2 C. W. N. 201 ; 13 Ind. Dec (N. S.) 247.

(15) 1 Ind. Cas. 562 ; 31 A. 21 ; A. W. N. (1908) 267 ; 5 A. L. J. 674.

(16) (1913) 2 K. B. 235 ; 82 L. J. K. B. 598 ; 108 L. T. 834 ; 20 Manson 129 ; 29 T. L. R. 352.

ANWAR *v.* KISHEN SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2176 OF 1921.
February 23, 1922.

Present:—Mr. Justice Broadway.

ANWAR AND OTHERS—DEFENDANTS—APPELLANTS
versus
KISHEN SINGH—PLAINTIFF—RESPONDENT.

Adverse possession—Co-sharers—Alienee from co-sharer.

Where a co-sharer sells a specific portion of a joint holding, which portion is in his possession and possession of which is immediately delivered to the purchaser, the possession of such purchaser is adverse to the other co-sharers from the moment of his entry. (p. 173, col. 1.)

Bhavrao v. *Rakhmin*, 23 B. 137; 12 Ind. Dec. (N. S.) 91 (F. B.), *Mittusami* v. *Rama Krishna*, 12 M. 292; 4 Ind. Dec. (N. S.) 553, *Chint Ram* v. *Bhakhtawar Rikh*, 1 P. L. R. 1902, *Sohandan* v. *Aurang Khan*, 9 Ind. Cas. 540; 23 P. L. R. 1911; 48 P. W. R. 1911, relied upon.

Ram Chand v. *Kirpa Ram*, 4 Ind. Cas. 912; 120 P. R. 1908; 172 P. W. R. 1908; 18 P.L.R. 1909; *Hardit Singh* v. *Gurmukh Singh*, 47 Ind. Cas. 626; 64 P. R. 1918; 58 P. W. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; 20 Bom L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.), *Mallah* v. *Behari*, 28 Ind. Cas. 276; 13 A. L. J. 298, *Faiz-ud-din Khan* v. *Reju Akab*, 28 Ind. Cas. 22; 21 C. L. J. 192, *Har Charan* v. *Binda*, 5 Ind. Cas. 559; 32 A. 389; 7 A. L. J. 298, *Matu* v. *Hirde*, 44 P. R. 1894, *Babu Rai* v. *Nathu*, 32 P. R. 1900, P. L. R. 1900, p. 337, *Jamna* v. *Jhalli*, 55 Ind. Cas 94; 18 A. L. J. 129, *Muthu Krishna Iyangar* v. *Sankaranarayana Iyer*, 25 Ind. Cas. 573; 16 M. L. T. 196; 1 L. W. 699; (1914) M. W. N. 708; 27 M. L. J. 600, *Bhaiji Shamrao* v. *Hajimiya Mahamad Amin*, 15 Ind. Cas. 500; 14 Bom. L. R 314, *Asad Ali* v. *Anand Sarup*, 27 Ind. Cas. 35; 12 A. L. J. 1233, *Tarubai* v. *Venkatrao*, 27 B 43; 4 Bom L. R. 721, *Murajalli Munia Goundan* v. *Ramasami Chetti*, 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W N. 448, referred to.

Second appeal from the decree of the District Judge, Ferozepore, dated the 13th July 1921, reversing that of the Munsif, First Class, Muktsar, District Ferozepore, dated the 9th May 1921.

Sardar *Kharak Singh*, for the Appellants.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—One Hasil was the occupancy tenant of a holding which consisted of 267 *kanals* 15 *marlas* in area. On his death he was succeeded by his three sons, Sohna, Mengha and Sagar, who held the property jointly. It appears that Sohna was in actual possession of 106 *kanals* 14 *marlas* of this joint holding and on the 30th of November 1895 he sold the land so possessed by him to Maluk Singh. In the sale-deed the area was mentioned as being 106 *kanals* 14 *marlas*; the numbers were specified. In 1896 this transfer was mutated and in the course of the mutation proceedings Sohna was recorded as having stated that he had sold his one-third share. The mutation entry was to the effect that Sohna had sold his one-third share consisting of 89 *kanals* 5 *marlas* to Maluk Singh. This state of affairs continued for a considerable period. Maluk Singh died and was succeeded by his son Prem Singh, who on his death was succeeded by Kishen Singh. Mengha and Sagar are also dead and their descendants recently sought to have the holding partitioned. On this Kishen Singh claimed to be the sole owner of the area in his possession, and his claim not having been recognized by the Revenue Authorities, on the 1st of October 1920 he filed a suit against the descendants of Mengha and Sagar aforesaid for a declaration to the effect that he was the sole owner of the occupancy tenancy of 105 *kanals* 8 *marlas* of land. In this suit he alleged that prior to the sale by Sohna to Maluk Singh a private partition had taken place between Sohna and his two brothers. He also contended that in any event his possession and that of his father and grandfather before him had been adverse ever since the 30th of November 1895. The Trial Court found that the private partition set up had not been proved and that, as Sohna had no right to sell the specific numbers, and as the mutation had been sanctioned only *qua* 89 *kanals* 5 *marlas*, adverse possession had not been established. Kishen Singh's suit having been dismissed he appealed to the District Judge, who agreed with the Trial Court on the question of the private partition which had been set up and held that it had not been proved. On the question of adverse possession, however, he took a different view, and holding on the authority of *Bhavrao* v. *Rakhmin* (1) that the possession of Maluk Singh and his successors was adverse from the date of the sale, decreed the plaintiff's suit. The defendants, Anwar and others, have now come up to this Court in second appeal through Mr. Kharak Singh. Mr. Durga Das has appeared for Kishen Singh.

(1) 23 B. 137; 12 Ind. Dec. (N. S.) 91 (F. B.).

ANWER *v.* KISHEN SINGH.

Mr. Kharak Singh has contended that, inasmuch as the possession of one co-sharer in a joint holding must be regarded as the possession of all the co-sharers, the possession of Maluk Singh and his successors was not and could not be adverse, inasmuch as Sohna could only clothe his alienee with the right that he himself possessed. He cited the following rulings:—

(1) *Ram Chand* v. *Kirpa Ram* (2), in which it was held that, as in common holdings the possession of one co-sharer is the possession of all, mere occupation and enjoyment by one to whatever period it may extend does not constitute an adverse possession as against the other co-sharers except under certain definite conditions.

(2) *Hardit Singh* v. *Gurmukh Singh* (3), which lays down the same principle.

(3) *Mallah* v. *Behari* (4), in which the same principle is enunciated and it was held that it lay upon the defendant to prove that he set up an adverse title to the plaintiff's share to the knowledge of the plaintiff for more than 12 years prior to the suit.

To the same effect is another case published in the same volume* at page 22 [*Faizuddin Khan* v. *Reju Akab* (5)].

(4) *Har Charan* v. *Binda* (6), which lays down the same principle as that enunciated in *Ram Chand* v. *Kirpa Ram* (2).

(5) *Matu* v. *Hirde* (7), in which it was held that the mere fact that the profits of a joint holding had been enjoyed by the co-sharers by separate possession did not amount to a partition.

It will be seen, however, that in this case Plowden, J. held that a stranger purchasing a specific land comprised in a joint holding *does not become a sharer in the khata.*

(6) *Babu Rai* v. *Nathu* (8), where it was held that in a joint holding one co-sharer cannot sell specific plots without the consent of the other co-sharers.

(7) *Jamna* v. *Jhalli* (9), where the same principles were enunciated and it was laid down that it is not permissible for one co-sharer who was in separate possession of a part of the joint holding to alienate that part to a third person.

(8) *Muthu Krishna Iyangar* v. *Sankaranarayana Iyer* (10). This is a Madras case, in which it was held that possession which can be referred to a lawful title cannot be adverse and that 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.

In a later decision of the same High Court (Madras) reported as *Abdul Gafur* v. *Ashamath Bibi* (11) and cited by Mr. Durga Das it was held that the entry of an alienee from a co-parcener into the property alienated is adverse to the other co-parceners from the very moment of that entry. This decision expressed approval of and followed *Muttusami* v. *Ramakrishna* (12) and *Bhavrao* v. *Rakhmin* (1) relied on by the learned District Judge. Mr. Durga Das, in supporting the District Judge's conclusions, contended that in a case such as the present the sale by one co-sharer of a specific portion of the joint holding, which portion was in his possession and possession of which was immediately delivered to the purchaser, the possession of such purchaser was adverse from the moment of his entry, and pointed out that this principle, which was laid down in *Bhavrao* v. *Rakhmin* (1), had been accepted and followed by this Court in *Chint Ram* v. *Bhakhtawar Rikh* (13) and *Sohandan* v. *Aurang Khan* (14). *Bhavrao* v. *Rakhmin* (1) had been referred to in *Tarubai* v. *Venkatrao* (15), *Murajalli Munia Goundan* v. *Ramasami Chetti* (16), *Bhaiji Shamrao* v. *Hajimiya*

(2) 4 Ind. Cas. 912; 120 P. R. 1908; 172 P. W. R. 1908; 18 P. L. R. 1909.
(3) 47 Ind. Cas. 626; 64 P. R. 1918; 58 P. W. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).
(4) 28 Ind. Cas. 276; 13 A. L. J. 298.
(5) 28 Ind. Cas. 22; 21 C. L. J. 192.
(6) 5 Ind. Cas. 559; 32 A. 389; 7 A. L. J. 298.
(7) 44 P. R. 1894.
(8) 32 P. R. 1900; P. L. R. 1900, p. 337.

Refers to 28 Ind. Cas. (*Ed.*)

(9) 55 Ind. Cas. 94; 18 A. L. J. 129.
(10) 25 Ind. Cas. 573; 16 M. L. T. 196; 1 L. W. 699; (1914) M. W. N. 708; 27 M. L. J. 600.
(11) 54 Ind. Cas. 385; 11 L. W. 31.
(12) 12 M. 292; 4 Ind. Dec. (N. S.) 553.
(13) 1 P. L. R. 1902.
(14) 9 Ind. Cas. 540; 23 P. L. R. 1911; 48 P. W. R. 1911.
(15) 27 B. 43; 4 Bom. L. R. 721.
(16) 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448.

Mahamad Amin (17) and *Asad Ali* v. *Anand Sarup* (18) and, as far as I have been able to see, has never been disapproved of. In these circumstances it seems to me that the view taken by the learned District Judge is based on authority and that his decision must be maintained.

It was argued that, inasmuch as in the mutation proceedings only the one-third share of Sohna was shown as having been transferred, the fact that specific numbers were entered in the sale-deed must be ignored, but I am unable to see the force of this contention in respect of the point which is before me, namely, whether the actual possession of the alienee was adverse or not. It is clear that Sohna was in possession of an area which exceeded his one-third share. His possession of that area could not be adverse to his co-sharers until he had definitely declared to them his intention of holding on his own behalf, but, as pointed out in *Bhavrao* v. *Rakhmin* (1), this principle does not apply to the alienee of a co-sharer and, as in this present case Maluk Singh obtained possession of the entire area bought by him under the deed of sale, that possession, I think, must be regarded as adverse to the co-sharers from its commencement. I accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(17) 15 Ind. Cas. 500; 14 Bom. L. R. 314.
(18) 27 Ind. Cas. 35; 12 A. L. J. 1233.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 873 OF 1921.
October 5, 1922.
Present:—Mr. Justice Oldfield.
SUDALI MUTHU PILLAI—
PETITIONER—APPELLANT
versus
V. SUDALI MUTHU PILLAI AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 144 — Conditional order— "Case," decision of—Refusal to exercise jurisdiction— Court Fees Act (VII of 1870), Sch. II, Art. 11—Restitution application — Appeal— Court-fee.

A conditional order in appeal declaring that the appeal will be dismissed if a certain amount of Court-fee is not paid within a fixed time;

(*i*) decides a 'case' within the meaning of section 115, Civil Procedure Code, (p. 174, col. 2.)

Sitaramaya v. *Ramappaya*, 39 Ind. Cas. 160; 5 L. W 207, *Arunachalam Chettiar* v. *Arunachalam Chettiar*, 69 Ind. Cas. 966, 43 M. L. J. 218; 16 L. W. 175; (1922) M. W. N. 453; (1922) A. I. R. (M.) 436, *Shanmuka Nadan* v. *Arunachalam Chettiar*, 69 Ind. Cas. 961; 45 M. 194; 14 L. W. 642; (1921) M. W. N. 799; 42 M. L. J. 97; 30 M. L. T. 172; (1922) A. I. R. (M.) 332, *Dodda Sannekappa* v. *Sakravva*, 36 Ind. Cas. 831, relied upon; and

(*ii*) amounts to a refusal to exercise jurisdiction. (p. 174, col. 2,)

Lakshmi Amma v. *Janamajayam Nambiar*, 4 M. L. J. 183 (F. B.), referred to.

Applications in restitution under section 144, Civil Procedure Code, are applications in execution; (p. 175, col 2,)

Somasundaram Pillai v. *Chokkalingam Pillai*, 38 Ind Cas. 806; 40 M. 780; 5 L. W. 267, *Unnamalai Ammal* v. *Muthan*, 42 Ind. Cas. 530; 33 M. L. J. 413 at p. 414; 6 L. W. 359; (1917) M. W. N. 643; 22 M. L. T. 333, *Mullaseri Gopala Menon* v. *Krisheki Kovilaknath Manavikraman*, 13 Ind. Cas. 179; 10 M. L. T. 568; 22 M. L. J. 146, *Kurgodigauda* v. *Ningangauda*, 41 Ind. Cas. 238; 41 B. 625; 19 Bom. L. R. 638, *Madan Mohan Dey* v. *Nogendra Nath Dey*, 39 Ind. Cas. 640; 21 C. W. N. 544, relied upon;

Jiwa Ram v. *Nand Ram*, 66 Ind. Cas. 144; 44 A. 407; 20 A. L. J. 226; (1922) A. I. R. (A.) 223, not followed.

and the Court-fee on appeals from orders disposing of such applications is leviable under Schedule II, Art. 11 of the Court Fees Act. (p 175, col. 2,)

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 Tuticorin, in Appeal Suit No. 46 of 1921, dated the 23rd of November, 1921, preferred against the order of the Court of the District Munsif, Srivaikuntam, in Civil Miscellaneous Petition No. 781 of 1919, in Original Suit No. 97 of 1905, on the file of the Additional District Munsif, Tinnevelly.

Messrs. *K. Rajah Aiyar* and *P. V. Krishnaswami Aiyar*, for the Petitioner.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—In this petition I am asked here to revise the order of the Subordinate Judge of Tuticorin directing the petitioner, appellant before him to pay *ad valorem* fees on the amount at stake in his miscellaneous appeal instead of the fixed fee of eight annas which he had actually paid.

The first question raised before me is whether this is a case in which this Court can interfere in revision with reference to the terms of section 115, Civil Procedure Code. In order to bring the matter with-

in the section I have first to find wether there is a case which has been decided by a Court. The respondent contends that there is no such case, because the lower Court's order does not decide anything at all being merely a conditional order which declares that the petitioner's appeal will be dismissed, if payment is not made within a month. The petitioner, it is urged, should have waited until a month had expired, allowed his appeal to be dismissed and then brought a second appeal against the dismissal in the ordinary course. Authority is against this contention. There are, firstly, cases resembling the present case generally in which this Court has interfered in revision with merely conditional orders containing a declaration that some result will follow in case a specified condition is not complied with. In *Sitaramaya* v. *Ramappaya* (1), *Arunachalam Chettiar* v. *Arunachalam Chettiar* (2), and *Shanmuka Nadan* v. *Arunachalam Chettiar* (3), this Court interfered by way of revision with orders directing the correction of misjoinder of parties or causes of action, failure to comply with which would have been followed by the dismissal of the suit at some later date. And there is further a decision of this Court in *Dodda Sannekappa* v. *Sakravva* (4), which is directly in point. It is urged that the cases relating to misjoinder afford no guidance here, since in them, if the proceedings had ben allowed to go on on a mistaken basis, subtantial expense and trouble would have been wrongly imposed on the party, whereas, here the only result of a refusal to deal with the order before me in revision will be that the petitioner will have to submit to the dismissal of his suit in consequence of his refusal to pay and to file an appeal against that dismissal without being put to any expense in consequence of the continuation of the proceedings. But that distinction takes no account of a more important consideration common to those cases and to this the possibility that in appeal this Court may confirm the lower Court's order and yet may not exercise its discretion to give the petitioner an opportunity to comply with it. The petitioner is entitled to avoid the risk of any such refusal on the part of this Court to exercise its discretion in his favour. Convenience and authority justify a decision that there is before me a case which has beeen decided.

I turn next to another question, whether the requirement of section 115 that the Subordinate Court has failed to exercise a jurisdiction vested in it or has acted in the exercise of its jurisdiction illegally, is fulfilled. Something has been said of the wording of section 12 of the Court Fees Act, under which the decision of the Court in whch the plaint is filed, is final as between the parties to the suit. But that has been explained in *Lakshmi Amma* v. *Janamajayam Nambiar* (5) as not debarring the Appellate Court from dealing with the question as to the category in which the suit is to be placed for the purpose of determining the Court-fee. Generally it is impossible to hold that the order directing the dismissal of an appeal in case the payment is not made, is not a refusal to exercise jurisdiction in that appeal and the fact that such refusal is conditional has already been dealt with in connection with the question whether there is a case which has been decided. Taking this view, I hold that it is open to me to proceed with the present case under section 115, Civil Procedure Code.

To turn to the merits the question is whether this appeal, relating to a claim under section 144, Civil Procedure Code, to restitution, should be valued *ad valorem* under Schedule I, Art. (*b*) of the Court Fees Act or should be valued simply as an appeal. This appeal is not from a decree or order having the force of a decree under Schedule II, Art. 11. The latter provision is applicable, if at all, in virtue of a Notification No. 4344 S. R., dated 6th October, 1893, published in the Gazette of the Government of India, 1893, Part I, page 575, directing that the fee chargeable on appeals from orders under

(1) 39 Ind. Cas. 160; 5 L. W. 207.
(2) 69 Ind. Cas. 966; 43 M. L. J. 218; 16 L. W. 175; (1922) M. W. N. 453; (1922) A. I. R. (M.) 456.
(3) 69 Ind. Cas. 961; 45 M. 194; 14 L. W. 642; (1921) M. W. N. 799; 42 M. L. J. 97; 30 M. L. T. 172; (1922) A. I. R. (M.) 332.
(4) 36 Ind. Cas. 851.
(5) 4 M. L. J. 183 (F. B.).

section 214 (c) of the Code of 1882, then in force, shall be limited to the amounts chargeable under the Article last referred to. Difficulty arises from the reference in the notification to the previous Code and the difference between the wording in that Code and in the Code now in force, the provision relating to restitution, section 144 of the present Code, differing in certain respects from the former section 583. It is common ground that before this change in the law, applications for restitution were in every sense applications in execution covered by section 244. But the respondents contend that applications for restitution are now made, not in excution, but in virtue of a substantive right conferred by the section. If the respondent's contention is well founded, it will, no doubt, be impossible to apply the Government of India Notification or Schedule II, Art. 11 of the Court Fees Act to such an appeal as that before me.

As regards the wording of the present Code I have been referred first to the definition of the decree in section 2 (2) in which section orders under section 47 and order under section 144 are mentioned separately, the inference supported being that under the present Code they are regarded as differing in nature. There is then the difference between the wording of the former section 583 and the present section 144, especially the omission from the latter of any reference to the rules prescribed for regulating proceedings in execution and a very comprehensive description in it of the orders which can be made in restitution proceedings, including those for payment of damages as compensation, which (it is said) are essentially different from those which an Executing Court can ordinarily pass. This argument is, however, supported by reference to only one decision *Jiwa Ram* v. *Nand Ram* (6). On the other hand, we have in favour of the view that proceedings in restitution under the present Code, are to be regarded as proceedings in execution. *Somasundaram Pillai* v. *Chokkalinga Pillai* (7), *Unnamalai Ammal* v. *Muthan* (8), *Mullaseri Gopala Menon* v. *Krisheki Kovilaknath Manavikraman* (9) and *Kurgodigauda* v. *Ningangauda* (10). It is true that in four of these cases the question was raised with reference to limitation and in the remaining case with reference to the application of the doctrine of *res judicata*. But it has not been shown how that is material or why, if applications of this kind are to be regarded as made in execution in these connections, they should not be so regarded as made in execution for the present purpose. There is also one case in which the point now under consideration was raised directly, *Madan Mohan Dey* v. *Nogendra Nath Dey* (11). The conclusion there was that applications in restitution are to be regarded as applications in execution and that on appeals from such orders Court-fee is leviable under Schedule II, Art. 11.

Following the tenor of the decisions of this High Court and the explicit decision of the Calcutta High Court, I allow the Civil Revision Petition, set aside the lower Court's order and direct it to admit the appeal and proceed to dispose of it in accordance with law. The respondent will pay the petitioner's costs in this Court.

Petition allowed.

V. N. V.
S. D.

(6) 66 Ind. Cas. 144; 44 A. 407; 20 A. L. J. 226; (1922) A. I. R. (A.) 223.
(7) 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267.
(8) 42 Ind. Cas. 530; 33 M. L. J. 413 at p. 414; 6 L. W. 359; (1917) M. W. N. 643; 22 M. L. T. 333.
(9) 13 Ind. Cas. 179; 10 M. L. T. 568; 22 M. L. J. 146.
(10) 41 Ind. Cas. 238; 41 B. 625; 19 Bom. L. R. 638.
(11) 39 Ind. Cas. 640; 21 C. W. N. 944.

NIMBA *v.* JANKI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE NO. 23-B OF 1921.

November 4, 1922.

Present:—Mr. Kotval, A. J. C.

NIMBA AND OTHERS—APPLICANTS

versus

Musammat JANKI—NON-APPLICANT.

Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), applicability of—Abatement of appeal—Death taking place before commencement of Act.

The provisions of Act XXVI of 1920 regarding the abatement of appeals are not meant to apply only to cases where the deaths have occurred after the coming into force of that Act, *viz.*, 1st January 1921.

In the Central Provinces there is no hardship in applying the provisions of Act XXVI of 1920 as regards abatement of appeals, to cases of deaths occurring before the date of coming into operation of the said Act as it was published in these Provinces more than three months before the date of its coming into force.

Appeal against an order of abatement in Second Appeal No. 253-B of 1920, dated the 22nd July 1921.

Mr. *Atmaram Bhagwant*, for the Applicants,

Mr. *K. K. Gandhe*, for the Non-Applicant.

ORDER.—The appeal, out of which this application arises, was filed by Nimba on the 9th August 1920. Nimba died on the 20th December 1920 and on the 22nd July 1921, the date fixed for the hearing of the appeal, the appeal was declared to have abated, because no application for substitution of Nimba's legal representatives was made till that date. On the 30th July 1921 the present application to set aside the abatement was made. If the period of limitation for bringing the legal representatives on the record, as originally provided by the Limitation Act, 1908, *viz.*, 6 moths, is applicable in this case, the application to set aside the abatement is within time, but if the period of three months as provided by Act XXVI of 1920 applies, the application is beyond time. I am of opinion that the period of limitation provided by Act XXVI of 1920 governs this case, *vide Arayil Kali Amma* v. *Pelappakkara Manakal* (1). The provision of this Act is not meant to apply only to cases where the deaths have occurred after the 1st January 1921. There is no hardship in applying the shortened period to cases of deaths occurring within less than 6 months before the date of the coming into force of the new Act, as the Act was published in these Provinces on the 10th September 1920, more than 3 months before its coming into force. The result of applying the new period to all applications filed after the Act came into force is only this, that in cases of all deaths occurring within three months before the coming into force of the Act the period would be reduced to 3 months and in those occurring between three months and 6 months before the coming into force of the Act the period would be up to the date of the Act coming into force, *i.e.*, the 1st January 1921. In every one of such cases there would be sufficient notice of the change in the period of limitation.

The application for setting aside the abatement being beyond time we have to see if there is any ground for the application of the provision of section 5 of the Limitation Act. In the affidavit, dated the 21st July 1921, accompanying the application it is said that the applicants came to know that their father had filed the appeal only a week before. The application was not made till the 30th July 1921. They have failed to account for the delay of about 17 days after they came to know of the existence of the appeal. I must, therefore, hold that the application for setting aside the abatement is time-barred.

The application is dismissed with costs.

N. H. *Application dismissed.*

(1) 5 Ind. Cas. 420; 20 M. L. J. 347; 7 M. L. T. 215; (1910) M. W. N. 516; 34 M. 292.

YERUKOLA *v.* YERUKOLA.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL APPEAL NO. 367 OF 1919.

January 12, 1922.

Present.—Sir Walter Schwabe, KT., Chief Justice, Justice Sir William Ayling, KT., Mr. Justice Coutts-Trotter, Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

YERUKOLA *alias* PENTA JOGULU (DEAD), AND OTHERS—PLAINTIFF'S LEGAL REPRESENTATIVES—APPELLANTS

versus

YERUKOLA *alias* PENTA TATAYYA *alias* PURUSHOTTAM AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND 5 TO 8—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 109, 120, 127—Hindu joint family—Partition in status—Subsequent collection by some members of profits and outstandings—Suit for account and delivery of plaintiff's share—Limitation—Cause of action.

By the Full Bench.—Where members of a Hindu co-parcenary have divided in status but have not effected an actual partition by metes and bounds, and some of the members collect thereafter the rents and outstandings due to the family, a suit for account and delivery of his share by a co-sharer plaintiff is governed by Art. 120 of the Limitation Act, or by Art. 89 if the facts establish that the persons who collected acted with the consent, express or implied of the other co sharers so as to constitute them their agents. To such a suit neither Art. 62, 109 or 127 is applicable. (p. 192, col. 2.)

The cause of action for such a suit arises and time begins to run not from the date of the receipt of the profits by the defendants but from the time of demand and refusal or from the time when the defendants asserted a hostile title to the knowledge of the plaintiff. (p. 192, col. 2.)

(Authorities reviewed and discussed.)

Per *Schwabe, C. J.*—If the facts be that the moneys, and rents and profits were received with the consent of all concerned by the various persons in possession pending final settlement by division, then, in the absence of evidence to the contrary, each of such persons should be considered as receiving as agent for himself and his co-owners; he would have authority, express or implied, to receive and would be acting on that authority on behalf of the co-owners and not on his own behalf adversely to them. In such a case a suit for an account against the persons who made the collections would be governed by Art. 89 of the Limitation Act. (p. 184, col. 1.)

Per *Kumaraswami Sastri, J.*—In a suit for partition where a claim is made for an account being taken of the moveable properties, outstandings and collections made by a member in respect of properties in which the parties were once joint but became subsequently separate in status the proper Article to apply is Art. 120 of the Limitation Act. The period of limitation will run from the demand of the share by the plaintiff or the refusal by defendant. The receipt by a co-tenant is not wrongful and, consequently, his possession cannot be wrongful till he refuses to deliver the share of the co-tenant he has received or sets up a hostile title to the knowledge of the co-sharer. (p. 192, col. 2.)

Marian Beeviammal v *Kadir Meera Sahib Taragan*, 29 Ind. Cas. 275, *Sarakki Abdul Rahiman* v. *Mahaidin Pathummal Bwi*, 32 Ind. Cas. 83; 30 M. L. J. 104; 19 M. L. T. 88, followed.

A mere separation in status cannot by itself make possession by one member hostile to the others or by itself amount to an ouster. (p. 190, col. 2.)

Per *Devadoss, J.*—The position of the members of a Hindu joint family after division in status and before division of property by metes and bounds or allocation or collection of outstandings is not the same in all cases. Each case will depend upon the intention and conduct of the members. (p. 199, col. 2; p. 200, col 1.)

The principle applicable to such cases may be put thus:

If *A* collects what belongs to *B*, knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without deduction for expenses, charges, &c., and loss by theft cannot be pleaded in bar of *B*'s claim. *A* has no duty to collect *B*'s money and being a volunteer cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum, if *A* collects the whole without being *B*'s agent implied or express, there is a presumption that he does so for *B*'s use and Art. 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects the others before they are allocated to *A* or *B*, neither *A* nor *B* can be said to collect for the other's use and a suit for account is the proper form of action and Art 62 would not apply. (p. 199, col. 2.)

Appeal against a decree of the District Court, Ganjam, in Original Suit No. 10 of 1918.

This appeal and the memoranda of Cross-Objections coming on for hearing on the 9th, 10th and 11th March 1921, upon perusing the grounds of appeal, the judgment and the decree of the lower Court and the material papers in the case, and upon hearing the arguments of Messrs. *C. S. Venkatachariar* and *H. Suryanarayana*, for the Plaintiff, and of Mr. *C. Sambasiva Rao* for the 7th Respondent, and of Mr. *P. Narayanamurti*, for the 1st to 6th Respondents, and of Mr. *K. Kamanna* for the 1st Respondent, and the case having stood over for consideration till the 22nd March

1921, the Court (Sir John Wallis, C. J., and Oldfield, J.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Plaintiff-appellant, his brothers Dalayya (deceased before suit) and 4th defendant with the other defendants, sons and grandsons of the two last mentioned, until 1905 constituted a joint family. It is not disputed that in that year they separated, appointing arbitrators who, in fact, divided some of the family properties according to the lists, Exhibit A series; but owing to disputes the partition was not completed and in 1917 plaintiff brought this suit for the division of the remaining properties, which during the interval have been enjoyed by one or other of the parties under a tenancy-in-common. The appeal has been argued against two of the substantial provisions in the lower Court's decree and also against its disallowance of various items on their merits and with reference to Limitation. The memorandum of defendants Nos. 1 to 3, 5 to 7 also relates to particular items. That of 8th defendant is not pressed.

Plaintiff objects first to the award under Issue No. 9 of Jyestabhagam or an extra share to Nos. 1 to 3 defendants, as descendants of Dalayya, the eldest member of the joint family. Such an award is not authorised by Hindu Law as administered in this Presidency, *Ranjagamier* v. *Ranjagam Iyyar* (1), *Venkata Reddi* v. *Kuppa Reddi* (2). Nor can we agree that the evidence establishes any custom of sufficiently certain character to be binding on the parties. In fact the lower Court's allowance of 2½ per cent. of the value of the property available for division did not correspond with the evidence of any witness and was merely arbitrary. The provision for Jyestabhagam must, therefore, be omitted from the decree.

Next, the lower Court gave the 4th defendant and his branch credit for the expenditure incurred since the severance of interests in 1905 on the marriages of three of his children and to be incurred on the marriage of a fourth in the future. The texts authorising the making of provision at partition for subsequent marriages are cited in *Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (3). But neither they nor that decision contemplate such provision for the marriages of any but the brothers, who are parties to the division; and *Karuturi Gopalam* v. *Karuturi Venkata Raghavulu* (4) and *Jairam* v. *Nathu* (5) are distinct authorities against the extension of this concession to persons, who are not in the same degree of relationship as those who have been married at the family expense. The decree must, therefore, be modified on this point.

The objections taken by plaintiff and defendants Nos. 1 to 3 and 5 to 7 to the lower Court's findings on the merits of the various items, can be disallowed at once for the reasons given in its judgment except in the cases to be referred to. The first of these, to follow the order of the judgment, is Item No. 2 in Schedule F, paddy due to the family on a bond of 1905. The existence of the debt is not disputed. The evidence that it was collected by Dalayya is hearsay and, if it was not collected, it must in the ordinary course have become barred. It is not plaintiff's case that it did so through the negligence of Dalayya. In these circumstances this item must be disallowed and first to third and fifth to seventh defendants' memorandum must be allowed in respect of it.

The lower Court would but for its finding on limitation have allowed Rs. 725 on account of Item No. 11, F Schedule. It has not noticed that further realization of Rs. 214-9-7 less Rs. 2 expenditure is shown in Exhibit XXVII (a). Rs. 937-9-7 should, therefore, have been shown as available for division under this item.

Item No. 14 of the same Schedule was claimed as representing the amount due from Chelluri Dallappa on Exhibits VI, VII and VIII, two bonds and a promissory-note, dated 1885, 1887 and 1890. The main question is whether this liability was, as

(1) 57 Ind. Cas. 18; 39 M. L. J. 382; 12 L. W. 435.
(2) 47 Ind. Cas. 716; 8 L. W. 400; (1918) M. W. N. 680.
(3) 23 Ind. Cas. 264; 38 M. 556; (1913) M. W. N. 1034; 15 M. L. T. 307; (1914) M. W. N. 282; 25 M. L. J. 644.
(4) 31 Ind. Cas. 574; 40 M. 632; 29 M. L. J. 710.
(5) 31 B. 541; 8 Bom. L. R. 632.

defendants say, discharged before Exhibit Y (1) in 1909 by a payment to plaintiff or is still subsisting and is represented by the whole or part of the debts secured by the mortgages, Exhibits W series, in favour of Dalayya and by the land transferred to him under Exhibit U. The recital in Exhibit Y (1) shows that this debt was unpaid in 1905 and the same recital is the only evidence of its payment to plaintiff, none of the Chelluri family being called and no receipt by plaintiff being in evidence. There is nothing in the shape of vouchers or accounts to show how any debt to Dalayya, which could have been represented by Exhibit Y (1) was incurred; and the very general recital therein that it was the settlement of an account relating to previous promissory-notes and cadjan items for marriage and household expenses, festivals and *kist*, carries the matter no further. That Exhibit Y (1) is registered, although no special reason for its being so has been given, suggests that it was executed for use as evidence against plaintiff shortly after, as Exhibit XI, shows, he had been exerting himself to recover another large debt due to the family. The lower Court was, therefore, justified in treating Exhibit Y (1) as substituted for Exhibits VI, VII and VIII and the subsequent documents, Exhibits U and W series, the connection of which with Exhibit Y (1) is not disputed, as property liable for partition, at least so far as they represent the debt evidenced by Exhibit Y (1). The memorandum of objections on this item must, therefore, be dismissed. The appeal is against the lower Court's conclusion that only Exhibit W series is available as a sets of the family; and, as we cannot follow its statement that plaintiff's claim against the property bought under Exhibit U is time-barred, the appeal must be allowed in respect of it.

As regards the profits for *Fasli* 1317 of a lease, which are part of Item No. 8 Schedule G plaintiff's claim to a share is disputed on the ground that he has not paid his share of the rent. The answer is that he can be debited with it in the account.

As regards the amount of the profits the lower Court's estimate based on the amount of rent is more probable than that supported by defendant's evidence and must be accepted.

As regards Item No. 6 of G Schedule and other items not specifically referred to we agree with the lower Court for the reasons it has given.

As regards the properties of A Schedule lands, the lower Court's decree and judgment are not clear. If they mean that plaintiff received Rs. 288-8-0 for each of the years, that is, it is admitted, wrong, Rs. 288-8-0 being the profits of three years.

As regards limitation, it was not contended that the suit was barred as to lands which before division were joint family property, but as regards money and receipt of profits from the lands held in common the District Judge has held that the suit was governed by Arts. 62 and 109 respectively and the decree has been passed on this basis. For the plaintiff-appellant, it has been contended that as regards these items the suit is governed either by Art. 127 or Art. 120. Art. 127 is for a share of property which is the property of a joint family at the date of suit, and appears to be in terms inapplicable to property which by reason of a division prior to suit has ceased to be the property of a joint family and is held by the members of the family as tenants-in-common. It was so held by one of us in *Kumarappa Chettiar* v. *Saminatha Chettiar* (6), though Sheshagiri Aiyar, J., the other learned Judge reserved his opinion. This ruling appears to be in accordance with the language of the Article and with the decisions of the other High Courts and we see no reason to differ from it.

Assuming that Art. 127 is inapplicable the next question is whether as regards money Art. 62 should be applied, as contended for the respondents, or Art. 120, as contended for the appellants. Art. 62 has been held applicable in *Arunachala Pillai* v. *Ramasamya Pillai* (7), *Tellis* v. *Saldanha* (8) and *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (9); which latter case was followed

(6) 52 Ind. Cas. 470; 42 M. 431; 36 M. L. J. 612; (1919) M. W. N. 328.
(7) 6 M. 402; 2 Ind. Dec. (N. S.) 560.
(8) 10 M. 69; 3 Ind. Dec. (N. S.) 79.
(9) 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 491; 19 M. L. J. 494.

in *Avancha Lakshminarasama* v. *Avancha Lak hamma* (10 and *Segu Chidambaramma* v. *Segu Balayya* (11) and the same view was taken in *Mahomed Wahib* v. *Mahomed Ameer* (12), where the decisions are reviewed by Mookerjee, J., who has also dealt with the rights of tenants-in-common in other respects in *Mahesh Narain* v. *Nowbat Pathak* (13). The cases mentioned were all cases in which money had been recovered by one of several persons interrested therein as tenants-in-common, which appea s to be the position of the members of a Hindu family after partition in respect of money which was left undivided.

On the other hand, Art. 120 has been held applicable in similar casse in *Khadersa Hajee Bappu* v. *Pathan Veettil Ayissa Ummah* (14), *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15), *Sarakhi Abdul Rahiman* v. *Mahaidin Pathummal Bivi* (16) and *Segu Chidamabramma* v. *Segu Balayya* (11) and *Madar Sahib* v. *Kader Moideen Sahib* (17) and *Subba Row* v. *Rama Row* (18) and we have also been refer ed to *Muhammad Habibullah Khan* v. *Safdar Husain Khan* (19) and *Parsotam Rao Tantia* v. *Radha Bai* (20), a decision of Richards, C. J. and Banerjee, J. with which, as at present advised, we are disposed to agree. We find some difficulty in reconciling these decisions. Art. 62 deals with suits for money received by the defendant for the plaintiff's use and applies to the well-known class of suits for money had and received. Now, it has been exp essly held in England that one tenant-in-common cannot maintain an action for money had and received against his co-tenant, his remedy being an action for account to recover what the defendant has receiv d in excess of his share: *Thomas* v. *Thomas* (21). Harrington, J., in *Mahomed Wahib* v. *Mahomed Ameer* (12) has explained this decision as proceeding merely on the ground that in England a suit for an account was prescribed in such cases by the Statute of Anne. But, as explained in Freeman on Co-tenancy, paragraph 274, the object of that Statute was to remedy a defect in the Common Law which left tenants-in-common without a remedy and to give the parties a remedy in the Common Law Courts which till then they had to seek in Equity, the gist of the new statutory action for an account being not that the defendant had received part of the common property but that he had received more than his share, just as in the case of partnership one partner cannot sue another for a share of partnership debt collected by him but only for what may be found due on taking the partnership accounts. See also 2 Blackstone's Commentaries, page 194, where it is observed that "by the Common Law no tenant-in-common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him"

As regards profits, Art. 109, which the District Judge has applied, is in terms inapplicable as it applies to suits "for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant" and it appears to be well settled that a receipt of profits by one of several tenants-in-common is not wrongful. In *Mahomed Riasat Ali* v. *Hasin Banu* (22), where Art. 109 was held applicable, there was no question of receipt of profits by a co-sharer as the widow had established her right to the possession of the whole of her deceased husband's estate for her life. If Art. 109 is inapplicable the only choice is between Art. 120 and Art. 62, and, if Art. 120 be

(10) 21 Ind. Cas. 394; 14 M. L. T. 325; (1913) M. W. N. 836; 25 M. L. J. 531.
(11) 12 Ind. Cas. 704; (1911) 2 M. W. N. 467.
(12) 32 C. 527; 1 C. L. J. 167.
(13) 32 C. 837 at p. 854; 1 C. L. J. 437.
(14) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W N. 447.
(15) 29 Ind. Cas. 275.
(16) 32 Ind. Cas. 83; 30 M. L. J. 104; 19 M. L. T. 88.
(17) 33 Ind. Cas. 705; 39 M. 54.
(18) 32 Ind. Cas. 899; 40 M. 291; 3 L. W. 192; 19 M. L. T. 134; (1916) 1 M W. N. 188; 30 M. L. J. 341.
(19) 7 A. 25; A. W. N. (1884) 219; 4 Ind. Dec. (N. S.) 254.
(20) 28 Ind. Cas. 953; 13 A. L. J. 407; 37 A. 318.
(21) (1850) 5 Ex. 28; 1 L. M. & P. 229; 19 L. J. Ex. 175; 14 Jur. 180; 155 E. R. 13; 82 R. R. 549.
(22) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar P. C. J. 374; Rafique and Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.).

held applicable the question will still arise as to whether the right to sue is to be deemed to accrue on the receipt of the profits or when an account is asked for and refused. In view of the conflict of decisions we have decided to refer to a Full Bench the question, "what are the Articles applicable to the claims for money and mesne profits in the present suit?"

This appeal and Memoranda of Cross Objections came on for further hearing in pursuance of the Order of Reference to a Full Bench, dated the 22nd March 1921.

Mr. *C. S. Venkatachari*, (with him Mr. *H. Surjanarayana*), for the Appellant The question for your Lordships' consideration is "What are the Articles applicable to the claims for money and mesne profits in the present suit" ? Thereare conflicting decisions on the point. It is Art. 127 or 120 that should apply and not Arts. 62 and 109 as the lower Court thought erroneously. Art. 109 obviously has no application, because the receipt of rents by one tenant-in-common can in no way be wrongful as against the other co-tenants. *Watson & Co.* v. *Ramchund Dutt* (23) and *Robert Watson & Co.* v. *Ram Chand Dutt* (24) deal with this position, and it is held there that the proper Article to be applied was Art. 120. Again Art. 62 cannot apply. It provides for suits for money payable by the defendant to the plaintiff for money received by the former to the latter's use. This implies that the defendant received moneys which in fact belonged to the plaintiff. It is impossible to say that any particular debt or rent was received for the benefit of any particular tenant-in-common. The rulings from *Arunachalla Pillai* v. *Ramasamya Pillai* (7), which decide in favour of this Article, are all wrong, and it is so held in *Subba Row* v. *Rama Row* (18). My further submission is that Art. 127 or 120 should apply. Art. 127 provides a period of 12 years for a suit by a member of the joint family who is excluded to enforce a right to share therein. Here joint family property means only property which was once joint [*Amme Raham* v. *Zia Ahmad* (25), *Sultan Begam* v. *Debi Prasad* (26), *Banoo Tewary* v. *Doona Tewary* (27), *Bhaerao* v. *Rakhmin* (28) were then referred to]. If your Lordships are not with me on this point, then I would contend that Art. 120 would apply to the facts of the present case. It is the residuary Article to be applied when there is no other Article applicable. I rely upon these cases for my position. [*Gurudas* v. *Ram Narain Sahu* (29), *Muhammad Habibullah Khan* v. *Safdar Husain Khan* (19), *Khadersa Hajee Bappu* v. *Pathen Veettil Ayissa Ummah* (14), *Robert Watson & Co.* v. *Ram Chand Dutt* (24), *Sarukhi Abdul Rahiman* v. *Mahaidin Puthummal Bivi* (16), *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15), *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (30), *Venkata Reddi* v. *Kuppu Reddi* (31), *Subba Row* v. *Rama Row* (18), *Parsotam Row* v. *Radha Bai* (20).

Mr. *P. Narayanamurthi*, (with him Messrs. *C. Samhasiva Rao* and *K. Kamawna*), for the Respondents. My submission to your Lordships is that in the circumstances of the present case only Art. 62 or 109 will apply. Art. 120 is a residuary Article which should be applied only if there is no other Article that would apply. The family became divided in 1905 only; with regard to some items of family property there was no division. With regard to them we must take it they continued as tenants-in-common. So when one tenant-in-common receives money for which another man is entitled he receives it for the use of the other, So Art. 62 is directly applicable and the starting point of limitation is the date of the receipt of money. This view has been taken repeatedly in this High Court and the other High Courts from a very long time. [Then in support of his

(23) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P C.).
(24) 23 C. 799; 12 Ind. Dec. (N. S.) 531.
(25) 13 A. 282; A. W. N. (1891) 88; 7 Ind Dec. (N. S.) 177 (F. B.).
(26) 30 A. 324; A. W. N. (1908) 126; 5 A. L. J. 352; 4 M. L. T. 38.
(27) 24 C. 309; 12 Ind. Dec. (N. S.) 873.
(28) 23 B. 137; 12 Ind. Dec. (N S.) 91 (F. B).
(29) 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C).
(30) 19 A. 169; A. W. N. (1897) 34; 9 Ind. Dec. (N. S.) 111.
(31) 61 Ind. Cas. 762; 13 L. W. 260.

position Vakil referred to the following cases: *Arunachala Pillai* v. *Ramasamya Pillai* (7), *Tellis* v. *Saldanha* (8), *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (9), *Avancha Lakshminarasamma* v. *Avancha Lakshamma* (10), *Segu Chidambaramma* v. *Segu Balayya* (11), *Mahomed Wahib* v. *Mahomed Ameer* (12), *Thomas* v. *Thomas* (21), *Kundun Lal* v. *Bansidhar* (32), *Thakur Prasad* v. *Pratab* (33), *Masih-ud-din* v. *Imtiazunnisa Bibi* (34).

Further, with regard to profits received from immoveable property Art. 109 applies. In this view I am supported by *Mahomed Riasat Ali* v. *Hasin Banu* (22).

Art. 127 will not apply as contended for by the appellant, for this is not a suit by a member of a joint family who is excluded from participation for his share.

If there is no other Article expressly applicable then only Art. 120 should be applied. It seems that Art. 89 might be made applicable. When one tenant-in-common receives money belonging to another it must be taken that he receives it as agent both on his behalf and on behalf of others. *Banoo Tewary* v. *Doona Tewary* (27) and *Gabu* v. *Zipru* (35) support me in this view.

The cases relied on by my learned friend in support of Art. 120 have no bearing to the present case. So my submission is that Art. 62 or 89 or 109 must apply.

Mr. *C. S. Venkatacha i* in reply.—The only Article of the Limitation Act that will apply to the facts of the present case is 120. I am supported in this view by *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15) and *Sarakhi Abdul Rahiman* v. *Mahaidin Pathummal Bivi* (16).

OPINION.

Schwabe, C. J.—The question referred to the Full Bench is "What are the Articles of the Limitation Act of 1908 applicable to certain money and profits received by two brothers or their representatives under the following circumstances?" Three brothers had been members of an undivided joint Hindu family. In 1905 they separated and appointed arbitrators to divide the ancestral property. Before division was complete, disputes arose and the properties remaining undivided were left in the hands of different members of the family until in 1917 this suit was brought for partition and for account. It is found, and no doubt correctly, that the properties remaining undivided were held during the period in question under a tenancy-in-common. Money was received from debtors in respect of debts which were owned in common, and rents and profits partly in money and partly in kind were received in respect of lands also owned in common. When asked to account and pay for the shares of the other co-owners, the defendants set up the Limitation Act in answer, and there being a conflict of judicial views on the subject, it is for us to decide which Article in the Schedule of the Act applies.

The Articles relied upon by those who claim to keep what they have received were Arts. 62 and 109, whereas plaintiff relied on Art. 127 or 120.

I agree that Arts. 109 and 127 have no application on the grounds stated in the order of reference.

Art. 62 relates to suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. These are technical terms of the Law of England used to cover a great variety of cases in which it can be said that the defendant has received money which really belongs to the plaintiff. There is, however, one case in which that form of action would not lie in England and that is by one tenant-in-common against another who has received more than his share. In fact, in such a case, until the passing of the Statute IV Anne Chapter XVI, section 27, no action would lie at all and by that Statute an action was permitted but only for an account. In *Thomas* v. *Thomas* (21), one of two tenants-in-common of some lands alleged that the other alone has received all the rents arising from those lands and he brought his action for money had and received. It was held by the Court of Exchequer (the judgment of the Court being delivered by that very eminent Judge Park, B.) that no such action lay,

(32) 3 A. 170; 2 Ind. Dec. (N. S.) 89.
(33) 6 A 442; A. W. N. (1884) 154; 4 Ind. Dec. (N. S.) 100.
(34) 27 Ind. Cas. 533; 37 A. 40; 12 A. L. J. 1256.
(35) 59 Ind. Cas. 357; 45 B. 313; 22 Bom. L. R. 1289.

the reason being that the rents remained undivided and no one tenant-in-common was entitled to any specific part, and further the collecting tenant-in-common would be entitled to all just allowances which could not be given in that form of action but could be given in an action for an account which under the Statute was permitted. It is worth observing that in *Mahomed Wahib* v. *Mahomed Ameer* (12), in which it was held that Art. 62 applied to a case somewhat similar but in my view distinguishable from this, Harrington, J. states that the ground of decision in *Thomas* v. *Thomas* (21) was that the plaintiff was bound to pursue his remedy for an account under IV Anne, which in my view is not correct, while Mookerjee, J. states the ground of the decision correctly but gives no effect to it. This, in my judgment, is in itself a sufficient ground for holding that Art. 62 has no application to this case, it being quite impossible to say that any particular debt or rent or profit or any part of either was received for the use of any particular tenant-in-common. Indeed on partition any of the debts or rents or profits might be awarded *in toto* to any of the tenants-in-common and further in this case each of the tenant-in common was collecting part of the common properties or the income from it and no doubt incurring expense in so doing. An action for an account would be appropriate, an action for money had and received would, in my judgment, be quite inappropriate. This view was taken in *Subba Row* v. *Rama Row* (18) in which it was held that Art. 120 and not Art. 62 applied in similar circumstances.

There are a large number of cases in the High Courts of India which decided in favour of Art. 62 as against Art. 120. Some are distinguishable. With those that are not, I do not agree. Of the Madras cases the earliest is *Arunachala Pillai* v. *Ramasamya Pillai* (7) and this case has been treated in later cases as an authority for holding that Art. 62 applied to moneys collected by one of several tenants-in-common. It did not so decide, for, in that case a debt had been collected by one of two brothers, each of whom was entitled to a third of the debt: but this was after partition and the debt had on partition been divided. The collecting brother had no authority or right to collect his brother's one-third share and it was a specific sum which the brother was alone entitled to and for which an action for money had and received would properly lie. *Tellis* v. *Saldanha* (8), *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (9), *Ramalagu Servai* v. *Solai Servai* (36), *Segu Chidambaramma* v. *Segu Balayya* (11), *Avancha Lakshminarasamma* v. *Avancha Lakshamma* (10), *Benode Lal* v. *Preo Nath* (37) purported to follow *Arunachala Pillai* v. *Ramasamya Pillai* (7), but they really extended the doctrine to cases like the present. To the same effect are *Banoo Tewary* v. *Doona Tewary* (27), *Mahomed Wahib* v. *Mahomed Ameer* (12), *Kundun Lal* v. *Bansidhar* (32), *Thakur Prasad* v. *Partab* (33), *Masih-ud-din* v. *Imtiazunnisa Bibi* (34), *Amina Bibi* v. *Najmunnissa Bibi* (38), *Abdul Gaffar* v. *Nur Jahan Begum* (39). On the other hand, the contrary has been held in *Sarakhi Abdul Rahiman* v. *Mahaidin Pathummal Bivi* (16) following *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15), *Subba Row* v. *Rama Row* (18), *Umardraz Ali Khan* v. *Wilayat Ali Khan* (30) *Parsotam Rao Tantia* v. *Radha Bai* (20), *Venkata Reddi* v. *Kuppu Reddi* (31), *Gabu* v. *Zipru* (35). All these cases decided against Art. 62 and, excepting the last, in favour of Art. 120. In *Subba Row* v. *Rama Row* (18) and *Venkata Reddi* v. *Kuppu Reddi* (31) it was held that Art. 62 does not apply to transactions in which the defendant is not under a mere duty to hand over the moneys which he has received but has other duties as well in respect of it. Without going through all these cases in detail, for the reasons stated above, I prefer the latter series of cases in which it was held that Art. 62 did not apply to the former in which it was held that it did.

Holding as I do that Art. 62 has no application, it follows that Art. 120 which applies to suits for which no period of limitation is provided elsewhere in the Schedule would apply unless there is some other Article applicable. In my judgment, Art. 89 has to

(36) 69 Ind. Cas. 274; 41 M. L. J. 274; (1921) M. W. N. 539.
(37) 40 Ind. Cas. 173.
(38) 27 Ind. Cas. 712; 37 A. 233; 13 A. L. J. 255.
(39) 29 Ind. Cas. 347; 37 A. 434; 13 A. L. J. 686.

be taken into account. This Article applies to suits by a principal against his agent for moveable property received by the latter and not accounted for, and the period of limitation is three years from the time when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates. The reference to us is wide enough to cover this question. But it has not been considered in the Court below or by the Referring Bench and I doubt whether we have really sufficient material before us upon which to decide whether it applies or not. I think, however, that it is desirable to say something about it and leave it to the Referring Bench to decide whether, on the facts which are before it, it applies in this case or not. If the facts be that these moneys and rents and profits were received with the consent of all concerned by the various persons in possession pending final settlement by division, I think that in the absence of evidence to the contrary, each of such persons should be considered as receiving as agent for himself and his co-owners; he would have authority, express or implied, to receive and would be acting upon that authority on behalf of the co-owners and not on his own behalf adversely to them. We were referred to two letters, Exhibits III and M (pages 66 and 68 of the documents' paper), and to passages in the judgment of the District Judge which seems to indicate that all the moneys, rents and profits were collected in fact on behalf of the co-owners, and it would, in my view, be very difficult indeed for a person collecting undivided parts of an estate in this manner to say that he was acting otherwise than for the benefit of himself and other co-owners. In *Banoo Tewary* v. *Doona Tewary* (27) on facts similar to these it was held that the defendant was acting on behalf of other co-sharers as their agent in the realisation of their shares, and in a recent case in *Gabu* v. *Zipru* (35), where an elder brother, after partition by agreement with his brothers realised parts of the estate, it was held that he acted as agent and that Art. 89 applied. With this judgment I fully agree. That case differs from this only in that there was in that case an express agreement that the elder brother should realise and divide among the three brothers while in this case there is no such agreement. But such an agreement can be implied as well as express, and, in the absence of evidence to the contrary, in my judgment where one brother collects the assets of an estate of which he and the other brothers are co-owners, the natural inference is that he is acting as agent for himself and the other co-sharers and not on his own account.

I, therefore, answer the question submitted by holding that Arts. 62, 109 and 127 have no application and that Art. 120 applies only if, applying the principles above enunciated, it is held on the facts that Art. 89 does not apply.

The question raised in the order of reference is in these words: "If Art. 120 be held applicable, the question will still arise as to whether the right to sue is to be deemed to accrue on the receipt of the profits or when an account is called for and refused". I am rather doubtful whether that question is referred to the Full Bench for decision, though I am inclined to construe the order of reference as intending so to do. However that may be, I think that, as the matter is before us, it is desirable that we should express our views upon it. The question turns, on words of Art. 120. "Suit for which no period of limitation is provided elsewhere in this schedule, time from which period begins to run is when the right to sue accrues". In my judgment, and I have the support of the authority already referred to, *Marian Beeriammal* v. *Kadir Meera Sahib Taragan* (15), the right to sue arises in this kind of case when there is a demand and refusal for an account, or it could be put as when there is, in fact, an ouster. It really follows from what I have already said that there is no cause of action on the mere receipt by one of the brothers of any particular amount, and it is clear to my mind that the period of limitation cannot arise until cause of action arises. That cause of action does not come into being until, at any rate, there is something done which shows that the man who got the money into his possession is holding it adversely to the plaintiff. If Art. 89 is held to apply, the same result would follow when, during the continuance of the agency the account is demanded and refused, or

when the agency terminates if no such demand is made.

Ayling, J.—I agree.

Coutts-Trotter, J.—I also agree.

Kumaraswami Sastri, J.—This reference arises out of a suit for partition. The plaintiff, the deceased Dalayya (the father of defendants Nos. 1 to 3) and the 4th defendant were brothers. The 5th defendant is the son of the 1st defendant. The 6th and 7th defendants are the sons of the 2nd defendant. The 8th defendant is the son of the 4th defendant who died pending suit leaving the 8th defendant his legal representative. The family was joint and undivided and owned moveable and immoveable properties but in 1905 disputes arose between the members and the plaintiff and his brothers divided some of the family outstandings, moveables and houses. Being unable to effect an amicable partition of the remaining properties they submitted their disputes to arbitration. The arbitrators divided some of the moveable properties and prepared lists showing the division effected by them but did not proceed further. The result was that there was a partial partition and a large portion of the joint properties was not divided. Some of the properties remained in the possession of the plaintiff and some in the possession of the defendants while some lands were still enjoyed by all the parties in common. The case for the plaintiff is that he is entitled to a third share in the joint family properties, moveable and immoveable, shown in the schedules to the plaint. The reliefs which the plaintiff asks for are: (1) a partition by metes and bounds of the immoveable properties specified in the plaint schedules, (2) an account of the moveables yet remaining undivided and the division of them into three equal shares and (3) payment of a specific sum of Rs. 6,150 which he alleges to be due under an arrangement. The account which he asks of the moveables includes, according to the plaintiff, the outstandings due to the family and the amounts collected by the defendants who, according to the plaintiff, have to account for and pay him one-third of the collections. Various defences were raised but it is only necessary to consider the plea of limitation as regards the amounts collected by the defendants. The District Judge in dealing with the question of limitation held that the plaintiff's claim to money is governed by Art. 62 and the claim to mesne profits by Art. 109. As the period of limitation under these Articles is three years from the date when the money or profits were received, the plaintiff's action in respect thereof would be barred if those Articles apply. The plaintiff appealed. His contention was that the case falls either under Art. 127 or Art. 120. In view of the conflict of authorities Wallis, C. J. and Oldfield, J. have referred to a Full Bench the question "What are the Articles applicable to the claims for money and mesne profits in the present suit?"

The facts contained in the pleadings, which I have set out above, show that this is a suit by a member of a Hindu family, some of the properties of which have been actually divided by metes and bounds and the rest of which are in the possession of the various members who have become divided in status, though the properties have not been divided by metes and bounds or apportioned among the various members in proportion to their respective shares. The plaintiff in prayer (*b*) in the plaint wants a decree "directing that an account be taken of moveables yet remaining undivided as per Schedules F, G and H and to direct that the same be divided into three equal shares and that plaintiff be awarded one share thereof from the defendants", and in prayer (*d*) wants a decree "directing defendants to pay costs of this suit with subsequent profits in respect of lands in possession of defendants till date of delivery and interest on the value of moveables from date of plaint to date of realization." I am of opinion that the proper Article to be applied to a claim like the present is Art. 120.

I shall first deal with Art. 109 which provides for a suit to recover the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant and fixes three years as the period of limitation, the starting point being the date on which the profits are received. It seems to me to be clear that the receipt of profits by one of several tenants-in-common cannot be said to be wrongful. The receipt of rents or profits

from tenants or persons in occupation of lands held in common is one of the ordinary modes of enjoyment of property and it cannot be said that a tenant-in-common is not entitled to receive the rents due. In *Watson & Co.* v. *Ramchund Dutt* (23) one co-sharer was in actual occupation of a portion of joint property and was cultivating it as if it was his separate property. Another co-sharer wanted to enter upon the same land and cultivate it for himself. Their Lordships of the Privy Council held that the co-sharer who was cultivating the land was entitled to protect himself by the profitable use of the land in good husbandry and that the other co-sharer was only entitled to receive his shares of the profits. The matter came up again before the High Court as regards the period of limitation which governs such cases, and in *Robert Watson & Co.* v. *Ram Chand Dutt* (24) it was held that the proper Article to be applied was Art. 120. It seems to me that if the cultivation of land by one co-sharer in the ordinary course to the exclusion of the other co-sharers is not wrongful the receipt by him of the rents and profits from persons who are bound to pay the same cannot become wrongful so as to attract the provisions of Art. 109.

It was argued for the appellant that Art. 127 would apply to cases like the present. Art. 127 provides a period of 12 years for a suit by a person excluded from joint family property to enforce a right to share therein, the period starting from the date when the exclusion becomes known to the plaintiff. It is clear from the pleading in the present case that at the date of the suit the members of the family were not members of a joint Hindu family in the ordinary sense of the term. The effect of the partial partition of certain properties and the reference to arbitration as regards the properties undivided as well as the conduct of the parties subsequently show clearly that they had become divided in status. At the date of the suit the plaintiff was not a member of a joint family. It is argued for the appellant that Art. 127 should be read as if the words "joint family property" meant property which at one time was joint family property and ought not to be confined to cases where the property is joint family property at the date of the suit but to property in which the plaintiff has a share and which is not divided by metes and bounds. No authority has been cited in support of such a construction of the plain terms of the Article. I agree with the learned referring Judges that Art. 127 is inapplicable to cases where at the date of the suit the property has ceased to be joint family property and is held by the sharers as tenants-in-common. This view is in accordance with the decisions in *Ammc Raham* v. *Zia Ahmad* (25), *Sultan Begam* v. *Debi Prasad* (26), where it was held by a Full Bench that the word "joint" in Art. 127 has a settled and well-defined meaning and could not be used as descriptive of property held in common, *Banoo Tewary* v. *Doona Tewary* (27), where the learned Judges held that Art. 127 presupposes the existence of some joint family and proceeding upon the hypothesis that there is a joint family it provides for the remedy of a member who is excluded and has no application to cases where there was disruption of the status of jointness and *Bhavrao* v. *Rakhmin* (28). The only other Article that could have any application are Arts. 62 and 120. Before dealing with the applicability of these Articles, I think it is necessary to consider the position in Hindu Law of persons situated like the present plaintiff. Till the decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (40), the current of the authority was that in order to effect a separation of status there must be an agreement, express or implied, between all the co-parceners. *Sudarsanam Maistri* v. *Narasimhulu Maistri* (41) deals with this question at great length. It has, however, now been settled by the decision of their Lordships of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (40) and *Girja Bai* v. *Sadashiv Dhundiraj* (42) that a separation of status is created by a clear and unambiguous expression of

(40) 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345l 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C).

(41) 25 M. 149; 11 M. L. J. 353.

(42) 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207l 31 M. L. J. 455; 43 I. A. 151. (P. C.).

the determination of one member to become divided. On such a declaration the rights and liabilities of the parties are no longer those of a joint Hindu family but have to be determined on the footing that they are not joint tenants but tenants-in-common. This, however, does not by itself change the nature of the suit to be brought for the working out of the rights of such members. The rule of Hindu Law that a member of a joint family cannot, except in certain specific circumstances, sue for a partial partition is applicable to cases where the joint family has been disrupted by severance of status between the various members. It is clear that, if a member of a Hindu family seeks to recover his share of any particular item of property, he will be met with the plea that the suit is bad and that he ought to file a suit for a partition of all the available properties in order that all the equities may be adjusted between the various parties. Each member will have to bring into the hotch-pot the properties in his possession and an account will have to be taken at least from the date when the joint family became divided in status of the rents and profits of the joint family properties received by any member and which are liable to be brought into the hotch-pot. Until the properties are actually divided, it cannot be predicated that any particular item of property would fall to any particular member of the joint family nor can it be said that any particular member of the joint family has a right to insist that each item of property shall be broken up into as many shares as there are sharers and that he should get a particular share of each item. As far as possible, in suits for partition the entire items of family property will be allotted to the members if it can be done without any prejudice to the rights of the others. It may thus well be that where a co-sharer has received the whole or portion of the monies due on a debt due to the family that particular item might be allotted to the member who has so received or in taking accounts it may well be that one co-parcener who lays claim to a particular item has overdrawn his share and is not entitled to any portion of the family property. Under these circumstances if a co-parcener should file a suit for a specific share in an outstanding recovered he will be met with the reply that not only is the suit for that share not maintainable but that the liability of the parties should be adjusted with reference to the taking of the general accounts. It is difficult to see how in such cases Art. 62 can be applied. As pointed out in *Augustinus* v. *Nerinckx* (43) where no specific sum is claimed but an account is asked for, the action is not a mere Common Law action to recover monies had and received and a plaintiff may in a proper case claim an account of the monies due to him. If a separate suit for partition cannot, except in certain specified cases, be brought for each item recovered, I think the only equitable course is to treat the cause of action in respect of a partition of family property as single and indivisible and to apply the same period of limitation as regards moveable property including outstandings collected. A distinction ought to be drawn between cases where the suit is one for a partition of joint family properties, one of the items for partition being the collections made by one or the other of the members of rent or outstandings due to the family, and cases where no account is necessary owing to the only item for division being property held in common. For example, if nothing more appears than that a debt is due to two or more persons jointly and one has collected it, the only question is whether the collection was made, and the shares being ascertained there is no necessity to take an account. On the other hand, in cases where a partition has to be effected of properties that were once held as joint tenants and subsequently as tenants-in-common, the accountability of each member being an essential element in the consideration of the division of shares, it would lead to injustice if in taking accounts each member is allowed to keep whatever be collected three years prior to the suit. In *Subba Row* v. *Rama Row* (18) it is pointed out that Art. 62 of the Limitation Act can only apply to cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff and that it is not applicable to cases where the defendant is asked to account for

(44) (1881) 16 Ch. D 13; 43 L. T. 458; 29 W. R. 225.

monies and where the person collecting is entitled to just allowances. The learned Judges refer to various cases and point out that in cases where Art. 62 was applied there was no question of rendering an account In *Muhammad Habibullah Khan* v. *Safdar Husain Khan* (19) the learned Judges, on the authority of *Gurudas* v. *Ram Narain Sahu* (29), applied Art. 120 and held that Art. 62 of the Limitation Act does not apply to cases of an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust properties and to recover what might be due, as the form in which the suit is brought is not that of an action for money had and received for the plaintiff's use, this form of suit not affording a sufficient relief. In *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (14) it was held by a Full Bench that a suit for partition of property left by a Mohammadan intestate was governed by Art. 120 as regards moveables and Art. 144 as regards immoveables. In *Robert Watson & Co.* v. *Ram Chand Dutt* (24) it was held that a suit by one of several joint tenants to recover compensation for the use and occupation by some of the joint tenants of part of the joint lands to the exclusion of the other joint tenants is governed by Art. 120. *Sarakhi Abdul Rahiman* v. *Mahaidin Pathuammal Bivi* (16) it was held that in a suit for partition by a Mohammadan lady against her co-heirs a claim for the amount of a mortgage-debt due to the deceased intestate collected by the defendants was governed by Art. 120 and not Art. 62. In *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15) a suit was filed by a Mohammadan lady for a share of her husband's property 23 years after her husband's death. She wanted to recover one-eighth share of the sum of Rs. 28,000 which was cash left by her husband. The suit was dismissed by the Subordinate Judge as being barred. On appeal it was held that the proper Article to apply was Art. 120. The learned Judges observe: "The defendants having taken possession o the property as tenants-in-common, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit. The judgment of the Judicial Committee in *Corea* v. *Appuhamy* (44) would show that mere intention on their part is not enough to change the character of that possession". In *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (45) the suit was one for a partition of moveable and immoveable properties. An issue was raised as to whether the suit was barred by limitation as regards the moveable properties and the Subordinate Judge dismissed the suit as regards moveables on the ground that it was filed after the lapse of three years from the date when, according to the plaintiff, the cause of action arose. The High Cout held that no portion of the plaintiff's claim was barred and this view was upheld by the Privy Council. Though their Lordships of the Privy Council did not discuss the particular Article under which a suit for partition would lie, it is clear that they dissented from the view that the three years' rule was applicable to cases of partition where the claim is *inter alia* for the recovery of the plaintiff's share in the bond debts and decrees realised by the defendant. In *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (30) it was held that a suit brought by some of the heirs to recover from the widow of a deceased Mohammadan a sum of money realised by her on account of a mortgage-debt due to the deceased was governed by Art. 120 of the Second Schedule to the Indian Limitation Act. In *Venkata Reddi* v. *Kuppu Reddi* (31) Art. 120 was applied to a suit for partition as regards the income derived from the joint properties. Wallis, C. J. observed: "The next question is with regard to the period of limitation within which the plaintiff is entitled to recover the income from the defendants, in respect of the portions of the properties which ought to have fallen to his share but which were enjoyed by them. It has been contended that the case is governed by Art. 62 which applies to suits, *i. e.*, for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.

(44) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(45) 31 C. 262; 14 M. L. J. 8; 31 I. A. 10; 8 C. W. N. 146; 8 Sar. P. C. J. 575; 6 Bom. L. R. 1 (P. C.).

The scope of this Article in cases like the present has been considered in *Subba Row* v. *Rama Row* (18), where it has been pointed out that it does not apply to transactions in which the defendant is not under a mere duty to hand over the money which he had received but has other duties as well in respect of it." In *Parsotam Rao Tantia* v. *Radha Bai* (20) where property was owned by three brothers as tenants-in-common and the rents were received by one of them as he was the *karta* of the family it was held that a suit by a widow of one of the members to recover from the manager her husband's share of money received by him as manager but owned by all the members of the family in equal shares was not a suit for money had and received but was one to which Art. 120 of the Limitation Act applied. Richards, C. J., and Banerjee, J., observed: " Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in reality a suit for partition of the moveable and immoveable property which had been held by the three brothers and in which the plaintiff's husband had a third share" and held that Art. 120 was applicable to a suit of that kind.

Many of the cases cited by Mr. Narayanamurthi for the respondents are cases where the claim was not for a partition between the members of a joint family which had become separate in status and in which an account was necessary to be taken to establish the liability of the various members to each other. *Mahomed Wahib* v. *Mohamed Ameer* (12) was a suit to recover the share of the plaintiff in respect of his *zurpeshgi* leases, the income of which the defendant had recovered from the lessees. *Ramalagu Servai* v. *Solai Servai* (36) was not a suit for partition but a suit to recover a debt which one member of a Hindu family which had become divided had collected and had not paid over to the other. *Sankunni Menon* v. *Govinda Menon* (46) was a case where the Karnavan of a Malabar Tarwad sued a junior for the recovery of a sum or Tarwad money received by the latter and not paid over to the Karnavan. As no partition is possible in the case of Malabar Tarwads and as the junior member had no right to receive the monies when the Karnavan was in management, the case was a simple one of money received by one member who did not pay it to the rightful person. *Syud Loolf Ali Khan* v. *Afzuloonissa Begum* (47) also related to the recovery of the plaintiff's 10-24th share of a sum of Rs. 2,00,000, paid by a debtor in respect of a debt due to the joint family and the only question was whether the claim was barred by limitation and there was no question of accountability or partition of joint family property. *Webor Ali* v. *Gaddai Behari* (48) was a case where one of two decree-holders, without the knowledge of the other decree-holder, transferred the decree to another person who executed the decree and recovered the money, and it was held that, if there was any cause of action against the transferee, it would be for money had and received and the suit would be governed by Art. 60 of the Limitation Act of 1871 which corresponds to Art. 62 of the present Act. *Binode Lal* v. *Preo Nath* (37) was a case where one of several co-sharers landlords filed a suit for arrears of rent and made the other co-sharers party defendants along with the tenants and prayed that, if the co-sharers had received the rents, the plaintiff should be paid his portion. It was found that the rent was paid by the tenants to the landlord defendants and the question was whether the suit was barred. It was held that Art. 62 applied to such a case, even though the defendants when they received the money did not intend to pay it to the plaintiff. *Thakur Prasad* v. *Pratab* (33) was a suit by one of two divided members of a joint Hindu family for the recovery of a specific amount, being his share of a decree debt due to the family which the defendant had realised. *Dalip Singh* v. *Tulshi Ram* (49) was a case where certain property was purchased by a person in his own name but for the benefit of himself and another. The purchaser refused to account for the profits and a suit was filed against him. It was held that the transaction in that case created the defendant a

(46) 14 Ind. Cas. 254; 37 M. 381; 11 M. L. T. 325; (1912) M. W. N. 516; 22 M. L. J. 485.

(47) 9 B. L. R. 348; 16 W. R. 20 (P. C.).
(48) 2 C. L. R. 165.
(49) A. W. N. (1887) 91.

trustee for the plaintiff and that the money received by the defendant which he was bound to pay over to his *cestuis que trustent* was money received for the use of the *cestuis que trustent* and fell under Art. 62 and not Art. 109 of the Limitation Act. It is unnecessary to consider how far this decision is right, having regard to the finding that the defendant was a trustee for the plaintiff and to the applicability of section 10 of the Limitation Act to such cases. *Abdul Gaffar* v. *Nur Jahan Begum* (39) was a case where a Mohammadan obtained a succession certificate to realise the debts of his deceased uncle and recovered some of them. A suit was filed by the widow of his co-heir for an account of the sums he collected on the authority of the succession certificate and for the recovery of her husband's shares and it was held that Art. 62 was applicable to that case. With all respects, I do not agree with the learned Judges in their attempt to distinguish this case from the decisions in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (31) and *Mahomed Riasat Ali* v. *Hasin Banu* (22); and if it is authority for holding that in suits for partition and account Art. 62 is applicable, I would respectfully dissent from it. I find it difficult to see how a case where one of the heirs takes charge of the cash left by the deceased and does not pay over the share of the others can be distinguished from a case where the heir receives money from a debtor, and in *Mahomed Riasat Ali* v. *Hasin Banu* (22) their Lordships of the Privy Council held that as regards monies taken possession of by one heir the suit was not barred at the expiry of three years. Treating it as a suit for partition, the decision in the same volume at page 318 [*Parsotam Rao Tantia* v. *Radha Bai* (20)], which I have already referred to, would apply. In *Masih-ud-din* v. *Bibi Imtiazunnisa* (34) it was held that where, pending arbitration, in respect of the distribution of the estate of a deceased person amongst his heirs, the estate was by their consent put in charge of a third party who was to realise the assets and pay the debts, a suit by one of the heirs to recover from such person her share was a suit for money had and received and was governed by Art. 62 of the Limitation Act. This decision is in direct conflict with *Subba Rao* v. *Rama Rao* (18). *Lakhpat Pandey* v. *Jang Bahadur Pandey* (50) was a suit to recover the share of a person who was entitled to it out of the monies collected in respect of certain bonds which stood in the name of the defendants or some of them and in which he was a co-sharer. It was held that Art. 62 was applicable. This was not a case where there was any claim for partition or any account was asked for. *Dulabh Vahuji* v. *Bansidhar Rai* (51) was a case where a person who was entitled to a share in a *deshpande vatan* sued to recover monies collected by his co-sharer and it was held that Art. 62 of the Limitation Act applied.

The only case which so far as I can see really touches the question is *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (9) where there was a partial partition between the members of a Hindu family. The greater portion of the properties had been divided and the parties subsequently continued to live separately. It was held that in such a case where the members of the joint family had become divided in status no member had a right on behalf of the others to recover any debt due to the family and where it was so recovered it was not joint family property so as to attract the provisions of Art. 127 of the Limitation Act, the Article applicable in such cases being Art. 62. It was also held that the principle that the possession of one tenant-in-common is to be deemed possession of all and limitation begins to run only after the exclusion of any tenant-in-common or adverse possession is set up, would not apply in the case of joint families after a complete separation in status. The latter proposition can hardly be good law having regard to the decision in *Kumarappa Chettiar* v. *Saminatha Chettiar* (6). It is difficult to see how a mere separation in status could by itself make possession by one member hostile to the otheror by itself amount to ouster. As regards the applicability of Art. 62, the learned Judges do not discuss the cases there referred to where Art. 120 has been applied to claims for partition. Of the cases referred to by the learned Judges, *Arunachala Pillai* v. *Ramasamya Pillai* (7) was not a suit for partition but a suit to recover a specific share of a joint debt collected by the father of the family. *Thakur Prasad* v. *Pratab* (33), which was

(50) 40 Ind. Cas. 37.
(51) 9 B. 111 ; 5 Ind. Dec. (N. S.) 74.

referred to, was also a similar case, and *Banoo Tewary* v. *Doona Tewary* (27) has already been referred to by me. As regards *Tellis* v. *Saldanha* (8) the main question there considered was whether there was a survivorship as between two Native Christian brothers. It was held that as regards the claim for the share of the rents by one of the persons so entitled, Art. 62 applied, and there is hardly any discussion on the subject. *Kundun Lal* v. *Bansidhar* (32), which was relied on, was also not a suit for general partition but only a suit by one of two heirs to recover his share of money which the other heir got from a person in respect of money due to the family.

Reference has been made to the English law that a tenant-in-common cannot maintain an action for money had and received against his co-tenant. Prior to the Statute 4 and 5 Anne Chap. XVI which gave a right of action by a suit for an account by one joint tenant or a tenant-in-common against the other of the rents and profits received in excess of his share there was no remedy at Common Law. In *Thomas* v. *Thomas* (21) it was held that one tenant-in-common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being by an action of account under 4 Anne Chap. XVI, section 27. So far as I can see, this decision has not been dissented from and an action for money had and received would not lie in England. This rule has not been applied to cases between joint tenants in India. The only case where, so far as I can see, the English doctrine was considered is *Mahomed Wahib* v. *Mahomed Ameer* (12) where Harrington, J., in meeting the contention that one tenant-in-common cannot maintain an action for money had and received against his co-tenant, was of opinion that the ground of decision in *Thomas* v. *Thomas* (21) was that the plaintiff was bound to pursue his statutory remedy for account under 4 Anne Chap. XVI, section 27. Mookerjee, J. simply stated that under English law one tenant-in-common cannot recover in an account for money had and received against another who has received more than his share of the profits and referred to the Statute 4 Anne Chap. XVI, section 27 and *Thomas* v. *Thomas* (21). He decided that Art. 62 of the Limitation Act applied. His view evidently was that the rule was not applicable to India. The referring Judges were inclined to the view that this principle is equally applicable to cases arising in India. The decisions in India I have referred to assume that a tenant-in-common has a right of action for money had and received against his co-tenant and it is argued that as Courts in India are not bound by the technical rules and procedure in England but have to administer justice on broad principles of equity and good conscience in cases where there is no statutory enactment relating to a particular subject and as there is nothing against equity or good conscience in one co-sharer suing to recover monies received by another in excess of his share without the necessity of having to take the cumbrous procedure of filing a suit for an account, Courts in India ought not to apply the rule in *Thomas* v. *Thomas* (21) that an action will not lie except for an account as between tenants-in-common. It is unnecessary to determine this wide question, as I am of opinion that in suits for partition between members of a joint and undivided Hindu family who have become subsequently divided in status, the plaintiff being entitled to ask for an account and the relative rights and obligations of the parties being dependent on the taking of the account which would include not only the properties moveable and immoveables in the possession of each member but also the assets of the family including the outstandings and rents and profits collected, the action for partition and the reliefs claimed in it cannot be brought under Art. 62 of the Limitation Act. Even in cases where Art. 62 has been applied, it seems to me that Courts have not given sufficient weight to Art. 89 of the Limitation Act. In cases of receipt by one member of a joint family, though divided in status, of sums due to the family it may well be that the person making the collection is acting on behalf of the other members and it need not necessarily be assumed that because there was a division of status there is necessarily a dishonest intention on the part of the person who is collecting the outstandings to appropriate the money to himself. Very often the receipt of rents is by the person who, when the family was joint and before separation

in status, was the managing member of the family. In cases where the properties of the joint family stand in the name of different members the receipt is very often by the person in whose name the particular item stands. Sometimes when the members of the family live in different places the receipt is by the person who resides at the place where the debtor happens to be or which is most convenient for collection. In all these cases the mere fact that a member declares his intention of separation does not amount to notice to the debtors not to pay. Except in cases where one member of the joint family has given notice to the other member or members not to receive monies due to his co-sharers and has informed the debtors not to pay, I do not think the collection by one of the co-sharers necessarily imports an intention on his part to appropriate the monies collected to his own use and not distribute them among the sharers when demanded. The mere fact that the person receiving the money was not expressly authorised after the division in status to collect it would not affect his liability as agent. I may in this connection refer to the decision of the House of Lords in *Lyell* v. *Kennedy* (52) where it was held that the collection of rents by a person on behalf of another, though unauthorised, may be ratified by the true owner and that such ratification may be expressed by a suit brought for an account within a reasonable time. *Gabu* v. *Zipru* (35) was a case where the learned Judges applied Art. 89. They dissented, and in my view rightly, from the decision in *Banoo Tewary* v. *Doona Tewary* (27), where the learned Judges applied Art. 62 inspite of their holding that the defendant was acting on behalf of his co-sharers as their agent in receiving their share of the monies. It seems to me that in cases where the suit is not one for partition after the taking of an account the question may still arise whether or not the defendant acted as the agent, express or implied, of the plaintiff in making the collections and, if so, it seems to me that the proper Article to apply will be 89 and not 62.

(52) (1889) 14 A. C. 437; 59 L. J. Q. B. 268; 62 L. T. 771 38 W. R. 353.

My answer to the reference is that in a suit for partition where a claim is made for an account being taken of the moveable properties, outstandings and collections made by the various members in respect of properties in which the parties were once joint but who subsequently became separate in status the proper Article to apply is Art. 120. The period of limitation will run from the demand of the share by the plaintiff or refusal by defendant. The receipt by the co-tenant is not wrongful and, consequently, his possession cannot be wrongful till he refuses to deliver the share of the co-tenant he has received or set up a hostile title to the knowledge of the co-sharer. The observations I have referred to in *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15) support this view. I may also refer to *Sarakhi Abdul Rahiman* v. *Mahaadin Pathummal Bivi* (16) where *Marian Beeviammal* v *Kadir Meera Sahib Taragan* (15) is approved of and followed.

Devadoss, J.—The question referred for the opinion of the Full Bench is "What are the Articles applicable to the claims for money and mesne profits in the present suit ?". In order to understand the question fully it is necessary to set out a few facts. The plaintiff, his brothers Dalayya and 4th defendant with sons and grandsons constituted a Hindu joint family till 1905. In that year, the plaintiff and his brothers became separate in interest and divided some of the family properties. Other properties remained undivided owing to disputes between the brothers till 1917, when the plaintiff brought the present suit for the division of the remaining properties. No question of limitation arises as regards the immoveable properties. As regards outstandings and mesne profits the defendants contend that the plaintiff's claim for his share of outstandings realised by them is barred by limitation under Art. 62 and as regards mesne profits his claim is barred under Art. 109 of the Schedule 1 of the Limitation Act of 1908. The plaintiff's contention is that as regards his share of outstandings collected, Art. 120 of the Limitation Act applies and as regards mesne profits Art. 127 applies. It is strongly contended before us by Mr. Narayanamurthi for the respondents that the proper Article to apply

to the case of outstandings collected is Art. 62 of the Limitation Act.

Column 1 of Art. 62 reads thus :— ' for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.' This Article is taken from the well-known form of action for money had and received. What averments are necessary to sustain the action can be seen from the following passage from Bullen on Leake's Precedents of Pleadings, page 257 (6th Edition) : " In actions for money received to the plaintiff's use, the statement of claim should in all cases state clearly, by way of particulars or otherwise, the facts relied on as showing that the money was received to the use of the plaintiff."

I shall first examine the cases relied on by Mr. Narayanamurthi in support of his contention. In *Arunachala Pillai* v. *Ramasamya Pillai* (7) it was held that Art. 62 applied to the plaintiff's claim to a specific debt due to the family said to have been collected by the father after a decree for partition.

In the decree for partition there was a declaration that the plaintiff was entitled to a third share of the specific debt and the plaintiff did not choose to give the debtor notice that he was entitled to a third share of the debt. It was contended that section 10 of the Limitation Act applied to the facts of the case and that the father was a trustee for the sons. The Court held that the father was not a trustee and that the plaintiff's claim was barred under Art. 62 of the Limitation Act. That decision can have no application to the present case, as the facts therein are different from facts herein. In the present case there was no decision by arbitrators or a decree of Court that plaintiff was entitled to a third of any specific item. When Dalayya collected the outstandings due to the family he collected what was due to the whole family and not any amount specifically due to the plaintiff either as a whole or in part. In the next case *Tellis* v. *Saldanha* (8) the Court held co-parcenership and the right of the survivorship, which are incidents peculiar to Hindu Law, have no application to the members of a Christian family, and if one member of such family collects rent to which two or more members of such family are entitled, the claim for a portion of the rent is barred after 3 years under Art. 62 of the Limitation Act. In this case there is no question of agency and the mere fact that two persons are members of a family would not make one the agent of the other. In the case of a joint Hindu family there is a managing member who contracts in his own name for the family and transacts all the affairs of the family and the other members cannot question his acts except by a suit for partition. In the present state of the law a mere unequivocal unilateral declaration of intention would bring about a division of status and that by itself would not take away the power of the managing member to manage the affairs of the family in the interests of all its members till there is an actual division of the property. *Tellis* v. *Saldanha* (8) is not an authority for the contention that Art. 62 should be held to be applicable to the facts of the present case.

The decision in *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (9) is a direct authority for the respondent's contention. The learned Judges observe at page 198*: "After the division in status of the members of a family one of them does not represent the others. He is not bound by the dealings of the others with reference to any property in which a person may be interested. Thus after 1892 no member of the family can recover the debt or any portion of the debt that may be payable to the other members. Their right against any debtor would stand unaffected by any payment to him and if any member as a joint creditor recovers the debt he becomes liable immediately to pay over the share of his joint creditor to him. This also explains the case of *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (45). There, as expressly stated by their Lordships, it was not the case of either party that there was a partial separation or a separation in respect of certain properties only, and the debts, therefore, realised by the brothers were realised on account of their family ; the only question was whether one of the brothers, as whose representative his widow claimed a partition, was separated in interest or continued an unseparated member. There was no claim advanced by any one of the members, to the debts realised, to the exclusion of the other members of the family. In the case before us, as already pointed out, the debts were

* Page of 32 M.—(*Ed.*).

not recovered or realised by the first defendant or any of the other brothers as the representative of the family or on behalf of the other members as well. We are, therefore, of opinion that Art. 62 applies".

It is difficult to see how Art. 62 would apply to such a case. The Article refers only to cases where money was received by defendant for the plaintiff's use. After division in status till outstandings are collected and divided or allocated to the various members of the family each may collect what he could and an account will have to be taken at the time of actual division. In no sense can one member of a family, divided in status, but holding property to be allocated or divided, be said to collect or manage on behalf of any other, unless there is an agreement, implied or express, to that effect or at least conduct indicating an intention to act as agent. Where one or some of the outstandings belonging to a once joint family is collected by a person after the members cease to be joint in status it cannot be predicated that such collection was made for the use of a member other than the person collecting. The matter would be different if any particular outstanding is ear-marked wholly or in part to any member and if another collects that whole or part, it can be presumed that the person collecting it did so for the use of the person to whom it was ear-marked. This, I think, is the principle of the decision in *Arunachala Pillai* v. *Ramasamyi Pillai* (7). It would be overlooking the clear words of Art. 62 and the history of the action for the money had and received, to apply the Article to the facts brought out in evidence in *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (9). The words of the Articles of the Limitation Act have to be construed strictly, and with the greatest possible respect to the learned Judges who decided *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (9) I venture to state that Art. 62 should not have been held applicable to the facts of that case.

The next case relied on by Mr. Narayanamurthi is *Avancha Lakshminarasamma* v. *Avancha Lakshamma* (10), wherein it was held that Art. 62 applied to a case where two brothers jointly advanced a sum of Rs. 1,600 on mortgage and one of the brothers realised the mortgage amount without the knowledge of the other. Mr. Justice Sadasiva Iyer observes at page 326 *: "In *Sankunni Menon* v. *Govinda Menon* (46) Benson, J., and myself held that Art. 120 should be applied only as a last resort in case no other Article is applicable, that, Art. 62, relating to money had and received for the use of the plaintiff was intended to cover all cases where plaintiff claims money which the defendant has received but which *ex æquo et bono* the defendant ought to refund to plaintiff and that the action for money had and received, is a very extensive and beneficial remedy. I think the case of *Segu Chidambaramma* v. *Segu Balayya* (11), decided by Abdur Rahim and Spencer, JJ., established that such a suit as the present will be governed by Art. 62. The suit in that case was by the plaintiff for his share of rent realised by the defendant after partition between the parties." In *Sankunni Menon* v. *Govinda Menon* (46) [also reported in I. L. R. 37 Madras 381, the decision relied on by Sadasiva Aiyar, J.] the junior member of a Malabar Tarwad withheld from the Karnavan certain Tarwad money which he had got hold of, and a suit by the Karnavan was held to be governed by Art. 62. The learned Judges say: "As observed in Blackstone's Commentaries, Volume III, page 162 an action lies 'When one has had and received money belonging to another, without any valuable consideration given on the Receiver's part: for the law construes *this to be money had and received for the use of the owner only*; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund,'" Evidently the learned Judges have overlooked the basis of the action for money had and received that defendant has collected or is in possession of money that rightfully belongs to the plaintiff and to which the defendant is not entitled and that

* Page of 14 M. L. T.—(*Ed.*).

the circumstances in evidence justify the inference that the defendant collected it or is in possession of it for the plaintiff's use. It is not necessary to examine in detail the case of *Ramalagu Servai* v. *Solai Servai* (36) which simply follows *Arunachala Pillai* v. *Ramasamya Pillai* (7) and *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (9). In *Banoo Tewary* v. *Doona Tewary* (27) a Bench of the Calcutta High Court held that a suit by some members of a joint Hindu family who had separated against the other members of the family who collected the family outstandings was governed by Art. 62. The plaintiffs contended that Art. 127 applied and the defendant contended that Art. 62 applied. The learned Judges held that Art. 127 could not apply as it presupposed " the existence of a joint family, and proceeding upon the hypothesis that there is a joint family it provides that when any member of such joint family is excluded from the enjoyment of the joint property or any portion thereof, the period of limitation shall run from the date when the exclusion comes to his knowledge. But when there has been a disruption of the status of jointness, it is difficult to conceive that it could have been the intention of the Legislature that the same provision should apply. The case of the plaintiffs is, that everything was divided, the family became separate, and only those debts were left undivided which were not ripe for realization. They were to be divided, of course, when they were realized. In such a state of circumstances it does not appear to us that Art. 127 would apply." They held that the proper Article to apply was 62. But with great respect to the learned Judges it is difficult to understand what follows after the passage quoted above, *viz.*, " The defendant was acting on behalf of the other co-sharers merely as their agent in the realization of their shares in these moneys, and we think, therefore, that the case is subject to 3 years' limitation, and that the claim of the plaintiffs, so far as items Nos. 1, 2, 3, 4 and 6 are concerned, is barred . , . . as they were realised more than 3 years before the institution of the suit." If the defendants acted as agents of the plaintiffs and other sharers the proper Article to apply was 89. From the report of the case it does not appear that plaintiff sought to bring his case under Art. 89 or 120 of the Limitation Act.

The facts of the case in *Mahomed Wahib* v. *Mahomed Ameer* (12) are that *B* received from *C* money due on two deeds of mortgage. *A* who was entitled to a share of the money instituted a suit for recovering his share from *B* more than 3 years after the receipt of the money by *B*. Held that the money was received by *B* for *A's* use and that, therefore, the suit was governed by Art. 62 and not by Art. 120. The lower Courts found that the money was not received for plaintiff's use and following *Nund Lall Bose* v. *Meer Aboo Mahomed* (53) held that Art. 62 did not apply. The learned Judges dissented from the view expressed in *Nund Lall Bose* v. *Meer Aboo Mahomed* (53), quoted with approval the passage from Blackstone's Commentaries already extracted and decided that the money was received for plaintiff's use because the defendant unjustly detained it for his own benefit.

Mr. Justice Harrington refers to the case of *Thomas* v. *Thomas* (21) and says: " That case lays down that one tenant-in-common of real property cannot maintain an action for money had and received against his co-tenant. But the ground of that decision was that the plaintiff was bound to pursue his statutory remedy for account under 4 Anne, Chapter XVI, section 27. So it does not affect the present case." With the greatest respect I may observe that the case of *Thomas* v. *Thomas* (21) has not been correctly understood by the learned Judge. By the Common Law, a tenant-in-common could not bring an action against his companion for money had and received. Parke Baron in delivering judgment in *Thomas* v. *Thomas* (21) said: " It is expressly laid down that no action of account lay by the Common Law by one tenant-in-common against his companion for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them. Now, this want of remedy by the Common Law was provided for by the Statute 4 Anne, Chapter XVI, section 27, which enables one tenant-in-common to maintain an action of account against the other as bailiff for receiving more than his due share or proportion, in which case, however, he is entitled to all the rights

(53) 5 C. 597; 5 C. L. R. 45; 2 Ind. Dec. (N. S.) 988.

and indemnities of a Reciever, and consequently would be able to show that the money had been lost without his fault ; whereas, in an action for money received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the Statute of Anne only gives an action of account, in which the Receiver would be entitled to all just allowances ; and, if so, that this action for money had and received will not lie."

In an action for money had and received the defendant is not entitled to deduct the cost of collections, Court expenses and other charges incidental to collection. Can it be contended here that the plaintiff is absolutely entitled to a third of the amount collected without any deduction for expenses incurred in collecting it ? It is obvious the English action for money had and received could not apply to a case like the present. The Statute of Anne gave a new remedy not available under the Common Law and not, as thought by Harrington, J., that the Statute restricted the remedy available under the Common Law.

In *Kundun Lal* v. *Bansidhar* (32) a Bench of the Allahabad High Court held that a claim by one heir of a deceased person against another for a share of the money realised by the latter was barred under Art. 62, " the suit being for money payable by defendant to the plaintiff for money received by the defendant for plaintiff's use. The receipt by the defendant was in law a receipt to the use of the plaintiff, to whom the sum in deposit rightfully belonged." If the said sum in deposit or any portion of it was ear-marked for the plaintiff, the decision would be in accord with *Arunachala Pillai* v. *Ramasamya Pillai* (7). The learned Judges who decided *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (30) observe . "We should have followed it [referring to *Kundan Lal* v. *Bansidhar* (32)] had it not been for the ruling of the Privy Council in the case of *Mahomed Riasat Ali* v. *Hasin Banu* (22). In that case the plaintiff as the widow of the deceased owner claimed, among other properties, certain cash and deposit money received and appropriated by her husband's brother, but their Lordships held that for a suit of this description there was no Article in the Schedule which was clearly applicable, and, therefore, Art. 120 governed the case." The ruling in *Amina Bibi* v. *Najmunnissa Bibi* (38) that Art. 62 applied to the case of some heirs of a deceased Muhammadan suing other heirs for their shares of a mortgage amount collected by the latter was upon the peculiar facts of the case. "The plaintiff's right to a one-fourth share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants, who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her one-fourth share in the amount recovered from the judgment debtor after deduction of costs. When the amount of the decretal debt was set off in part against the amount of the defendants' bid at the auction, this was done as a matter of convenience, and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had then with defendants Nos. 4 to 6 recovered the amount due under the decree, and we have no hesitation, on the facts of the suit before us, in holding that Art. 62 applies. The money was received by the defendants for the plaintiff's use. The decision in *Mahomed Wahib* v. *Mahomed Ameer* (12) supports us." There is a distinct finding in this case that defendants undertook to pay to the plaintiff one-fourth share of the amount recovered and this ruling can have no application to the case before us. In *Abdul Gaffar* v. *Nur Jahan Begum* (39) the defendant recovered money belonging to his deceased uncle and the suit by the widow of the defendant s brother, who died subsequent to the uncle's death, was held barred under Art. 62. The defendant collected money, half of which belonged to his brother and it may be said he did so for his brother. If he denied the right of the brother to the money or set up a right in himself, it cannot be said that he collected the money for the use of his brother. In *Dulabh Vahuji* v. *Bansidhar Rai* (51) there was a declaratory decree of plaintiff's title and his suit against his co-sharer in a *deshpande vatan*, who was bound by the decree to recover arrears, was held to be a suit for money had and received and was governed by Art. 62. In this case also the plaintiff's right to a share of the specific debt was undisputed and on the

evidence the collection was held to be for the use of the brother.

I shall now deal with the cases in which Art. 120 of the Limitation Act has been held to be the proper Article applicable to the cases of collection of outstandings or management of property by one interested in the outstandings or property along with others. In *Persotam Rao* v. *Radha Bai* (20) the facts were:—Three brothers who had been living with their father as a joint Hindu family obtained under the Will of their father, in whose hands it was separate property, a considerable amount of moveable and immoveable property. The property so bequeathed was divided by the Will into three lots; but the legatees still continued to live as a joint Hindu family and the property was managed for a series of years by one member of the family acting as if he were the *karta* of a joint Hindu family. Richards, C. J. and Banerji, J. observe at page 322*: "We have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immoveable property and to have invested and dealt with their money making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures, he still received it in his capacity of manager. When we speak of a manager we do not mean the managing member of a joint Hindu family, but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by Art. 120." It is quite clear from the judgment that the manager who managed the affairs of the family did so for the benefit of not any particular member but of the whole family. It would be most inequitable, if after collection, the manager is allowed to say that he collected it for *A*'s or *B*'s use and a claim by *A* or *B* for his share should be brought within three years a ter collection. If the manager acted as the agent of the others Art. 89 wou d apply, if not Art. 120, as there is no other Art cle specifically intend ed to cover such a case. In *Subba Row* v. *Rama Row* (18) the facts were: The plaintiff and the defendant were co-sharers in a *jagir* of which the latter was appointed by the Government as manager. The former sued the latter in a District Munsif's Court for his share of the net income due for the year 1912, but the plaint was returned for presentation to the Court having jurisdiction. The plaintiff did not represent the plaint in any Court but instituted the present suit in 1913 in the District Court for an account and recovery of his share of income due for the years 1905 to 1907. The Court held that the suit was one for an account which was governed by Art. 120 and not Art. 62. Srinivasa Ayyangar, J. observes at page 295*: "The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference. . . . . The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The Article of limitation governing the suit is not, therefore, Art. 62." If the plaintiff was entitled to any particular sum or any portion thereof the principle of the decision in *Arunachala Pillai* v. *Ramasamya Pillai* (7) would be applicable. As observed by the learned Judge, the plaintiff was not entitled to any particular sum and, therefore, Art. 62 could not apply to the case. In *Khadersa Hajee Bappu* v *Puthen Veetil Ayissa Ummah* (14) it was held that "in the case of a Muhammadan dying intestate the estate is at once vested in the heirs as tenants-in-common and there is no one charged by law with its distribution. . . . . We think the answer to the question referred must be that Art. 144 is applicable when the property is immoveable and Art. 120 when it is moveable property." In *Madar Sahib* v. *Kader Moideen Sahib* (17) the plaintiffs who were co-owners of the suit house with the defendants sued for possession of their half share of the house after partition and for recovery of arrears of rent and rent subsequent to the suit. Both the lower Courts decreed partition and possessions of a moiety of the house and rent for six years before suit under Art. 120 of the Limitation Act. The defendants bought the undivided moiety of the house from the father of the plaintiffs Nos. 1 to 7 and later

* Page of 37 A.—(*Ed.*)

* Page of 40 M.—(*Ed.*)

in the same year executed a lease to him in respect of the other moiety for a period of three years. The lease expired in 1899 and since that time the defendants have been in possession of the whole house without executing any fresh lease to the plaintiffs or paying them rent. The learned Judges observe at page 56*: "The decision of the question whether Art. 110, 115 or 120 is to be applied to this case depends, in our opinion, on the answer to the question whether the relationship between the parties after the expiry of the lease in 1899 was based on a contract, express or implied. Arts. 110 and 115 both presuppose the existence of such a contract. If the suit is in reality a suit for rent or for damages for use and occupation then Arts. 110 or 115 may apply, but if not then the remaining Art. 120 would be properly applied..... The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ltd.* v. *Ram Chand Dutt* (24) was, in our opinion, rightly applied to the case notwithstanding the difference in the facts which has been referred to above." The facts of the case in *Sarakhi Abdul Rahiman* v. *Mahaidin Pathummal Bivi* (16) were: "One of the two suits was brought by two sisters against their two step-brothers and their mother for partition of the property of their father (including the accretions to the said properties) and the other suit was by the mother of the plaintiffs in the first suit against her said step-sons (the same defendants Nos. 1 and 2) for her share. The father died in February 1898 and these suits were brought in July 1911." Sadasiva Aiyar and Napier, JJ. held that Art. 120 governed the claim as regards moveables. Sankaran Nair and Oldfield, JJ. decided in *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (15) that the heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred unless and until the other heirs set up an adverse right to the knowledge of that heir and that Art. 120 applied to the case. " The defendants having taken possession of the property as *tenants-in-common* they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to say that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of the suit." If I may say so Art. 120 has been rightly held to govern the case. It was held in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (30) that a suit, brought by the other heir to recover from the widow of a deceased Muhammadan a sum of money said to have been realised by her on account of a mortgage-debt due to her deceased husband was governed by Art. 120 of the Limitation Act. In *Venkata Reddi* v. *Kuppu Reddi* (31) the facts were that in a partition between Hindu co-parceners, one of whom was a minor represented by his mother, it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly. The minor sued to re-open the partition and to recover from the said senior co-parcener's sons the income from the portion of the properties which ought to have fallen to his share but which were enjoyed by them more than 3 years after the deed of partition. The learned Chief Justice observes at page 261*:— "It has been contended that the case is governed by Art. 62 which applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The scope of this Article in cases like the present has been considered in *Subba Row* v. *Rama Row* (18) where it has been pointed out that it does not apply to transactions, in which the defendant is not under a mere duty to hand over the money which he had received, but has other duties as well in respect of it. The facts of this case are for this purpose that under Exhibit U it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly, and apparently believing that they continued joint, the defendant's father managed the property which fell under Exhibit U to him and to the plaintiff. As manager it was his duty, not merely to account for the money received, but to pay the *kist* and the other expenses as well as to maintain the minor; and what sum the defendants should be ordered to pay can only be determined by taking an account. I entirely agree with the decision in *Subba Row* v. *Rama Row*

* Page of 39 M.—(*Ed.*).

* Page of 13 L. W.—(*Ed.*).

(18) that Art. 62 does not extend to such transactions. It is admitted that if this is so, the only other Article applicable is Art. 120; and, therefore, the suit is not barred."

It is quite clear from the language of Art. 62 that it cannot apply to the facts of the present case. The cases like *Arunachala Pillai* v. *Ramasamya Pillai* (7), where Art. 62 has been held applicable, can be explained on the ground that the plaintiff was entitled to the whole or part of a specific debt and the defendant when he collected it must have intended to collect it for the plaintiff's use. But where there are several outstandings belonging to a Hindu joint family consisting of say *A*, *B*, *C* and *D*, if *A* after they became divided in status collected any outstanding could it be said that he collected it for the use of *B* and not of *C* and *D*. Each member might probably collect what he could, especially where they fall out, and an account will have to be taken of the various collections after deducting the cost of collection, incidental charges, &c.

The plaintiff in this case does not contend that he is entitled to the whole or portion of any specific outstanding and he does not claim his share without a deduction for the cost of collection.

Article 89 of the Limitation Act would be applicable if the facts warrant an inference that by agreement, express or implied, Dalayya collected the outstandings. If Dalayya and the 4th defendant acted as agents for the whole family impliedly or expressly they cannot set up Art. 62 as a bar to the plaintiff's suit and they are bound to render an account within three years of demand for such amount. In *Gabu* v. *Zipru* (35) the facts were: plaintiff and his two brothers lived jointly. They divided their immoveable estate in 1898 but kept joint certain cash securities, as they were all in the name of the elder brother, Ramsingh. At the time of the partition it was orally agreed that Ramsingh should realise the securities and divide the proceeds among the three brothers. Ramsingh did not divide the proceeds nor gave any account. He died on 6th January 1914. Thereafter plaintiff demanded an account from Ramsingh's son but he having refused, filed a suit for an account on 3rd January 1917. Both the lower Courts dismissed the suit as being barred under Art. 62. The Bombay High Court disagreeing with *Banoo Tewary* v. *Doona Tewary* (27) held that the suit was governed by Art. 89. Macleod, C. J. observes at page 316 *: "The lower Court has relied on the decision in *Banoo Tewary* v. *Doona Tewary* (27). That was a very similar case to this. The learned Judges applied Art. 62 of the Indian Limitation Act, although they said that the defendant was acting on behalf of his co-sharers as their agent in realising their share in these monies. With all due respect it seems difficult to see why Art. 62 was applied and not Art. 89. In a case of this description, the other sharers would not be expected to know when the debts were recovered by the members of the family entrusted with their recovery and it would seem to be very inequitable to hold that time was running against them from the time the monies were received, when they could not tell on what dates they had been received and could not be aware that the managing member was intending to hold those monies against them."

It is for the Division Bench trying the appeal to see whether the facts on record would warrant such an inference. If the facts would not warrant the inference that Dalayya acted as agent for the plaintiff, then the only Article applicable is 120, there being no specific Article applicable to such a case as the present. The principle deducible from the decision discussed above is: — If *A* collects what belongs to *B* knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without deduction for expenses, charges, &c., and loss by theft cannot be pleaded in bar of *B's* claim. *A* has no duty to collect *B's* money and being a volunteer cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum if *A* collects the whole without being *B's* agent, implied or express, there is a presumption that he does so for *B's* use and Art. 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects the others before they are allocated to *A* or *B*, neither *A* nor *B* can be said to collect for the other's use and a suit for account is the proper form of action and Art. 62 would not apply.

In the case of the income of the immoveable property in the suit, the proper Article

* Page of 45 B.—(*Ed.*).

to be applied is Art. 120.

It is not necessary for the present purpose to examine the law relating to tenants-in-common. The position of the members of a Hindu joint family after division in status and before division of property by metes and bounds or allocation or collection of outstandings is not the same in all cases. Each case will depend upon the intention and conduct of the members.

My answer to the question referred to the Full Bench is, Art. 62 of the Limitation Act does not apply to the claim of the plaintiff in the present case. Article 89 would apply if Dalayya or the 4th defendant acted as plaintiff's agent, implied or express. If the facts do not warrant the finding of agency on the part of Dalayya or the 4th defendant, the proper Article to apply to the facts of the case is 120 of the Limitation Act.

Time begins to run from the time of demand and refusal or from the time when the defendant asserted a hostile title to the knowledge of the plaintiff.

M. C. P.

Order accordingly.

MADRAS HIGH COURT.

CIVIL APPEAL, No. 266 OF 1920.

October 20, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

Sri Rajah INNGANTI RAJAH GOPAL RAO BAHADUR GARU, PROPRIETOR OF SIRIPURAM, ETC., ESTATES AND ANOTHER —PLAINTIFF AND APPELLANT No. 2— APPELLANTS

versus

CHELIKANI VENKATASURYA RAO AND OTHERS DEFENDANTS —RESPONDENTS.

Madras Sub-Division of Zemindari Act (I of 1876), ss. 6, 2— Permanently settled estate— Ownership of portion transferred—Separate registration and assessment— Decree.

Against a person who has become the owner of a portion of a permanently settled estate, the Zemindar is entitled to a decree for separate registration and assessment of that portion, and the decree cannot be refused on the ground that it will result in imposing a new burden on the land.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 21 of 1919.

Messrs. *P. Narayana Murti* and *Y. Suryanarayana*, for the Appellants.

The Government Pleader for the Government.

Mr. *B. Satyanarayana*, for the Respondents.

JUDGMENT.—This is an appeal from a suit brought under Act 1 of 1876 for separate registration of a portion of a permanently settled estate by the Zemindar as against the defendants who, according to him, are the owners of that separate portion. The Zemindar applied to the Collector for separate registration, but as the parties did not agree before him, the Collector refused to act under section 2, as the result of which the Zemindar brought this suit under section 6 of the Act.

The lower Court has found in its judgment that defendants Nos. 1 to 4 are the owners of the suit lands, but it declined to pass a decree declaring that the suit land should be separately registered and assessed because it thinks that by apportionment a new burden will be imposed upon the land which was not contemplated by the original grantor. That, however, is not a consideration for us to refuse the prayer of the plaintiff. All that we have to decide is who the owner of the land is. The way in which the land was dealt with is this. The land was given by the Zemindar of Bobbili to one Varahulu, his Serishtadar, on a kattupadi of Rs. 15 a year. The result of that transaction was, no doubt, to make Varahulu only a permanent lessee. But very soon thereafter the Zemindar at the request of the grantee passed an order remitting the entire kattupadi once for all, so that the land passed into the hands of Varahulu free from any kattupadi in favour of the Zemindar. The result of these two transactions taken together was, we think, in effect to make Varahulu the owner of the lands in question as if they had been gifted to him; for, subsequently the Zemindar had no control or interest in them. That being so, the present defendants, who are the assignees of that right, should also be treated as owners of the lands. The necessary result of that find-

ing is that the declaration sought for by the plaintiff should be given. If there was any understanding of which, however, there is no evidence in this case, that the grantor should himself pay the assessment imposed on the lands after separate registration, that would be a matter of contract between the grantor and the grantee, and by paying the assessment, the grantee will in such a case be able to recover the amount from the grantor. Such a case does not arise here, and we are not expressing any opinion about it.

In the result, the appeal must be allowed, the decree of the lower Court set aside, and a decree given under section 6 of Act 1 of 1876 declaring that separate registration should be made of the lands in question.

As regards costs, respondents Nos. 1 to 4 must pay the appellant's costs in this Court and in the lower Court, and also the costs of the 5th respondent in the appeal.

V. N. V. *Appeal allowed.*
S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 855 OF 1917.
June 6, 1922.
Present:—Mr. Justice Abdul Raoof and Mr. Justice Abdul Qadir.

HAYAT, MINOR, THROUGH HIS FATHER, DITTA—DEFENDANT—APPELLANT
versus
AHMUN AND OTHERS—PLAINTIFFS
Musammat SATO *alias* SAT BHARAI, THROUGH MUHAMMAD DIN, HER HUSBAND—DEFENDANT—RESPONDENTS.

Custom—Succession—Sister v. *Collaterals—Khotis of Tahsil Pind Dadan Khan, District Jhelum—Burden of proof.*

In questions of succession to non-ancestral property between collaterals of the eighth degree and sisters the *onus* of proving that they have a preferential right is, in the first instance, on the latter especially where the entry in the *riwaj-i-am* is against them. (p. 203, col. 1.)

Hussain Bibi v. *Nigahia*, 55 Ind. Cas. 828; 1 L. 1; 70 P. L. R. 1920; 34 P. W. R. 1920; 1 L. L. J. 89, *Jiwi* v. *Sandhi*, 58 Ind. Cas. 986; 1 L. 433; 2 L. L. J. 384, relied upon.

Fatima Bibi v. *Shah Nawaz*, 60 Ind. Cas. 509; 2 L. 98; 3 L. L. J. 152, distinguished.

Among *Khotis* of Tahsil Pind Dadan Khan, Jhelum District, a sister is not entitled to succeed to the ancestral property of her brother in preference to collaterals of the eighth degree. (p. 203, col. 2.)

Second appeal from the decree of the District Judge, Jhelum, dated the 14th December 1916, affirming that of the Subordinate Judge, Second Class, Jhelum, dated the 31st May, 1916.

Mr. *Amar Nath Chona*, for the Appellant.
Mr. *Zafrulla Khan*, for the Respondents.

JUDGMENT.—The land in dispute belonged to one Muhammad. The plaintiffs, alleging themselves to be his reversioners, have brought this suit for a declaration that the decree, dated the 27th April, 1915, based upon an award shall not affect their reversionary rights after the death of *Musammat* Gauhran. The following facts will disclose the nature of the suit and the questions to be determined in this appeal.

The parties are *Khoti* Muhammadans of Chak Hamid, Tahsil Pind Dadan Khan, District Jhelum. There were three sons of one Hasham, namely, Sharfa, Bakhtawar and Dadu. The plaintiffs Nos. 1 to 5 are the descendants of Dadu, while plaintiff No. 6 is descended from Bakhtawar. The defendants are descended from Sharfa. The pedgiree filed on the record shows that the plaintiffs are related to Muhammad, whose land is in dispute in the eighth degree. The following genealogical table will show the relationship of the defendants to the said Muhammad:—

IBRAHIM
(widow *Musammat* Gauhran alive, defendant No. 1),

Sardar, (died)	Muhammad, (died childless of plague on 3rd April 1907).	*Musammat* Sardaran
Musammat Satto, (or Sat Bhari, defendant No. 2)		Hayat, (defendant No. 3.)

On the death of Muhammad, which took place on the 3rd April 1907, his land was mutated in the name of *Musammat* Sat Bhari, his brother's daughter on the 5th June 1907, but this mutation entry was amended subsequently and on the 3rd

December 1908 half of the land was allotted to *Musammat* Gauhran. Muhammad being childless had brought up *Musammat* Sat Bhari as her daughter and intended to marry her to Hayat, his sister *Musammat* Sardaran's son. He, however, died before effecting this contemplated marriage and *Musammat* Sat Bhari was afterwards married outside the family and lost all claim to any share in the land of Muhammad. On the 4th March 1912 *Musammat* Gauhran and Hayat, defendant No. 3, executed an agreement of arbitration for the decision of their dispute in respect of the land in question. The arbitrators made an award giving the land measuring 57 *kanals* 5 *marlas* and a house to Hayat and held *Musammat* Gauhran to be entitled to maintenance. On the application of *Musammat* Gauhran the award was filed in Court and a decree was passed on it on the 27th April 1915. The plaintiffs in the suit impugn the decree on the grounds of collusion and fraud and claim a right to succeed to the land as reversioners after the death of *Musammat* Gauhran, the mother of Muhammad, alleging that the land was ancestral. *Musammat* Gauhran, *Musammat* Sat Bhari and Hayat were impleaded as defendants, but *Musammat* Sardaran, the mother of Hayat, and the sister of Muhammad was not made a defendant.

The suit was resisted practically by Hayat, the defendant No. 3 alone, who denied the *locus standi* of the plaintiffs as reversioners and set up his claim as an adopted heir and *khana damad* of Muhammad and also pleaded that the deceased had left a Will in his favour. He further alleged that, according to the custom governing *Khotis*, an alienation in favour of a sister and sister's son was allowed. The ancestral nature of the property was also denied.

The Trial Court held that according to the pedigree, the plaintiffs were the reversioners of Muhammad in the 7th degree. It is, however, admitted on all hands that they are the reversioners in the eighth degree. The allegations as to the adoption of Hayat and as to the Will by Muhammad were held to be unfounded and the property was found to be ancestral, with the result that the suit was decreed by the Trial Court.

An appeal was preferred by Hayat. The Appellate Court thought it necessary to amend the issue relating to the ancestral nature of the land and called upon the Trial Court to find whether the land was proved to be ancestral *qua* the plaintiffs. Two witnesses, namely, the *lambardar* of the village and Kirpa Ram, *Naib Sadar Qanungo*, were produced to prove the ancestral character of the land. The last mentioned witness produced a document, Exhibit P-e, described as an extract from the *Shajra-i-Nasab wa Haquq Malikan* of *Mauza Khotian* placed on the record of the Revised Settlement of 1888. The Trial Court, relying mostly on the evidence supplied by this document, held that the land in dispute was proved to be ancestral. No objection was taken against this finding by the appellant and it was accepted by the Appellate Court. The main question discussed and considered by the lower Appellate Court was whether, according to the custom applicable to the *Khotis*, *Musammat* Sardaran, the sister of the *propositus*, had a right to exclude the plaintiffs, the reversioners in the eighth degree, and succeed to the land left by her brother. Upon this question the Appellate Court found against the defendant and in favour of the plaintiffs, and dismissed the appeal, maintaining the decree of the Trial Court.

Hayat has come up in second appeal to this Court and his case has been argued before us by Mr. Amar Nath Chona. The learned Counsel has contested the finding of the Courts below as to the ancestral character of the land and has argued that on a correct interpretation of Exihibit P-e., the land must be held to be the self-acquired property of Muhammad. Having regard to the fact that no objections were taken by his client in the Courts below to the findings returned by the Trial Court, it is hardly open to the learned Counsel to re-agitate the question in second appeal. Moreover, the finding after all is a finding of fact based on evidence and we doubt very much whether it can be challenged here on the ground that a wrong construction has been put upon a document produced in evidence. Over and above this, having regard to the course adopted before us in the argument, the question of the

nature of the land is not of much consequence.

The argument put forward on behalf of the appellant is that it lay upon the plaintiffs to establish that, according to the custom applicable to the *Khotis* of Tahsil Pind Dadan Khan, the reversioners in the eighth degree had a right to exclude the sister of the last owner. On the other hand, it has been contended on behalf of the respondents that under the general custom applicable to agriculturists sisters as well as their issue being usually excluded from inheritance it lay upon the appellant to establish that his mother, *Musammat* Sardaran, excluded the plaintiffs. It may at once be remarked that there is entire absence of evidence on this point either on behalf of the plaintiffs-respondents or on that of the defendant-appellant. The decision of this appeal, therefore, solely depends on the determination of the question of *onus probandi*.

According to paragraph 24 of Rattigan's Digest of Customary Law, 9th Edition, sisters are usually excluded, as well as their issue. In the case of *Hussain Bibi* v. *Nigahia* (1), the parties were Muhammadan Rajputs of Nakodar Tahsil in the Jullundur District. The plaintiffs, who were collaterals in the eighth degree of the last male owner, sued to contest a gift of the land made by *Musammat* Bholi, mother of the deceased in favour of her daughters. The land in dispute was found to be non-ancestral. According to the *riwaj-i-am* sisters or their sons had no right to inherit, and it was held that "in questions of succession to self-acquired property between collaterals of the eighth degree and sisters the *onus* of proving that they have a preferential right is in the first instance on the latter." It was also held that "in regard to Muhammadan Rajputs of the Jullundur District the *onus* was also clearly on the sisters in view of the entries in the *riwaj-i-am* of the District."

In the case of *Jiwi* v. *Sandhi* (2) it was held "that among Mussulman Rajput agriculturists of the Jullundur District the *onus probandi* was on the plaintiff, the sister of the deceased, to prove that she is entitled to succeed to her brother's land in preference to the defendants, collaterals in the sixth degree, the entry in the *riwaj-i-am* being against her, although the land was non-ancestral *qua* the defendants."

Now, in the present case also the entry in the *riwaj-i-am* is against the right of sisters to succeed. In the General Code of the Tribal Custom in the Jhelum District, Volume XIX, the 68th question was framed as follows :—

"Does the property ever devolve upon sisters or upon sisters' sons ?"

The answer given was as follows :—

"Among Sayyads a sister can hold until marriage only, if there are no descendants and no brothers. Her son cannot inherit."

"Among Awans of Tallagung, Mairs and Kahuts and miscellaneous Chakwal tribes sisters and their sons can inherit if there are no daughters and no agnates within the fourth degree."

"Among *Khojas* sisters take a share according to Muhammadan Law," and

"*Among all other tribes a sister or her sons can never inherit.*"

In this case the finding is that the property in dispute is ancestral, but even if it were non-ancestral, according to the two rulings above cited, the burden of proving that *Musammat* Sardaran had a right to succeed as against the present plaintiffs lay upon the appellant and this *onus* he has failed to discharge.

A different rule, however, appears to have been laid down in the case of *Fatima Bibi* v. *Shah Nawaz* (3) in which it was held : "that where no custom having been ascertained as to the rights of sisters as against collaterals of the 9th degree in the case of acquired property, the Courts should have fallen back on the personal law of the parties, for the decision of the case and that the suit must consequently be decreed in favour of the sisters."

The attention of the learned Judges of the Division Bench, who decided the above case, does not appear to have been drawn to the above mentioned two decisions which were also given by two Division Benches. This case has been strongly relied upon by the learned Counsel for the

(1) 55 Ind. Cas. 823 ; 1 L. 1 ; 70 P. L. R. 1920; 34 P. W. R. 1920; 1 L. L. J. 89.

(2) 58 Ind. Cas. 986 ; 1 L. 433; 2 L. L. J. 384.

(3) 60 Ind. Cas. 509 ; 2 L. 98; 3 L. L. J. 152;

appellant, but it cannot help the case of the appellant, because in the first place the collaterals in that case were in the 9th degree, and in the second place an emphasis appears to have been laid upon the circumstance that the rules laid down in a *riwaj-i-am* refer generally to ancestral and not to acquired property. Moreover, the entry in the *riwai-i-am* in the reported case was found to have been discredited in various cases. We agree in the view taken in the two cases reported as *Hussain Bibi* v. *Nigahia* (1) and *Jiwi* v. *Sandhi* (2) and hold that the decisions of the Courts below in this case are correct.

We accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 220 OF 1921.

October 16, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

MALAYANDI GOUNDAN AND ANOTHER —DEFENDANTS Nos 6 AND 7—APPELLANTS

versus

BOMMAN POOSARI AND OTHERS— PLAINTIFFS Nos. 2 TO 4 AND DEFENDANTS Nos. 2 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 24 — First Court's finding on all issues—Power of Appellate Court to remand whole suit for re-trial after framing additional issues Appeal.

Where the Trial Court has framed and decided issues on all points arising from pleadings, it is not open to the Appellate Court, while framing additional issues, to remand the whole suit for re-trial under O. XLI, r. 23 of the Code of Civil Procedure as though the suit had been decided on a preliminary point. (p. 204, col. 2.)

Sultan Beg v. *Chunilal Maturam*, 46 Ind. Cas. 922, followed.

If an appeal cannot be disposed of under O. XLI, r. 24 owing to some essential point not having been considered by the First Court, the proper course is to frame the essential issues and ask the First Court to return findings on them after giving opportunity to parties to adduce fresh evidence. (p. 204, col. 2.)

Where the Code expressly limits the powers of a Court, there cannot co-exist an inherent power in that Court to disregard that limitation. (p. 205, col. 1.)

Malayath Veetil Raman v. *Krishnan Nambudripad*, 69 Ind. Cas. 828; 43 M. L. J. 354; 31 M. L. T. 208; 16 L. W. 425; (1922) M. W. N. 589, followed.

If a Court purports to act under a power it possesses but makes a wrong order in the exercise of that power, an appeal will lie. (p. 205, col. 1.)

Appeal against the order of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 33 of 1920, (Original Suit No. 34 of 1916, on the file of the Court of the Additional District Munsif's Court, Kulitalai.)

JUDGMENT.—The procedure of the Subordinate Judge in remanding the whole suit for a re-trial after framing 4 additional issues, is a procedure not provided by the Code of Civil Procedure and is furthermore one not conducive to the expeditious settlement of the disputes between the parties.

In a case like the present where the first Court has framed a number of issues, arising out of the points on which the parties joined issue in their pleadings and has decided every one of them in its judgment, it is not open to an Appellate Court to remand the case under r. 23 of O. XLI as though the suit had been decided on a preliminary point [*vide Sultan Beg* v. *Chunilal Maturam* (1)]. Granting that the appeal could not well be disposed of in the manner provided by O. XLI r. 24, owing to the question of the 6th defendant's hereditary powers not having been considered at the trial, the proper course for the Appellate Court was to frame the essential issues and to call upon the District Munsif to return findings on them, after allowing each side to adduce additional evidence.

We set aside the order of remand and direct that the case be remitted to the Subordinate Court in order that the appeal may be further dealt with and disposed of according to law.

The costs of this appeal will abide the result.

A preliminary objection was taken to the admissibility of this appeal on the ground that O. XLIII, r. 1 (*a*) only provides for an appeal in a case where the First Court has disposed of the case on a preliminary point, and as there was no such disposal here, the Subordinate Judge must have acted in the exercise of his inherent powers under section 151 of the Code of Civil Pro-

(1) 46 Ind. Cas. 922.

cedure. In answer to this objection it is sufficient to refer to the observations of the learned Chief Justice in his judgment in Full Bench case in *Malayath Veetil Raman* v. *Krishnan Nambudripad* (2), where he points out that where the Code expressly limits the power of a Court, there cannot co-exist an inherent power in that Court to disregard that limitation.

As the Subordinate Judge does not refer to section 151 in his judgment, we may assume that he was acting under r. 23 of O. XLI and not under section 151.

If he purported to act under a power that he possessed but made a wrong order in the exercise of that power, an appeal will lie. In the present case, the appellant has also filed a revision petition, so that we have undoubtedly power to make the order as set out above

V. N. V.

S. D. *Order set aside.*

(2) 69 Ind. Cas. 828; 43 M. L. J. 354: 31 M. L. T. 208; 16 L. W. 425; (1922) M. W. N. 589.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 95 OF 1921.

October 27, 1922.

Present:—Mr. Batten, J. C.

DONGAR SINGH AND ANOTHER—APPELLANTS

versus

VISHWANATHSINGH AND OTHERS—RESPONDENTS.

C. P. Land Revenue Act (II of 1917), ss. 169 (1) (a), 220 (n)—*Application for partition—Revenue Officer referring parties to Civil Court—Cause of action for suit—Limitation, operation of—Jurisdiction of Civil Courts.*

A suit for ascertaining the titles of parties to the lands in a *mahal* in a village is not time-barred under Art. 120 of the Limitation Act merely because a Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court. (p. 206, col. 2.)

The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of title has been decided does not amount to an order to any parties to file a civil suit and does not confer on a Civil Court jurisdiction which did not previously reside in it. A Civil Court can enquire into the question as to whether the *khudkasht* or *sir* lands are or are not the sole property of a person or whether they are joint property, though it cannot decide whether there should be a partition or not. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though they can give no direction whatever as to whether there should be a partition or how a partition should proceed. (p. 206, col. 2.)

Appeal from the decree of the Sub-Judge, Khandwa, in Civil Suit No. 63 of 1920, dated the 16th August 1921.

Mr. *M. Gupta*, for the Appellants.

Messrs. *M. B. Niyogi* and *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The plaintiffs in this suit are 6 annas 8 pies sharers in the village of Pathada. They acquired the rights as follows :—

In 1893 the plaintiffs purchased from Guldar Singh and others a 5-annas 4-pies share which Guldar Singh, Umrao Singh and others had inherited from *Musammat* Uma, the widow of Datar Singh, who was one of the two sons of Arjun Singh and who held a share of 10-annas 8-pies, while his brother, Jaswant Singh, held a share of only 5-annas 4-pies. Jaswant Singh's son Umrao Singh held a 1-anna 4-pies share, out of Jaswant Singh's 5-annas 4-pies share. This 1-anna 4-pies share was sold in 1885 to one Ramkisan who, in his turn, sold the 1-anna 4-pies share to the plaintiffs in 1914. The plaintiffs are thus holders of a 6-annas 8-pies share.

In 1905 Guldar Singh, a brother of Umrao Singh and a son of Jaswant Singh, who, at that time, held part of the share that had originally belonged to Jaswant Singh applied for a partition. The plaintiffs were non-applicants to this application as co-sharers of the 5-annas 4-pies share which originally belonged to *Musammat* Uma and which the plaintiffs had purchased from Umrao Singh, Guldar Singh and others in 1893. The parties were unable to agree as to the title to the *khudkasht* land claimed by Daryao Singh, who is now represented by defendants Nos. 1 to 5 in the present suit, and the Revenue Officer declined to proceed further with the application unless and until the parties brought a suit determining the rights of the parties to this *khudkasht*. Another non-applicant in that case was Ram-

kisan, through whom the plaintiffs claim the 1-anna 4-pies share. Therefore, the plaintiffs as regards the whole of their share were parties to the former application. But the learned Judge is wrong in saying in paragraph 6 of his judgment that Guldar Singh, when he made his application of 1905, was the predecessor-in-title of the plaintiffs. The plaintiffs had already bought a share from him, but when he made the application he made it not in his capacity of the predecessor-in-title of the plaintiffs but in his capacity as holder of a totally different share to that held at the time by the plaintiffs and by Ramkisan. The plaintiffs who were not actually or constructively the applicants in the former application of 1905 made a fresh application for partition in 1919, some of the defendants claimed that the *sir* and *khudkasht* lands were not liable to a fresh partition as they had already been partitioned, in other words, they maintained that these *sir* and *khudkasht* lands are not common property but private property not liable to partition.

The Revenue Officer under section 169 (1) (*a*) of the present Land Revenue Act of 1917 has declined to grant the application until the questions in dispute as to the title have been decided by a Civil Court. He has referred to the previous decision of 1905 to the same effect which he holds to be still in force and which he reiterates. The learned Subordinate Judge has dismissed the suit on the ground that it is time-barred. He holds that the cause of action to bring the present suit arose when the Revenue Officer passed the order in 1905. If the Revenue Officer's order did constitute the cause of action for the present suit and if the present suit could not possibly have been brought otherwise, the period of limitation selected is no doubt correct, namely, six years under Art. 120, but the question arises as to whether any period of limitation has begun to run at all. If the view taken by the lower Court is correct, then once a Revenue Officer has declined to entertain an application for partition until the matters in dispute as to title have been decided by the Civil Court and if no suit is brought within six years of such order, then for all future time there cannot be a partition of the *mahal*. This result on the face of it is absurd, unless of course there has already been a partition. Under section 136-G of the old Land Revenue Act any question of title or proprietary right may be left by the Revenue Officer to be determined by a competent Court unless they have already been determined by a Court of competent jurisdiction. According to section 152 (*b*) (13-*a*) a Civil Court cannot entertain a suit or exercise jurisdiction over the distribution of the land of a *mahal* by partition. The corresponding provisions of sections 169 (1) (*a*) and 220 (*n*) of the new Land Revenue Act are not materially different. The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of title has been decided does not amount to an order to any parties to file a civil suit and does not confer on a Civil Court jurisdiction which did not previously reside in it. A Civil Court can enquire into the question as to whether the *khudkasht* or *sir* lands are or are not the sole property of a person or whether they are joint property, though it cannot decide whether there should be a partition or not, the question of title may have to be decided for other purposes than for the purposes of partition. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though, of course, they can give no direction whatever as to whether there should be a partition or how a partition should proceed. So far then as this suit is a suit for ascertaining what the titles of the parties respectively are over the lands in the *mahal*, the suit cannot be time-barred merely because the Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court.

The learned Pleaders for all the defendants, except defendants Nos. 14 and 15, seek to support the decree dismissing the suit on the ground that the finding, that no partition in the time of Datar Singh and Jaswant Singh is proved, is a wrong finding. It so happens that the Subordinate Judge has recorded a finding on this issue of fact, though he has left a great many other issues of fact undetermined on account of his view that the suit is time-barred. It appears to me impossible to say whether or not the decision on the

first issue is correct without knowing what is the decision on the other issues. What I mean is this, that without knowing the history of the *sir* and *khudkasht* holdings of the respective parties and without knowing what *sir* and *khudkasht* lands were held by Datar Singh and Jaswant Singh, and what have since been acquired by the present holders from tenants, it is impossible really to come to a determination as to whether or not the extent of the holdings indicates or does not indicate a partition. I feel myself unable to decide this question, as I do not think it should have been decided by the lower Court without a decision on the other issues of fact. In remanding the suit for further hearing, I, therefore, order that the decision of the first issue should be reconsidered, in fact all the issues of fact should be taken up afresh.

The case is remanded for a further hearing on the ground that the suit has wrongly been held to be time-barred. A refund certificate will issue, other costs will be costs in the suit; there will be only one set of costs as regards both lots of defendants who have opposed the appeal.

S. D. *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 496 OF 1921.
July 24, 1922.
Present:—Mr. Hallifax, A. J. C.

GADI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
GOVINDA AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (I of 1920)—Will devising malguzari *share in village—Occupancy rights in* sir *land, whether can be devised with such share—Sanction of Revenue Authorities, whether necessary.*

Occupancy rights in *sir* land can be devised by Will along with the *malguzari* share to which they appertain without the sanction of the Revenue Authorities. (p. 207, col. 2.)

Murlidas v. *Haridas*, 62 Ind. Cas. 246, followed.

Appeal from the decree of the Additional District Judge, Nagpur, dated the 18th July 1921, in Civil Appeal No. 43 of 1921.

Mr. *R. B. Gadgil*, for the Appellants.

Mr. *A. C. Roy*, for the Respondents.

JUDGMENT.—The first two grounds of appeal have been expressly abandoned. The taking of the plea in the First Court that the Will, which bears the thumb impressions of both appellants and was presented by them for registration, was not a genuine document was as shamelessly dishonest as it was futile. Its repetition in two Appellate Courts is only more and more so. The second contention, that the occupancy rights in *sir* land cannot be devised by Will along with the *malguzari* share to which they appertain without the sanction of the Revenue Authorities was negatived on 17th February 1921 in *Murlidas* v. *Haridas* (1) by a Bench of this Court of which I was a member. Apart from these two matters, we are concerned with the interpretation of the devise in the Will of one Tatia, who died on 4th May 1911, of landed property in favour of his two brothers and the three sons of another brother who died before the Will was made. The Will directs that these five persons shall be his heirs and shall take the property "according to their shares" (*bhaga pramane*). I am not in the least pressed by the somewhat grotesque

(1) 62 Ind. Cas. 246.

suggestion, which is explained to be the basis of the third ground of appeal, that *bhag* means the share that each legatee would get in an intestacy under the Hindu Law, and that, therefore, the three nephews get nothing at all.

(2) The passage in the Will requiring interpretation is as follows: "My heirs, Tanba, son of Sadashiv Patel, and Gadi, son of Sadashiv Patel, and my nephews, Govinda Bhau, Anand Rao and Dajiba sons of Chimna Patel, will take my *malguzari* share (*hissa*) according to (their) shares *bhaga pramane*." There is nothing else in the Will to explain the meaning of *bhaga pramane* and it has been held in both the Courts below that it means division *per capita* and not division *per stirpes*. In this connection it is to be noted that the nephews themselves in their original plaint interpreted the expression as giving them one-third of the property between them, and they only claimed one-third, though they were allowed to amend the plaint and claim three-fifths between them. This is in itself some evidence of the ordinary meaning of the word *bhag*.

(3) Very little attention appears to have been given to the matter in the Courts below. It appears to me in the first place that the expression "according to equal shares" has practically no meaning, and if *bhag* here meant equal shares the word *pramane* would not have been used. "According to shares" or rather "according to their shares" must mean according to shares that are not necessarily equal. The word *bhag* is certainly used of any kind of a share or portion, but probably most frequently among Hindus to denote a share allotted in a partition of joint family property. It is so used in the title of the work Daya Bhaga. That the word was meant by the testator to denote the share that each legatee would get in the property in a partition if they were joint owners of it is further indicated by the way in which he has stated their names. Tanba and Gadi are each described separately as the son of Sadashiv, and the three nephews are grouped together as the sons of Chimna. I find that by the terms of the Will the three plaintiffs, the sons of Chimna, are entitled jointly to one-third of the property and not to three-fifths.

(4) There remains the contention of the two defendants that the plaintiffs must pay them their share of the debts due by the testator before they can take their share of the property. The Will says: "Any debt found due by me is to be paid by my heirs. If they do not pay it, it is to be paid out of my estate." It is true that elsewhere in the Will Tanba is appointed executor along with another legatee who is not a party to this suit, but that does not entitle him to claim payment of the debts in this suit where he is a co-defendant with another legatee, particularly if he denies the very existence of the Will. The decree of the First Court, which was confirmed in appeal gives the plaintiffs a three-fifths share in the *malguzari* share in the village and a three-fifths share in a *sir* field, and the whole of a half-anna share in nine mango trees. The mention of the whole of the share in the mango trees is obviously due to carelessness. The decree will be modified so as to declare that the property of which the plaintiffs are to be put in possession is a one-third share of each of the three items mentioned. The defendants will pay eleven-fifteenths of the total costs incurred by both parties in all three Courts and the plaintiffs will pay the remaining four-fifteenths.

G. R. D. *Decree modified*

BANAMALI DAS, *In the matter of*

PATNA HIGH COURT.

CIVIL REFERENCE NO. 1 OF 1922.

June 7, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, Justice Sir B. K. Mullick, KT. and Justice Sir Jwala Prasad, KT.

BANAMALI DAS, *In the matter of.*

Legal Practitioners Act (XVIII of 1879), ss. 13, 14—Suspension of Pleader, reference for—Invalid reference—High Court, power of, to take action.

Under section 13 of the Legal Practitioners Act, the High Court has absolute power, after such enquiry as it thinks fit, to suspend or dismiss a Pleader or *Mukhtar* from practice, even though the matter is referred to it under section 14 of the Act by a Court having no jurisdiction to refer it under that section. (p. 210, col 2.)

Mr. *K. N. Chaudhuri* (with him Messrs. *Parmeshwar Dayal, G. Prasad* and *B. C. De*), for the Pleader.

JUDGMENT.

Miller, C. J.—This matter comes before us upon what purports to be a report of the District Judge of Cuttack under section 14 of the Legal Practitioners Act, although, from the wording of the report itself, it would appear that the learned District Judge considered that it was a case in which it was necessary or desirable for the High Court to take action under section 13 of that Act. Upon receipt of the learned District Judge's report this Court issued notice to the Pleader in question, Babu Banamali Das, a Pleader practising in the Courts at Puri, to show cause why he should not be dealt with under the Legal Practitioners Act. The charge which is made against the Pleader is in effect that he signed and filed in Court a written statement on behalf of a defendant for whom he was not authorized to appear at all. It is unnecessary to go in detail through the various stages of the litigation in which this alleged offence was committed or the processes by which the matter eventually came before this Court. It may be stated shortly that the Pleader was briefed in a suit instituted before the Munsif at Puri on behalf of some of the defendants in that suit. There were five defendants altogether and the *vakalatnama*, which was accepted by the Pleader, was on behalf of four only of the defendants. The suit against the five defendants was brought by the superintendent of a *math* claiming damages and other reliefs against the defendants for having wrongfully collected tolls from the shop-keepers in the *mela* at the end of the month of *Magh* when the plaintiff alone as the superintendent of the *math* was entitled to collect those tolls. The defendant No. 4 in the suit, who was a servant of some of the other defendants, did not join in the *vakalatnama* and consequently the Pleader was not instructed by him. A written statement, however, was prepared, not by the Pleader whose conduct is now in question before us, but by his senior who had also been briefed by the other defendants. This written statement, when it was brought to the Pleader for signature, contained what purported to be the signatures not only of the four defendants who had briefed him but also the signature of Balabadra, the other defendant who had not briefed him, and the Pleader, without apparently considering or making any enquiries as to whether his *vakalatnama* had really been signed on behalf of Balabadra, signed the written statement and presented it in the Munsif's Court purporting to be a written statement on behalf of all the defendants. Subsequently, about a little more than a week later, the 4th defendant himself presented a written statement on his own behalf and, at the same time, put in a petition repudiating the authority of the Pleader or anybody else to act on his behalf and to file a written statement purporting to be with his authority before the Court. In so far as the written statement put in by Balabadra is concerned, it was not very materially different from that already put in by the other defendants purporting to be on his behalf as well as the others. The only difference is that whereas in the original written statement the defendants deny having collected any tolls at all and further deny that the defendant No. 4 and the defendant No. 5 had collected any tolls legally payable to the plaintiff the written statement put in subsequently by Balabadra admitted that certain tolls amounting to a small sum of something like Rs. 6 had in fact been collected by the defendant No. 5 apparently with the assistance and connivance of Balabadra himself. It is clear that the difference between these two statements, although not very vast in extent, was a material difference in this way, that

BANAMALI DAS, *In the matter of.*

one admitted the collection of tolls to a small extent at all events, whereas the other put the plaintiff to proof of his statement by denying that any tolls had been collected. During the conduct of the case an application was made to the Munsif to take criminal proceedings against the defendants other than Balabadra and against the Pleader upon charges of forgery, and a further application was made to take proceedings against the Pleader under section 14 of the Legal Practitioners Act in that he had appeared for a party by whom he was not instructed.

The learned Munsif did not immediately hold an enquiry but at the trial he examined the Pleader himself and various other parties in connection with the alleged misconduct, the subject of the charge made by the defendant No. 4, Balabadra, and in the course of his decision he made some adverse comments upon the conduct of the Pleader and came to the conclusion that in giving his explanation of what had happened he had certainly not been very frank and fair. He did not, however, take any steps with regard to a criminal prosecution or granting sanction, and the case subsequently went on appeal to the District Judge.

The District Judge dismissed the appeal, the finding originally having been in favour of the plaintiff. Subsequently, a further application was placed before the Munsif again asking that criminal proceedings might be instituted and that an enquiry might be held against the Pleader under section 14 of the Legal Practitioners Act. This application came before the successor of the Munsif who originally tried the case and both the application for sanction to prosecute and the application under section 476 of the Criminal Procedure Code were rejected as well as the application to proceed against the Pleader under the Legal Practitioners Act. Subsequently, it appears that the matter was re-agitated before the District Judge and the District Judge after hearing the Pleaders on behalf of the parties came to the conclusion that a serious offence had been committed by the Pleader and referred the matter to this Court in a letter, dated the 23rd February this year. The learned District Judge says that he refers the case under section 14 of the Legal Practitioners Act and then he sets out a short account of the case with certain findings arrived at by him and ends his letter by saying: "Accordingly, I think that necessary action ought to be taken against him under section 13 of the Legal Practitioners Act."

It is contended before us to-day that the reference to this Court under section 14 of the Legal Practitioners Act by the District Judge is *ultra vires* and ought not to be entertained because under that section it is only the presiding officer of the Court in which the offence is committed who has power to deal with the matter and make the reference to the High Court. In so far as this objection to the reference is concerned I think that there is no answer to it. The section provides that the proper person to make the enquiry and refer the matter and make the report to the High Court is the presiding officer of the Court in which the offence or misconduct is committed. That Court in the present instance clearly was not the Court of the District Judge and, therefore, the District Judge had no power under section 14 to make a reference to this Court in the present case. But, at the same time, I have no doubt that under section 13 of the Act the High Court has absolute power in any case, after such enquiry as it thinks fit, to suspend or dismiss a Pleader or *Mukhtar* from practice, and if we thought that this was a case in which suspension or dismissal would be a proper punishment to be inflicted we could, in the circumstances, in my opinion, take action under that section. Nor does it matter that the case has come before us merely upon a reference by the District Judge who had no power to refer the matter to the Court under section 14. It would be necessary, however, that this Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the Court. We have before us in this case, I think, all the materials necessary to enquire and come to a decision upon the case, and we could, without any further notice, as the Pleader has already appeared, assuming he did not wish to put before us any further evidence on his behalf, deal with the case upon the evidence which is already before us. A petition has been filed by the Pleader and he sets out in detail the facts of the case, and his case is that when he signed the written statement he was under the impression that he had been

briefed, not merely by four of the defendants in the case, but by them all, and further that when he did sign the written statement the signature of Balabadra, the other defendant, was in fact upon the written statement so signed by him, and in these circumstances it never occurred to him that he was not authorized to sign the written statement on behalf of Balabadra. After considering the case I have come to the conclusion that no actual intention on behalf of the Pleader to commit a fraud or to mislead the Court has been made out and the only doubt or difficulty that I have had, arises purely and simply from the manner in which the Pleader himself gave evidence about this matter when he was examined before the Munsif. There can be no doubt that the attitude he took up on that occasion, which was an attitude of forgetfulness as to all the important things which had happened, was probably intended to shield as far as possible the other defendants or their servants who had also given evidence about how the signature of Balabadra came to be upon the written statement. In adopting that attitude, I think, he was certainly not frank and straightforward. He was also extremely foolish because it led the Munsif to treat his whole conduct with great suspicion and it has also created a doubt in my mind as to his *bona fide* in the matter. At the same time, I am not satisfied from the evidence which is at our disposal that he had any real intention at the time he signed the written statement of committing a fraud or lending himself to any fraud which had already been committed.

Before finishing this judgment, I think that one ought to draw attention to a practice which appears in some parts of this Province to have grown up of disregarding entirely the rules which have been laid down under the Legal Practitioners Act in relation to the accepting of *vakalatnamas*. If these rules were properly carried out, then it would be almost impossible for mistakes such as that which has happened in the present case to take place. One of the rules provides (it is numbered 451 in Chapter XI of the General Rules and Circular Orders, Appellate Civil, Volume I) that a Pleader accepting a *vakalatnama* shall note on it the name of the person from whom it has been received with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or his servant or relation or one who has been authorized by the party to deliver it to him, as the case may be. He should also note the date of his receipt of the *vakalatnama*. In the present case the *vakalatnama* was merely signed by the Pleader with the word "received" above. There in no date nor is there anything to indicate on whose behalf it was received or any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent. If that had been done, I think it would have been impossible for the Pleader in this case when he came to sign the written statement and file it in Court to have had any doubt as to whether or not he had been instructed on behalf of Balabadra, the defendant No. 4. It was simply through neglect to obey these rules that, when the time came, he apparently got the impression that he had authority to act for a party who had in fact not instructed him. Although I do not think that this is a case which merits either dismissal or suspension from practice I think that the Pleader has been careless and very remiss in the exercise of his duties. He is a young man, at the beginning of his career, and I think it ought to be pointed out to him that he cannot be too careful, exercising as he does a position of responsibility and trust both towards his clients and towards the Court, in seeing that his conduct is in all matters in connection with his profession absolutely above suspicion. Although it is not a case to be dealt with severely, I think it is a case in which the Pleader through his neglet to carry out the rules, has brought himself into a precarious position and it is a case in which I think he ought to be reprimanded and warned to be more careful in the future.

Mullick, J.—I agree.

Jwala Prasad, J.—I agree.

N. H. *Order accordingly.*

DERVISH HUSSAIN, *In re*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 114 OF 1922.
(CRIMINAL REVISION PETITION NO. 165 OF 1922).

November 3, 1922.

Present:—Mr. Justice Wallace.

DERVISH HUSSAIN, *In re* AND OTHERS—ACCUSED NO. 2—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 263, 370, 441 · S. 441, scope and effect of—Presidency Magistrate—Reasons for conviction, omission to record - Grave irregularity—High Court, when will interfere.

Section 441 of the Criminal Procedure Code merely allows a Presidency Magistrate to supplement the reasons which have already been stated, under sections 263 and 370, for convicting an accused person. The effect of the section is not to abrogate the terms of section 263 or section 370, and the omission to record reasons is a grave irregularity which, in most cases, would be sufficient to warrant interference by the High Court. But where the reports submitted under section 441 of the Code contain good grounds for the decision, they may be considered as setting forth the reasons for the conviction, and if no substantial failure of justice has resulted, the High Court will not interfere. (p. 212, col. 2; p. 213, col. 1.)

Queen-Empress v. *Shidgauda*, 18 B. 97; 9 Ind. Dec. (N. S.) 573, *Panjab Singh, In the matter of the petition of*, 6 C. 579, 3 Ind. Dec. (N. S.) 377, *King-Emperor* v. *Alagarisami Pathan*, 25M. 546; 2 Weir 245 and *Tilak Chandra Sarkar* v. *Barsagomoff*, 23 C. 502; 12 Ind. Dec. (N. S.) 334 distinguished.

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 Honrary Presidency Magistrates, Rayapettah, Madras, dated 31st January 1922, in Calendar Case No. 1[illegible]72 of 1921.

Mr. *A. T. Codlin*, for the Petitioner.

The Crown Prosecutor, for the Crown.

ORDER.—Two points are taken by petitioner, (1) that he was refused opportunity to have his defence evidence produced; (2) that the Bench Court has recorded no reasons for his conviction.

As to point (1), after a good deal of searching of records rendered necessary by the inaccurate reports of the Honorary Presidency Magistrate's Court, it was verified that the petitioner had paid *batta* for a *sub-pœna* for the production on 20th December 1921 of two Police Diaries from D-2 and D-3 stations, and that *sub-pœna* was issued accordingly. Service was effected too late, and neither diary was produced on 20th December 1921. The case was taken up on several dates after that, on 3rd January 1922; on 10th January 1922 and 24th January 1922, but on none of these dates did petitioner ask for any further *sub-pœnas* or warrants for the production of these diaries nor was any taken out. On the date of final hearing, 31st January 1922, the Bench Court refused adjournment on the ground that the defence witnesses, though served, were absent. In the circumstances, I consider the refusal was fully justified.

As to point (2), it is the case that the Bench Court has recorded no reasons whatever for convicting petitioner and the question is, whether this omission to obey the terms of section 263 (*h*) of the Code of Criminal Procedure is an irregularity which wholly vitiates the trial, or, if not, whether petitioner has been gravely prejudiced by the omission. This is not a case which section 370 (*i*) will remedy, since a substantive sentence of imprisonment has been passed and, therefore, under section 370 (*i*) as equally under section 263 (*h*), the Honorary Presidency Magistrates should have recorded reasons. The Crown Prosecutor argues that the defect is cured by section 441 which permits a Presidency Magistrate to submit with the record, when called for under section 435, a statement setting forth the grounds of his decision. But, as a matter of law, it is clear that section 441 does not abrogate the terms of section 263 or section 370. I take it that it merely allows the Presidency Magistrate to supplement the reasons which have been already stated under sections 263 and 370.

Under section 537, however, this Court will not upset a conviction on the ground of irregularity in the judgment unless a failure of justice has resulted. My attention has been called by petitioner to certain rulings, *e. g.*, *Queen-Empress* v. *Shidgauda* (1), and *Panjab Singh, In the matter of the petition of* (2), passed under section 263 (*h*), or its equivalent section 227 (*h*) in the former Code, wherein these Courts held that the omission to record reasons was in itself a sufficient ground for interference in revision.

(1) 18 B. 97; 9 Ind. Dec. (N. S.) 573.
(2) 6 C. 579; 3 Ind. Dec. (N. S.) 377.

Neither of these cases was a case of judgment by a Presidency Magistrate. As a general rule, I consider the principle of these rulings, *viz.*, that the Magistrate must state reasons so that the High Court may judge whether there were sufficient materials before him to support the conviction perfectly sound. Rulings quoted on the opposite side, such as *King-Emperor* v. *Alagarisami Pathan* (3), *Tilak Chandra Sarkar* v. *Baisagomoff* (4), deal with the sections of the Code such as section 202 or 367, and neither deals with a case of a Presidency Magistrate or of a summary trial. It is one thing to hold that, in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial failure of justice has occurred by the omission of the trying Court to record reasons. It is a very different case when the conviction was passed without reasons therefor, on evidence of which no record is taken and which, therefore, is not available to the High Court. In such a case I agree with the rulings already quoted that the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference.

But in the case of convictions by Presidency Magistrates there is the saving section 441, and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration. The reports submitted in this case by the Bench on the 25th February 1922 and 17th October 1922 show that the Magistrates had a clear recollection of the case and the evidence recorded therein and had good grounds for their decisions. Considering these as under section 441 they may be considered as setting forth the reasons for the conviction of petitioner, I am of opinion that no substantial failure of justice has occurred in his case.

I am asked to interfere with the sentence. It is a stiff sentence, but I am not prepared to interfere with the discretion of the Honorary Presidency Magistrates in this case. I dismiss the petition.

I would impress on the Bench the necessity of obeying sections 263 and 370 of Criminal Procedure Code in future.

V. N. V.

W. C. A.

Petition dismissed.

(3) 25 M. 546 ; 2 Weir 245.
(4) 23 C. 502; 12 Ind. Dec. (N. S.) 334.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 459 OF 1922.
October 16, 1922.
Present:—Mr. Justice Stuart.
GAJRAJ SINGH AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—"Land," meaning of—House, furnished, dispute concerning—Furniture, attachment of.

In a proceeding under section 145 of the Criminal Procedure Code, the jurisdiction of the Magistrate to attach the subject of dispute is confined to "land" and where this "land" consists of a furnished house he can attach the house but not the furniture or other moveable property in it.

Criminal revision from an order of the Magistrate, First Class, Meerut.

Mr. *G. P. Boys*, for the Applicants.

Mr. *Uma Shankar Bajpai*, for the Opposite Party.

JUDGMENT.—This application must succeed.

The facts are, shortly, that two parties are claiming succession to the property of *Musammat* Bishan Devi deceased :

(1) Persons who allege that they are trustees under a deed executed by the deceased which entitles them to succeed as trustees ;

(2) Har Charan, who claims as a collateral of her deceased husband and contests her authority to execute the deed of trust.

The Magistrate being moved in the matter under section 145 of the Criminal Procedure Code has found that a dispute likely to cause a breach of the peace exists, and being unable to decide on the question of possession, had attached the property and appointed a Receiver thereof under section 146.

This order cannot be questioned in so far as the "land" in dispute is concerned. The "land" in dispute consists of one house. But the order goes further and covers all the moveable property left by

the lady. This application asks that the order, in so far as it affects property other than the "land" and the rents and profits of such land, should be set aside. Under the law the Magistrate had no jurisdiction except as to the land.

The application is allowed.

N. H. *Application allowed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 376 OF 1921.
September 8, 1921.
Present:—Mr. Justice Newbould
and Mr. Justice Ghose.
CHETTO KALWAR—APPELLANT
versus
EMPEROR.

Charges, misjoinder of—Penal Code (Act XLV of 1860), ss. 411, 414, joinder of charges under, legality of—Defective charge, if can be remedied at conclusion of trial—Procedure—Alternative charges—Criminal Procedure Code (Act V of 1898), s. 236.

Joinder of charges of offences under section 411, Indian Penal Code, with charges of offences under section 414, Indian Penal Code, is bad. If, however, the charges are framed in the alternative under section 236 of the Code of Criminal Procedure there would be no defect in the trial. But having framed defective charges, the Magistrate cannot remedy the error at the conclusion of the trial, by saying in his judgment that he would only proceed on the charges that had been legally joined. If he wishes to strike out any of the charges he should do so before concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit on the charges as amended. Where this is not done the error vitiates the trial and makes the conviction illegal. (p. 214, col. 2; & p. 216, col. 1.)

Criminal appeal against the order of the Third Presidency Magistrate, Calcutta, dated 16th June 1921.

Babu *Manmatha Nath Mukerjee* (with him Babus *Heramba Chandra Gupta* and *Mahendra Lal Roy Chowdhry*), for the Appellant.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—It is unnecessary to discuss the facts of this case in this appeal, as we are of opinion that the trial was bad for misjoinder of charges, and we propose to order a re-trial of the appellant. At the trial the present appellant Chetto Kalwar and one Jug Mohan Kalwar were jointly tried. Twelve charges were framed against them. In the first, Chetto was charged with wrongful possession of two items of stolen property on the 25th of March 1921. In the second Jug Mohan was charged with having abetted that offence. In the third charge Chetto was charged with being in wrongful possession of three items of stolen property on the 27th of March 1921 and, in the fourth charge, Jug Mohan was charged with having abetted that offence. In the fifth charge, Chetto was charged with being in wrongful possession of eleven items of stolen property on the 31st of March 1921 and, in the sixth charge, Jug Mohan was charged with the abetment of that offence. Then, in the remaining charges Chetto and Jug Mohan were each separately charged with having assisted in the disposal of the stolen properties referred to in the six previous charges. When writing his judgment the Magistrate held that there should not have been a joint trial of the two accused and acquitted Jug Mohan. He also held that it was safer to proceed against the first accused Chetto under the three heads of section 411, Indian Penal Code, only, and to forego those under section 414, Indian Penal Code. In the end, he convicted the appellant on the first and third charges and, with reference to the facts stated in the fifth charge, he held that an offence punishable under section 54A of the Calcutta Police Act had been committed.

We think that the joinder of the charges of offences under section 411, Indian Penal Code, with charges of offences under section 414, Indian Penal Code, was bad. Had the charges been framed in the alternative, this might have been within the terms of section 236, Criminal Procedure Code. But as the charges were framed, they were not in the alternative, and the mistake cannot be corrected by the argument that, if they had been in the alternative, there would have been no defect in the trial. Having framed defective charges, the Magistrate could not remedy the error at the conclusion of the trial, by saying in his judgment that he would only proceed on the charge

that had been legally joined. If he wished to strike out any of the charges he should have done so before concluding the trial, and should have given the accused an opportunity of making such defence as he thought fit on the charges as amended. Not having done so, we must hold that the error vitiated the trial and made the conviction illegal. We, accordingly, allow this appeal, reverse the conviction and sentence of the appellant, and direct that he be re-tried according to law. We are asked to order that the re-trial be taken place before another Magistrate, and no objection is taken to this on behalf of the Crown. We, accordingly, direct that the re-trial do take place before such other Magistrate as the Chief Presidency Magistrate may select.

B. N.

Re-trial ordered.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 389 OF 1921.

July 21 1921.

Present:—Sir Shadi Lal, KT., Chief Justice.

GAJJA NAND AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR (THROUGH PRABHU MAL)—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 494—Bigamy—Hindu marriage—Fraud.

A Hindu marriage tainted by fraud is a voidable transaction, but it is binding until it is set aside by a competent Court. Unless it is declared to be invalid, it can sustain an indictment for bigamy. (p. 216, col. 1.)

Criminal Revision.

Messrs. *Bevan-Petman* and *Nanak Chand*, for the Petitioner.

Mr. *Des Raj Sawhney*, for the Complainant.

JUDGMENT.—This criminal case arises out of an unfortunate dispute between a Hindu wife and her husband regarding the right to give their daughter in marriage. It appears that the wife, *Musammat* Haryan, fell out with her husband, Gaja Nand, probably on account of the latter having married another wife and that she left her husband's house and migrated with her minor daughter, *Musammat* Dhapan, to the house of her brother, Ballu. While she was there, she, probably instigated by her brother, performed the marriage of *Musammat* Dhapan, who was only nine years old, with one Pirbhu, a man of 40 years of age. There is some evidence to the effect that the child was practically sold to this man, who himself admits that he paid Rs. 5,000 as a *quid pro quo* for the girl.

The father, when he learnt of this unfortunate affair, made an application to a Magistrate, who issued a warrant under section 100 of the Criminal Procedure Code. Thereupon, Ballu appeared with the girl and handed her over to her father. The latter, a few months afterwards, solemnised the marriage of his daughter with one Kirpa Ram, and it is this second marriage which has led to the prosecution of the father and Kirpa Ram for abetting the offence of bigamy.

The Courts below have held that the charge of abetment has been established, and, after giving my careful and anxious consideration to all the circumstances of the case and to the law bearing upon the subject, I concur in the conclusion reached by them. There can be no doubt that the marriage of a girl of nine years with a man of 40, prompted as it was by the cupidity of her maternal uncle and by the resentment of her mother against her husband, was not in the interests of the girl; but the crucial question for determination is, whether it was a void transaction and had consequently no existence in the eye of the law. Now, it has been found as a fact that the mother actually celebrated the marriage, and the presumption is that the usual ceremonies were performed.

The law is perfectly clear that the father is the proper person to give his daughter in marriage, and that, unless the father has deserted his wife and daughter, the

mother cannot give the daughter in marriage without the consent of the father. But a Hindu marriage is a sacrament and the rule is now firmly established that a marriage which is duly solemnised and is otherwise valid, is not rendered invalid because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court, *vide*, *inter alia*, *Maya Devi* v. *Ram Chand* (1).

It is, however, contended that the mother and her brother brought about the marriage by fraud, but the simple answer to this contention is that, though a marriage may, on that account, be declared to be invalid, it is not a nullity. A marriage tainted by fraud is a voidable transaction, but it is binding until it is set aside by a competent Court. Unless it is declared to be invalid, it can sustain an indictment for bigamy.

While sympathising with the father, I find no valid reason for dissenting from the conclusion that he has infringed the provisions of the law. I must, therefore, confirm the conviction and dismiss the application for revision.

W. C. A.

Revision rejected.

(1) 31 Ind. Cas. 186; 20 P. R. 1916; 177 P. W. R. 1915.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO.184 OF 1922.

April 21, 1922.

Present:—Mr. Justice Stuart.

INCHA RAM—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 182—False report to Police—Motive—Offence.

Accused made a report to the Police that his horse had strayed, when, as a matter of fact, he had previously sold it to another, who in turn had sold it to a third person; the report was made to enable him to make a false charge against this last person, and this he subsequently made:

Held, that an offence under section 182 of the Penal Code was made out, as in making the report the accused clearly gave false information to the Police which he knew to be false and that he knew that it was likely that he would thereby cause the Police Authorities, if they found the horse answering to his description, to take it from the possession of its rightful owner. (p. 217 col. 1)

Reference made by the Sessions Judge, Moradabad, under section 435 of the Code of Criminal Procedure.

REFERRING ORDER.—The applicant in this case, Incha Ram, has been convicted in a summary trial under section 182 of the Indian Penal Code and has been sentenced to one month's rigorous imprisonment. The facts, as found by the Magistrate, are as follows:—On 31st December 1921 the applicant reported at the *thana* that his horse had strayed from the jungle on the previous day. An enquiry was made by the Police and the *chaukidar* of the village reported that some months before Incha Ram had sold the animal to one Chadammi Lal, who is said to be his cousin, and that Chadammi Lal on the 26th of December 1921 had sold it at Rith Cattle Market to a third person. After the institution of proceedings under section 182 of the Indian Penal Code Incha Ram brought a case against Chadammi Lal under section 379-411 of the Indian Penal Code. In that case the Magistrate took evidence under section 202, Criminal Procedure Code, and finally dismissed the complaint under section 203, Criminal Procedure Code.

It has been urged in revision that the act for which the applicant has been convicted went no further than the preparation for the commission of an offence, and that the report, not being of a cognisable offence, and not in itself calling for any action by the Police, fell short of the conditions justifying a conviction under section 182 of the Indian Penal Code. I have been referred to the ruling of the High Court in the case of *Algoo Lal* v. *Emperor* (1). The principle there laid down seems to me to apply to the present case. The fact that here the alleged false report was followed by a complaint of theft does not affect the principle. I hold that the conviction was bad on a point of law. I, therefore, forward the record to the Hon'ble High Court with the recommendation that the conviction

(1) 57 Ind Cas. 96; 18 A. L. J. 636; 21 Cr. L. J 576; 2 U. P. L. R. (A) 296.

of Incha Ram under section 182 should be set aside.

ORDER.—Incha Ram made a report at the Police Station that his horse had strayed. This report was false to his knowledge. His horse had not strayed. He had previously sold the horse to his cousin and he clearly made this false report in order to enable him to make a false charge against the man who had bought the horse from his cousin. He made that charge subsequently. In making this report he clearly gave false information to the Police which he knew to be false and he must have known that it was likely that he would thereby cause the Police Authorities, if they found the horse answering to his description, to take it from the possession of its rightful owner. On these facts an offence under section 182 was clearly made out. I accordingly refuse to interfere and return the record.

W. C. A. *Record returned.*

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 325 AND 342 OF 1922.

(CRIMINAL MISCELLANEOUS PETITION NO. 498 OF 1922,

(S. R. No. 5083 OF 1922.)

August 11, 1922.

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

MITTOR MOIDEEN HAJEE, *In re*, AND ANOTHER—ACCUSED NOS. 19 AND 20—APPELLANTS IN CR. A. NO. 325 OF 1922 AND

EDEKKATTU CHEKKUTI HAJI, *In re*—ACCUSED NO. 36—APPELLANT IN CR. A. NO. 342 OF 1922.

Limitation Act (IX of 1908) s. 5, application of—Appeal under special enactment—Criminal Procedure Code (Act V of 1898), s. 423 (1) (d)—Order excusing delay, whether consequential or incidental order—Appeal, forum of—Different sentences passed on several accused.

Section 5 of the Limitation Act cannot be utilised by an Appellate Court in dealing with an appeal under a special enactment. (p. 218, col. 1.)

An Appellate Court cannot excuse the delay in presenting an appeal, under section 423 (1) (*d*), Criminal Procedure Code, as an order excusing the delay is neither a consequential nor an incidental order. (p. 218, cols. 1 & 2.)

Any power conferred by section 423 can be used only after the stage at which section 423 becomes applicable to the proceedings has been reached. Therefore, the application of the section is legitimate only after the preliminary stage indicated in sections 421 and 422 has been passed; that is, after the appeal has been admitted and after the notice referred to in the latter section has been given. (p. 218, col. 2.)

Where different sentences are passed on different accused, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence and not on the extent of the sentences of the other accused. (p. 219, col. 1.)

Venkatakrishnayy, In re, 39 Ind. Cas. 294; 40 M. 591; 31 M. L. J. 837; 18 Cr. L. J. 454, followed.

Appeals, under section 11, clause (2) of Ordinance No. 1 of 1922 and sections 418 and 419 of the Criminal Procedure Code, against the judgment of the Court of the Special Magistrate, Calicut, in Special Case No. 22 of the Calendar for 1922.

Mr. *T. Krishna Kurup*, for the Appellant.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

JUDGMENT.—These appeals came before one of us for admission; and notice was issued to the Public Prosecutor solely on the question whether they could be admitted or whether they were out of time. The point arises primarily because the convictions and the sentences were passed under Ordinance 1 of 1922, a special enactment. The time provided for appealing under that Ordinance is only 15 days. Judgment was given in each of these appeals on the 31st March. The presentation in this Court was, in Appeal

No. 325, on the 24th April and in Appeal No. 342 on the 28th April. It is clear that this presentation was out of time, unless the appellants were entitled at least to an allowance for the period requisite for obtaining copies of the judgments appealed against. Such a deduction would, of course, be admissible in any appeal against a conviction under the ordinary law with reference to section 12 of the Limitation Act. This Court has, however, recently held in *Koppathi Lingayya* v. *Alaveti Chinnarayana* (1) that section 12 cannot be applied in the case of appeals under a special law, such as the Ordinance we have to deal with.

The point, however, calls for no further consideration since the passing of Act X of 1922, which became law on the 5th March, 1922, and provided that sections 4, 9 to 18 and 22 of the Indian Limitation Act should be applicable to proceedings under any special or local law, in so far as and to the extent to which they are not expressly excluded by such law. It may be said at once that there is nothing in the Ordinance expressly excluding this provision. The appellants are, therefore, entitled to credit for the time they spent in obtaining copies; and that is, as Mr. Kurup on their behalf agrees, from the date of judgment, 31st March 1922 to the date, on which copies were given to their Vakil, 2nd April 1922.

That deduction, however, made, the presentation on the 24th and 28th April was still beyond the 15 days allowed by the Ordinance. Mr. Kurup has accordingly conceded that there is delay in the presentation of Appeal No. 325 and has urged that the delay should be excused by this Court. The difficulty is, that section 5 of the Limitation Act, under which the Court can excuse delay, is not one of the provisions the application of which is extended by Act X of 1922 to proceedings under a special or local law. We, therefore, have no right to utilise section 5 in dealing with these appeals. Next, it has been argued that we have power to excuse the delay under section 423 (*1*) *d*), Criminal Procedure Code, because an order excusing the delay would be a consequential or incidental order and would be just or proper in their disposal. We are unable to take that view of the nature of such an order. It is not consequential. We must then consider whether it is incidental and, if so, incidental to what? Section 423 begins: "The Appellate Court shall then send for the record of the case, if such record is not already in the Court;" and it has to be presumed that any power conferred by section 423 can be used only after the stage, at which section 423 becomes applicable to the proceedings, has been reached. That is clearly indicated by the use of the word "then". The application of section 423 must, we think, be taken as legitimate only after the preliminary stage indicated in sections 421 and 422 has been passed; that is, after the appeal has been admitted and after the notice referred to in the latter section has been given. It is true that notice has been given in this case to the Public Prosecutor but (as we stated distinctly in the order directing it) it was given only for the special purpose of enabling him to appear to take part in the proceedings authorised by section 421 at which the question of admission and the question whether there should be further proceedings, with respect to which section 423 applied, are considered. We do not think that section 423 confers on us any power the exercise of which can help these appellants. We must therefore, dismiss Appeal No. 325 as out of time.

These considerations, however, are not sufficient for the disposal of appeal No. 342, because it is presented by the 36th accused, who was sentenced only to 4 years' rigorous imprisonment and a fine and who, therefore, is entitled, under section 11 of the Ordinance, to appeal only to the Special Judge and not to this Court. In fact, he did present his appeal originally to the Special Judge. But that officer returned it to him on the ground that some of the accused had been sentenced in the judgment appealed against to 5 years' rigorous imprisonment and that the appeal lay in the case of those also who had been sentenced to a shorter period to the High Court. That view of the law is incorrect—*Vide Venkata*

(1) 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566 7 L. W. 443, (F. B.)

krishnayya, In re (2). For the purpose of deciding the Tribunal before which the appeal lies, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence. That being the law, the learned Special Judge was wrong in returning the appeal to the appellant for presentation to this Court.

We have only then to decide whether the presentation to the learned Special Judge was in time. It is not disputed that, if allowance is made for the time taken for obtaining copies and for the time during which the Court was closed for the holidays, presentation there on 24th April 1922 was in time. That being so, the learned Special Judge has refused to exercise the jurisdiction vested in him by law and we must deal with his order in revision. We, therefore, in Appeal No. 342 return the appeal to the appellant's Counsel for re-presentation in the Court of the Special Judge.

One appeal dismissed; one returned.

V. N. V.

S. D.

(2) 39 Ind. Cas. 294; 40 M. 591; 31 M. L. J. 837; 18 Cr. L. J. 154.

PATNA HIGH COURT.

DEATH REFERENCE NO. 10 OF 1922.
CRIMINAL APPEAL NO. 65 OF 1922.
May 9, 1922.
Present:—Mr. Justice Coutts and Mr. Justice Adami.
NIRU BHAGAT—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 364 — Accused, examination of—Evidence elicited by putting leading question—Value.

Where the examination of an accused is not such as is contemplated by the Criminal Procedure Code but is really a cross-examination it should be left out of consideration. (p. 220, col. 2.)

No value should be attached to evidence elicited by the prosecution by putting a leading question to its witness. (p. 221, col. 1.)

Criminal appeal from the order of the Judicial Commissioner, Chota Nagpur, dated the 12th April 1922.

Mr. S. *A. Sami*, for the Appellant.

Mr. *Sultan Ahmed*, Government Advocate, for the Crown.

JUDGMENT.

Coutts, J.— The appellant in this case, Niru Bhagat, has been convicted by the Judicial Commissioner of Chota Nagpur of the murder of his mistress named *Musammat* Lalo on the 1st of January of this year and he has been sentenced to undergo the extreme penalty of the law.

The case for the prosecution is that, about six months before the date of the occurrence, *Musammat* Lalo deserted her husband and went to live with the appellant. The appellant was a follower of Kabir, one of whose tenets was abstention from the eating of meat. Lalo refused to adopt the rules of Kabir and the result was that quarrels arose between her and Niru. On the Thursday before the death of Lalo there was a particularly bitter quarrel and Niru turned her and her things out of his house. She, however, put her things back into the house and refused to go and we next hear of the two having supper together amicably on the evening of Sunday, the 1st of January. What happened afterwards at the house we do not know, but, according to the prosecution, during the night, sometime towards morning, Niru went to the house of a fellow-villager, Gansu Rautia, woke him up and told him that as he was going to Barwe, he was returning him an axe which he had borrowed from him before. He actually left two axes with Gansu and went off. Barwe, I may mention, is a *pargana* the boundary of which is a short distance from Niru's village. Before going away Niru told Gansu that he had killed Lalo. Niru then went to another co-villager, Chhedan Rautia, woke him up and demanded from him Rs. 9 which he had left with him to be kept in safe custody, and having got his money he told Chhedan that he had killed Lalo and then went away. Niether Gansu nor Chhedan did anything that night; but in the morning Lalo's

father, who had been living with Niru and who had been away on a visit returned. He found the *angan* untidy and the door chained; he undid the chain and on opening the door he found Lalo's dead body lying on the ground. Meanwhile, Chhedan had for some unexplained reason gone to Gansu and told him that Niru had killed Lalo, whereupon Gansu went and fetched the *chaukidar* of the village named Thirpa. Thirpa on arriving at the house unhooked the chain which Lalo's father had apparently re-fastened and after he had seen the dead body of Lalo, he with Gansu and another villager, Gurlu Rautia, went to Raidih Thana and laid the First Information. Raidih Thana is only ten miles from Niru's village; but the First Information was not recorded till 6 o'clock in the evening, and it was not until the next day at about 2 P. M. that the Writer Head-Constable, who had recorded the First Information, went to the spot. I may note here that after the Sub-Inspector of Raidih began to record the First Information, he was seized with a fit and became "senseless", so the recording was continued by the Writer Head-Constable, and this accounts for it being the Writer Head-Constable who first went to the place of occurrence. On arrival at the place he began the investigation and sent the body of Lalo for *post mortem* examination. On the following day (the 4th) he handed over the investigation to the Sub-Inspector of Chainpur, who later, on the 13th, handed it over to the Sub-Inspector of Raidih.

On the morning of the 2nd when Lalo's father, Shibtahal Rautia, went to the house and when the *chaukidar* was taken there Niru was not at home, and for this reason apparently it was stated in the First Information that he was suspected of having committed the murder. There was no trace of Niru until the 4th when a Sub-Inspector of Police who had been at Gumla to give evidence and was returning to his own Police Station, saw a man at Lohardagga Railway Station behaving in what he considered to be a suspicious manner and when the man got into the train he followed him into the same carriage and got into conversation with him. On account of what he told him he arrested him and took him to the Sub-Divisional Officer's office in Ranchi. The accused has in the Sessions Court denied all knowledge of the occurrence. In the Committing Magistrate's Court he was subjected to an examination which was really a cross-examination and in the course of it he stated that he had seen Lalo being killed by her husband, Budhu Rautia. Some reliance appears to have been placed on portions of this statement not only by the Committing Magistrate but also by the Sessions Judge. It is clear, however, that the statement must be left out of consideration in this case, for it is not an examination of the accused such as is contemplated by the Code of Criminal Procedure. What we have then is a denial of all knowledge of the occurrence by the accused who also says that he was away from home at the time.

The result of the *post mortem* examination shows that Lalo had five very severe wounds on her head, each of which had cut through the skull into the brain. The medical evidence shows that death was due to shock and hœmorrhage caused by these injuries. The injuries were probably caused by an axe, and it is clear from this evidence that the woman Lalo was killed by some one who had made a brutal attack on her.

The question is, whether it was the appellant who inflicted the injuries. The evidence against the appellant is, (1) that he quarrelled with the woman after she went to live with him because she would not accept his mode of living; (2) that he was seen with her after supper on the evening before her dead body was found; (3) that he made confessions to Gansu and Chhedan, and (4) that he was seen at Lohardagga by the Sub-Inspector and was arrested by him in the train.

The most important evidence against the appellant is his alleged confessions to Gansu and Chhedan, the former of which is said to have been overheard by Gansu's wife, Budhani (P. W. No. 3). As this is the most important evidence, it is necessary to examine it carefully, but I may say at the outset that the learned Government Advocate has admitted that it is open to very grave criticism. Gansu's statement is that Niru woke him up in the night. He

said he was going to Barwe and handed over two axes, one of which he had previously borrowed from Gansu. There his evidence stopped, but a leading question was put to him by the prosecution:

"Did he say anything about *Musammat* Lalo?"

to which the reply is:

"Yes, he said he had killed her."

I need hardly say that it was most improper of the prosecution to put a leading question of this kind and it is surprising that the learned Judicial Commissioner should have allowed it or that he should have recorded and used the reply. It is impossible to attach any value to evidence elicited by the prosecution in this way. Apart from this, however, I fail to see how it would be possible to rely on this evidence. In the first place, the story is an improbable one. That a man who had just committed a brutal murder and was escaping should go to a neighbour merely to return a borrowed axe and thus to create evidence against himself is a story it would be very difficult to believe. It becomes still more incredible when we find that it was never told to any one until the 12th or 13th when it was told to the Sub-Inspector of Raidih. The improbability of this story and the fact that it was not told until nearly a fortnight after the occurrence is sufficient to damn it, but in addition to this there are certain discrepancies between the evidence of Gansu and Budhani his wife, which of themselves would go far to discredit the evidence. Gansu says that Niru did not speak loudly and that he could not distinctly hear whether he said he had killed his wife or what he said. Budhani, on the other hand, says that he spoke loudly when he said he killed his wife. Again, Gansu says that Niru gave him the axes, whereas his wife says that Niru had fled before her husband got into the verandah. It is unnecessary to go further into these discrepancies. It is impossible, in my opinion, to credit this story and the story of the axes would appear to have been introduced for the purpose of getting some material exhibit in the case.

The evidence of the witness Chhedan is of very much the same character, except that he is the only person who tells the story and, consequently, there can be no corroboration or discrepancies. His story is that Niru woke him up to get Rs. 9 which he was keeping in safe custody. Here, again, we have the inherent improbability of the story of a man having just committed a brutal murder creating evidence against himself and the fact that Chhedan did not tell the story of this so-called confession until nearly a fortnight after the occurrence. It is an improbable story which is uncorroborated, and, under the circumstances, I am unable to accept it.

The evidence of the so-called confession then goes and without this there is really nothing even if we accept the rest of the evidence to connect the accused with the murder except the quarrel, and the fact that Niru was the last person seen with the deceased before her death. The last quarrel, however, took place three days before the day of the occurrence and the evidence is that the appellant and the deceased when last seen were apparently sitting amicably together, so that the motive for the crime, so far as the accused is concerned, has disappeared. As a matter of fact, however, it is difficult to say whether the evidence of the quarrel and of eating supper together can be believed or not. The examination-in-chief and the cross-examination of all the witnesses indicate that both the prosecution and the defence have been conducted in a most perfunctory manner, and the learned Judicial Commissioner does not appear to have exerted himself to get at the real truth of the case. Not only does this appear from a perusal of the evidence itself but it is also apparent from the fact that material witnesses have not been examined and no explanation is offered for their non-examination. With the exception of the Writer Head-Constable, no investigating officer has been examined though apparently there were other two such officers. We, therefore, do not know when the witnesses Nos. 5 and 6, who deposed to the quarrel and the eating together of the supper, were examined by the Police. It was important to know this and the non-production of such material witnesses as the investigation officers, is a serious omission which

cannot but throw suspicion on the whole prosecution case.

Other points, which no attempt has been made to explain, are the delay in laying the First Information and the delay in the Writer Head-Constable going to the spot after the First Information was laid. In this connection also I may mention that Shibtahal Rautia in his evidence has referred several times to his wife, and his evidence as it stands shows that he was expecting to find her at the house when he returned on the morning after the occurrence. I am not certain that the word "wife" has not been wrongly recorded by the learned Judicial Commissioner for the word "daughter" and I think that this is probably what has occurred; but it is a matter which should have been cleared up, and if there is no mistake in recording the evidence Shibtahal's wife was the most important witness in the case.

It is hardly necessary to refer to the evidence regarding the arrest of the appellant in the train, because, as the learned Government Advocate has said, it does not really affect the case. Niru's travelling by train from Lohardagga is quite as consistent with his story told to the Judicial Commissioner that he was away from home at the time of the occurrence as with his guilt.

In the result then, in my opinion, no case has been established against the appellant. I would accordingly set aside the conviction and sentence and acquit the appellant.

Adami, J.—I agree with the decision arrived at by my learned brother. There is only circumstantial evidence to connect the accused with the crime, and in cases of this nature, especially in case of a charge of murder, it is most necessary that every link of the chain of evidence should be carefully tested; no link should be missing and every link should be fully proved. In the present case there are links which will not stand the test. In my opinion the test applied by the prosecution and the Court was not sufficient. The examination of the witnesses has been somewhat perfunctory, and insufficient attempt has been made to verify the details of the case which was one in which caution was most necessary.

I am of opinion that the appellant should be acquitted.

N. K. *Conviction set aside.*

CALCUTTA HIGH COURT.

CIVIL MISCELLANEOUS CASE NO. 27 OF 1922.
May 22, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

RAM SARAN SINGH—COMPLAINANT —PETITIONER

versus

CHANDRA MOHUN SAHA AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195, (6)—Sanction to prosecute—Period of sanction, extension of—High Court, jurisdiction of Revocation of sanction, application for Proceedings in pursuance of sanction whether barred.

The period of six months referred to in sub-section (6) of section 195 of the Code of Criminal Procedure begins to run from the date on which the sanction to prosecute is given by the Court to which the application for sanction was made. (p. 224, col. 1.)

The words used in sub-section (6) of section 195 of the Code of Criminal Procedure are wide enough to give the High Court jurisdiction to extend the time mentioned in that sub-section though the period of six months has expired and the sanction is no longer in force. (p. 224, col. 2.)

Kali Kinkar Sett v. *Dinobandhu Nandy*, 32 C. 379 at p. 381; 9 C. W. N. 321; 2 Cr. L. J. 106, not followed.

The High Court, when considering an application for extension of the period of sanction, ought to be very careful not to extend the time unless it is clearly shown that "good cause" for extending the time exists within the meaning of the section. (p. 225, col. 1.)

An application for the revocation of sanction is no bar to the institution by the complainant of proceedings in pursuance of the sanction. (p. 225, col. 1.)

Where such proceedings are instituted, it is open to the Court to stay them pending the decision of the application for revocation. (p. 225, col. 1.)

Rule against the order of the Subordinate Judge, Comilla.

Babu *Sasadhar Roy*, (Senior) for the Petitioner.—The facts out of which the present Rule arises are briefly these. I brought a suit for rent against Chandra Mohan and others which was decreed on 8th October 1920. In support of their case the opposite parties filed certain *dakhilas* as evidence in the case. The learned Subordinate Judge, who discussed these documents, found that they were not genuine and were forged. I, thereupon, applied under section 195 of the Code of Criminal Procedure for sanction to prosecute the opposite parties under sections 193 and 471 of the Indian Penal Code. The learned Subordinate Judge granted sanction on 13th June 1920. The opposite party then applied for revocation to the District Judge who dismissed the application on 26th September 1921. The present application is for extension of time under section 195 (6), Criminal Procedure Code. My case is that I fell ill and was confined to bed from October 1921 till February 1922. I submit I have amply made out sufficient cause from the medical certificate and the Doctor's evidence. See *Muthukudam Pillai, In re* (1) and *Karuppana Servagaran* v. *Sinna Gounden* (2).

Babu *Upendra Kumar Roy* (with him Babu *Nogendra Chandra Chaudhuri*), for the Opposite Party.—The application should have been made before the expiration of six months as provided for in section 195. The time has long expired. I submit there is nothing in the application to take action upon. Refers to *Kali Kinkar Sett* v. *Dinobandhu Nandy* (3). In the Madras cases no clear reasons have been given. Those cases were not followed in this Court. My next contention is that section 195, Criminal Procedure Code, is a penal section and ought to be strictly construed. The period of six months is not an ordinary rule of limitation. It is an absolute bar. Refers to *Ananta Panda* v. *Bhagaban Ramanuja* (4). A private prosecutor should not be allowed to keep the sanction *in terrorem* over the head of the accused indefinitely. On the merits, no sufficient cause has been made out. The medical certificate is highly unsatisfactory. The Doctor does not state that the petitioner was ever under his treatment. I submit the Rule should be discharged.

Babu *Sasadhar Roy* in reply:—The observations in *Kali Kinkar Sett* v. *Dinobandhu Nandy* (3) are merely *obiter dicta*. The point involved was quite different. It was merely by way of a passing remark which was quite unnecessary for the case. As regards the point that you have no jurisdiction to entertain the application because the six months has already long expired my submission is this. If one applies for extension before the expiry of the period the application will be considered premature and the petitioner will be asked to start the proceedings at once. That I submit was clearly not the intention of the Legislature.

JUDGMENT.

Sanderson, C. J.—This was a Rule issued by my learned brothers Mr. Justice Walmsley and Mr. Justice Suhrawardy calling upon the opposite party to show cause why the period of the sanction should not be extended.

The Rule was granted on the 3rd April 1922 on an application supported by an affidavit which was affirmed on the 27th February 1922.

It appears that the petitioner instituted a suit against one Chandra Mohun Saha and others for rent. It was tried by the Subordinate Judge of Comilla, who gave judgment in favour of the petitioner. Certain rent-receipts had been put in evidence by the defendants and the learned Judge held that the rent-receipts were forgeries. An application was made by the petitioner to the learned Judge for sanction to prosecute the defendants and some of their witnesses under section 195 of the Code of Criminal Procedure, and on the 13th of June 1921 sanction was given by the learned Subordinate Judge. An application to revoke the sanction was then made by the defendants to the District Judge. The learned

(1) 26 M. 190 at p. 191; 2 Weir 200.
(2) 26 M. 480 at p. 481; 2 Weir 201.
(3) 32 C. 379 at p. 381; 9 C. W. N. 321; 2 Cr. L. J. 106.
(4) 11 Ind. Cas. 246; 12 Cr. L. J. 382.

District Judge, after making a small variation in the order of the learned Subordinate Judge, dismissed the application to revoke the sanction and his judgment was given on the 26th September 1921.

The allegation of the petitioner is, that he fell ill in October 1921, and was confined to bed until February 1922. Section 195, sub-section (6) of the Code of Criminal Procedure provides, that, "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and no such sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time." If, therefore, the period of six months referred to in sub-section (6) of section 195 of the Code of Criminal Procedure, began to run from the date on which the sanction was granted by the learned Subordinate Judge, namely, the 13th June 1921, that period would expire on the 13th December 1921, and, in my judgment, it must be taken that the period did begin to run from the 13th June 1921.

It was contended on behalf of the opposite parties that inasmuch as the period of six months had expired by reason of the provisions of sub-section (6) of section 195 of the Code of Criminal Procedure the sanction was no longer in force and that the High Court had no jurisdiction at the time this Rule was granted, namely, on the 3rd April, 1922, to extend the time, and reliance was placed on a decision of this Court in the case of *Kali Kinkar Sett* v. *Dinobandhu Nandy* (3). In the judgment, which was a judgment of the learned Chief Justice, Sir Francis William Maclean, Mr. Justice Hill and Mr. Justice Harrington, there are some remarks which are relevant to this question. But it is to be noted that those remarks were not necessary for the decision. The decision was based upon another ground altogether. The learned Chief Justice at the end of his judgment is reported to have said as follows :—

"The other questions do not, in this view, become material : but as they have been argued we may say that we do not agree with the view that the time can be extended when it has expired. If the time has expired, there is nothing to extend. The cases in the Madras High Court, upon which the Court of first instance relied, were heard *ex parte*, apparently without the question being argued, and can scarcely be treated as authorities. Any way we respectfully differ."

As I have already said, these remarks were not necessary for the decision, and being *obiter dicta*, they do not amount to a decision binding upon this Court. But being opinions of the learned Chief Justice and two of the learned Judges of this Court they are entitled to the respect and consideration which opinions of such Judges must inspire. With great respect, however, to the learned Judges who were responsible for those remarks, I find myself unable to adopt the reasoning which led them to the conclusion at which they arrived. Reading the words of the section and giving to them their ordinary meaning it seems to me that the words are wide enough to give the High Court jurisdiction to extend the time, though the period of six months has expired and though the sanction is no longer in force. To hold otherwise, in my judgment, would have the effect of limiting unduly the meaning of section 195, sub-section (6) of the Code of Criminal Procedure. It seems to me that the occasions on which it would be necessary for a party, who had obtained sanction to prosecute, to apply for an extension of time before the period of six months expired would be few and far between : and if such an application were made before the expiration of the period of six months, apart from any special circumstances, the reply which would be made to such an application would be that the applicant for extension of time should proceed forthwith to lodge the complaint and should proceed with the prosecution inasmuch as the period of six months had not expired. Consequently, I am prepared to hold, with the greatest deference to the learned Judges who were responsible for the "*obiter dicta*" to which I have referred, that the High Court has jurisdiction to extend the time even though the period of six months for which

the sanction was in force has expired; I see no real risk or danger in so holding. It is obvious that the object of the provision relating to the period of six months is a laudable one, namely, to prevent a prosecution from hanging over the head of the accused person or persons for an undue or unreasonable time, and, in my judgment, the High Court, when considering such an application as this, ought to be very careful not to extend the time unless it is clearly shown that "good cause" for extending the time exists within the meaning of the section. If such care is taken, I see no reason why the interpretation of the section, which I have adopted, should lead to any unfairness or injustice to the accused person.

It only remains for me now to consider the facts of this case and I propose to deal with them shortly. They are of no general importance. In my judgment the petitioner has made out a good case why the time should be extended. Although it was open to the petitioner to institute the proceedings at any time after the 13th of June 1921, which is the date of the sanction, it does not seem to me to be altogether unreasonable that the petitioner should, under the circumstances of this case, have postponed filing his complaint till the defendants' application for revocation of the sanction had been disposed of. This was not until the 26th September 1921. I desire, however, to make it clear that this must not be taken as a decision that the application to the District Judge for revocation of the sanction was a bar to the institution by the complainant of proceedings in pursuance of the sanction. If the complainant had instituted the proceedings, it would, no doubt, have been open to the Court to stay further proceedings until the decision of the learned District Judge was given. I am satisfied that, shortly after the learned District Judge disposed of the application for revocation, the petitioner did become seriously ill and I am also satisfied that he continued to be ill from that time up to February 1922. In February 1922 he made his application to this Court and, therefore, in my judgment, there was no undue delay on the part of the petitioner.

For these reasons, in my judgment, this Rule must be made absolute and the time should be extended. We extend the time by one month from to-day. We give directions to the office to send down the record with copy of our judgment to the lower Court as soon as possible.

Panton, J.—I agree.

B. N. *Rule made absolute.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 468 OF 1922.

August 3, 1922.

Present:—Mr. Justice Ghose and Mr. Justice Chotzner.

ARAN SARDAR AND OTHERS—FIRST PARTY—PETITIONERS

versus

HARA SUNDAR MAJUMDAR AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Possession adjudged—Disturbance of possession—Maintenance of peace—Fresh proceedings under s. 145—Wrong exercise of judicial discretion—Government of India Act, 1915. (5 & 6 Geo V, c. 61), s. 107—Abuse of process of Court—Interference by High Court.

Where by an order passed under section 145, Criminal Procedure Code, the possession of a party has been once adjudged, the duty of the Magistrate is to see that the unsuccessful party does not disregard the order and disturb the possession without having recourse to law. Therefore, if, instead of maintaining the possession, he initiates fresh proceedings under section 145, Criminal Procedure Code, for maintaining the peace, he does not exercise a proper judicial discretion. (p. 227, col. 1.)

When legal proceedings are taken under the Code of Criminal Procedure which amount to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, the High Court has ample jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act. (p. 227, col. 1.)

Rule granted against an order of the Sub-Divisional Magistrate, Manikgunge, dated the 18th May 1922.

Babu *Manmatha Nath Mukherjee* (with him Babu *Hira Lal Sanyal*), for the Petitioners.—

This matter arises out of a proceeding under section 145 of the Code of Criminal Procedure. The first party is the petitioner. There was a previous proceeding under section 145, Criminal Procedure Code, between us and the second party in which we were successful. That order was made on 29th August 1919 and we were held to be entitled to retain possession of the lands in dispute. There was a local investigation and it was found that the lands now in dispute were also the subject-matter of the previous proceeding. The learned Magistrate held that there being evidence of a *bona fide* dispute as to actual possession, the whole of the lands would be attached under section 145, Criminal Procedure Code. My contention is that the order in the previous proceeding is binding on the parties and that the Magistrate has erred in drawing up fresh proceedings under section 145, Criminal Procedure Code. Hence I submit you should quash these proceedings in the exercise of your powers under section 107 of the Government of India Act, 1915. It is clearly the duty of the Magistrate to maintain the first party in possession under the order passed in the previous proceeding under section 145, Criminal Procedure Code, on 29th August 1919. I submit there ought to be a finality in these things. The second party cannot be allowed to disregard the previous order which is binding on them. They cannot be allowed to reap fresh advantages from these fresh proceedings from time to time.

Babu *Dasarathi Sanyal* (with him Babu *Debendra Narain Bhattacharjee*), for the Opposite Party.—I submit this Court cannot interfere with the discretion used by the Magistrate. Refers to *Emperor* v. *Abbas* (1), *Kulada Kinkar Roy* v. *Danesh Mir* (2). The Magistrate has power either to proceed under section 107 or section 145 or under both these sections of the Code of Criminal Procedure. You cannot interfere in revision with that order. See *Queen* v. *Protab Chandra Barooah* (3); section 45 of the Specific Relief Act; *Amulya Charan Sarkar* v. *Amrita Lal Mukherjee* (4). It may be that there was a previous order under section 145 three years ago. But in the meantime there might have been great changes in the circumstances. Surely, that does not prevent the Magistrate from acting in the way he thinks best now.

Babu *Manatha Nath Mukherjee*, replied in brief.

JUDGMENT.—We are invited in this Rule, which was obtained under section 107 of the Government of India Act, to quash certain proceedings initiated by the Sub-Divisional Magistrate of Manikganj under section 145, Criminal Procedure Code.

The question in controversy lies within a very narrow compass. There was a proceeding under section 145, Criminal Procedure Code, between the first party and persons now represented by the second party which resulted in an order being made in favour of the first party on the 29th of August 1919 declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction. The principal person of the second party then was one U. N. Roy. The interest of U. N. Roy has now passed to one Hara Sundar Mazumdar and he is now the principal person among the second party. It appears that after Hara Sundar acquired his interest he began to disturb the possession of the first party, which was maintained by the order of the 29th of August 1919. There is no dispute as to the identity of the parties. There was a question whether the present dispute related to the same land which was the subject-matter of dispute in the proceedings mentioned before and the Magistrate deputed a Kanungoe to make a local enquiry. The result of the enquiry, shortly stated, was that the lands in the present dispute were included within the lands which formed the subject-matter of the previous dispute. The learned Magistrate thereupon made an order on the 18th May 1922 which runs as follows:—

"I am satisfied from the Kanungoe's report that the eastern boundary of the lands at present in

(1) 12 Ind. Cas. 833; 39 C. 150 at p. 156; 14 C. L. J. 429; 16 C. W. N. 83; 12 Cr. L. J. 569.
(2) 33 C. 33; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.)
(3) 21 W. R. (Cr.) 2.
(4) 60 Ind. Cas. 336; 24 C. W. N. 1075; 22 Cr. L. J. 224.

dispute is not identical with that which was the boundary of the lands in the former 145, Criminal Procedure Code. Nevertheless, the lands at present in dispute form part of the lands adjudged under the 145 proceedings, but there is evidence of a *bona fide* dispute as to actual possession now. Therefore, as I consider a breach of the peace to be imminent, I hereby attach the whole of the lands included in Sheet No. 1, Purulia, under section 145 (4), Criminal Procedure Code, Draw up new proceedings under section 145, parties to produce evidence as to possession on 6th June 1922."

The identity of the parties and the lands being established it was clearly the duty of the Magistrate to see that the possession of the first party adjudged under the previous order was not disturbed. That order is binding on the parties and the unsuccessful party cannot be allowed to disregard it and disturb the possession of the other party without having recourse to law. It is not the proper course for the Magistrate to initiate fresh proceedings under section 145 of the Criminal Procedure Code for maintaining the peace.

It has been contended on behalf of the opposite party that this Court has no jurisdiction to quash the proceedings at this stage. We are of opinion, however, that when legal proceedings are taken under the Code of Criminal Procedure which amounts to an abuse of process of the Court and the object of which is only to harass the party, who has got a previous order of the Magistrate in his favour, this Court has ample jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act. The object of the second party is quite apparent in instituting these proceedings. It is to get an order in his favour, if possible, contrary to the order which was passed in August 1919, and, if not, even an adverse order, which may also be of advantage to him. If the proceedings are allowed to continue and terminate in a fresh order under section 145, Criminal Procedure Code, it would affect the first party in another way. As is well known, the previous order of the 29th of August 1919 is binding upon the parties to the proceedings and a suit for recovery of possession by a person against whom that order was made can only be brought within three years of the order under Art. 47 of the Limitation Act. If the proceedings terminate in a fresh order it would be really giving the second party, assuming that the new order is made against him, a fresh start of limitation in order to bring a suit for recovery of possession. That is a proceeding which, appears to us, can hardly be justified.

It has further been argued on behalf of the opposite party that we should not interfere with the discretion of the Magistrate to proceed either under section 107, Criminal Procedure Code, or under section 145 of that Code, as he thought fit, and the learned Vakil has cited a number of cases in support of his contention. It is, no doubt, true, if things stood alone, it was perfectly competent to the Magistrate to initiate such proceedings as he thought proper and the High Court would not interfere with his discretion in starting proceedings according to his judgment. In this case, however, it was the duty of the Magistrate, as already pointed out, to maintain the first party in possession under the order passed previously under section 145, Criminal Procedure Code, and not to start fresh proceedings under that section. The Magistrate has ample powers under the law to maintain peace and to see that the order made in August 1919 is obeyed. In this case, therefore, in our opinion, the Magistrate did not exercise proper judicial discretion in starting proceedings under section 145 afresh. The result of such a course would be that the binding effect of an order under section 145, Criminal Procedure Code, would be disregarded and any number of proceedings may be initiated by any disappointed party leading to no result whatsoever, a position which would surely be intolerable.

One other argument which was addressed on behalf of the opposite party is, that the character of the property has been changed. This, we consider, does not require any serious consideration: because even assuming that part of the land was submerged and has re-appeared, there was no difficulty with regard to the identification of the lands: and the mere fact, that there was temporary submergence would not nullify the effect of the previous order passed with regard to them on the 29th of August 1919.

We, therefore, set aside the order of the Magistrate, dated the 18th May 1922, instituting fresh proceedings under section 145, Criminal Procedure Code, with regard to the lands in dispute. This order will not preclude the Magistrate from taking such other proceedings as he may consider necessary for the purpose of maintaining the first party in possession of the property and for the preservation of the peace.

S. D. & B. N. *Order set aside.*

— —

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 51 OF 1922.
(CRIMINAL REVISION PETITION NO. 51 OF 1922.)
May 5, 1922.
Present:—Mr. Justice Ramesam.
THYLAYEE AMMAL—PETITIONER
versus
SRIRANGAROYA GOUNDAN AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Revisional powers of High Court.

Where there is initial want of jurisdiction, proceedings, though they may purport to be under section 145 of the Criminal Procedure Code, are not really proceedings under that section and the High Court can interfere under section 439 of the Criminal Procedure Code. But if the proceedings were properly started, the High Court can interfere only under section 107 of the Government of India Act on the ground of irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it, serious enough to vitiate the order. (p. 230, col. 2.)

(Case-law reviewed).

Section 145 does not apply where the parties have joint possession. Where in proceedings under section 145, a perverse finding is arrived at by a Magistrate after getting rid of the documentary evidence by incorrectly saying that it relates to the legal title only, and by getting rid of oral evidence by saying, without assigning any reason, that it is unnecessary to enter into it, there is no judgment or finding which a Court can accept and the High Court will interfere. (p. 229, col. 1, & p. 232, col. 1.)

Kist receipts and *pattas* are not only evidence of legal right but strong evidence of possession which a Court cannot lightly disregard. (p. 231, col. 2.)

Petition, under section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-Divisional, First Class Magistrate, Erode, dated the 8th of December 1921, in Miscellaneous Case No. 38 of 1920.

Messrs. *K. V. Krishmaswamy Iyer* and *N. Swaminatha Iyer*, for the Petitioner.

Mr. *L. A. Govindaraghava Iyer*, for the Responpents.

ORDER.—This revision petition is against an order of the Sub-Divisional Magistrate of Erode, dated 8th of December 1921. An objection has been taken by Mr. Govindaraghava Iyer, the learned Vakil for the respondents, that I have no power to interfere. He relied on *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1) (Ayling and Napier, JJ.,) and *Sakhawat Ali* v. *Emperor* (2), (Knox, J.) A sentence in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1) " Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction" quoted with approval and followed in *Vellanki Srinivasa Jagannatha Rao* v. *Gopalakrishan Rao* (3) (Ayling, J.) produces the first impression that it decided that once the proceedings are properly started under section 145, there can be no challenge of those proceedings before the High Court. But the words " must be considered in relation to procedure" do not support such a view of the case. They rather show that no point of jurisdiction can be made after the initial stage but only a question of serious irregularity in procedure. For, if no such power of interference exists, there is nothing to consider. The point argued in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1), was only a question of jurisdiction and the observations in the judgment refer to the only contention raised before the learned Judges. In *Vellanki Srinivasa Jagannatha Rao* v. *Gopalakrishan Rao* (3) the irregularity com-

(1) 17 Ind. Cas, 65; 36 M 275 at p 286; 12 M.L.T. 439; (1912) M.W.N. 1154, 23 M.L.J. 499; 13 Cr. L. J. 753.

(2) 51 Ind. Cas, 337; 41 A 302; 17 A.L.J. 321; 20 Cr. L. J. 449.

(3) 53 Ind. Cas, 613; 37 M. L. J. 589; 10 L. W. 447; 20 Cr. L. J. 773.

plained of was that some of the evidence was taken by another Magistrate, to whom part of the enquiry was delegated, and I must take it that, in the opinion of his Lordship (Ayling, J.), it was not such an irregularity as to justify an interference with the orders in Criminal Revision Case No. 407 of 1920. Napier, J., who was the other learned Judge who took part in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1), said: "It would have been better if he had referred to the evidence in his order, but I cannot treat the absence of such a reference as a *serious irregularity*, much less a want of jurisdiction"—showing that a serious irregularity may be a ground for interference. (Otherwise these words are unnecessary). I will show later on that, where serious irregularity is a ground for interference the interference can be only under the Charter Act (section 107) and not under section 439 of the Criminal Procedure Code.

Anyhow, Mr. Govindaraghava Iyer had to concede in the course of the argument, with reference to other decisions, to which I shall presently refer, that there may be cases in which the High Court can interfere on account of serious irregularity in the proceedings of the Magistrate amounting to improper exercise of jurisdiction or improper refusal to exercise his jurisdiction. In *Muhammad Koolayappa Rowthan* v. *Sheik Abdul Khadir Rowther* (4), (to which Ayling, J., was a party) it was held that, where the finding of the Magistrate was that the parties had joint possession, section 145 does not apply and the order was set aside. I agree with this decision and the cases in *Nritta Gopal Singh* v. *Chandi Charan Singh* (5), *Makhan Lal Roy* v. *Barada Kanta Roy* (6) and *Manik Chandra Chakravarti* v. *Preo Nath Kuar* (7) on which it was founded. See also *Basanta Kumari Dasi* v. *Mahesh Chandra Laha* (8). I wish to point out that the High Court could not interfere in such a case if the sentence in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1), quoted above, is understood as if it meant to lay down that the High Court can never interfere if it were satisfied that the proceedings started properly. In *Tarujan Bibee* v. *Asamuddi Bepari* (9), *Dharani Kanta Lahiry* v. *Girija Kanta Lahiry* (10) and *Radha Raman Ghose* v. *Baliram* (11) it was held that the possession of a partner or a trustee or an agent is the possession of all the partners, co-trustees, or principal, and section 145 should not be used to protect such possession, and orders under section 145 were set aside. It is true that the first of these cases was dissented from in *Narayana Asari* v. *Kandasami Asari* (12), reversing the decision of Sadasiva Iyer, J., in *Kandasami Asari* v. *Narayana Asari* (13), But the dissent is on the merits as to the proper scope of section 145 and the nature of the possession governed by it. All these cases are authorities for the proposition that, when section 145 is seemingly misapplied, the High Court can interfere. If the correct view is, that an agent's possession or sole partner's possession would not be protected under section 145 (as these Calcutta cases hold) but the Magistrate issued an order under section 145, the High Court will interfere to set aside the order. If the correct view is, that such possession must be protected under section 145 [which is the view in *Narayana Asari* v. *Kandasami Asari* (12)], the High Court will interfere to set aside an order refusing to give such protection. The case in *Narayana Asari* v. *Kandasami Asari* (12) cannot be explained away on the ground that the Magistrate in that case gave the order; that it was a Single Judge of the High Court (Sadasiva Iyer, J.) that vacated it, and the Judges who decided *Narayana Asari* v. *Kandasami Asari* (12), sitting in Letters Patent Appeal restored the Magistrate's order. I imagine that if the Magistrate himself refused to pass an order under section 145, in that case the High Court will be equally empowered to interfere; for, I do not think anybody would contend for the absurd anomaly that the High Court can interfere in Letters Patent

(4) 25 Ind. Cas. 324; 27 M.L.J. 169; 15 Cr. L.J. 572.
(5) 10 C. W. N. 1088; 4 Cr. L. J. 215.
(6) 11 C. W. N. 512; 5 Cr. L. J. 296.
(7) 17 Ind. Cas, 533; 17 C.W.N. 205; 17 C.L.J. 397; 13 Cr. L. J. 789.
(8) 19 Ind. Cas, 541; 40 C, 982; 17 C.W.N. 944; 14 Cr. L. J. 269.
(9) 4 C. W. N. 426.
(10) 8 C. W. N. 485; 1 Cr. L. J. 367.
(11) 32 C. 249; 8 C. W. N, 885; 1 Cr. L. J. 847.
(12) 29 Ind. Cas. 541; 3 L. W. 164; 16 Cr. L.J. 525.
(13) 26 Ind. Cas 644; 3 L. W. 107; 16 Cr.L.J.52;

Appeal with a wrong order of a Single Judge of this Court but not with a wrong order of the Magistrate. Such a view will involve the further anomaly that the High Court can interfere, where the Magistrate refused an order under section 145 and a Single Judge confirmed it, but the Single Judge himself cannot set aside the order of the Magistrate even if he knew it to be wrong.

Now I come to other instances of interference. In *Vaithianatha Ayir* v. *Suppalu Ammal* (14) (to which Ayling, J., was a party) it was held that there was no finding and the case was sent back. In *Velu Malavarayan* v. *Kuppuswami Pillai* (15) Ayling and Coutts-Trotter, JJ., interfered in a case where there were several items, on the ground that all the claimants of the various items were not made parties. I am clear, therefore, that neither Ayling, J., nor Napier, J., meant what is sought to be attributed to the decision in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1). In *Sreemanavedava Raja* v. *Parapravan Naidu* (16) no oral evidence was taken and the case was sent back by two Judges of this Court. In *Marudanayakam Pillai* v. *Mohammad Rowthen* (17) Seshagiri Iyer, J., interfered on the ground that the Magistrate refused to take the evidence of witnesses tendered. He distinguished *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1). In *Pananganti Parthasarathy* v. *Venkatasami Reddi* (18) Miller, J., set aside the Magistrate's order on the ground that it dealt with the right to possession and not to the actual possession. In *Kailashbehari Lal* v. *Jai Narayan Rai* (19) the whole oral evidence was not considered and the High Court interfered. In *Atul Hazra* v. *Uma Charan* (20) the High Court (Chitty and Walmsley, JJ.) interfered on the ground that a judgment-debtor should not be protected under section 145.

In *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (21) the High Court set aside the order on the ground that the order was based on what the Magistrate saw and heard and inferred at the local enquiry and which is not on the record. This case comes nearest to the case before me. In *Arumuga Govindan* v. *Venkatasubbier* (22) Wallis, J., set aside the order of the Magistrate on the ground that the Magistrate himself ought to take the evidence and the order was based solely and substantially on evidence recorded by a Subordinate Magistrate. I would here point out that the decision in *Vellanki Srinivasa Jagannatha Rao* v. *Gopalakrishan Rao* (3) is inconsistent with this, and as between the two I would prefer to agree with the view of Wallis, J., in *Arumuga Govindan* v. *Venkatasubbier* (22).

When there is initial want of jurisdiction, it is clear that the proceedings, though they may purport to be under section 145, Criminal Procedure Code, are not really proceedings under it and the High Court can interfere under section 439, Criminal Procedure Code, but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under section 107 of the Charter Act. In *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (23) the petition was filed under section 439, Criminal Procedure Code, and there was no question of jurisdiction. This was pointed out by Sadasiva Iyer, J., in *Palani Chetty* v. *Rathina Chetty* (24), where he held that the High Court had power to interfere under the Charter Act in an appropriate case. I may add that the High Court in *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (23) considered the argument on the merits and held that section 145 may be used to protect the possession of a Manager of a joint family, following *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (25) and dis-

(14) 26 Ind. Cas. 156 ; 1 L. W. 939 ; 15 Cr.L J. 708.
(15) 59 Ind. Cas. 378 ; 12 L. W. 315; 22 Cr.L.J. 90.
(16) 54 Ind. Cas. 254 ; 38 M. L. J. 73 ;(1920) M.W.N. 133; 27 M.L. T.85; 11 L. W. 285; 21 Cr.L. J. 46.
(17) 34 Ind. Cas. 329; 17 Cr. L. J. 217.
(18) 6 Ind. Cas. 398 ; 34 M. 138 ; 8 M. L. T. 104 ; (1910) M.W. N. 400 ; 11 Cr. L. J. 353.
(19) 57 Ind. Cas. 169; (1920) Pat. 288; 1 P.L.T. 291 ; 21 Cr. L J. 601.
(20) 33 Ind. Cas. 822 ; 23 C.L.J. 555; 20 C. W. N. 796; 17 Cr. L. J. 182.
(21) 10 C. W N. 181 ; 3 Cr L. J. 193.
(22) 31 M. 82 ; 17 M. L. J. 535 ; 3 M. L. T. 108 ; 6 Cr. L. J. 384.
(23) 31 M. 318 ; 18 M. L. J. 343 ; 4 M. L. T 301 ; 8 Cr. L. J. 205.
(24) 24 Ind. Cas. 597; 26 M. L. J. 208 ; (1914) M. W. N. 352 ; 15 Cr. L, J. 509.
(25) 27 C. 259 ; 4 C. W. N. 420 ; 14 Ind. Dec. (N. S.) 171.

tinguishing *Tarujan Bibi* v. *Asamuddi Bepari* (9), *Dharani Kanta Lahiry* v. *Girija Kanta Lahiry* (10) and *Radha Raman Ghose* v. *Baliram* (11) (which was cited before them—though the report does not give the references) as "cases of co-trustees or ordinary partners in which the rights of each trustee or partner are equal." In *Sundar Nath* v. *Emperor* (26) the opinion of Walsh, J., seems to be that, though the High Court cannot call for records under section 439 or the Charter Act, the party can invoke the superintending power of the Court, if the record had been sent for and the application had been admitted.

I would observe that I have not considered, as it is irrelevant, the particular irregularity which was the ground of interference in each of the cases cited by me. It is possible that different Judges may take different views on the question whether a particular irregularity is grave enough to justify interference. I have cited them only to show that the power exists, provided that there is irregularity serious enough to vitiate the order in the opinion of the Court.

In the present case, the plea of the counter-petitioner was, that Sellappa Goundan helped the petitioner (who was a young widow of 20) in all her litigation with her mother-in-law. In paragraph (vi) the counter-petitioner says: "Sellappa Goundan prosecuted the suit with Thylaiyammal as the plaintiff and carried on litigation in three Courts, all of which ended in favour of Sellappa Goundan"—as if Sellappa Goundan was then the real owner and plaintiff was merely a *benamidar*. In view of the fact that the title at that time was in the plaintiff and is still in her and all that the counter-petitioner could plead in paragraph (v) is a bare agreement without any conveyance, the suggestion that the title was in Sellappa Goundan is so absurd that it only shows the extravagant position taken up by the counter-petitioner. All the documentary evidence from the termination of the litigation up to the present disputes was in favour of the petitioner. The Magistrate says: "The counter-petitioners readily admit that the *pattas* and *kist* receipts are also in the name of the petitioner. There is, therefore, no doubt as to the legal right of petitioner to the lands. But the question is, whether petitioner was actually enjoying the lands." There is a good deal of fallacy in these statements. The Magistrate seems to think that the *kist* receipts and *pattas* are evidence only of legal right and not of possession. They are strong evidence of possession which a Court cannot lightly disregard. Again, by the use of the words "actual enjoyment" it is clear that the Magistrate's notions of possession (in law) are not quite correct. The Magistrate seems to think that a person must deal with the tenants personally or collect the rents from them personally or periodically visit or walk on the land if the dealings are to constitute possession in law. He later on says that Sellappa Goundan "must have enjoyed the lands keeping the petitioner under his protection." According to the learned Magistrate, if *A* (a female, who is the owner of certain lands,) and *B*, a friendly male who helps her, live together and enjoy the income of the lands and *B* has all the dealings with the tenants—such as negotiating the lease with a tenant, getting him to execute the *muchilika* in *A*'s name and collects the produce and brings it to the house to be enjoyed by both, *A* has no possession, whereas the correct view is that in such cases, *A* is the person in actual enjoyment and legal possession and *B* is merely a servant. *B* has not even an agent's possession. On the view of the Magistrate, no Zamindar who has a large estate consisting of several divisions and who manages each division through a Samuddar and a Tanadar and no big landholder who, being at a distance, manages his lands through his clerk, is in possession of his lands. It is the Tanadar of the Zemindar or the clerk of the landholder that is in possession and if the Tanadar or the clerk chooses to rebel against the master, his possession must be protected under section 145. It is far better that section 145 does not exist than that such use should be made of it or such use should not be interfered with by a High Court. If the Magistrate had clearly recorded his findings as to the facts, I would have at once interfered in favour of the petitioner. But there is no finding beyond the sentence: "In the nature of things, he must have enjoyed the lands, keeping petitioner under his protection"—a statement based on some speculative consideration which does not commend itself to me as

(26) 44 Ind. Cas 673; 40 A. 364; 16 A. L. J. 189; 19 Cr. L. J. 369.

probable or even plausible. He first thinks that Sellappa Goundan must have helped the petitioner. The next step is, he would not have allowed the petitioner to enjoy all the lands and keep quiet. If this meant that he would have claimed some remuneration for the help rendered, one would not quarrel with it. The next step is that he (Sellappa) must have enjoyed all the lands keeping the petitioner in his protection—a conclusion so perverse that I cannot accept it as a finding. When we find that this conclusion is arrived at after getting rid of the documentary evidence by saying that it relates to the legal right only (which is not correct) and by getting rid of the oral evidence by saying that it is unnecessary to enter into it—why, we are not told,—I am of opinion there is no judgment or finding that any Court can accept.

I, therefore, send back the case for a proper finding on the evidence on record and in the light of my remarks as to possession. Costs to abide the result.

V. N. V. *Case sent back.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL, NO. 57 OF 1922.
April 5, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

KHETRAMANI DASI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 373—Intention or knowledge—Inference from circumstances—Burden of proof—Evidence Act (I of 1872), s. 106, Ill. (a).

Proof of intention or knowledge, such as are mentioned in section 373 of the Penal Code, must be almost entirely a matter of inference from circumstances. (p. 234, col. 2.)

Where in a prosecution under section 373 of the Penal Code against a woman all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose, the burden lies upon the woman of proving that she intended to wait until the girl had reached the age of majority. (p. 234, col. 2.)

Criminal appeal against the order of the Third Presidency Magistrate, Calcutta, dated the 23rd December 1921.

Babu *Probodh Chunder Chatterjee*, for the Appellant.

Mr. *S. R. Das*, for the Crown.

JUDGMENT.

Walmsley, J.—The appellant has been convicted under section 373, Indian Penal Code, and sentenced to undergo one year's rigorous imprisonment. The girl in this case is Ranibala Dasi, who, according to the Police Surgeon, was about sixteen years old on December 2, 1921, when he gave evidence.

The first question that arises is, whether the appellant obtained possession of her. It is suggested that she bought her, but there is no evidence of this. It is conceded, however, that the girl has been with the appellant for several years. In cross-examination some questions were put suggesting that the appellant was the mother of the girl, but the appellant in the course of her very lengthy written statement made no such assertion. The only possible conclusion is, that the girl is not the daughter of the appellant, and that the appellant obtained possession of her some ten years ago, as set out in the charge.

The next and most important question is the intention or knowledge of the appellant. Here I may mention that the learned Magistrate does not appear to have made the mistake of thinking that the proposed explanation was ever added to the section, whatever may have been his impression when he framed the charge. He recognised that the *onus* lay on the prosecution, and, therefore, his reasoning is not vitiated by any fundamental misconception. Proof of intention or knowledge, such as are mentioned in the section, must be almost entirely a matter of inference from circumstances.

The appellant is admittedly a prostitute herself. Evidence is given that she has been in the habit of keeping *chukries*, and appropriating their earnings. One of these girls is Gouribala Dasi, prosecution witness No. 11. The fourth witness, Norendra Nath Mandal, who is not at all hostile to the appellant, says that her house was a brothel, and he had visited it twice within eighteen months of giving evidence. Until about the end of 1918, when Ranibala was a girl of thirteen, she habitually lived with the appellant in such surroundings, and it is clear from the evidence that she knew quite well what was going on. During this time Ranibala received practically no literary education: the Sarkar of another *bariwali* was employed to

:each her for a few months before she was iurried out of Calcutta at the end of 1918. She did, however, receive training from an *ostad*: she mentions this herself and the Sarkar says he saw the *ostad*. It is not denied :hat an *ostad* teaches accomplishments :hat enhance a girl's attractiveness.

If we look at this chapter of the girl's life, t seems to me that everything goes to show :hat the appellant intended the girl to prac:ise prostitution, or knew that she would be likely to do so.

The second chapter begins about the end of 1918, when the appellant became alarmed by the action of the Police in regard to the young girls kept in brothels. She hurried Ranibala to Sodepur and left her with Norendra Maiti, the Post-Master, and there she passed as the sister of Norendra's wife. She formed the acquaintance of Nanda Lal Datta, a Veterinary Surgeon, and his family, and through them of Nirmal Kumar Mitter, a Christian youth; and between her and the latter an attachment grew up. To these witnesses she told her story, and there can be no doubt that she told them very definitely that, in her view, the appellant intended her to be a prostitute, and that she begged them to help her. I think that the importance of this part of the evidence lies in this fact that when Ranibala was for the first time in her life removed from the poisoned environment in which she lived to the clean atmosphere of a respectable Hindu household she realized at once where the life she was living in the Upper Chitpore Road would lead her, and I attach much more importance to what she said about the appellant's intentions at Sodepur than to what she said after the case had been taken up by the Police.

After three months at Sodepur, a third chapter was begun by the removal of the girl to a village in the interior of Midnapur. It is on this part of the case that the learned Pleader for the appellant has dwelt at greatest length. He urges that the appellant put the girl in a good home, made arrangements for her education which were so successful that she won a scholarship, and laid plans for building a home for herself where she could live out her old age with Ranibala married to some villager. He has also laid great stress on Nirmal's intervention, and to Ranibala's supposed infatuation for Nirmal. Ranibala stayed at Asthwapur for a little over two years and undoubtedly she was well treated there and the expenditure was borne by the appellant. Nothing, however, seems to have been done to arrange a marriage for the girl. The appellant does not say in her written statement that she opened negotiations with any one: she only refers to a letter from Ranibala objecting to two men who had been proposed, and in cross-examination of Ranibala all that was elicited was that Norendra Jana had proposed three names. Norendra, however, says that he made no efforts to find a bridegroom, because he knew that no one would marry a prostitute's girl. He does bear out the case that the appellant was trying to make a home for herself, but Kshetramani's desire for a homestead and paddy land has nothing to do with her intentions regarding Ranibala. Nothing, I think, but genuine efforts to secure a suitable husband for Ranibala would prove that Kshetramani wanted her to live as a respectable woman. The only positive statement that the appellant makes about marriage is that she actually went to Asthwapur in February 1921 and gave her in marriage to Kshetra Maiti but this allegation is denied by both Ranibala and Norendra and no evidence is offered in support of it. My conclusion is that there never was any genuine attempt to arrange a marriage for the girl; and I think the explanation of the visit to Asthwapur is that Kshetramani was afraid that Nirmal would carry the girl off and frustrate her plans, while she hoped that Ranibala, finding marriage to be out of the question, would realize that she had no choice but to follow her patron's calling. I have dwelt on the evidence about Ranibala's life at Asthwapur because it was argued before us that if the appellant had at one time intended to bring up the girl for a life of prostitution, her conduct during those years shows that she had altered her plans and was trying to establish the girl in a decent home. There is a double difficulty in the way of this argument : one is that the appellant herself does not make out such a case : the other is that, as I have tried to show, the facts do not support the view.

Then it appears that Ranibala was brought back to Calcutta after about two years in Asthwapur, she was taken for one night

to the Upper Chitpur Road and then to the house of Norendra. The explanation offered is that Ranibala was restless. The more probable explanation is that Kshetramani thought that she had reached an age at which her employment as a prostitute involved no risk.

Turning to the other branch of the argument, I cannot understand what bearing Nirmal's conduct has on the question of Kshetramani's intention. Granting that he had formed an attachment for the girl, and that the girl wrote to him with unmaidenly warmth, I fail to see how he prevented Kshetramani from carrying out the honourable intentions that, it is said, she cherished. Certainly, with the first chapter of her life he had nothing to do, and with the girl buried in the heart of Midnapur he did not prevent Kshetramani from finding a suitable husband.

In my opinion the only possible conclusion is that Kshetramani intended from the outset that Ranibala should be brought up to follow an immoral calling: and I do not think that there is any reason for crediting her with a change of purpose.

Now, I come to the legal point involved in the case. The learned Magistrate has inserted in the charge the words "at any age." It was proposed in 1911 to add those words to the section, but the proposal did not become law. A well-known text-book, however, printed them as part of the section. The Magistrate evidently consulted that text-book, and he has fallen into a mistake thereby. The proposed alteration was intended to meet the difficulties created by the construction put on the words 'such minor' in three reported decisions: *Queen-Empress* v. *Ramanna* (1), *Deputy Legal Remembrancer* v. *Karuna Baistobi* (2) and *Queen-Empress* v. *Chanda* (3). Personally, I think, with all deference to the learned Judges who decided those cases, that the construction is unreasonable, and if it were necessary to decide the point I should make a reference to the Full Bench.

In the present case, however, the question need not be decided. As was said in the Calcutta decision, Illustration (*a*) to section 106 of the Evidence Act has an important bearing on the case. "When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him." Here, in my opinion, all the circumstances go to show that the intention of the appellant was to employ the girl as a prostitute as soon as she was physically ready for the purpose, and the burden lay upon her of proving that she intended to wait until the age of majority had been reached. I do not think that she has discharged that burden by showing that Ranibala has reached the age of sixteen without ceasing to be a virgin. That is a position imposed upon the appellant by circumstances outside her own control.

I think, therefore, that all the elements of an offence under section 373, Indian Penal Code, have been established, and that the appellant has been rightly convicted.

The appeal is accordingly dismissed.

Suhrawardy, J.—I agree.

Appeal dismissed.

B. N.

(1) 12 M. 273; 1 Weir 375; 4 Ind. Dec. (N.S.) 540.
(2) 22 C. 164; 11 Ind. Dec. (N.S.) 110.
(3) 18 A. 24; A. W. N. (1895) 141; 8 Ind. Dec. (N.S.) 729.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL, No. 514 OF 1922.

July 27, 1922.

Present:- Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

SIPAHI SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Concerted attack by armed men—Injuries inflicted resulting in death—Penalty, proper.

Where a number of men armed with *lathis* make a concerted attack upon another man and practically kill him on the spot, inflicting injuries to the head, the result of blows which must have been struck either with the intention to kill, or, at any rate, with the intention to cause hurt such as the strikers must have known to be imminently likely to result in the death of the

person struck, the penalty prescribed by the law as the proper penalty in cases of murder should be inflicted on the ring-leader, at least, of such an assault. (p. 236, col. 1.)

Emperor v. *Ram Newas*, 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615, distinguished.

Criminal appeal from an order of the Sessions Judge, Allahabad.

Mr. *Sarkar Bahadur Johari*, for the Appellants.

Mr. *Lalit Mohan Banerji* (Government Advocate), for the Crown.

JUDGMENT.—In this case five persons, caste-fellows and relatives, residents of village Diha, near Karchana, in the southern part of this district, were tried before the Sessions Judge, at Allahabad, on charges under section 302 and section 147 of the Indian Penal Code. The charge of rioting may be disregarded, more particularly in view of the fact that one of the accused persons, Sheoratan Singh, has been acquitted by the Sessions Court, on the ground that the evidence implicating him in the affair is not altogether satisfactory. The other four accused, Sipahi Singh, Sundar Singh, Bisheshar Singh and Bira Singh, have been convicted under section 302 of the Indian Penal Code. The learned Sessions Judge, while admitting that the question of sentence is one of some difficulty, has passed sentence of death on Sipahi Singh, and submitted the record to this Court for confirmation of the same. He has passed the lesser sentence of transportation for life on the other three accused, but has, at the same time, remarked that he would desire to recommend their case to the Local Government for consideration with regard to the exercise of the prerogative of mercy.

The broad facts of the case are not in issue, although there was a considerable variation in general outline between the story told by the accused and that for the prosecution. We have been taken through the evidence on the record and where the two versions differ, we have no doubt that the learned Sessions Judge was right in giving the preference to that put forward by the witnesses for the prosecution. It appears that Raghubar Singh and Ragho Prasad Singh, two brothers, neighbours of the accused, had impounded a number of goats belonging to the appellant, Bisheshar Singh. On the 23rd of March last, the day before the occurrence of the events referred to in the charge, the goats were released from the pound, and the evidence for the prosecution is that as Bisheshar Singh drove them home, he was using abusive language and declaring openly his intention to be revenged by impounding forcibly any cattle belonging to Raghubar Singh or Ragho Prasad Singh wherever he might find them. On the following morning, according to the evidence of Ragho Prasad Singh, he was grazing a number of cattle in a field where he had a perfect right to do so, Sipahi Singh and Sundar Singh came up from one direction. The other two accused, in the company of Sheoratan, the man who has been acquitted, came up from another. They had *lathis* in their hands. They overawed the witness by a display of force and drove off his cattle in the direction of the pound. The witness ran towards the village calling for his brother Raghubar Singh. The latter came up. There is some conflict of evidence as to whether he was armed or not. But the Sessions Judge has himself accepted the statement that he had at least a stick in his hand. At any rate, when he came up to the accused and endeavoured to stop the wrongful and forcible impounding of his cattle Sundar Singh and Sipahi Singh struck him to the ground. The witness says that the others also struck him after he had fallen and the injuries to the back and on the buttock disclosed by the *post mortem* examination corroborate this statement. When the witness, Raghubar Singh, protested, he was himself set upon and felled to the ground. This is substantially the story told in the first report and it is corroborated by several eye-witnesses, Raghunath Singh, Baij Nath Singh, Band Singh, Baljor Singh and Mauji. Raghubar Singh was so seriously injured that he died the same day; Ragho Prasad Singh received a number of injuries but only one of them was technically grievous, still he had evidently been subjected to a severe beating. The medical evidence shows that the injuries on the corpse of Raghubar Singh were serious; there were about eleven injuries on the body. The learned Sessions Judge has understated the number in summing up the case in his judgment, and three of these were on the head; the left parietal bone was fractured.

On this state of facts it has been contended before us that the learned Sessions Judge ought not to have found any of the accused persons guilty of the offence of murder. The argument is that it is not to be inferred that they intended to kill Raghubar Singh. The learned Sessions Judge has gone into this matter carefully in his judgment, and we are in thorough agreement with the general principles laid down by him. A similar case was before this Court in *Emperor v. Ram Newas* (1), and that decision contains, in our opinion, a correct statement of the law on this point. There was not, in the present instance, a sudden fight, in the heat of passion on a sudden quarrel. The accused persons were the aggressors from the beginning, and in carrying off to the pound cattle illegally seized by them, and in making a violent attack upon a single man who endeavoured to interfere with their proceedings they were behaving in an altogether outrageous and lawless manner. The nature of the injuries inflicted, and particularly the injuries to the head, justifies the inference that the persons who struck those blows intended, when striking them, to cause death. We are not disposed to interfere with the sentence passed upon Sipahi Singh. In cases like the present, where a number of men armed with *lathis* make a concerted attack upon another man and practically kill him on the spot, inflicting injuries to the head, the result of blows which must have been struck either with the intention to kill, or, at any rate, with the intention to cause hurt such as the strikers must have known to be imminently likely to result in the death of the person struck, we think it should be clearly laid down that, in the case of the ring-leader at least in such an assault, the penalty prescribed by the law as the proper penalty in cases of murder will be inflicted. As regards the remaining appellants we are prepared to endorse, for the reasons stated by him, the recommendation of the learned Sessions Judge to a certain extent. As in a case of this sort the Local Government expects this Court to pronounce an opinion regarding the proper sentence, in the event of the prerogative of mercy being exercised, we propose to do so. The result is that we dismiss the appeals of all the appellants.

Appeals dismissed.

W. C. A.

(1) 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 625.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 86 OF 1922.

March 28, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

BIMALA PROSAD MOOKERJEE AND OTHERS—PETITIONERS

versus

TATA IRON AND STEEL CO., LD., AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, applicability of—Dispute with regard to sub-soil rights—Possession, meaning of—"Land," whether includes mining rights.

The provisions of section 145 of the Criminal Procedure Code may be used in disputes with regard to sub-soil rights and the fact that other proceedings might have served equally well to preserve tranquillity is no ground for holding that the Magistrate has no jurisdiction to have recourse to that section (p. 237, col. 2.)

Per *Suhrawardy, J.* The definition of land, as given in the Criminal Procedure Code, is wide enough to cover mining rights and even prospecting or boring licenses. (p. 237, col 2.)

Criminal revision against the order of the Deputy Magistrate, Asansole, dated the 10th February 1922.

Babus *Dasarathi Sanyal* and *Kshitish Chandra Chakrabutty*, for the Petitioners.

Babus *Manmatha Nath Mukherjee* and *Ambicapada Chowdhury*, for the Opposite Party.

JUDGMENT.

Walmsley, J.—This Rule was issued in regard to an order passed under section 146, Criminal Procedure Code, attaching two plots of lands respecting which proceedings had been drawn up under section 145, Criminal Procedure Code.

The petitioners are four members of the first party, and they are lessees and sub-lessees under the other members of the first party, who are described in the petition as proprietors of Estates Nos. 4551 and 769.

The second party, the opposite party at this stage, are the Tata Iron and Steel Co., Ltd., and its servants; and the Company holds a mining lease from the Maharaja of Burdwan, who is, according to the Company, Zamindar of the whole village in which the land is situated.

The cause of the dispute is that the petitioners in virtue of the rights conferred on them by their lessors want to bore in the area to which the proceedings relate, while the Company claims that the sub-soil rights have been given to them, and that they are entitled to prevent the petitioners from boring in the village. Neither party attaches any importance to the surface rights, except as a means of access to the minerals beneath. The surface is actually in the occupation of cultivators who grow crops on it, and the Company is perfectly ready that they should continue in their occupation: in fact, it does not object to their paying rent to the petitioners, for it may be many years before it requires the surface.

The grounds on which the Rule was issued are these:—

(1) For that, having regard to the nature of the dispute between the parties, the claims put forward by them in their respective written statements and in the trial, the proceedings under section 145, Criminal Procedure Code, are not applicable to the facts of the case, and the order of the Magistrate under section 146, Criminal Procedure Code, is without jurisdiction.

(2) For that, in view of the statements made by the second party (the Tata Iron and Steel Co.) in paragraph 6 of their written statement, that they are not in possession of the surface lands of the subject-matter of dispute, the order of attachment so far as it relates to the surface lands is without jurisdiction and extremely prejudicial to the petitioners.

Now, it has been expressly conceded by Babu Dasrathi Sanyal, Vakil for the petitioners, that the provisions of Chapter XII of the Criminal Procedure Code may be used in disputes with regard to sub-soil rights, so that the scope of the first ground is very limited. The argument is that in the present case there is no real dispute about possession of the minerals, and, therefore, section 145, Criminal Procedure Code, has no application. For this proposition reliance is placed upon the decision in the case of *Indian Iron and Steel Company* v. *Banso Gopal* (1). It appears to me that the two cases are not alike: in the reported case the parties had prospecting leases, while in the present case the Company at least has a mining lease. There is an immense difference between mining coal under a mining lease and ascertaining whether coal exists under a boring license. It is admitted that the Company has sunk shafts in the neighbourhood, and, in my opinion, the inference to be drawn from such operations is that as soon as the petitioners tried to get below the surface to the coal beneath, there arose a dispute about possession of the coal. It follows that proceedings under section 145, Criminal Procedure Code, cannot be regarded as inapplicable to the facts. Other proceedings might have served equally well to preserve tranquillity, but that is a matter on which the learned Magistrate was entitled to use his own discretion. Even if I were to hold that he would have been well-advised to use other measures, I could not on that ground hold that he had no jurisdiction to have recourse to Chapter XII.

The second ground is not seriously pressed.

In my opinion the Rule should be discharged.

Suhrawardy, J.—I agree: I only wish to express my respectful dissent from the view expressed in the case of *Indian Iron and Steel Company* v. *Banso Gopal* (1), if that case purports to lay down broadly that a license to dig minerals confers no interest or estate in the soil, and that a dispute concerning mining rights is not one with which the Magistrate can deal under section 145 of the Criminal Procedure Code. The definition of land, as given in the Criminal Procedure Code of 1898, is wide enough to cover mining rights and even prospecting or boring licenses which can only be utilised by going upon the land and exercising some rights relating to it. Nor do I assent to the proposition which seems to have been stated in that case that section 145, Criminal Procedure Code, is limited in its scope to disputes relating to actual possession only, if by that expression is meant possession

(1) 59 Ind. Cas. 403; 32 C. L. J. 541; 22 Cr. L. J. 99.

by squatting on the land. It is conceivable that actual possession in that restricted sense may be with some one else and the real dissension between the parties may be regarding the exercise of some right over it or even under it without interfering to any appreciable extent the actual or manual possession of any one. In this category falls the dispute relating to collection of rents or profits which is expressly included in the definition of 'land' and 'water' as given in the section.

It is not necessary to probe into the question further in this case, but I wish to guard myself against the view urged restricting the scope of section 145, Criminal Procedure Code. I reserve my opinion as to the applicability of section 146, Criminal Procedure Code in this case as the question was not raised or discussed at the Bar.

B. N. & W. C. A. *Rule discharged.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 263 OF 1922.
(CRIMINAL REVISION PETITION No. 234 OF 1922).

September 1, 1922.

Present.—Mr. Justice Krishnan.

RAMASAMI CHETTIAR—COMPLAINANT—PETITIONER

versus

MUTHUVELU MUDALI AND OTHERS—ACCUSED—RESPONDENTS.

Jurisdiction—Complaint, filing of, effect of—Revision—Complainant, whether can object to jurisdiction—Madras Town Nuisances Act (III of 1889), s. 3 (12), offence under, whether cognizable by Bench of Honorary Magistrates.

The mere filing of a complaint invoking the jurisdiction of a Magistrate, does not invest the Magistrate with jurisdiction, if otherwise he had no jurisdiction to try the offence, and it is open to a complainant, in revision to the High Court, to object to the jurisdiction of the Magistrate. (p. 239, col. 1,)

Inasmuch as an offence under section 3 (12) of the Madras Town Nuisances Act falls within clause (2) of r. 1 of the Rules for the guidance of Honorary Magistrates, a Bench of Honorary Magistrates has power to entertain a complaint in respect of such an offence. (p. 239, col. 1,)

Queen-Empress v. *Oolaganadan*; 13 M. 142; 1 Weir 910, 2 Weir 327, 4 Ind. Dec. (N. S.) 811, referred to.

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 Bench of Magistrates at Cuddalore, in Summary Trial No. 1027 of 1921.

Mr. *T. R. Srinivasa Aiyangar*, for the Petitioner.—The accused were wrongly acquitted of the offence under section 3 (12) of Madras Act (III of 1889). The Bench Court has no jurisdiction to try offences not covered by rule framed under section 16 of the Criminal Procedure Code. Rule 1, which deals with offences triable by Bench Court, mentions only sections 5, 6 and 7. It has been held an order passed by the Bench Court not duly constituted is invalid. *Queen-Empress* v. *Muthia* (1). *Mohidin Karim* v. *Emperor* (2).

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.—The complainant himself invoked the jurisdiction of the Court and cannot be heard to question it now. It is a question of jurisdiction. The Court cannot acquire jurisdiction merely by my complaint.

Mr. *Patanjali Sastri*, for the Accused.—Sections 3 and 4 of the Act must be read as part of the Police Act (*vide* section 11). The conservancy offences under the Police Act are triable by the Bench Court by virtue of r. 2, framed under section 16. The result is that Bench Court can try offences under section 3, though they are not mentioned in r. 1. They are in fact covered by r. 2. Offences under section 48 of the old Madras Police Act, XXIV of 1859, have been held to be triable by the Bench Court. *Queen-Empress* v. *Oolaganadan* (3).

Mr. *T. R. Srinivasa Aiyangar* in reply.—Sections 3 and 4 are not exact reproduction of old section 48 of the Act of 1859. Present sections are wider in scope. Observations in *Queen-Empress* v. *Oolaganadan* (3) are *obiter* with reference to clauses in section 48. The offence in question is not one against conservancy provisions. The word "con-

(1) 16 M. 410; 2 Weir 14; 5 Ind. Dec. (N. S) 992.
(2) 55 Ind. Cas. 849; 22 Bom. L. R. 154; 21 Cr. L. J. 369; 44 B. 499.
(3) 13 M. 142; 1 Weir 910; 2 Weir 327; 4 Ind. Dec. (N. S.) 811.

servancy" can only be used with reference to clauses relating to public health.

ORDER.—This is a revision petition by the complainant against the acquittal of the accused by the Bench Magistrates of South Arcot. The ground taken is that the Bench had no jurisdiction to try an offence under section 3, clause (12) of Act III of 1889. Curiously enough, the objection is taken by the complainant himself who invoked the jurisdiction of the Bench. This does not, however, prevent him from doing so in revision, for a Court cannot get jurisdiction if it had none under the law merely because complainant invoked its jurisdiction.

On the question of jurisdiction it is argued that the Bench had jurisdiction only to try offences under sections 5, 6 and 7 named in r. 1, clause (5) (*e*) of the Rules framed by the Government for the guidance of Bench Magistrates under section 16 of the Code of Criminal Procedure. The answer to this argument is that section 3 is not mentioned in clause (5) (*e*) becuase it falls under the earlier clause, clause (2), as an offence against the conservancy clauses of the Police Act punishable only with fine or with imprisonment for a term not exceeding one month. Though section 3 is in the Town Nuisances Act, section 11 of that Act directs that the section is to be read with and forms part of Act XXIV of 1859, the Police Act. It was ruled in *Queen-Emperess* v. *Oolganadan* (3) that all the clauses in section 48 of the Police Act fell within the term "conservancy clause." Section 3 of the Towns Nuisances Act is practically the same as clause (6) and part of clause (7) of section 48 of the Police Act. That case is, therefore, an authority for holding that an offence under section 3 (12) of the Act III 1889 falls within clause (2) r. 1, of the Rules for the guidance of Bench Magistrates and the Magistrates had jurisdiction to dispose of the present case.

The petition fails and is dismissed.

V. N. V. *Petition dismissed.*

W. C. A.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 327 OF 1922.

June 28, 1922.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

MAHAMMAD OZIULLAH—ACCUSED—PETITIONER

versus

BENI MADHAB CHOWDHURY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 196—Evidence Act (I of 1872), ss. 78, 79, application of—Sanction to prosecute signed for Chief Secretary, if evidence of authority of Local Government—Presumption—Magistrate initiating proceedings, if disqualified to receive complaint.

A letter issued from the office of the Chief Secretary to the Government conveying sanction, under section 196, Criminal Procedure Code, to a prosecution under section 204 A of the Penal Code, which is not signed by the Chief Secretary, but by some other officer on his behalf is no legal proof that the Local Government has ordered or authorised the prosecution. The capacity of the Chief Secretary in such a case being that of a delegate of the head of the Local Government, the order could not be certified on his behalf. In such a case the order must be proved according to the provisions of section 78 of the Evidence Act.

Apurba Krishna Bose v. *Emperor*, 35 C. 141; 7 C. L. J. 49; 7 Cr. L. J. 10; 2 M. L. T. 500, distinguished.

There is no bar to a Magistrate receiving a complaint by reason of the fact that he submitted a report to Government for the purpose of obtaining the sanction required under section 196 of the Criminal Procedure Code. (p. 240, col. 2.)

Lakhai Narayan Singh v. *Emperor*, 6 Ind. Cas. 276; 14 C. W. N. 589; 37 C. 221; 11 C. L. J. 415; 11 Cr. L. J. 305, referred to.

Criminal revision against the proceeding under section 294A of the Indian Penal Code, pending before the Additional Sub-Divisional Magistrate, Chittagong.

Babus *Dasarathi Sanyal, Manmatha Nath Mukherjee, Tarakeswar Pal Chowdhury, Jnan Chunder Roy* and *Lalit Mohan Sanyal*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.

Walmsley, J.—The petitioner has been placed on his trial upon a charge under section 294 A of the Indian Penal Code.

The Police reported the facts upon which the charge is based, and Mr. Burrows, as Additional District Magistrate, submitted a report to Government for the purpose of obtaining the sanction required by section 196, Criminal Procedure Code, and

the authority was conveyed in a letter issued from the Chief Secretary's Office, and signed by Mr. A. Cassells for Chief Secretary. A Police Officer then made a complaint to Mr. Burrows, and the petitioner was summoned. On the day fixed for hearing Mr. Burrows transferred the case to another Magistrate.

On these facts two objections are based. The first is that Mr. Burrows was not competent to take cognizance of the case at all, because he had taken a part in initiating the proceedings. The second is that the authority is defective because the letter is signed by Mr. Cassells, and not by the Chief Secretary himself.

I cannot see any merit in the first objection, save to the extent that Mr. Burrows would have been well advised to direct some other Magistrate to receive the complaint, instead of transferring the case for trial after issuing process.

The second objection is extremely technical, but I think that effect must be given to it.

Under section 196, Criminal Procedure Code, the complaint must be made by order of or under authority from the Local Government. The Evidence Act lays down the conditions under which the Court may accept a mere letter as proof that the order has been issued or the authority conferred by the Local Government. Under section 79 it must draw certain presumptions, and if Mr. Stephenson had himself signed the letter the order would have been proved. When it was argued in the case of *Apurba Krishna Bose* v. *Emperor* (1), that the head of the Local Government, then the Lieutenant-Governor, ought to have signed the order, it was said that he must, necessarily, and ordinarily does, communicate his orders through his accredited and gazetted officers, but in that case the sanction had been signed by the Chief Secretary. That decision, therefore, has no bearing on the present case, for here the letter is signed by Mr. Cassells for the Chief Secretary. Mr. Cassells was at the time Deputy Secretary, according to the Civil List, but he did not claim for himself any official position: he merely signed on behalf of the Chief Secretary. In these circumstances, I think it must be held that there is no legal proof that the Local Government has ordered or authorised the prosecution. No presumption arises as to Mr. Cassell's capacity to sign the letter, and he could not certify the order on behalf of Mr. Stephenson, whose own capacity was that of a delegate.

The result is that the Rule is made absolute and the proceedings quashed. The petitioner will be discharged from his bail.

Suhrawardy, J.—I agree. The first objection is that on general principles the Additional District Magistrate should not have taken cognizance of the case, as he had himself taken part in the initiation of the proceedings. It is argued that if a Magistrate in the position of the Additional District Magistrate takes cognizance of a case, the provisions of sections 202 and 203, Criminal Procedure Code, which empower a Magistrate to dismiss a complaint or enquire into its truth, become futile and meaningless. I do not think there is any substance in this argument. As has been observed by Carnduff, J., in the case of *Lakhai Narayan Singh* v. *Emperor* (2), there is no bar prescribed by the Code of Criminal Procedure to a Magistrate in such a position receiving a complaint whereas section 556 may render him incompetent to try it. Moreover, section 190 (*c*), Criminal Procedure Code, gives express jurisdiction to a Magistrate to take cognizance of an offence even "upon his own knowledge" in which event, it is clear, sections 202 and 203, Criminal Procedure Code, are of as little avail as in the present case.

With reference to the second ground I agree in holding that the sanction required by section 196, Criminal Procedure Code, has not been properly proved in this case. That section demands a sanction by the Local Government. The sanction in this case is contained in a letter which is headed "From H. L. Stephenson, Esq., C. S.I., C.I.E., Chief Secretary to the Government of Bengal" and signed "A. Casselis, for Chief Secretary to the Government of

(1) 35 C. 141 ; 7 C. L. J. 49 ; 7 Cr. L. J. 10 ; 2 M. L. T. 500.

(2) 6 Ind. Cas. 276 ; 14 C. W. N. 589 ; 37 C. 221 ; 11 C. L. J. 415 ; 11 Cr. L. J. 305.

Bengal." This order of the Government sanctioning the present prosecution has to be proved according to the provisions of section 78 of the Evidence Act, which requires that an order of the Local Government may be proved by the record certified by the head of that department. The original letter is not on the record but there is a copy which is defective and does not appear to be a certified copy under section 76 of the Evidence Act. Besides, the letter does not purport to have been signed or certified by the head of the department to attract the presumption arising under section 79 of the Act. Had Mr. Cassells issued the letter in the official capacity he held, I doubt, if it would not have then been in order, as all orders of the Government are issued through its accredited officers. We do not know and no evidence has been given to prove what authority Mr. Cassels had to sign for Mr. Stephenson. I am not sure if the prosecution cannot prove that proper sanction has been accorded by Government *de hors* the letter under consideration, but no such material being before us, we have no alternative but to quash the proceedings based on a document which does not satisfy the requirements of law.

B. N.

Rule made absolute; Proceedings quashed.

CALCUTTA HIGH COURT.

CRIMINAL REVISIONAL JURISDICTION.

March 10, 1921.

Present:—Mr. Justice Teunon and Mr. Justice Ghose.

ABDUL LATIF YUSUFF, *In the matter of* —ACCUSED—PETITIONER

versus

ABU MOHOMMED KASSIM—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 181 (2)—Criminal breach of trust, offence of—Forum—Jurisdiction of Criminal Courts.

Accused was employed by a firm at Singapore, but had to account for all monies received by him at Calcutta; the firm filed a complaint against him of criminal breach of trust before the Presidency Magistrate at Calcutta, and it was contended that as the alleged offence was committed at Singapore, the Calcutta Court had no jurisdiction:

Held, that inasmuch as the accused had to account at Calcutta, the Calcutta Court had jurisdiction to adjudicate upon the complaint.

Simhachalam v. *Rati Kanta Laha*, 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762, distinguished.

Colville v. *Kristo Kishore Bose*, 26 C. 746, 3 C. W. N. 598; 13 Ind. Dec. (N. S.) 1077, followed.

Rule.

Mr. *Meghnad Mitter* and Babu *Santosh Kumar Bose*, for the Petitioner.

Babu *Narendra Kumar Bose*, for Babu *Monmotha Nath Mukherjee* and Babu *Satindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—In this case the allegations made in the complaint against the accused-petitioner are that while the accused was in the service of the complainant firm at Singapore, he committed criminal breach of trust in respect of a sum of Rs. 12,379 and goods to the value of Rs. 2,386-13-0. The complaint was made to the Presidency Magistrate of the Northern Division on the 17th of June, and the accused obtained the present Rule on the 10th of January 1921. His contention is that on the allegations made by the prosecution the offence complained of, if any, was committed and completed in Singapore and that the Courts in Calcutta have no jurisdiction to try the case. In support of this contention reliance is placed on the provisions of section 181 (2) of the Code of Criminal Procedure and the decision

of this Court reported as *Simhachalam* v. *Rati Kanta Laha* (1).

But here the further case of the prosecution was that for all monies received the accused was to account at Calcutta. Thus, the decision directly in point is that reported as *Colville* v. *Kristo Kishore Bose* (2). Following that decision, we must hold that on the allegations made the Courts in Calcutta have jurisdiction.

We, therefore, discharge this Rule.

W. C. A. *Rule discharged.*

(1) 41 Ind. Cas. 138; 44 C. 912; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762.
(2) 26 C. 746; 3 C. W. N. 598; 13 Ind. Dec. (N. S) 1077.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 239 OF 1922.
(CRIMINAL REVISION PETITION No. 211 OF 1922.)
November 15, 1922.

Present:—Mr. Justice Wallace.

MATHI VENKANNA, *In re*—AND OTHERS —ACCUSED—PETITIONERS.

Penal Code (*Act XLV of* 1860), *ss.* 143, 447—*House trespass by member of unlawful assembly—Composition of offence under s* 447—*Conviction of accused under s.* 143, *legality of.*

In the case of a house trespass by members of an unlawful assembly the conviction of the accused under section 143 of the Indian Penal Code is not illegal even though the offence under section 447 had been compounded. (p. 242, col. 2.)

Basireddi v. *Sheikh Khayrat Ali*, 20 Ind. Cas. 618; 17 C. W. N. 948; 14 Cr. L. J. 458, referred to.

The essence of the offence under section 143, Indian Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that purpose constitutes in itself an offence distinct from the criminal offence which these persons agree and intend to commit. (p. 242, col. 2.)

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 Divisional Magistrate, Bandar, in Criminal Appeal No. 46 of 1921, preferred against the judgment of the Court of the Stationary Subordinate Magistrate, Bandar, in C. C. No. 377 of 1920.

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

The Public Prosecutor, for the Crown.

ORDER.—The only point raised in this petition is that the conviction under sections 143 and 147 of the Indian Penal Code was illegal, since the offence under section 447, Indian Penal Code, was compounded.

It appears that on 5th July 1920 a compromise petition was put into the lower Court signed by the first petitioner (first accused) and porsecution witnesses Nos. 1 and 2, P. W. No. 1 being the alleged owner of the field on which the alleged trespass took place. The case was being prosecuted by the Police and the compromise petition was rejected by the lower Court as the offence under section 143 of the Indian Penal Code is not compoundable.

The common object charged against the accused as members of an unlawful assembly is the criminal trespass aforesaid. Petitioner contends that, since the parties had a legal right to compound that trespass, such a composition has the effect of annulling the common object charged and, therefore, the charge under section 143, Indian Penal Code, falls to the ground.

I am not prepared to support this contention. The essence of the offence under section 143, Indian Penal Code, is the combination of several persons united in the purpose of committing a criminal offence and that purpose constitutes in itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed; but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered. The law allows P. W. No. 1 to so deal with the offence of criminal trespass, but not with the offence

of five or more persons combining to effect that criminal trespass.

Petitioners refer me to the ruling quoted in *Basireddi* v. *Sheikh Khayrat Ali* (1), but that ruling does not say that the composition of the offence of house trespass and grievous hurt in that case had the effect in law of compounding the offence of being members of an unlawful assembly, whose common object was the commission of those offences. It rather implies the opposite.

The petitioner's objection, therefore, fails. I dismiss this petition.

V. N. V.
N. H.

Petition dismissed.

(1) 20 Ind. Cas. 618; 17 C. W. N 948; 14 Cr. L. J. 458.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 395 OF 1922.
July 27, 1922.
Present:—Mr. Justice Stuart.
NARAIN PRASAD NIGAM AND OTHERS —APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 435, proceedings under—Person convicted not contesting propriety of conviction.

Under the very extensive powers contained in section 435 of the Criminal Procedure Code, the High Court can call for and examine the record of proceedings if the necessity for so doing has been brought to its notice in any manner, and it is satisfied that there are *a priori* grounds for apprehending a miscarriage of justice, but it should be loath to interfere on behalf of a person convicted in a criminal case, if that person is an adult of ordinary intelligence when that person himself in no way contests the propriety of his conviction. (p. 244, col. 1.)

Criminal Revision from an order of the District Magistrate, Allahabad.

Mr. *A. P. Dube*, for the Applicants.

JUDGMENT.—This application in revision is of an unusual kind. Fifty-five persons were convicted, on the 19th of December 1921, under section 17 (2) of the Criminal Law Amendment Act (XIV of 1908) and sentenced to various terms of imprisonment and fine. The imprisonment was, in some cases, rigorous and, in some cases, simple. These persons could have appealed. They did not appeal. The period of appeal has long since expired. On the 26th of July 1922, something more than seven months after their convictions, this application has been put in on revision, not by these persons, but by a practising Pleader of Cawnpore called Babu Narain Prasad Nigam, on their behalf, suggesting that the convictions be set aside. The learned Counsel, who appears for Babu Narain Prasad in support of this application, has stated very frankly that the fifty-five persons in question, who were convicted, have not themselves applied to this Court and that they, in no way, approach the Court on the subject of the legality of the convictions passed against them, or the legality of the sentences passed upon them, or the severity of those sentences. These fifty-five persons apparently have deliberately refrained from taking any action in this matter either by way of appeal or revision, but Babu Narain Prasad Nigam has applied on their behalf (I am given to understand, without their consent) in what he considers to be the public interest.

I give, in the first place, my considered opinion that a Court should be loath to interfere on behalf of a person convicted in a criminal case if that person is an adult and of ordinary intelligence when that person himself in no way contests the propriety of his conviction. The learned Counsel, who has argued this application, informs me that all these fifty-five persons are adults, that they are all of full mental capacity, and that the majority (if not all of them) are men of education above the average. They have refused to move the Court, and from the decision with which I am asked to interfere, it appears that they refuse to recognise the existence of any Court established by the British authority in India. I presume they include the High Courts among

other tribunals. I am, therefore, asked in this revision to look into the matter on behalf of persons who not only have not requested me to look into the matter on their behalf but who, as far as I can see, refuse to recognize my authority or my existence. This appears to me a somewhat amazing situation. However, it has been urged upon me that in the interests of justice I should at least read the judgment which it is proposed to set aside. Of course, it is perfectly clear that under the very extensive powers contained in section 435 I can call for and examine the record of proceedings if the necessity for doing so has been brought to my notice in any manner. Mr. Nigam has as good a right to bring the matter to my notice as any body else in India, and, if I so desire, I can undoubtedly send for the record. But before I do so, it would be necessary for me to be satisfied that there are *a priori* grounds for apprehending a miscarriage of justice. My position is simply this. Mr. Nigam has brought the matter to my notice and filed a copy of the judgment. The matter might equally well have been brought to my notice by a paragraph in a newspaper or a placard on a wall or an anonymous post card. It would be open to me, on information contained in a newspaper, a placard on a wall or an anonymous post card, to take action if I considered that sufficient grounds were established to justify my so doing. So the case here stands. The judgment has been brought before me and read to me. I have heard the learned Counsel's arguments. One of the arguments which I have heard contains the assumption that there can be no evidence upon the record except that to which the Magistrate refers in his judgment. That assumption is, of course, unjustified. The remaining points taken are points of a technical nature. They might have been interesting points to argue if the persons in question had appealed, as they had a right to appeal, but they are not points to which I should be disposed to attach the slightest importance in an application for revision made by the convicted person himself, and I certainly do not attach the slightest importance to them when suggested, as they are suggested, not by the persons convicted but by a gentleman who has not satisfied me, in any way, as to his responsibility, and who admittedly has no authority on behalf of the persons convicted. There is nothing to show me that there has been any miscarriage of justice. In these circumstances, I have no hesitation in rejecting this application, which I reject accordingly.

W. C. A. & N. H.

Application rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 490 OF 1922.
(CRIMINAL REVISION PETITION NO. 416 OF 1922).

October 31, 1922.

Present:—Mr. Justice Wallace.

KAKARLA CHINNA CHENDRAYYA—COUNTER-PETITIONER—PETITIONER

versus

MADDUKKURI SUBBARAYUDU—PETITIONER—COMPLAINANT—RESPONDENT.

Criminal Procedure Code, (Act V of 1898), ss. 10 (2), 197—Additional District Magistrate, powers of—Order under s. 197, nature of—Reasons, whether should be recorded—Notice to accused unnecessary.

Where, under section 10 (2) of the Criminal Procedure Code, the Local Government appoints an Additional District Magistrate and confers upon him "all the powers of a District Magistrate under the Code," such powers are not confined to those enumerated in Schedule III (v) of the Code, but include all powers with which a District

Magistrate is invested under the Code, and where one of the powers exercised by a District Magistrate is the power to pass an order of sanction under section 197, it is within the competence of an Additional District Magistrate, empowered under section 10 (2), to exercise this latter power. (p. 245, col. 2.)

An order of sanction under section 197 of the Criminal Procedure Code is more of the nature of an executive than a judicial order, and a Magistrate is not bound to record reasons for such an order, but the order should refer to some distinct offence and not be so vague as to make it obvious that the Magistrate had not come to a decision of his own that reasonable grounds existed for the prosecution. (p. 245, col. 2.)

Queen-Empress v. *Samavier*, 16 M. 468 ; 3 M. L. J. 227 ; 2 Weir 220; 5 Ind. Dec. (N. S.) 1033 and *Kalagava Bapiah, In the matter of*, 27 M 54 ; 2 Weir 227; 578 & 263, referred to.

It is not necessary that the accused should have notice before sanction is granted under section 197, Criminal Procedure Code. [p. 245, col. 2.]

Kalagava Bapiah, In the matter of, 27 M 54 ; 2 Weir 227; 578 & 263, relied on.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the Court of the Additional District Magistrate, Kistna, L. Dis. No. 23-7835 of 1922, dated the 1st May 1922, according sanction to prosecute the petitioner herein under section 197 of the Code of Criminal Procedure for an offence under section 392 of the Indian Penal Code.

Mr. *V. Suryanarayana*, for the Petitioner.

Mr. *F. S. Voss*, for the Public Prosecutor, for the Crown.

ORDER.—The first point taken in this petition is that an Additional District Magistrate has no authority, unless specially empowered by designation by the Local Government, to pass an order of sanction under section 197, Criminal Procedure Code.

It is not disputed in this case that by G. O., dated 9th October 1874, the Local Government has empowered all District Magistrates to pass orders of sanction under section 197, Criminal Procedure Code, and that by G. O, dated 24th of January 1922, it conferred on Mr. Senneck "all the powers of a District Magistrate." This last power is conferred under the provisions of section 10 (2), Criminal Procedure Code, which enables the Local Government to appoint an Additional District Magistrate and to confer on him "all the powers of a District Magistrate under this Code". The ordinary powers of a District Magistrate under that Code are set out in Schedule III (*v*) which makes no reference to section 197. Petitioner contends that the scope of the powers conferred under section 10 (2) is limited by its language to the powers set out in Schedule III (*v*). On consideration, I am of opinion that this view is too narrow. Under the first G. O. noted above, the Magistrate had, on the date of the second G. O, the power to pass an order of sanction under section 197, Criminal Procedure Code, and was exercising that power under that Code. It was in fact then one of the powers of the District Magistrate exercised by him under the Code which, therefore, may be passed on by the Local Government under section 10 (2) to the Additional District Magistrate. To view the point from another angle, section 197 authorises the Local Government to designate some officer as the officer empowered under section 197, just as section 10 (1) by virtue of which designation he is empowered to exercise *inter alia* the powers set out in Schedule III (*v*) and section 10 (2) authorises it to transfer to the Additional District Magistrate all the powers it has conferred under the Code on the other officer designated by it as District Magistrate. I, therefore, hold that this contention of petitioner must fail.

The next point taken is that no reasons have been stated for granting the sanction. The only authority in point quoted before me is *Queen-Empress* v. *Samavier* (1), which does not lay down that the officer must state his reasons, but only that the sanction order must refer to some definite offence, and not be so vague that it is obvious that the sanctioning officer has not come to a decision of his own that reasonable grounds existed for the prosecution. The analogy of section 195 will not be in point, for in the case of that section a special appeal lies, and thus something in the nature of a judgment has to be written by the original Court. In cases under section 196, no reasons are necessary and the order to prosecute is sufficient. Action taken under section 197 is more of the nature of

(1) 16 M. 468 ; 3 M. L. J. 227 ; 2 Weir 220; 5 Ind. Dec. (N. S.) 1033.

BUTA SINGH *v.* EMPEROR.

executive than judicial action, see *Kalagava Bapiah, In the matter of* (2). I am not prepared to hold that the lower Court acted with any irregularity in not recording reasons.

The next point is that the sanction has been granted after and not before the complaint. For the decision of this point sufficient facts have not been put before me. If this sanction is going to be used to validate a trial on a complaint already laid without sanction, then petitioner's point would be good, though it would be a point more properly taken before the Trying Court. But if a complaint is going to be laid in consequence of this sanction, then petitioner has no valid objection to it.

As to the petitioner having received no notice before sanction was granted, that is unnecessary. See *Kalagava Bapiah, In the matter of* (2).

I, therefore, see no reason to interfere in this case and dismiss the petition.

V. N. V.

W. C. A. *Petition dismissed.*

(2) 27 M. 54 ; 2 Weir 227, 578 & 263.

OLAYET KHAN *v.* EMPEROR.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Lyallpur, dated the 24th July 1922, affirming that of the Magistrate, First Class, Lyallpur, dated the 14th July 1922.

Mr. *Nanak Chand*, for the Petitioners.

Lala *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—This is an application by the accused in a criminal case for revision of the order of a Magistrate charging them with an offence under section 420, Indian Penal Code. This Court certainly has the powers, see *Emperor* v. *Bishen Das* (1), to set aside the charge but it should, I consider, exercise it only in very exceptional cases. It is contended that the present case is really of a civil nature. If complainant is owed money by the accused for goods supplied and not paid for, he can claim it in the Civil Courts, but if the accused entered into a conspiracy to cheat him by obtaining from him goods which they have no intention of paying for, then they can be prosecuted criminally. Without expressing any opinion on the merits of the case, I consider that this is not such an exceptional case where this Court should set aside the charge and I, therefore, reject the application.

S. D. *Application rejected.*

(1) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr. ; 57 P. L. R. 1911; 12 Cr. L. J. 50; 50 P. W. R. 1910 Cr.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1222 OF 1922.

December 9, 1922.

Present:—Mr. Justice Scott-Smith.

BUTA SINGH AND OTHERS—ACCUSED —PETITIONERS

versus

EMPEROR, THROUGH BISHAN DAS —RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Charge, setting aside of.

A High Court has the power to set aside in revision an order of a Magistrate charging an accused person with an offence, but it should exercise that power only in very exceptional cases.

Emperor v. *Bishen Das*, 8 Ind. Cas. 1161 ; 33 P. R. 1910 Cr.; 57 P. L.R. 1911 ; 12 Cr. L. J. 50; 50 P. W. R. 1910 Cr., referred to.

PATNA HIGH COURT.

CRIMINAL REVISION No. 85 OF 1922.

April 4, 1922.

Present:—Sir Justice Jwala Prasad, Kt., and Mr. Justice Coutts

OLAYET KHAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423, 439—Appeal heard in the absence of Counsel—Revision, whether competent.

HAJARI SONAR *v.* EMPEROR.

A High Court has no power, under section 439 of the Criminal Procedure Code, to set aside the judgment of a Court below merely upon the ground that the Counsel on behalf of the petitioner was prevented from being present in Court in time and, therefore, could not be heard.

Criminal revision against an order of the Sessions Judge, Manbhum-Sambalpur, dated the 10th February, 1922.

Mr. *Hasan Imam*, for the Petitioner.

Mr. *H. L. Nandkeolyar* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This application appears to be incompetent. The appeal in the Court below was disposed of under section 423 of the Code of Criminal Procedure after "perusing the record" and considering the grounds of appeal The appellant's Counsel could not be heard, inasmuch as he was prevented from being present in Court in time on account of the Railway strike. The appeal was, therefore, disposed of on the merits, and in revision we can deal with it only under section 439 of the Code of Criminal Procedure, under which the petition before us has to be disposed of under section 423 of the Code. There is, therefore, no power in this Court to set aside the judgment of the Court below, merely upon the ground that the Pleader or the Counsel on behalf of the petitioner was not heard in the Court below.

The application is therefore, rejected.

N. F. *Application rejected.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 818 OF 1921.

November 8, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Ghose.

HAJARI SONAR—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 457—House trespass for theft, charge of—Conviction for house trespass with other object—Charge, amendment of—Prejudice to accused.

Although it cannot be laid down as a general rule that in all cases a prosecution for house trespass with the alleged object of theft must fail if that object is not proved, yet when a charge has been definitely framed in which theft is alleged the accused cannot be convicted of house trespass with some other object without an amendment of the original charge, unless the Court is satisfied that he has not in any way been prejudiced in his defence by the omission to amend the charge.

Jharu Sheikh v. *Emperor*, 14 Ind. Cas. 320; 16 C. W. N. 696; 13 Cr. L. J. 224, *Mahomed Hossein* v. *Emperor*, 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247, followed.

Criminal Revision.

Babu *Norendra Krishna Bose*, for the Petitioner.

JUDGMENT.—The accused petitioner was tried on a charge of breaking open the *khirki* door of one Ram Lakhan Sonar to commit theft of property to the value of Rs. 30-4-0 when caught red-handed and thereby of committing an offence punishable under section 457, Indian Penal Code. The finding of the Trial Magistrate and also of the Appellate Court is that the prosecution has failed to establish that theft was the object with which the accused entered into the complainant's house. They have both held that he came to the complainant's house to carry on an intrigue with his wife, and, following the decisions of this Court in the cases of *Koilash Chandra Chakrabarty* v. *Queen-Empress* (1), *Balmakand Ram* v. *Ghansumram* (2) and *Premanundo Shaha* v. *Brindaban Chung* (3), they have convicted the accused of the offence punishable under section 456, Indian Penal Code.

Though it cannot be laid down as a general rule that in all cases a prosecution for house trespass with the alleged object of theft must fail if that object is not proved, we think, as was held by a Bench of this Court in the cases of *Jharu Sheikh* v. *Emperor* (4) and *Mahomed Hossein* v. *Emperor* (5), that when a charge has been definitely framed in which theft is alleged the accused cannot be convicted of house trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge. In the present case

(1) 16 C. 657; 8 Ind. Dec. (N.S.). 434.
(2) 22 C. 391; 11 Ind. Dec. (N.S.). 262.
(3) 22 C. 994; 11 Ind. Dec. (N.S.). 660.
(4) 14 Ind. Cas 320; 16 C. W. N. 696; 13 Cr. L. J. 224.
(5) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247.

had the petitioner been called upon to answer the charge of the offence of which he has been convicted he might have been able to establish his innocence. If an amended charge had been framed an important point which would have to be decided, it would be whether the accused came to the complainant's house at the invitation of his wife or not. That is a point to which no enquiry appears to have been directed and there is no distinct finding on this point by either of the Courts.

We, therefore, hold that the Rule succeeds on the first ground on which it was issued and we accordingly make this Rule absolute. We do not think it necessary to direct a retrial and the accused is accordingly acquitted. His fine, if paid, will be refunded and the bail-bond discharged.

B. N. *Rule made absolute.*

PATNA HIGH COURT.

CRIMINAL REVISION NO 395 OF 1922.
August 1, 1922.
Present:—Justice Sir Jawala Prasad, KT.
LALJI SINGH—COMPLAINANT
—PETITIONER
versus
NAURANGI LAL AND OTHERS—
ACCUSED—OPPOSITE-PARTY.

Procedure—Counter-complaints—Process issued in one and other postponed till its disposal—Revision.

Where, of two counter-complaints filed before a Magisrrate, process is issued in one while the other is ordered to be put up after its disposal, the Magistrate does not contravene any rules of procedure and a High Court cannot interfere in revision with the discretion exercised by him.

Application against an order of the Sub-Divisional Magistrate, Monghyr.

Mr. *G. C. Pal*, for the Petitioner.

Mr. *Yunus*, for the Opposite Party.

JUDGMENT.—The application seems to be premature. Two counter-complaints were filed before the Sub-Divisional Officer of Monghyr In one of them the petitioner, Lalji Singh, was the complainant and in the other Naurangi Lal. Both the complaints were referred to a probationary Sub-Deputy Collector for "enquiry and report"

under sect on 202 of the Code of Criminal Procedure. On receipt of the report the Magistrate issued process in the case of Naurangi Lal and that case is being tried. In the case of the petitioner, Lalji Singh, the Magistrate recorded the following order: "Read Sub-Deputy Magistrate's report. Put up after the disposal of the case of Naurangi Lal against No. 751"

Mr. G. C. Pal, on behalf of the petitioner, contends that his complaint should have been immediately disposed of either by dismissing it under section 203 or by summoning the accused under section 204 of the Code. The learned Vakil has, however, failed to point out to me any rule of procedure which the Magistrate has contravened. I do not, therefore, think that I can at this stage in revision interfere with the discretion exercised by the Magistrate. I do not think it permissible to enter into the relative merits of the two complaints placed before me when the matter is *sub-judice* before a competent Tribunal.

The application is, therefore, rejected.

N. K. *Rule discharged.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 9 OF 1922.
June 16, 1922.
Present:—Mr. Pipon, J. C.
HARNAM DASS—PETITIONER
versus
SAIN DASS AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 199, 248 (2), 333, 345, 439—Prosecution under s. 498, Penal Code—Complaint by agent of absent husband—Competency of agent to compound offence—Acquittal on composition by agent—Subsequent complaint by husband, whether maintainable—Revision—Order of acquittal—Miscarriage of justice.

An agent prosecuting under the powers granted by section 199 of the Criminal Procedure Code for the alleged abduction of another person's wife, under section 498 of the Penal Code, is not legally competent to compound the case under section 345 of the Criminal Procedure Code on

behalf of the husband, whose interests would not be affected by the composition; and an order of acquittal based on such a composition is not justified. (p. 250, col. 2.)

Where, therefore, during the absence of a husband in jail his wife was enticed away, and his aunt instituted a complaint under section 498 of the Penal Code, but, subsequently, before the framing of a charge, withdrew it, whereupon the Magistrate, acting under section 345 of the Criminal Procedure Code, acquitted the accused:

Held, that the aunt of the husband was not competent to compound the offence; that the order of acquittal was not justified, and that the husband on release from jail was entitled to institute a complaint against the same accused and to have that complaint adjudicated upon. (p. 251, col. 1.)

An order of acquittal, without a charge having been framed against the accused, is justified only (1) in summons-cases by the operation of section 248, Criminal Procedure Code; (2) under section 345, when there has been a composition, and (3) under section 333, when the Advocate-General withdraws from the case, and where the Court considers it proper, even though a charge has not been framed, to acquit the accused. The last is a rare contingency. (p. 250, col. 1.)

The High Court will, in revision, interfere to set aside an order of acquittal which is illegal, having been passed on a composition which was invalid. (p. 252, col. 1.)

Emperor v. *Panwan Bachal*, 24 Ind. Cas. 961; 7 S. L. R. 206; 15 Cr. L. J. 553, *Umer-ud-din* v. *Emperor*, 2 Ind. Cas. 219; 32 A. 317; 6 A. L. J. 262; 9 Cr. L. J. 526 referred to.

Case reported by the Additional Sessions Judge, Peshawar, dated the 4th January 1922.

Mr. *Mehta Mangal Sain*, for the Appellant.

Mr. *Saad-ud-Din Khan*, K. S., for the Respondent.

JUDGMENT.—The material facts of this case are these. The petitioner, Harnam Das, was sentenced to four years' imprisonment. During his imprisonment his aunt, *Musammat* Morni Devi, on the 23rd September 1919, lodged a complaint under sections 498/109, Indian Penal Code, against three persons, Sain Dass, *Musammat* Mathro Devi and *Musammat* Gango, for the abduction of *Musammat* Durgo, wife of Harnam Das. The complainant also charged *Musammat* Durgo with adultery under section 30, Frontier Crimes Regulation. Warrants were issued for the arrest of the accused, and the date of hearing was eventually fixed for the 5th of November 1919. Before that date arrived, *viz.*, on the 29th of October 1919, *Musammat* Morni Devi filed an application stating that she did not wish to take further proceedings, and asking for the case to be "filed." The application was described as a *dastbardar nama*, or application for withdrawal. *Musammat* Morni Devi's statement was briefly recorded to the following effect: "I instituted the complaint against the accused, but I do not wish to prosecute. My case may be filed." Upon this the Magistrate, Captain Betham, passed the following order on the 29th of October 1919: "*Musammat* Morni Devi states that she does not wish to continue with her case. I, therefore, acquit the accused under section 345, Criminal Procedure Code." On the 11th of August 1921, Harnam Dass, who had then been released from jail, instituted a fresh complaint against the same persons under the same sections. The Magistrate, Captain Gaisford, after recording the statement of the complainant, passed the following order: "As the above offence has already been a matter of a decision by the City Magistrate, wherein the latter acquitted the accused under section 345, Criminal Procedure Code, I am unable to take up this case, *vide* section 403, Criminal Procedure Code," and dismissed the complaint. On application by Harnam Dass, the Additional Sessions Judge has referred the case to this Court. He has pointed out that the order of acquittal of 29th of October 1919 is irregular, inasmuch as (1) *Musammat* Morni Devi had no authority to compound, (2) that the application was one of withdrawal and not of composition, and (3) that the accused should legally have been discharged and not acquitted.

The present case has been argued before me at considerable length by Counsel on both sides. For the petitioner it is pointed out that there is a very clear distinction between section 199, Criminal Procedure Code, and section 345, Criminal Procedure Code. Section 199 lays down that the husband is normally the only person who can prosecute under section 498, Indian Penal Code, but that a person having the custody of his wife on his behalf can also prosecute. On the other hand, section 345, Criminal Procedure Code, in tabulating the persons who

may legally compound, states clearly that the only person who can compound an offence under section 498, Indian Penal Code, is the husband of the woman. Sub-clause (4) of the same section lays down that if a person, otherwise competent to compound, is incompetent by reason of minority or lunacy, the composition may be made by his guardian. It is argued that this sub-clause is exhaustive, and that it gives the only cases in which a representative may compound on behalf of a complainant. It does not say that a representative may compound in cases where the natural complainant is in jail. Nor does it make any allusion to the competency to compound of a person acting under section 199, Criminal Procedure Code. Clause (7) of section 345, Criminal Procedure Code, states categorically that no offence should be compounded except as provided by this section. As against this, Counsel for respondents argues that when a case is legally compoundable, and can legally be brought by a person who has the status of an agent acting for the complainant, such agent can clearly be presumed to have the authority to compound. There appears to me to be no force whatever in this argument. To begin with, in an ordinary case, such as that of causing hurt, the complaint need not necessarily be brought by the person who has been injured. At the same time, no person, except the injured party, can legally compound. I cannot subscribe to the very ingenious explanation put forward for the respondents that a person competent to institute a complaint of hurt is not necessarily the agent of the injured person, but may be any member of the general public. This point seems to me to be perfectly irrelevant. The provisions of section 345, Criminal Procedure Code, are perfectly clear, and if the Legislature had intended that a person who is not the aggrieved husband, but who has custody of the wife, and is, therefore, competent under section 199, Criminal Procedure Code, to prosecute under section 498, Indian Penal Code, should have the power of making a composition, this fact would have been clearly stated. Further, it is manifestly inequitable to suppose that such an authority could be granted. A composition, as has been pointed out by the learned Counsel for the respondents himself, must imply a bilateral arrangement. He has indeed been at pains to show that in the present case *Musammat* Morni Devi had received consideration for her withdrawal of the complaint by the simultaneous withdrawal of a complaint lodged in Rawalpindi by *Musammat* Durgo against her. It is hardly conceivable that an agent prosecuting under the powers granted by section 199, Criminal Procedure Code, for the alleged abduction of another person's wife should be allowed to compound the offence by reason of some consideration which might be of personal benefit to the agent, but could be of none to the injured husband. As a matter of fact, this is precisely what is shown to have happened in the present case. It is to my mind perfectly clear that *Musammat* Morni Devi was in no case competent to compound the case on behalf of Harnam Dass, that the composition can have no effect upon his interests, and that no order of acquittal based upon such composition was justified. There are precedents to show that when an order of acquittal has been passed on an invalid composition, the order of acquittal can be set aside upon revision. *Emperor* v. *Kamzan Bachai* (1) deals with a case where the relatives of a deceased person made a composition with the accused under section 325, Indian Penal Code. It was held that an acquittal on this composition was invalid, and it was also held that section 439 (5), Criminal Procedure Code, was no bar to revision. The ruling published as *Umer-ud-din* v. *Emperor* (2) deals with a case where a soldier, absent in Burma, authorised his brother to lodge a prosecution under section 498, Indian Penal Code. The Court eventually passed an order of acquittal on the ground that the said brother was not competent to prosecute. It would appear from that case that, instead of asking for a revision

(1) 24 Ind. Cas. 961; 7 S. L. R. 200; 15 Cr. L. J. 553.
(2) 2 Ind. Cas. 219; 31, A. 317; 6 A. L. J. 262; 9 Cr. L. J. 526.

of the order of acquittal, a Court re-tried the case, and treated the acquittal as a nullity. The High Court declined to interfere, holding that there was no valid acquittal, and that, even if there had been an acquittal, the High Court would have had no hesitation in setting it aside. I hold that there has been no composition in this case.

It is argued, however, for the respondents that even if there was no composition, the Magistrate was justified in acquitting the accused if *Musammat* Morni Devi's application be treated as one merely for withdrawal. I confess that I have some difficulty in following the argument put forward by the learned Counsel for the respondents. He refers to the ruling published as *Emperor* v. *Ranchhod Bawla* (3), where the learned Judges held that in a non-compoundable case, where there had been no charge, the order should have been one of discharge. He asks me to draw the inference that if the case had been compoundable the order should have been one of acquittal and not of discharge. In other words, he wishes to establish the theory that if a complainant withdraws from a case, the order should be one of acquittal in compoundable cases and one of discharge in non-compoundable cases. There is, in my opinion, not the slightest justification for this view. It is perfectly clear that there are only three contingencies under which a person can be acquitted without a charge having been framed against him, (1) in summons-cases, by the operation of section 248, Criminal Procedure Code, (2) under section 345, Criminal Procedure Code, when there has been a composition, and (3) under section 333, Criminal Procedure Code, when the Advocate-General withdraws from a case, and where the Court considers it proper, even though a charge has not been framed, to acquit the accused. This last and rare contingency need not be considered here. Section 248, Criminal Procedure Code, also does not apply, because the present case is a warrant-case. A composition under section 345, Criminal Procedure Code, is the only contingency, therefore, which could warrant an order of acquittal without a charge being framed. I have already pointed out that there has been no valid composition, and it follows, therefore, that the withdrawal by *Musammat* Morni Devi could not justify an order of acquittal.

Counsel for the respondents takes up the further position that there has been no miscarriage of justice, and that I am not called upon to exercise the power of revision in order to redress it. He has put forward certain circumstances connected with the case which, it may be added, are not supported by anything on the record. There is, however, no doubt, some truth in them. Harnam Dass was sentenced to imprisonment for trafficking in women. It is alleged that *Musammat* Morni Devi attempted, during his absence, to sell *Musammat* Durgo. *Musammat* Durgo instituted a complaint for security under section 107, Criminal Procedure Code, against *Musammat* Morni Devi, and *Musammat* Morni Devi lodged in Rawalpindi a complaint against *Musammat* Durgo's mother, alleging that *Musammat* Durgo had been made away with. These complaints were simultaneously withdrawn, and it is this simultaneous withdrawal that is put forward as showing that there had been consideration for a composition. Now, I consider that the character of Harnam Dass is quite irrelevant to the present proceedings. The account which I am given of the conduct of the parties, after his imprisonment, seems to me an additional reason for showing that there may actually have been a miscarriage of justice. *Prima facie*, *Musammat* Morni Devi would seem to have bargained with the rights of Harnam Dass in a way which was absolutely unjustifiable. It is also argued that Harnam Dass has his remedy in a Civil Court, and it is mentioned *inter alia* that the validity of his alleged marriage with *Musammat* Durgo will be contested. The point is that Harnam Dass is clearly entitled, if he wishes, to lodge a complaint under section 498, Indian Penal Code, and he is entitled to have that complaint adjudicated upon. It is perfectly possible that the complaint in itself may be justifiably dismissed under section 203, Criminal Procedure Code, if

(3) 18 Ind. Cas. 413; 37 B. 369; 15 Bom. L. R. 61; 14 Cr. L. J. 77.

the alleged facts are not substantiated, whether before or after an inquiry, under section 202, Criminal Procedure Code. But the fact remains that there has been no adjudication whatever upon the facts of the complaint. It has been thrown out on one ground and one ground alone, *viz.*, that the Magistrate was debarred from taking cognizance of it, because a valid order of acquittal was in operation. I have shown that the order of acquittal in question was illegal and invalid. Although Captain Gaisford may have been perfectly justified in taking the position that he could not proceed with the case while such an order of acquittal was on record, there is nothing which debars me now from quashing that order of acquittal as being illegal. The case is clearly one to be decided upon its merits. I, therefore, in the exercise of the powers of revision, set aside the order of Captain Betham, dated the 29th October 1919, as invalid, and I further set aside the order of Captain Gaisford, dated the 11th November 1921, as being passed on grounds no longer subsisting, and I direct that the complaint be entertained on its merits by a Magistrate having jurisdiction.

W. C. A. *Order set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 187 OF 1922.
CASE REFERRED No. 19 OF 1922.
September 6, 1922.

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

In re MARUDA MATHU VANNIAN AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 250, 537 (a)—Warrant-case—Accused, right of, to state his case before and after framing of charge—Irregularity—Witness, examination of, when completed.

Where in a warrant-case the accused is examined only before the charge is framed, and not also after the prosecution witnesses have been recalled for further cross-examination under section 256 of the Criminal Procedure Code, the procedure cannot be regarded as a mere error, omission or irregularity such as is contemplated in section 537 (*a*) of that Code, because the accused is entitled to an opportunity of stating his case both before and after the charge is framed. (p. 254, col 2)

Mitarjit Singh v. *Emperor*, 63 Ind. Cas. 825; 2 P. L. T. 520; (1922) Pat. 7; 22 Cr. L. J. 697; 6 P. L. J. 644; (1922) A. I. R. (Pat.) 158 and *Tinguturi Sriramulu* v. *Nalam Krishna Row*, 25 Ind. Cas. 1001; 38 M. 585; (1914) M. W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673, referred to.

Narayanaswamy Naidu, In re, 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233; 10 M. L. J. 157; 9 Cr. L. J. 192 (F. B.), distinguished.

The examination of a witness cannot be regarded as completed, until the last stage at which the law authorises its continuance has been passed. (p. 253, col. 1)

Mitarjit Singh v. *Emperor*, 63 Ind. Cas. 825; 6 P. L. T. 520; (1922) Pat. 7; 22 Cr. L. J. 697; 2 P. L. J. 644; (1922) A. I. R. (Pat.) 138, referred to.

Case referred for orders of the High Court under section 438 of the Criminal Procedure Code by the Additional District Magistrate, Tanjore, in his letter dated the 15th December 1921.

The Public Prosecutor, for the Crown.

JUDGMENT.

Oldfield, J.—This reference, made by the Additional District Magistrate, Tanjore, at the instance of the accused in Calendar Case No. 365 of 1920 on the file of the Stationary Sub Magistrate, Tanjore, raises two questions: (1) whether the latter's procedure in examining the accused in this, a warrant-case, only before charge was framed and not also after the prosecution witnesses had been re-called for further cross-examination under section 256 (1), Criminal Procedure Code, was correct; (2) if it was not, whether there was an illegality vitiating the trial or an irregularity, on account of which we can, in the exercise of our discretion, refuse to interfere in revision.

The accused are not represented before us. But we have had the advantage of a very full and careful argument from the learned Public Prosecutor. The first provision relating to the examination of the accused in a warrant-case is section 253, Criminal Procedure Code which provides that he shall be discharged, "if, upon taking all the evidence referred to in section 252" that is, the evidence of the prosecution witnesses "and making such examination (if any) of the accused as the Magistrate thinks necessary" he finds that no case has been made out which would warrant a conviction, and section 254 directs in the contrary event the framing of a charge and section 255 the taking of the accused's plea. But, as

the words "if any" and "as he thinks necessary" show, the examination at this stage depends on the option of the Magistrate, and to ascertain at what stage an examination is obligatory, we must turn to section 342, one of the general provisions relating to enquiries and trials under which "the Court shall for the purpose aforesaid" (of enabling the accused to explain any circumstances appearing in the evidence against him) "question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It is on this provision that accused's contention is founded, their argument being that they were entitled to be questioned, after the examination of the witnesses had been completed by their further cross-examination after charge.

It has been suggested before us that, as section 253 (1) makes no explicit reference to cross-examination before the charge and the first such reference to it occurs in section 256(1), the stage at which it should ordinarily take place is after a charge has been framed. But this is unsustainable, because the wording of section 253 is identical with that of the corresponding section of the Code of 1882, in which there was no provision for further cross-examination similar to that in the present section 256: and it is unnecessary to assume that the insertion of that provision was intended to alter the meaning of a section, which was left unchanged. The better and the sufficient ground for acceptance of accused's contention is that the examination of a witness cannot be regarded as completed until the last stage at which the law authorises its continuance has been passed. This, as explained in *Mitrjit Singh* v. *Emperor* (1), is as easily reconcilable with the description of the course of a witness's examination in section 137, Indian Evidence Act, as any other supplementary cross-examination which the Court may for special cause allow.

We have, however, to deal with the ambiguity involved in the specification in section 256 (1) of the stage before which the further cross-examination is to take place as "before the accused is called on to enter on his defence", because that may not simply and easily be understood as equivalent to "before the framing of the charge."

The use of the same words in section 289 in connection with the essentially different procedure at a Sessions trial suggests no solution of the difficulty. It is true that in sections 255 and 256 (1) the various stages (1) the recording of the charge, (2) the taking of the accused's plea, (3) the re-calling of the prosecution witnesses and their further cross-examination, (4) the accused's entry on his defence, are distinctly stated in that order. But it may be doubted whether the restriction of the accused's defence to the last stage and to the taking of the evidence he adduces corresponds with any exact or consistent use of the language, for it is difficult to see how his statement of his case to the Court or the further cross-examination by him of the prosecution witnesses on his own responsibility and for his own benefit can be regarded, as the argument of the accused before s requires, as part, not of his defence, but of the prosecution case; and that argument cannot be reconciled with the ordinary view of the framing of a charge, as a decisive stage in the case, because it amounts to a recognition (sometimes with important consequences as to the grant of bail) that *prima facie* the commission of an offence has been established, and because, on a charge being framed, the proceedings are, as was held in *Tinguturi Sriramulu* v. *Nalamkrishna Row* (2), transformed from an "enquiry" into a "trial," and, in the words of Wallis, J., in *Narayanaswamy Naidu, Inre* (3), "the accused is charged and called on to answer." I add that the general *moffusil* practice, as I gather it from recollection and such records as have come before me in this Court, is to examine the accused only once, before the charge is framed, and to frame the charge only after the prosecution witnesses have first been cross-examined or offered for cross-examina-

(1) 63 Ind. Cas. 825; 2 P. L. T. 520; (1922) Pat. 7; 22 Cr. L. J. 697; 6 P. L. J. 644; (1922) A. I. R. (Pat.) 158.

(2) 25 Ind. Cas. 1001; 38 M. 585; (1914) M. W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673.

(3) 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192 (F. B.)

tion, although the learned Public Prosecutor assures us that it is framed in many cases in the Presidency Magistrate's Courts after the examination-in-chief of P. W. No, 1. But, although these implications of the accused's contention may entail anomaly or inconvenience, they are not grounds for disregard of the language of the Code already referred to, by which that contention is supported and which the Legislature has chosen to employ. Section 256 took its present form by an amendment which originated in Select Committee when further cross-examination after charge was allowed on the re-enactment of the Code in 1898. In the Code of 1882, the words "the accused shall, at any time whilst he is making his defence, be allowed to re-call and re-cross-examine any witnesses for the prosecution present in the Court or its precincts", which contained the only recognition then allowed of the right of further cross-examination, indicated clearly that its exercise was a part of the defence; and it is possible that, when the amendment was drafted, its effect on the interpretation of other provisions relating to warrant-case procedure was not noticed. But, whatever our opinion as to the result, we are not at liberty to give effect to it, when the conclusion entailed by the words used is clear. I add that, whether or no an examination of the accused at the stage they now contend for will be of any particualr service to them or the administration of justice, it will seldom increase the Magistrate's work or delay the trial to any appreciable extent. On the first question, stated above, the decision must be that the Magistrate's procedure was incorrect.

The second question is, whether the trial before him was vitiated by his error or whether in dealing with the case in revision we can exercise our discretion. On principle, it is impossible to distinguish between cases of breach of duty to examine the accused, as it has hitherto been recognised, before charge is framed and, as it must now be recognised, after; and, if the accused is equally entitled to an opportunity of stating his case to the Court at either of those stages, the failure to allow him to do so at either must have the same effect on the validity of the trial. The accused's right to state his case, at whatever stage the law permits him to do so, is, in my opiuion, fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in section 537(*a*). There is little authority on the point. But *Mahomed Hossaen* v. *Emperor* (4) and *Mitarjit Singh* v. *Emperor* (1), already cited, are in accordance with this view, whilst *Mir Tilawan* v. *Emperor* (5) is distinguishable, because there, although the accused were not examined, they filed written statements, which could be treated as equivalent to their examination. Taking this view, I would set aside the accused's convictions. The District Magistrate states that the case is not of importance and that the sentences of imprisonment have been undergone. It is, therefore, unnecessary to order a re-trial.

But, as the convictions are set aside, the fines which also formed part of the sentences must, if levied, be refunded.

Ramesam, J.— I agree.

M. C. P. *Convictions set aside.*

W. C. A.

(4) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247.

(5) 69 Ind. Cas. 383; 1 Pat. 31; (1922) A. I. R. (Pat.) 388; 23 Cr. L. J. 703; 4 P. L. T. 60.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 508 OF 1922.

October 9, 1922.

Present:—Mr. Justice Adami.

HARENDRA KRISHNA BAGCHI AND OTHERS—1ST PARTY—PETITIONERS

versus

BALKUMAR KUMAR AND OTHERS—2ND PARTY—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), ss. 148 (3), 386, scope of—Costs awarded in proceedings under s. 145—Delay in applying to realize costs—Magistrate, power of, to refuse to realize costs—Limitation.

Section 148 (3) of the Criminal Procedure Code merely points out the way in which costs awarded in a proceeding under section 145 are to be recovered, and does not give a Magistrate a discretion to refuse to recover such costs. (p. 255, col. 2.)

HARRENDRA KRISHNA BAGCHI *v.* BAL KUMAR.

Inasmuch as a person to whom costs have been awarded has a period of six years within which to apply for the recovery thereof, the mere fact that there is delay, not exceeding such period, in applying to recover the costs, would not justify a Magistrate in refusing the application. (p. 255, col. 2.)

The use of the words "may in his discretion" in section 386 of the Criminal Procedure Code cannot be used for the purpose of interpreting the words "may be recovered" in section 148 of the same Code. The discretion in section 386 of the Code only refers to cases where there has been a conviction and sentence. (p. 255, col. 2.)

Application against an order of the Sub-Divisional Magistrate, Banka, dated 28th June 1922,

Messrs. *C. C. Das* and *S. S. Bose*, for the Petitioners,

Messrs. *P. C. Roy* and *S. N. Roy*, for the Opposite-Party.

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

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

Now, an order had been made granting costs to the petitioner and there is no doubt that if the Magistrate who passed that order still held office he would have enforced his order. The learned Magistrate now maintains that it is in his power, although his predecessor had ordered the costs to be recovered, to exercise discretion and refuse to carry out that order. In my opinion the wording of section 148 sub-section (3) "all costs so directed to be paid may be recovered as if they were fines" does not give the Magistrate discretion to refuse to recover the costs. It merely points out the way in which these costs are to be recovered and the reference is merely to section 386, Criminal Procedure Code. The use of the words "may in his discretion" in section 386 cannot be used for the purpose of interpreting the words "may be recovered" in section 148. The discretion in section 386 only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine the offender shall be imprisoned. In my mind there is no doubt that the petitioners were entitled to insist that steps should be taken to recover the amount of costs awarded and that the Magistrate had no option to refuse to take steps

It is then urged that the delay in making the application for a further warrant entitles the Magistrate to refuse to grant the application. The petitioners had six years within which to apply for recovery of the costs and any time within those six years they had a right to go before the Magistrate and ask him to take proper steps to recover the amount. I think, therefore, that the order of the Magistrate was wrong and that he should have issued distress warrants as desired by the petitioners. With regard to the recovery of costs from the opposite

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

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

N. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 116 OF 1922.

August 2, 1922.

Present:—Mr. Justice Rafique.

HIRA LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 556—Transfer—Prosecution ordered by Cantonment Magistrate acting as Secretary, Cantonment Committee—Advisability of other Magistrate to try case.

Where a prosecution is ordered by a Cantonment Magistrate in his capacity as Secretary of the Cantonment Committee, it is advisable that the case should be tried by some Magistrate other than the Cantonment Magistrate.

Application for transfer under section 526 of the Code of Criminal Procedure.

Messrs. *C. Ross Alston* and *Ramnama Prasad*, for the Applicant.

Mr. *Lalit Mohan Banerji* (Government Advocate), for the Crown.

JUDGMENT.—The applicant, Hira Lal, is a resident of the Cantonment in Meerut. It seems that he began to erect a building within the Cantonment limits and a servant of the Cantonment Authority reported that the said Construction was in contravention of the Cantonment Rules. A notice was served, under the Cantonments Act, upon the applicant. The learned Cantonment Magistrate himself proceeded to the spot and inspected the building under construction to see if a breach of the Cantonment Rules had been committed. Thereafter, according to the applicant, under the sanction of the Cantonment Magistrate, a formal complaint was lodged against him, Hira Lal, the applicant, in the Court of the Cantonment Magistrate. The applicant moved the District Magistrate to transfer his case to some other Court on several allegations, the principal of which was that the prosecution having been started at the instance or under the sanction of the Cantonment Magistrate, he, the applicant, apprehended that he would not have an impartial trial. An explanation was called for by the District Magistrate from the Cantonment Magistrate. In his explanation of the 21st of June the learned Cantonment Magistrate admits that "having seen the unauthorised building, he naturally ordered the prosecution in his capacity as Secretary of the Cantonment Committee." The District Magistrate, however, rejected the application for transfer. Thereupon the applicant came to this Court. The learned Government-Advocate opposes the application. I think, on a consideration of all the circumstances in the case and specially taking into consideration the fact that the prosecution of the applicant was ordered by the learned Cantonment Magistrate after inspection of the building in question in his capacity as Secretary to the Cantonment Committee, it would be more advisable if the case were tried by another Court. I do not for a moment say that the applicant will not have an impartial trial before the learned Cantonment Magistrate. But it is quite conceivable that, in the circumstances of the present case, there is a reasonable apprehension in the mind of Hira Lal, the applicant, that he would not have an impartial trial in the Court under whose order the prosecution has been started against him. I, therefore, allow the application and transfer the case against Hira Lal, from the Court of the learned Cantonment Magistrate to that of the learned District Magistrate. The latter will either try the case himself or transfer it for trial to some other Magistrate subordinate to him.

W. C. A. *Case transferred.*

MADRAS HIGH COURT.

CIVIL APPEAL NO. 374 OF 1919.
November 3, 1921.

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

ARUNACHALAM CHETTIAR—DEFENDANT—APPELLANT

versus

B. RAJA RAJESWARA SETUPATI *alias* MUTHURAMALINGA SETUPATI AVERGAL—PLAINTIFF—RESPONDENT.

Interest, award of—No contract to pay interest—Equity—Interest Act (XXXII of 1839), whether exhaustive.

The Interest Act is not exhaustive of cases where interest is allowable when no contract exists, but, apart from contract and the provisions of the Act, a Court is competent to decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it. (p. 258, col. 2.)

Muhammad Abdul Gaffur Rowthar v. *Hamida Beevi Ammal*, 52 Ind. Cas. 505; (1919) M. W. N. 484; 42 M. 661, 25 M.L.T. 242; 36 M. L. J. 456, relied on.

Where by the wrongful act of the defendant the plaintiff is deprived of money which was actually making interest, a Court of Equity, in an action for money had and received, is competent to award interest on the amount due. (p. 259, col. 1.)

Miller v. *Barlow*, (1871) 8 Moore P. C. (N. S.) 127; 3 P. C. 733; 17 E. R. 276; 14 Moo I A. 209; 20 E. R. 765; 3 Sar. P. C. J. 727 (P. C.), followed.

In granting equitable relief the Court ought to look to the substance of the claim, and not to the form of the action. (p. 259, col. 1.)

Appeal by the first defendant, against so much of the decree as is against him of the Court of the Subordinate Judge, Madura, in Original Suit No. 58 of 1917.

Messrs. *K. V. Krishnaswami Aiyar* and *N. Swaminatha Aiyar*, for the Appellant.

Messrs. *A. Krishnaswami Aiyar* and *S. Sundararaja Aiyangar*, for the Respondent.

JUDGMENT.

Oldfield, J.—The question for the determination of which this re-hearing on review was granted is, whether the lower Court erred in awarding to plaintiff the amount due from the first defendant as rent of the suit property for Faslis 1323 and 1324, with interest thereon.

No objection is now taken to the confirmation of the decision of the lower Court in plaintiff's favour as to the principal amount claimed as rent, and the facts necessary for appreciation of the argument regarding interest can be stated shortly. Plaintiff's father leased property to second and third defendants for forty years and afterwards leased the same property to first defendant in perpetuity. That contract provided for first defendant's right to collect the rent from the second and third defendants, until their lease expired, and his duty to pay it over to plaintiff. Disputes arose and plaintiff brought a suit for the cancellation of first defendant's lease, which was compromised by a decree for, *inter alia*, payment by first defendant of what he had collected from second and third defendants up to Fasli 1323. Although, however, first defendant's lease was to end under the compromise with Fasli 1322, he collected, and admittedly is liable for, the rent for Faslis 1323 and 1324, although the exact circumstances in which he collected it, whether fraudulently or by mistake, have not been ascertained.

The difficulty in the way of allowing plaintiff interest on these principal amounts is, that he clearly cannot claim it on the strength of any contract, because his contract with first defendant related only to the period ending with Fasli 1321; and he must, therefore, support his claim by showing that interest is, in the words of the Interest Act (XXXII of 1839), "payable by law". He cannot claim it directly as damages, because such a claim would, it is conceded, be out of time. The alternative suggested by him is, that his suit is one for money received by first defendant for his use, and is subject to Art. 62, Schedule I of the Limitation Act; and the suit, no doubt, is of that nature, for the facts resemble those in *Durga Prasad* v. *Asa Ram* (1) in which there was held to be a constructive trust; and there was certainly the privity between plaintiff and first defendant which the decision in *Ramasami Naidu* v. *Muthusami Pillai* (2) requires. It is urged, however, that, even so, plaintiff cannot claim interest in a suit for money received to his use; and such a claim in a suit of that nature was no doubt rejected in *Fruhling* v. *Schroeder* (3).

(1) 2 A. 361; 1 Ind. Dec. (N. S.) 841.
(2) 48 Ind. Cas. 756; (1918) M. W. N. 796 at p. 197; 35 M. L. J. 581; 41 M. 923.

The answer to this objection is, first, that *Fruhling* v. *Schroeder* (3) was decided under the Common Law and that a claim to interest, which would be inadmissible under it, may be sustainable in equity or in any Court, such as this, which exercises both jurisdictions. *Miller* v. *Barlow* (4) and *John* v. *Dodwell and Co.* (5). And, next, plaintiff's substantive claim being sustainable under Chapter IX of the Trusts Act, first defendant is subject, under section 95 thereof, to the same liabilities as if he were a trustee of the money he has retained; and there can be no doubt that liability for interest is among them. On its merits, it may be added that his plea is clearly unconscionable, since there is no reason why he should be allowed to profit by his wrongful conduct.

Plaintiff's memorandum of cross-objections is against the lower Court's award of interest at 6 per cent., 12 per cent. being claimed. We can see no reason for interference with the rate allowed.

The result is that, with reference to this Court's previous judgment, and to the calculation of interest, on which the parties have now agreed, clause 2 of the lower Court's decree is modified by the substitution of Rs. 1,215-3-11 for Rs. 3,202-5-1 corresponding alterations must be made in the portion of that clause and clause 3 relating to costs. The order of this Court in its previous judgment as to costs in appeal will be set aside and an order for proportionate costs in appeal substituted. The plaintiff will pay first defendant's costs in the review petition.

The memorandum of cross-objections is dismissed with costs.

Krishnan, J.—At the re-hearing of this appeal before us, it is conceded by the first defendant that the decree of the lower Court, in so far as it awarded to the plaintiff the sum of Rs. 1,100, the amount received by him from the term lessee as rent for Faslis 1322 and 1323, was not open to any objection and might be confirmed. The only point argued for him was that no interest should have been awarded on the said sum The lower Court gave interest by way of equitable damages at 6 per cent. and I am of opinion that that award is correct.

It is true that there was no contract to pay interest and that interest was not awardable under the Interest Act either, as there was no demand made for payment. But it is now settled that, apart from contract and the Interest Act, it is open to the Court to decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it. The latest pronouncement of this High Court on the point is in the case of *Muhammad Abdul Gaffur Rowthar* v. *Hamida Beevi Ammal* (6). In that case the learned Judges granted interest by way of damages on a sum of money found due to the plaintiff as her share of her father's assets in a partnership business which was carried on by the defendants after the father's death, her money having been utilised by them in the business. The previous authorities are referred to and discussed at length by the learned Judges, and they came to the conclusion that the Interest Act was not exhaustive of cases where interest is allowable when no contract exists but that interest could be given by way of equitable damages. It is not necessary, therefore, to discuss once again the prior authorities which, it may be observed, include the rulings of the Privy Council in *Miller* v. *Barlow* (4) and other cases.

The question then is, whether the circumstances here are such as justify an award of interest by way of equitable damages. The first defendant had clearly no right to receive, much less to retain, the rents paid by the term lessee for the Faslis in question, as his right to collect them had ceased with the termination of his permanent lease, under the terms of which alone he had such a right. His action, therefore, in retaining the money was clearly wrongful, and he would be liable in damages for it. But it is contended that, as plaintiff waived the tort and sued for the money received by the defendant as money had and received by him to the plaintiff's use, the defendant is not liable to pay damages in this suit in any form. It seems to me that

(3) (1832) 2 Bing. (N. C.) 77; 3 Scott 135; 4 L. J. P. 299; 132 E. R. 31.

(4) (1871) 8 Moore P. C. (N. S.) 127; 3 P. C. 733; 17 E. R. 260, 14 Moo. I. A 209; 20 E. R 705; 2 Sar. P. C. J 727 (P. C.).

(5) (1918) A. C. 563; 87 L. J. P. C. 92; 118 L. T. 661; 34 T. L. R. 261.

(6) 52 Ind. Cas. 505; (1919) M. W. N. 484; 42 M. 661; 25 M. L. T. 242; 36 M. L. J. 456.

this argument is not sound as, in granting equitable relief, we must, I think, look to the substance of the claim and not to the form of the action. When the grant is in the form of interest there cannot be any question of limitation when the claim for the principal is admittedly not barred. The first defendant having obtained the money himself and kept the plaintiff wrongfully out of it, the plaintiff is, in my opinion, clearly entitled in equity to interest on it, the money was carrying interest in the hands of the term lessee under his contract, and if it had been paid over to the plaintiff, he could also have earned interest on it. The case is thus really covered by the ruling of the Privy Council in *Miller* v. *Barlow* (4) where their Lordships observed: "It, therefore, appears that by the wrongful act of the defendant the plaintiff has been deprived of money which was actually making interes , and their Lordships are of opinion, that under these circumstances a Court of Equity would clearly be entitled to give interest."

In England there has, no doubt, been a course of decisions against the granting of interest in such cases, and *Fruhling* v. *Schroeder* (3) relied on by the respondent is one of such cases. But, as pointed out in *Muhammad Abdul Gaffur Rowthar* v. *Hamida Beevi Ammal* (6) the noble Lords who decided the case of *London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (7), and especially Lord Herschell, actually regretted that they were prevented by principles of *stare decisis* from re-opening the question and awarding interest on equitable grounds. We are under no such di ability in this country and we need not follow the English rule. Our Courts are Courts of both Equity and Law; and there is nothing to prevent us from giving equitable relief in suitable cases.

I, therefore, agree to the order proposed by my learned brother in this appeal as well as in the m morandaum of cross-objections.

V. N. V.
W. C. A. *Decree varied.*

(7) (1893) A. C. 429; 63 L. J. Ch. 93; 1 R. 75; 69 L. T. 637; 58 J. P. 36.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1327 OF 1918.
January 27, 1922.
Present:—Mr. Justice Abdul Raoof
and Mr. Justice Harrison.

ABDUL HAQ AND OTHERS—DEFENDANTS—APPELLANTS
versus
THE FIRM SHIVJI RAM-KHEM CHAND—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85 Mutual, open and current account Evidence Act (I of 1872), s. 34 Account books, entries in - Proof.

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions. An account current is an open or running account between two or more parties, or, an account which contains items between the parties from which the balance due to one of them is, or, can be, ascertained. (p. 263, col. 2.)

Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits. (p. 263, col 2.)

An account under which one party has merely received and paid monies on account of the other, is not a mutual account, properly so called. Each party must receive and pay on account of the other. (p. 263, col. 2.)

A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality. (p. 263, col. 2.)

The mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the books of the plaintiffs does not make the account between the parties a mutual account in which there have been reciprocal demands between the parties. (p. 263, col. 2.)

Ram Pershad v. *Harbans Singh*, 6 C. L. J. 158, relied upon.

Where a plaintiff makes cash advances to a defendant and also makes purchases on his behalf and the latter consigns goods to the former for sale on commission and interest is charged both on the credit and debit side, the account between the parties is a mutual, open and current account within the meaning of Art. 85 of Schedule I to the Limitation Act. (p. 264, col. 1.)

Shive Gowda v. *Fernendez*, 8 Ind. Cas. 141; 34 M. 513; 8 M. L. T. 412; (1911) 1 M. W. N. 1; 21 M. L. J. 391, distinguished

Ratan Chand Jwala Das v. *Asa Singh Bogha Singh*, 59 Ind. Cas. 669; 3 U. P. L. R (L) 3; 26 P. W. R. 1921, *Namberumal Chetty* v. *Kotayya*, 21 Ind. Cas. 773; 14 M. L. T. 498 and *Madhave Motiraut* v. *Jairam Sakharam*, 63 Ind. Cas. 950; 23 Bom. L. R. 540, relied upon.

In order to obtain a decree on the basis of entries in books of account it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of business, the entries themselves must also be proved, unless the necessity

for such proof is removed by the admission of the opposite party. (p. 265, col. 1.).

Imambandi v. *Malasuddi*, 13 Ind. Cas. 678; 15 C. L. J. 621, *Ganga Ram* v. *Kaka Ram* 22 Ind. Cas. 403; 47 P. L. R. 1914; 53 P. W. R. 1914, relied upon.

First appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the 20th February 1918.

Mr. *Zafrulla Khan*, for Abdul Haq and Abdul Khalik, and Mr. *Badr-ud-Din Qureshi*, for Abdul Karim, Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—First Appeals Nos. 1327 of 1918 and 1655 of 1918 are connected cross-appeals, and have arisen out of the following circumstances. It will be convenient to deal with both of them in one judgment.

The plaintiff-firm, known as Shivji Ram-Khem Chand, carried on the business of money-lending and commission agents. They also were cloth merchants. They instituted the present suit for the recovery of Rs. 5,325-5-6 principal and interest on the strength of *bahi* account on the following allegations:—

That Shah Muhammad, father of the defendants Abdul Karim, Abdul Haq and Abdul Khaliq, and the defendants were joint and their business was also joint, and that Shah Muhammad and his sons commenced dealings with the plaintiff-firm and the accounts were opened from the 9th November 1907. The facts as to the condition of the accounts as stated in the plaint are as follows:—

(*i*) On the 7th June 1909 Rs. 6,185-0-3 were debited against Shah Muhammad and the aforesaid defendants, Rs. 2,597-0-3 were credited to them, and Rs. 213-2-9 were added on account of interest, and on *Asarh Badi* 4, *Sambat* 1965, a balance was struck by Abdul Karim signed on his own behalf and that of his brothers, Abdul Haq and Abdul Khaliq.

(*ii*) That up to *Katak Badi* 3, *Sambat* 1960 Rs. 4,969-10-9 were debited and Rs. 6,563-7-6 credited and Rs. 633-2-6 were added on account of interest. A balance of Rs. 2,840-5-9 was struck.

(*iii*) Till *Magh Sudi* 10, *Sambat* 1966, Rs. 320-3-9 were debited and Rs. 28 were credited.

On this statement of the accounts the plaintiff-firm claimed Rs. 3,132-9-6 on account of principal and Rs. 2,192-12-0 on account of interest at the rate of Rs. 12-0-0 per cent. per annum, total Rs. 5,325-5-6.

The suit was resisted by a total denial of the claim. The allegation as to the striking of balances was traversed and a plea of limitation was urged in the alternative. Abdul Haq and Abdul Khalik in their pleas did not admit that they were joint with Abdul Karim or that they had any joint business. Abdul Karim also in his *jawab-i-dawa* alleged that he was separate. The following issues were framed by the Trial Court:—

(1) Have Shah Muhammad and Abdul Karim to pay Rs. 5,325-5-6 to the plaintiff per account?

(2) Are Abdul Haq and Abdul Khaliq also liable for the payment of this debt on account of their being joint or otherwise?

(3) Is the plaintiff's suit within limitation? How far?

(4) Have the remaining *bahis* been lost? And can the plaintiff produce hearsay evidence about these entries?

The fourth issue was framed owing to the non-production by the plaintiff-firm of the *bahi* containing the alleged balances, which was said to have been lost. The finding of the Court on this last issue is against the plaintiff-firm. Evidence was given to prove the loss and to lay the foundation for the production of secondary evidence. That evidence was disbelieved and it was held that the plaintiff-firm had failed to discharge the burden of proof.

On the third issue the Court held that as the loss of the *bahi* was not proved it must be held that no balances were struck as stated in the plaint. In the opinion of the Court six years' limitation under the Punjab Limitation Act governed the case. The Court, therefore, held that all items more than six years old were barred by time, but that the plaintiff-firm was entitled to get a decree as regards items falling within six years. The total of the items within time was found by the Court to be Rs. 1,094-7-3. On this the Court allowed Rs. 390 as interest at the rate of Rs.6 per cent. per annum. The claim was accordingly decreed for the total sum of Rs. 1,484.

On Issue No. 2 which related to disputes between the defendants *inter se* the Court found that as the claim really was against

the estate of Shah Muhammad all the defendants were equally liable for the debts in proportion to their shares in the inheritance

Both the parties are dissatisfied with the decree of the Court below. Therefore, both of them have come up in appeal to this Court. First Appeal No. 1655 of 1918 has been preferred by the plaintiff-firm and the object of this appeal is to get the whole of the claim decreed, the main plea being that no part of the claim was barred by time. Other pleas raised the question of the right of the plaintiff to adduce secondary evidence to prove the alleged balances, and questioned the correctness of the decision of the Court as to the amount decreed and the rate of interest allowed. Appeal No. 1327 of 1918 has been preferred by the defendants and the following pleas have been urged on their behalf by their learned Counsel Mr. Zafrulla Khan:—

(*i*) That the entire claim was barred by time, as the suit was governed by three years' limitation under Art. 85 of the Indian Limitation Act and not by six years' limitation under the Punjab Limitation Act.

(*ii*) That under section 34 of the Evidence Act the mere production of the account-books was not sufficient to prove the accounts on which the plaintiff-firm relied:

(*iii*) That inasmuch as the claim of the plaintiff-firm was based on the alleged striking of balances, which the plaintiff-firm had failed to prove, the suit ought to have been dismissed, and

(*iv*) That excessive costs have been allowed to the plaintiff in the decree of the lower Court.

As regards the first contention we have to see whether the case comes within the provisions of Art. 85 of the Limitation Act. If it does, then the Punjab Limitation Act cannot apply to it. This Article provides three years' limitation from the close of the year in which the last item admitted or proved is entered in the account for a claim "on the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties." Mr. Zafrulla Khan has taken us through the accounts and has contended that the nature of the transactions between the parties, as shown by the account-books, clearly brings the case under that Article. An examination of the transliteration of the *bahi* accounts discloses the following facts. On the debit side there are entries showing cash advances, price of cloth sold, payments made to third persons on behalf of the defendants for things supplied, and commission charged for purchases made by the plaintiff for the defendants. On sheet No. 1 on the reverse side there are two items of Re. 0-2-0 and Rs. 1-2-3 showing commissions charged. On the credit side there are entries showing that the plaintiff-firm received various kinds of grain from the defendants and having sold them in the market credited the proceeds to the defendants. On some of the goods other than grain they charged commission and deducted expenses before crediting the nett balance. At page 1 on the credit side the second entry runs thus:—*Shah Muhammad-Abdul Karim Sakhere da jama kanak chauda man tis ser bechi—Sattar rupae ath anna aur chheh pai, i.e.*, credited to Shah Muhammad-Abdul Karim Sakhera, on account of 14 maunds and 30 seers of wheat sold . . . . . Rs. 70-8-6. There are numerous entries of this kind to be found in the accounts to which it is not necessary to refer in detail. On page No. 1 on the reverse side are to be found four entries as to the sale of bricks for the total sum of Rs. 227-8-0 which were credited to the defendants. The heading above these entries contains the following words :—

"*Inten da tumahre kahe mujib*"

(literally translated, this means: sale of bricks according to your instructions.)

The detail of the entries is given below:—

		Rs. A. P.
1. "*Ek sau iklis rupae char anna, intan nag pachas hazar, dar do rupae das anna.*"	1. On account of 50,000 bricks at the rate of Rs. 2-10	131 4 0
2. "*Chhattis rupae ath anna, intan nag tera hazar nau so, dar do rupae das anna.*"	2. On account of 13,900 bricks at the rate of Rs. 2-10 0-0	36 8 0
3. "*Pandrah rupae, int nag chheh hazar, dar do rupae ath anna.*"	3. On account of 6,000 bricks at the rate of Rs. 2-8-0	15 0 0

4. "*Chaulalis rupae bara anna ini nag panch hazar chheh sau, dar ath rupae.*"	4. On account of 5,600 bricks at the rate of Rs. 8.	44 12 0
	Total	227 8 0

It appears that the plaintiff-firm also used to advance cash and corn for seeds to the tenants of the defendants and the latter had stood surety for the tenants undertaking the liability to pay if anything was found due to the plaintiff. The defendants admittedly are land-holders and from the numerous entries in the account-books it would appear that they used to raise produce of different kinds of grain and used to sell them in the market through the plaintiff-firm. The plaintiff as their commission agent used to sell goods delivered and credited the defendants with the price realised. He also used to advance cash and grain to the tenants of the defendants for which the latter has become surety.

A great deal of light is thrown on the nature of the transactions between the parties by reference to an agreement dated the 1st November 1909 found transliterated in Urdu at the end of the transliteration of the *rokar pakki bahi*. This agreement is signed by Abdul Karim on behalf of the defendants.

It runs thus:—

"*Aj moarkha yakam November* 1909 *ko tahrir di hai Sheoji Ram-Khem Chand ko Shah Muhammad-Abdul Karim ne jo ke meri asami hai beej wa dana wa biaj wa rupae dia jawega tadadi do sau ya do sau pachhas ya tin sua unke jimmedar ham hain. Agar yeh rupea na deven to unka hisab smajh kar ham denge. Asamian ka hisab ka sud dar ek rupea nau anna fi sainkara mahwar ka hoga.*

"(*Sd.*) Sultan *wald* Girju Joya.

"(*Sd.*) Nur Hassan *wald* Wajid Sakhera.

"(*Sd.*) Bel Khan *wald* Keswa Joya.

"(*Sd.*) Pira, Diwan *wald* Girja.

"(*Sd.*) Jani *wa* Saddiq *wald* Mewa Joya.

"*Apna ya apka jo mal farokhat karenge tumhari dukan ki maarfat farokhat karenge.*

"*Bakalm Khud* Abdul Karim

"*Yakam* November 1909."

(Translation)

"To-day, the 1st November 1909, Shah Muhammad and Abdul Karim, who are my *asamis*, have given a writing to Sheoji-Ram-Khem Chand. Seed, grain, interest and money will be given. We are responsible for Rs. 200 or Rs. 250 or Rs. 300. If they do not pay the money we will pay it after adjustment of account. Interest at the rate of Rs.1-9-0 per cent. per mensem shall be charged on the amount due from the *asamis*.

"(*Sd.*) Sultan, son of Girju Joya.

"(*Sd.*) Nur Hassan, son of Wajid Sakhera.

"(*Sd.*) Bel Khan, son of Keswa Joya.

"(*Sd.*) Piru and Diwan, sons of Girju.

"(*Sd.*) Jani and Saddiq, sons of Mewa Joya. We shall sell your or our (?) goods through your shop, dated the 1st November 1909.

"(*Sd.*) Abdul Karim.

" (In his own hand in Persian characters)."

It has already been shown that the alleged striking of balances was not established. Therefore, there can be no doubt that the accounts between the parties were not closed, but remained open and current. Even if any or all of the balances were found to have been struck the accounts would still be treated as open and current, because they do not appear to have been finally closed, as advances and receipts are to be found thereafter also. We have, however, to see whether the accounts in this case were mutual and there had been reciprocal demands between the parties. The oral evidence affords little or no assistance as to the course of business between the parties and we have to rely almost entirely on the plaintiff's accounts. There is, however, some indication as to the mutuality of the accounts between the parties in the evidence of Moti Ram (P. W. No. 13). Speaking about the practice of charging interest this witness states as follows :—

"*Rokar* page 209, Rs. 625-4-6. *Assauj Sudi* 6, *Sambat* 1966. It is in my hand. It is on account of interest. I calculated the interest. Interest is charged on credits or debits both. Rs. 7-14-0 debited to Shah Muhammad-Abdul Karim in month *Katak, Sambat* 1966, and anna one on account of stamp. Entry is in my hand. Shah Muhammad-Abdul Karim struck the balances for Rs. 2,840-5-9. Interest is charged at Re. 1-0-0 per cent. The debits and credits

are entered in the *bahi*. Abdul Karim used to enter this in his own *bahi*. The account was made up by comparison of his books."

This shows that both sides used to charge interest and accounts used to be made up by comparison of their respective books. Abdul Haq defendant's statement, printed at page 9, shows that Shah Muhammad, father of the defendants, owned 2,900 *bighas* of land, that during the time he had dealings with the plaintiff-firm he used to sell the produce of the land through them. However, as already mentioned, we must mainly depend on the accounts of the plaintiff for our decision on the question. A careful scrutiny of these accounts can lead to no other conclusion than that the accounts were mutual. The plaintiff used to make cash advances and make purchases for the defendants for which he would have a demand against the defendants. On the other hand, the plaintiff also used to sell goods for the defendants and had to account to them for their price and thus had often to give credit to the defendants for the amounts realised. Can there be any doubt on the question that the defendants would have a demand against the plaintiff for any sum due to them on account of the sale of the goods?

Mr. Manohar Lal, Counsel for the plaintiff, strongly relied on the case of *Shive Gowda* v. *Fernandez* (1) and contended that various kinds of goods delivered to the plaintiff for sale must be looked upon as consignments in payment towards the debts due to the plaintiff. No doubt, on the facts proved, it was found that the consignment of coffee to the plaintiffs in that case was for the purpose of part payments of the debts due to the plaintiffs. In that case the learned Chief Justice, Sir Arnold White, after examining the accounts made the following observation :—

"I am of opinion that, having regard to the course of business so far as it can be ascertained from the plaintiffs' accounts, the relation between the defendants and the plaintiffs was not that of seller and buyer as regards the coffee consigned to the plaintiffs—nor that of principal and agent in respect of the coffee sold by the plaintiffs, ... but that the contract between the parties was, as would seem to be suggested in paragraph 4 of the plaint and in the concluding portion of paragraph 6 of the learned Judge's judgment that the plaintiffs should finance the defendants, and that the defendants should keep the plaintiffs secured in respect of the advances made by the plaintiffs on their behalf by consigning to them coffee of a value equal to the amount of their indebtedness, the defendants being given credit for the proceeds of the coffee as and when sold by the plaintiffs and that if they failed to do this, they should make the further payment which is called commission, but which is really a payment by way of damages."

The facts of the present case, as already shown, are entirely different. In this case it appears that the plaintiff acted as a commission agent of the defendants, but as he happened also to be their creditor he credited the price of the goods sold to the defendants. The case relied upon, therefore, has no bearing on the present case.

Mr. Manohar Lal has also relied upon the case of *Ram Pershad* v. *Harbans Singh* (2). The decision in that case lays down general principles applicable to the consideration of the provisions of Art. 85 of the Limitation Act and is in no way helpful to the plaintiff. The head-note fully summarises the principles laid down by Mr. Justice Mukerjee in his judgment and it will be useful to reproduce it in this judgment in order to see whether the facts found bring the present case within those rules. The Headnote is to the following effect:—

"An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions."

"An account current is an open or running account between two or more parties, or, an account which contains items between the parties from which the balance due to one of them is, or, can be ascertained.

"Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.

"An account under which one party has merely received and paid monies on account of the other, is not a mutual account, properly so-called. Each party must receive and pay on account of the other.

"A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality.

"The mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the book of the plaintiffs, does not make the account between the parties a mutual account in which there have been reciprocal demands between the parties."

(1) 8 Ind. Cas. 141; 34 M. 513; 8 M. L. T. 412; (1911) 1 M. W. N. 1; 21 M. L. J. 391.

(2) 6 C. L. J. 158.

In our opinion all ingredients necessary for bringing the case under Art. 85, as detailed in the judgment of Mr. Justice Mukerjee, are to be found in the present case. This case also does not support the contention of Mr. Manohar Lal.

The case which really applies to the facts of the present case is one of *Ratan Chand Jawala Das* v. *Asa Singh Bogha Singh* (3). This is a decision of Mr. Justice Scott-Smith of our own High Court. It is true that this is a decision of a Single Judge, but it is based upon a number of rulings which are discussed in the judgment and some of which have been referred to during the arguments before us. The facts of the reported case were pra tically similar to the facts of the case under consideration. The plaintiffs of that case made advances of money to the defendants. The defendants were dealers in grain and used to send their grain to the plaintiffs' shop. Plaintiffs sold it as commission agents and after deducting their commission and other charges credited the amount remaining to the defendants in the account. The plaintiffs having sued the defendants to recover the balance due to them on the account it was held that the suit was governed by Art. 85 of the Limitation Act. Mr. Justice Scott-Smith referred to the case of *Namberumal Chetty* v. *Kotayya* (4) and held that the case appeared to him to be very similar to the case he had to decide. It will be enough to reproduce here the head-note of the case reported in *Namberumal Chetty* v. *Kotayya* (4) in order to show how similar were the facts of the reported case to those of the present case. The head-note runs thus :—

"The plaintiff advanced moneys to the defendant and the latter consigned goods to the former for sale on commission. *Held*, that there were independent obligations on each side and the account between the parties was a mutual, open and current account within the meaning of Art. 85 of the Limitation Act."

There is another case reported as *Madhav Motiram* v. *Jairam Sakharam* (5), which goes a long way to support the argument of the defendants' Counsel as to the applicability of Art. 85. The facts of that case, as given in the judgment of the Chief Justice, were as follows :

"The plaintiff sued to recover on a *khata* or account of dealings which had continued between the parties from the 1st March 1913. The business between the parties was that the plaintiff advanced money to the defendant to buy cotton, which was ginned and pressed by the plaintiff, the charges being debited to the defendant, and after that the cotton was sent to Bombay through the plaintiff and sold, the plaintiff being credited with the sale-proceeds as against the advances made by him to the defendant."

On those facts Sir Norman Macleod, Chief Justice, and Mr. Justice Shah held that the account between the parties was mutual, open and current, and that Art. 85 applied.

A large number of authorities was cited by the Counsel for the parties during the arguments, but it will serve no useful purpose to discuss all of them in any detail.

In our opinion the cases above referred to clearly lay down the rule and principles underlying the provisions of Art. 85 of the Limitation Act.

On the question of mutuality, difficulty is always felt in coming to the conclusion whether the accounts in any particular case show mutuality and reciprocity. In this case we can with a fair degree of certainty hold that there was mutuality and reciprocity between the plaintiff and the defendant. The suit, therefore, was clearly barred by three years' limitation. In this view it is not necessary to decide the remaining points urged by Mr. Zafrulla Khan on behalf of the defendants. If it were necessary we would hold that the second contention put forward by him also has force. Section 34 of the Indian Evidence Act provides that :—

"Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

Now, in this case there was a total denial of the plaintiff's claim and, therefore, the Court had to enquire into the matter. The plaintiff, however, practically produced no evidence besides the entries in account-books in support of the items with reference to which the defendants were to be made liable. It has been rightly contended by Mr. Zafrulla Khan that the items decree

(3) 59 Ind. Cas. 669; 8 U. P. L. R. (L.) 31; 26 P. W. R. 1921.
(4) 21 Ind. Cas. 773; 14 M. L. T. 398.
(5) 63 Ind. Cas. 950; 23 Bom. L. R. 540.

ought to have been proved by independent evidence.

In the case of *Imambandi* v. *Matasuddi* (6) the learned Judges, who decided the case, made the following observation, which is to be found on page 680,* column 2 :—

"It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business, but it is not sufficient merely to prove the correctness of the books. The entries themselves have to be proved unless, indeed, the necessity for such proof is removed by the admission of the opposite party."

It is true that the Commissioner appointed in this case has reported that the books produced in this case had been regularly kept in the course of business, but no proof had been given to prove the correctness of the entries of those books.

A similar view was expressed by a Division Bench of the Punjab Chief Court in the case of *Ganga Ram* v. *Kaka Ram* (7).

We, therefore, hold that the accounts in this case have not been proved according to law.

In this view the defendants' Appeal No. 1327 of 1918 must be accepted and the suit must be dismissed. Accordingly, we allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in all Courts.

Z. K. & N. K. *Appeal accepted.*

(6) 13 Ind. Cas 678 ; 15 C. L. J. 621.
(7) 22 Ind. Cas. 403 ; 47 P. L. R. 1914 ; 53 P. W. R. 1914.
* Page of 13 Ind. Cas. - (*Ed.*)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 806 OF 1921.
December 7, 1922.
Present :—Mr. Justice Gokul Prasad.
LAKHU AND OTHERS—DEFENDANTS—APPELLANTS
versus
Sardar LAL SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Adverse possession—Proof—Enclosing land for keeping cattle during daytime—Possession, nature of.

It is no defence to a suit for possession of land that the land has been in possession of the defendant for more than 12 years. If plaintiff's title is to be denied, adverse possession for more than 12 years must be set up and proved. (p. 266, col. 2.)

To enclose a plot of land, which is of no immediate use to its owner, and to use it for the temporary purpose of keeping cattle there in the daytime, does not amount to adverse possession. (p. 266, col. 2.)

Secretary of State for India v. *Chelikani Rama Rao*, 35 Ind. Cas 902 ; 39 M. 617 ; 31 M. L. J. 324 ; 20 C. W. N. 1311 ; (1916) 2 M. W. N. 224 ; 14 A. L. J. 1114; 29 M. L. T. 435 ; 4 L. W. 486 ; 18 Bom. L. R. 1007 ; 25 C. L. J. 69 ; 43 I. A. 192 (P. C.), referred to.

Second appeal against a decree of the First Additional Judge, Aligarh, dated the 2nd of March 1921.

Mr. *Bhagwati Shanker*, for the Appellants.
Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of an enclosure and Rs. 10 as damages on account of the cutting down by the defendants of two plum trees, and for an injunction.

The plaintiffs are the Zemindars of the village in which the land in dispute is situate. Their allegation was that the defendants had taken wrongful possession of the plot in dispute and had cut down certain trees ; hence the suit.

The defence of defendants Nos. 1 to 4 was that they had been in possession of the land in dispute for more than 12 years, that the cattle troughs which stood on the land were very old ones and that they had not cut down the old trees.

The Court of first instance came to the conclusion that the land in dispute was situated within the ambit of the plaintiffs' land, that the defendants had been in possession for more than 12 years and that the trees cut were worth Rs. 5 only. In the result it dismissed the claim.

On appeal the lower Appellate Court has agreed with the findings of the Court of first instance that the defendants had been in possession for more than 12 years but that their possession was not such as to be adverse to the plaintiffs. It accordingly decreed the appeal, the plaintiffs' suit for possession and for an injunction with Rs. 5 as damages

The defendants come here in second appeal and the first ground taken is that no plea of adverse possession was raised by the defendants and the lower Court was, therefore, not justified in determining that question against the defendants. It is not easy to

understand what this really means. This plea has been argued at great length by the learned Vakil for the appellants who has tried to point out a distinction between cases governed by Arts. 142 and 141 of the Limitation Act respectively. He has urged with great force that the lower Appellate Court ought not to have entered into the question of adverse possession, as such a plea was not raised by the defendants. If such a plea was not raised by the defendants there was no defence to the suit and the suit ought to have been decreed off hand. When this point was explained to the learned Vakil for the plaintiffs he said that the plea of limitation was raised and that the decision was incorrect, having regard to the ruling of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *Chelikani Rama Rao* (1). That case is very much in point. In that case islands had appeared at the mouth of the river Godawari, admittedly, years before the passing of the order of Government directing them to be made reserved forests. In that case it was admitted that the Government had never been in possession of them and that the defendants had been in possession of them for more than 30 years, and nonetheless their Lordships of the Privy Council have held that it was for the defendants to prove that they were in adverse possession for more than 60 years before they could claim by adverse possession. The facts of that case are very similar to the facts of the present case. Here the land in dispute was within the ambit of the Zemindari of the plaintiffs. The defendants had been found to have been in possession for more than 12 years but the nature of their possession was such that, according to the finding of the lower Appellate Court, it could not amount to a denial of the plaintiffs' title or adverse possession. The plot in dispute was waste land, that is, unoccupied by houses situate in the *abadi*. The defendants had built a wall a foot and a half (one *hath*) in height and thus enclosed it, and used to keep their cattle there in the day time. This was such a possession which would not make the Zemindar try to kick the defendants out. The land was of no immediate use to him and was used for temporary purposes by the defendants. This would not amount to adverse possession. The defendants, if they set up adverse possession, were bound to show that the possession was adverse and had been as such for more than 12 years. Such temporary user, which would be unnoticed or permissible would not amount to adverse possession. In my opinion the view taken by the lower Court was right. I, therefore, dismiss this appeal with costs.

S. D. *Appeal dismissed.*

(1) 35 Ind. Cas 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 552 OF 1920.
March 24, 1921.
Present:—Mr. Justice Odgers.
T. L. RANGIAH CHETTY—DEFENDANT—PETITIONER
versus
T. GOVINDASAMI CHETTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitration—Award—Decree in terms of award before expiry of ten days, validity of—Agreement not to object to award, effect of—Fraud—Material irregularity.

Where a Court passes a decree in terms of an award prior to the expiry of the ten days allowed for the filing of objections to the award, it acts without jurisdiction, or with material irregularity, notwithstanding the fact that the defendant had agreed not to raise objections to the award. [p. 268, col. 2.]

Velu Pillay v. *Appasawmi Pandaram*, 9 Ind. Cas 197, (1911) 1 M. W. N. 141; 9 M. L. T. 301; 21 M. L. J. 444, and *Sooraparaju* v. *Narayanaraju*, 1- Ind. Cas. 431; (1912) M. W. N. 1232; 12 M. L. T. 408, relied on.

Batcha Sahib v. *Abdul Gunny* 21 Ind. Cas 308; (1914) M. W. N. 142; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507, distinguished.

An agreement whereby the parties contract not to raise objections to an award is of no effect, where the award travels into various extraneous matters not connected with the suit and not forming the subject-matter of the reference to arbitration, nor does such an agreement cover fraud unless it is expressly excepted. [p. 268, col. 1.]

Tullis v. *Jacson*, (1892) 3 Ch. 441; 67 L. T. 340; 61 L. J. Ch. 655; 41 W. R. 11, *Pearson* v. *Dublin Corporation*, (1907) A. C. 351 at 363; 77 L. J. P. 1, *Mackay, In the matter of*, (1834), 2 Ad. & E. 356; 111 E. R. 138; 41 R. R. 456, referred to.

RANGIAH CHETTY *v.* GOVINDASAMI CHETTY.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Subordinate Judge, North Arcot, in Original Suit No. 59 of 1917.

Messrs. *A. Krishnaswami Aiyar* and *B. Somayya*, for the Petitioner.

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

JUDGMENT.—This is a petition to revise the decree passed on 31st March 1920 by the Sub-Judge of North Arcot. The decree was passed in terms of an award following a reference to arbitration, in Original Suit No. 59 of 1917, by the parties thereto. The suit was brought by the plaintiffs for an account of their family property which had been in the management of the defendant during the minority of the eldest member. The reference or *muchiliba*, the terms of which are important, runs as follows (page 27 paragraphs 1 and 2 of the printed pleadings):—

"1. That the parties herein have agreed to refer all matters in dispute between them in this suit to the arbitration of M. R. Ry. Emuloor Bojjayya Chetty Garu of Tirupati.

"2. The said arbitrator's decision shall be final and binding upon all the parties to the suit and they will not object to his award."

The award was issued on 29th March 1920 and on 30th March 1920, the defendant asked for further time (one month) to file objections to the award, although, under Art. 158 of the Limitation Act, he had 10 days for this purpose. The defendant was examined orally by the Sub-Judge on 30th March, 1920, the very same day on which he put in his petition for time, and he there alleged that the award had been passed "one-sidedly" by the arbitrator yielding to the plaintiff's influence and that the former has not examined the *chitta* papers. On 31st March 1920 the Sub-Judge passed an order refusing time to the defendant and stating that there was no real objection to the award and that the objection of collusion cannot stand. He passed a decree the same day in terms of the award.

The case in *Velu Pillay* v. *Appasami Pandaram* (1) is authority for saying that a decree passed on an award within the 10 days allowed by the Limitation Act is bad. This was the decision of a Single Judge (Wallis, J., as he then was) but is supported by a decision of a Bench of this Court in *Sooraparaju* v. *Naravanaraju* (2), where it was held that such a procedure was without jurisdiction or was vitiated with material irregularity such as to call for revision. In *Batcha Sahib* v. *Abdul Gunny* (3) relied on by Mr. C. V. Anantakrishna Aiyar, for the counter-petitioners (plaintiffs) in this case, the decision was that no appeal lay. The Court was asked to revise the decree appealed from and White C. J., said: "If it were quite clear that the learned Judge has exercised discretion wrongly in this case, we might be prepared to take the strong step of interfering in revision but the general policy of the Legislature is clear that in these matters the judgment in accordance with an award should be final." There is an *obiter dictum* in the judgment of the learned Chief Justice to the effect that, where "an application to set aside the award had been made and refused it would have been open to the Court to pronounce judgment even though the ten days had not expired" This was not, in my opinion, necessary to the decision, and in connection with the *dictum* a passage from Banerji's book is quoted on page 258 of the report with approval. The passage is to the effect that, in order to secure finality to the judgment and decree the necessary conditions are that there has been no order remitting the award and that no application has been made to set aside the award within 10 days, or if an application has been made it has been refused after judicial determination by the Court. If it were necessary to do so, I should not be prepared to hold that the oral objections stated by defendant on 30th March 1920 in answer to question of the Subordinate Judge amounted to an application to set aside the award or that such application had been refused after judicial determination. It seems to me impossible to say that the summary, I may

(1) 9 Ind. Cas. 197; (1911) 1 M. W. N. 141; 9 M. L. T. 301; 21 M. L. J. 444.

(2) 17 Ind. Cas 431; (1912) M. W. N. 1232; 12 M. L. T. 408.

(3) 21 Ind. Cas 308; (1914) M. W. N. 142; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507.

say informal, procedure adopted by the lower Court on 30th March 1920 was in fact a judicial determination of the matter.

The next question to consider is, whether the defendant by the terms of paragraph 2 of the *muchilika* has debarred himself from taking any objection to the award, and, if so, whether the Court has any right to assume jurisdiction not given to it by law in consequence of an agreement entered into by the parties. The case of parties contracting not to raise objections to an award has been dealt with in several decisions It may here be stated that it was urged by the Vakil for the petitioner (defendant) and not contested by the Vakil for the counter-petitioners (plaintiffs) that the award has travelled into various extraneous matters not connected with the suit and not forming the subject-matter of the reference to arbitration. I am inclined to think this is so (*e. g.*,) with regard to the *rasi* account, the accounts of the property of plaintiffs' junior uncle "Ramiah" and the matters contained in paragraph 33 of the award which have nothing to do with the share of the third brother. I do not think the agreement not to object can fairly be taken to cover these extraneous matters which are not properly the subject-matter of the award at all. It is also established that such an agreement does not cover fraud unless it is expressly excepted. Fraud may be expressly excepted, that is, the parties may agree that it shall not be raised. It was held by Chitty, J., in *Tullis* v. *Jackson* (4), that fraud may be expressly excepted, that is, the parties may agree that it shall not be raised, though in *Pearson* v. *Dublin Corporation* (5), Lord James Hereford says: —"As a general principle I incline to the view that an express term that fraud should not vitiate a contract would be bad in law." Again in *Mackay, In the matter of* (6) it was held that a clause precluding the parties from bringing actions against the arbitrators or impeaching their award unless for fraud did not debar a party to the deed from moving to set aside the award for illegality on the face of it, though no fraud or collusion appeared. It seems to me, therefore, that, in spite of clause 2 of the *muchilika*, the defendant might lawfully have raised several grounds of objection to the award. In view of the proceedings of the Sub-Judge on 31st March 1920 on the application for time made by the defendant, and in view of the award which appears to me to travel outside the terms of reference and also from the fact that, in my opinion, the defendant would have been entitled to take objections to the award, I have come to the conclusion that the lower Court acted without jurisdiction or with material irregularity in passing the decree of 30th March, 1920 and that, for the reasons stated, it is no answer to say that the defendant had agreed not to raise objections to the award.

The Court, therefore, had no power to pass a decree before the expiry of the 10 days allowed by Art. 158 of the Limitation Act and the case falls under the decisions in *Velu Pillay* v. *Appasawmi Pandaram* (1) and *Sooraparaju* v. *Narayanaraju* (2) cited above. The decree must be set aside and the case remitted to the lower Court to be dealt with according to law. Costs will abide the result.

This Civil Revision petition having been posted to be spoken to this day, the Court delivered the following

JUDGMENT.

The case is remitted to the Court of the Subordinate Judge of Chittoor for disposal.

V. N. V. *Petition remanded.*

W. C. A.

(4) (1802) 3 Ch. 441; 67 L. T. 340; 61 L. J. Ch. 655; 41 W. R. 11.
(5) (1907) A. C. 351 at p 362; 77 L. J. P. C 1.
(6) (1834) 2 Ad. & E. 356; 111 E. R. 138; 41 R. R. 456.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPLICATION
No. 364 OF 1922.
July 31, 1922.

Present:—Mr. Justice Abdul Qadir.

THE NATIONAL ENGINEERING COY., KARACHI—PETITIONER

versus

THE RATTAN ENGINEERING COY., LAHORE—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 22, 23—Jurisdiction - Transfer of suit.

It is only when a suit may be brought in one or other of two Courts, both of which have jurisdiction, that an application may be made under sec.

tions 22 and 23 of the Civil Procedure Code. Where the jurisdiction of one of the Courts is denied an application for transfer under these sections cannot lie.

Gilmour v. *Ram Lal*, 4 Ind Cas. 922; 77 P. L. R. 1909; 117 P. W. R. 1909 *Purna Chandra Mukerji* v. *Dhone Kristo Biswas*, 24 Ind. Cas. 318; 12 A. L. J. 898, *Sachendra Nath Mitra* v. *Muhammad Habibullah*, 24 Ind. Cas. 707, *Ram Kumar Sheo Chand Rai* v. *Firm Tula Ram Nathu Ram*, 56 Ind. Cas. 920; 1 P. L. T. 277; (1920) Pat 235, *Askaran Baid* v. *Bhola Nath*, 48 Ind. Cas. 105; 21 O. C. 217, referred to.

Application under sections 22 and 23, Civil Procedure Code, for the transfer of the case, from the Court of the Subordinate Judge, First Class, Lahore, to Karachi.

Mr, *B. R. Puri*, for the Petitioner.

Bakhshi *Tek Chand*, and Mr. *Feroz Khan Nun*, for the Respondent.

ORDER.—Two suits arising out of one and the same transaction are pending between the parties. One is at Lahore, in which the Rattan Engineering Company, Lahore, are the plaintiffs and the National Engineering Company, Karachi, are the defendants. The other suit is pending at Karachi, in the Court of the Judicial Commissioner there, in which the Karachi firm are the plaintiffs and the Lahore firm defendants. An application under sections 22 and 23, Civil Procedure Code, has been filed in this Court by Mr. B. R. Puri, on behalf of the Karachi firm, praying that the suit pending in Lahore should be transferred to Karachi. It is stated in paragraph 2 of the application that the Lahore Courts have no jurisdiction to entertain the suit, as the bargain of which the suit is based was made at Karachi and its performance was also to be made there. It is added in paragraph 4 that assuming that the Lahore Courts have jurisdiction it is a fit and proper case for transfer to Karachi.

A preliminary objection has been raised before me, by Mr. Tek Chand on behalf of the Lahore firm, that an application under sections 22 and 23, Civil Procedure Code can be made only in cases where a suit may be instituted in any one of two or more Courts and that in a case where a petitioner is questioning the jurisdiction of one of the Courts to entertain the suit, it is not open to him to apply under section 22 of the Civil Procedure Code. Reliance is placed in support of this contention on the following judgments:—*Purna Chandra Mukerji* v. *Dhone Kristo Biswas* (1), *Sachendra Nath Mitra* v. *Muhammad Habibullah* (2), *Gilmour* v. *Ram Lal* (3), *Askaran Baid* v. *Bhola Nath* (4), *Ram Kumar Sheo Chand Rai* v. *Firm Tula Ram Nathu Ram* (5).

An unpublished ruling of this High Court, in Case No. 179 of 1917, decided by Mr, Justice LeRossginol, on the 22nd June 1917, is also cited as a case which is on all fours with the present one. I do not think it is necessary to discuss at length the judgments cited by the learned Counsel, and it is sufficient to refer to only two of them specifically. *Purna Chandra Mukerji* v. *Dhone Kristo Biswas* (1) is a decision of the Allahabad High Court, in which it has been laid down that "it is only when a suit may be brought in one or other of two Courts, both of which have jurisdiction, that an application may be made under sections 22 and 23 of the Civil Procedure Code. . . . . Where the jurisdiction of one of the Courts is denied an application for transfer under these sections cannot lie." Mr. Justice LeRossignol has referred to this decision with approval in his judgment. He has held in Case No. 179 of 1917 that the petitioner must be judged by the allegations on which he seeks to move this Court and that on his allegations the requirements of section 22 of the Code were not fulfilled.

I think this last mentioned ruling, as well as the other authorities mentioned above, are fully applicable to the case before me, and following them I dismiss this application with costs.

Z. K. *Appeal dismissed.*

(1) 24 Ind. Cas. 318; 12 A. L. J. 896.
(2) 24 Ind. Cas. 707.
(3) 4 Ind. Cas. 922. 77 P. L. R. 1909; 117 P. W. R. 1909.
(4) 48 Ind. Cas. 105; 21 O. C. 217.
(5) 56 Ind Cas. 920; 1 P. L. T. 277; (1920) Pat 235.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1571 OF 1919.
March 3, 1921.

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

THIRUMALASSERI KOTTAYIL SREEDHARAM VALIA RAJAH, STYLED CHUNARAN OF ISWARAMANGALAM AMSHOM—PLAINTIFF—APPELLANT

versus

PARAKKAT *alias* KARUTHEDATH *alias* PARAPALLI *alias* KANDARATH ILLATH KARNAVAN AND MANAGER OF KUNHI *alias* NARAYANA NAMBUDRIPAD AND OTHERS—RESPONDENTS.

Landlord and tenant—Denial of landlord's title—Forfeiture—Necessity for landlord's knowledge—Admissions, receiving of, in evidence—Civil Procedure Code (Act V of 1908), O VI, r. 17—Amendment of plaint Reviving barred claims, whether allowable

In order that a denial by a tenant of the landlord's title may work a forfeiture, it must be unequivocal and clear and must be brought home to the knowledge of the landlord prior to the institution of the suit. (p. 271, col. 1.)

Komalukutti v *Puthiakath Muhamad*, 45 Ind. Cas. 743; (1918) M. W. N. 200; 41 M. 629; 34 M. L. J. 170; 23 M. L. T. 178; 7 L. W. 291, *Kolangereth Raman Nair* v. *Kolimatamullathil Mariyomma*, 56 Ind. Cas. 13; (1920) M. W. N. 332; 11 L. W. 513; 43 M. 480, *Maharaja of Jeypore* v. *Rukmini Patamahadevi*, 50 Ind. Cas. 631; (1919) M. W. N. 271; 42 M. 589 at p. 598; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; 23 C. W. N. 889; 26 M. L. T. 16; 10 L. W. 381; 46 I. A. 69 P. C.), relied on.

Per *Napier, J.*—Admissions must be taken either altogether or not at all; that is to say, although a party cannot by an admission make evidence for himself, still, if it is sought to be used against him, all the words of the admission must be taken and even if they operate in favour of the defendant they must be taken with the words which the person seeking to rely on admission calls to his aid. (p. 271, col. 2.)

Per *Odgers, J.*—A plaintiff ought not to be allowed to amend his plaint by substantially altering his original claim and setting up fresh claims in respect of causes of action which, since the suit, have become barred by Statute of Limitation. (p. 272, col. 2.)

Kumara Venkata Perumal v. *Velayuda Reddi*, 24 Ind. Cas. 195; 27 M. L. J. 25, *Wallis* v. *Neal*, (1887) 19 Q. B. D. 394; 56 L. Q. B. 621; 35 W. R. 820, relied on.

Quære.—Whether in respect of a Malabar *anubavam* tenure there can be forfeiture for denial of landlord's title.

Second appeal against a decree of the Court of the Subordinate Judge, South Malabar, at Calicut, in Appeal Suit No. 180 of 1918, preferred against a decree of the Court of the District Munsif, Ponani, in Original Suit No. 291 of 1916.

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

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

JUDGMENT.

Napier, J.—This appeal arises out of a suit by the plaintiff to redeem a *kanom*. That was the original form of the suit, although it is true that in his plaint he claimed also to recover the land on the strength of title.

The defendants pleaded that they were *anubavam* tenants to the knowledge of the plaintiff.

In the course of the trial, the plaintiff applied to the District Munsif for leave to amend his plaint by accepting the position that the defendants were *anubavam* tenants, and claiming his rights to recover the property on the ground that his title as *jenmi* has been denied by the defendant, which denial operated as forfeiture.

The First Court declined to grant the amendment. On appeal, the Subordinate Judge allowed the amendment, but he allowed it on very narrow grounds which are to be found at the bottom of page 28 of the printed pleadings. He said: "By the amendment sought to be made, plaintiff only wanted to make his position clear. There was no change in the nature of the suit. Even without any specific allegation about forfeiture in the plaint, the plaintiff would have been entitled to argue that, on the strength of his title, he was entitled to get a decree for possession, inasmuch as the defendants have forfeited their right to hold the properties." In my opinion, this is not a correct description of the nature of the amendment sought by the plaintiff. I do not think he only sought to make clear his original position. I am satisfied that, finding that he could not prove his *kanom*, he sought leave to bring the suit on the true footing that defendants were *anubavam* tenants.

In the order in which he gave leave to amend, the lower Appellate Court, however, refused leave to call for further evidence, and, in disposing of the appeal, the lower Appellate Court has found that he has not proved everything that is necessary for the purpose of establishing his right to forfeit. What was necessary has been laid down by a Bench of this Court, to which I was a party,

and it is the judgment in that case on which the Subordinate Judge relies. That was the decision in *Komalukutti* v. *Puthiakath Muhamad* (1). The requirments laid down in that case, which the lower Appellate Court has found not to be satisfied, is stated in the head note to be that the denial must be made to the knowledge of the landlord. This decision has been attacked by the learned Counsel on the ground that it was something new, and that no case has ever laid down that before. I believe that it is true that the proposition had never been stated so definitely before, and that was the reason why my learned brother and I thought it necessary to state the whole law and all the requitements carefully. It has, however, been followed, in a judgment of another Bench. That is a case reported as *Kolancreth Raman Nair* v. *Kolimatamullathil Machomma* (2). There Seshagiri Aivar, J., said: "It is well-understood in this Presidency that the denial must be brought home to the knowledge of the landlord and it must be unequivocal and clear" and added that in *Komalukutti* v. *Puthiakath Muhamad* (1) and in another case this principle was distinctly stated. In my opinion, this must, as the learned Judges say, be now taken to be undisputed in this country.

That being so, we have to consider whether there had been such a communication as to come within the Statute. In the lower Appellate Court the Vakil for the appellant relied on a certain document, Exhibit J., which was a grant *jenm* right of two items of this estate, by the person who now claims to be only an *anubavam* tenant. That this does operate as an unequivocal denial cannot be denied, but when it came to the necessity of showing that this had been brought to the notice of the landholder prior to the suit, the appellant was unable to do so.

That the requirements must all be satisfied before the institution of the suit, is definitely stated in a judgment of their Lordships of the Privy Council reported as *Maharaja of Jeypore* v. *Rukmini Pattamahadevi*(3). Their Lordships say as follows: "There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted." So that, on the materials dealt with by the lower Appellate Court, the dismissal of the suit was perfectly correct.

It is urged here, however, that there was evidence, and that evidence is to be found in the admission made in paragraphs 7 and 8 of the written statement of defendants Nos. 1 and 2. In those paragraphs the defendants set up that they had demised Items Nos. 1 and 2 on *kanom* right, as far back as 1865, renewed them in 1888 and that, ever since that date, those Items, Nos. 1 and 2, have been enjoyed as *jenm* of the *illom* of these defendants with the knowledge of the plaintiff and others. Mr. Menon has contended strenuously here that, this being an admission in the pleadings, it is evidence of the notice having been given at a date prior to the institution of the suit, and that he is entitled to rely on it. The answer to this, to my mind, is to be found in the doctrine that admissions must be taken either altogether or not at all, that is to say, that although a party cannot by an admission make evidence for himself, still if it is sought to be used as an admission against him, all the words of the admission must be taken, and even if they operate in favour of the defendant, they must be taken with the words which the person seeking to rely on the admission calls to his aid. Now, this is an admission doubtless, but it is more, it is an allegation that the plaintiff has been under notice of the claim of the defendants since 1865 and that, therefore, his suit would be barred by limitation. The result to my mind is this, that the plaintiff cannot rely on this admission alone, without accepting the position that his suit is barred. On this short ground, I am prepared to hold that there is no material on which the Court could decide that notice of the claim had come to the knowledge of the landlord—notice of the claim such as would entitle him to claim the benefit of the forfeiture. Another point taken by the defendants is, that the tenure now conceded to be *anubavam* cannot be forfeited for denial of title. It

(1) 45 Ind. Cas. 743; (1918) M. W. N. 200; 41 M. 629; 34 M L. J. 170; 23 M. L. T. 178; 7 L. W. 291.
(2) 56 Ind Cas. 13; (1920) M. W. N. 332; 11 L. W. 513; 43 M. 480.
(3) 50 Ind. Cas 631; (1919) M. W. N. 271; 42 M. 589 at p. 598; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; 23 C. W. N. 889; 26 M. L. T. 16; 10 L. W. 381 ; 46 I. A. 109 (P. C.).

is true that there is a decision of two learned Judges of this Court, in Suit Appeal No. 687 of 1915. Coutts-Trotter, J., took the view that there had been previous decisions with regard to certain service tenures which were sufficient to cover all forms of permanent leases. Srinivasa Aiyangar, J., seems, as far as I can understand, to raise a very much larger point that there can be no forfeiture of any permanent lease. With regard to this latter point, we have, however, the distinct ruling of the Privy Council in the case reported as *Abhiram Goswami* v. *Shyama Charan Nandi* (4) that no such doctrine is known to India. The other limited proposition in respect of this particular Malabar tenure that there can be no forfeiture for denial of title, is not distinctly negatived in any particular case, but has certainly been doubted. If it was necessary for the disposal of this case to decide this important question, I would, speaking for myself, certainly desire to refer the matter to a Full Bench; and so I do not desire to express any personal opinion on the subject. As it is, I prefer to dismiss the appeal for the reason stated. The second appeal is dismissed with costs.

Odgers, J.—I entirely agree with the order proposed by my learned brother. I would only add a word on the subject of the amendment which was allowed by the lower Appellate Court. The amendment was applied for on the 6th December 1917 and was granted on the 8th February 1919, the application having been dismissed by the District Munsif. It, therefore, follows that at the date of the amendment, the defendant could have set up a plea of limitation which would have held good as against the denial or the forfeiture alleged by the plaintiff, under Exhibit J, dated 1904. Although, no doubt, O. VI, r. 17 of the Code of Civil Procedure is very wide and allows all such amendments to be made in such a manner and on such terms as may be just, still it seems to me that, wide as the latitude is, there must be some limit. In this connection I would refer to the case of *Kumara Venkata Perumal* v. *Velayuda Reddi* (5), a decision of Wallis, J., (as he then was) and Sadasiva Aiyar, J. Wallis, J., following the English case of *Weldon* v. *Neal* (6), in which the Court of Appeal laid down that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of actions which, since the issue of the writ, have become barred by Statute of Limitation. This, as I have said, is followed in the case cited by Wallis, J., who said: "With great respect, it does not seem to me to be just to allow a plaintiff by amending his pleadings to revive a barred claim." Sadasiva Aiyar, J., went further and was inclined to give the Court full power to amend the pleadings at any stage so as to advance substantial justice, without much regard to the consideration whether the judgment-debtor or the defendant may not be prejudiced in his right to raise technical pleas, though he admitted that the Courts must also possess a discretion not to allow such amendments under particular circumstances. It seems to me, when it comes to an amendment of this character of the Appellate Court, it ought not to have been allowed. What was the character of this amendment? The plaintiff by his plaint claims, (*a*) redemption, and (*b*) the surrender by the defendant to the plaintiff on the strength of the demise and of the admission of the plaintiff's own *jenm* title. By the amendment, it appears to me, the cause of action was materially changed, in that it allowed the plaintiff to set up a forfeiture with regard to *anubavam* or perpetual lease. It is, I think, clear in the original plaint there was no mention of this question of *anubavam*, but that, by allowing the amendment, the claim in the plaint was not only extended but also substantially altered. In any case, the amendment, to my mind, prevented the defendant from setting up the plea of limitation which he was otherwise entitled to do and, therefore, the order on that ground alone ought to have been disallowed. With regard to the other questions raised in the appeal, I agree with my learned brother, and the second appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*
W. C. A.

(4) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).
(5) 24 Ind. Cas. 195; 27 M. L. J. 25.
(6) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35; W. R. 820.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 173 OF 1921.
November 20, 1922.
Present:—Mr. Justice Stuart.
Musammat MUSTAFAI BIBI AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
Sheikh MUHAMMAD SHABBIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Fraud not carried into effect—Fraud, whether can be pleaded against innocent person.

It is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between the transferor and the transferee. [p. 273, col. 2.]

Govinda Kuar v. *Lala Kishun Prosad*, 28 C. 370 and *Honapa* v. *Narsapa*, 23 B. 406; 12 Ind. Dec. (N. S.) 270, relied upon.

Fraud cannot be pleaded successfully against an innocent person. [p. 274, col. 1.]

Second appeal against a decree of the District Judge, Ghazipur, dated the 25th October 1920.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Appellants.

Dr. *K. N. Katju* and Mr. *K. Verma*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are these:—On the 14th March 1896 Abdul Aziz transferred certain property to his wife in lieu of dower. This may be called property (*a*). His wife's name was Hajira. On the 29th June 1907 Hajira transferred this property (*a*) together with property (*b*) to Muhammad Fasih, the son of her deceased son Muhammad Wasi, and to Muhammad Shabbir, the son of her deceased son Muhammad Shibli. Hajira died in 1909. Muhammad Fasih died in the same year. In 1919 *Musammat* Mustafai Bibi, the widow of Muhammad Wasi and the mother of Muhammad Fasih, and Karim-un-nissa Bibi, the daughter of Muhammad Wasi, instituted a suit against Abdul Aziz and Muhammad Shabbir for possession of such portion of property (*a*) and (*b*) as they could have inherited either from Muhammad Wasi on the allegation of previous oral gift or from Muhammad Fasih on the allegation of the deed of gift of 1907.

The finding of fact of the lower Appellate Court is this:—That property (*a*) was never transferred by Abdul Aziz to Hajira, and that the deed purporting to transfer it was collusive and fictitious; that Abdul Aziz had made a colourable transfer in 1896 to his wife in lieu of dower-debt due but that this transfer had never been carried into effect and had been made to defraud creditors. It would, however, appear that no creditor had actually been defrauded. The lower Appellate Court further found in respect of property (*b*) that *Musammat* Hajira had no title to property (*b*) and had nothing to transfer. Therefore, finding that there had been no valid transfers either to Muhammad Wasi or to Muhammad Fasih it dismissed the plaintiff's suit concurring in the finding of the Trial Court which was to the same effect.

The plaintiffs appeal here. Their learned Counsel argues in the main that it is not open to the defendants to plead that the deed of 1896 was fraudulent or collusive, as this would be tantamount to permitting Abdul Aziz to plead his own fraud in his own favour. It is, however, to be noted that Abdul Aziz died during the pendency of these proceedings. His sole heirs on the plaintiffs' own showing are his daughter Majidan and Muhammad Shabbir, whose names have been substituted for his. During the pendency of the proceedings Abdul Aziz transferred all his interests to Muhammad Shabbir but I am not concerned with the effect of that transfer. What I have to note are two points. The first point is that on the findings of fact the transfer of 1896 was certainly fraudulent and collusive and intended to deceive creditors but that on the facts it did not result in defrauding any body. The law, as laid down in *Govinda Kuar* v. *Lala Kishun Prosad* (1) and *Honapa* v. *Narsapa* (2), decides that it is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between the transferor and transferee. Here, the fraud was not carried into effect. Here further, the circumstances are peculiar. The fraudulent transfer was made by Abdul Aziz in favour of his wife. His wife having no authority so to do, transferred first to her sons Wasi and Shibli according to the plaintiffs, and subsequently to her

(1) 28 C 370.
(2) 23 B 406; 12 Ind. Dec. (N. S) 270.

grandsons, Fasih and Shabbir, and this transfer was to the prejudice of her daughter Majidan. So if I gave effect to the plea put forward by the learned Counsel for the appellants I should not be punishing Abdul Aziz, the person guilty of the fraud, but punishing his innocent daughter, who, owing to his fraud in the first instance and owing to her mother's unauthorised transfers in the second instance, would be effectually deprived of her property. It has never been laid down in any Court that a fraud can be pleaded successfully against an innocent person. For these reasons the plea is untenable. That is really the sole point in the appeal. The remaining decisions are decisions of fact. There is no question of the interpretation of the legal effect of documents. Here we are only concerned with the construction of the documents in so far as the question of the identity of the property transferred is to be considered. There is no doubt that the document of 1896 is a transfer of property in lieu of an alleged dower-debt and that the document of 1907 is a deed of gift. On the facts, *Musammat* Hajira was transferring property which it is not proved she was entitled to transfer. There is no question of estoppel, and that concludes the matter. I dismiss this appeal with costs which include fees on the higher scale.

S. D.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 422 OF 1921.

October 11, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

ATLURU SARASWATAMMA—DEFENDANT NO. 2—APPELLANT

versus

ATLURU PADDAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act XVI of 1908), s. 49 (c)—Document declaring intention to separate,—Registration.

In order to effect a disruption in the status of a joint Hindu family, an agreement between all the co-parceners is not essential; the separation, so far as the separating member is concerned, s a matter of individual volition, and evidence may be given of acts of parties or declarations independent of any document. But the intention to separate must be unequivocally and clearly expressed to the other members of the family. A document, therefore, which merely contains a declaration or affords evidence of conduct does not itself create a division in status, and although the document is unregistered it is admissible in evidence for the purpose of proving the declarations of the conduct of the executant, as such document is not tendered as evidence of a transaction, but *in* evidence, and is unaffected by the prohibition contained in section 49 (*c*) of the Registration Act. [p. 276, cols 1 & 2, p. 277, col. 1.]

Appeal against an order of the District Court, Kistna, dated the 29th August, in Appeal Suit No. 7 of 1920, preferred against the decree of the Court of the Subordinate Judge, Bezwada, in Original Suit No. 39 of 1918.

Messrs. *C. V. Anantakrishna Iyer* and *V. Suryanarayana*, for the Appellants.

Mr. *P. Narayana Murti*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—The Temporary Subordinate Judge held that Exhibit V was admissible in evidence and the District Judge disagreed with him and refused to admit it on the ground that it was unregistered. The material question to be decided in this appeal is, whether there was a division between the plaintiff, the first defendant and the second defendant's husband, and whether the document above referred to can be admitted in evidence. The facts necessary for the decision of this question may be very briefly stated.

The first defendant and the deceased husband of the second defendant were brothers, being the sons of the plaintiff. The suit is for partition. The second defendant contends that a partition was effected during the lifetime of her husband and that Exhibit V embodies the terms thereof, that under it, of the 12 acres of land which the family possessed, each son obtained about 5 acres and odd and the plaintiff, the father, was allotted for his maintenance one acre and 50 cents. It may be stated that the plaintiff, ignoring this arrangement, claims in the suit a moiety of the property; but there is an alternative prayer

in the plaint to the effect that he may be allotted one-third of the property in the event of the Court holding that there was a partition in the lifetime of the second defendant's husband. The Subordinate Judge, holding that there was a completed partition, dismissed the plaintiff's suit, and the District Judge, having decided that the partition was effected only between the two brothers and that the plaintiff was not a party to it and was not bound thereby and, therefore, that the plaintiff was entitled to a half share, reversed the decree of the Subordinate Judge and remanded the suit for disposal on the other issues framed in the case.

It must be stated at the outset that Exhibit V, the deed of partition, relied on by the second defendant, was executed only by the first efendant and the deceased husband of the second defendant and that it was not registered.

The question whether the plaintiff was a consenting party to the division is a question of fact, and Mr. Anantakrishna Aiyar on behalf of the second defendant-appellant argued that, though this finding of fact is binding upon him, it is open to him to contend that there was no division in status between the members of the family, and that the District Judge acted erroneously in refusing to admit Exhibit V for the purpose of showing that there was such severance.

The Subordinate Judge observes as follows in regard to Exhibit V: "The plaintiff and the first defendant objected to its admissibility on the ground that it required registration. I overruled the objections because the second defendant was tendering the document to prove the status of the family but not the title of any particular shares to any particular item."

The District Judge, while holding that there was no actual division, fails to consider the question whether there was a division of status. In this, I think, he was clearly wrong. It has been held that, to effect a severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject-matter may operate to effect a separation in interest and in right. In *Appovier* v. *Rama Subba Aiyar* (1) their Lordships of the Privy Council had to consider the effect of a deed of partition executed by all the members of an undivided Hindu family which spoke of a division having been agreed upon to be thereafter made, and the contention that the deed was ineffectual to convert the undivided property into divided property until it had been followed up by an actual partition by metes and bounds was rejected by their Lordships. Mr. Anantakrishna Aiyar, on behalf of the second appellant, argued that Exhibit V effected, in any event, a division of right and that the document was admissible in evidence to prove such a division. The question then arises, is a document, which operates to convert a change in the status of the family and effect a division of right, when it is unregistered, admissible in evidence? Mr. Narayanamurthi, on behalf of the respondents, strongly relied on *Ayyakutti Mankondan* v. *Periasami Koundan* (2) and *Pothi Naicken* v. *Nagama Naicker* (3). Both were Letters Patent Appeals and three learned Judges decided each of them, and the judgments are entitled to great weight. It was held in both these cases that a document merely effecting a division of status required registration, and if it was not registered, it was inadmissible in evidence. But the authority of these rulings is considerably weakened by the fact that in *Natesa Iyer* v. *Subramania Iyer* (4) Ayling and Seshagiri Aiyar, JJ., (it will be noticed that the latter took part in both the Letters Patent Appeals) observed at page 309* as follows:—"In this view it is unnecessary to consider how far the decisions of this Court in *Pothi Naicken* v. *Nagama Naicker* (3) and *Ayyakutti Mankondan* v. *Periasami Koundan* (2) are reconcilable with the pronouncement of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj* (5)." In *Subrahmania Aiyar*

(1) 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.
(2) 31 Ind. Cas. 615; 30 M.L J 404; 2 L.W.1184.
(3) 32 Ind. Cas. 486, 30 M.L J.62; 19 M. L. T.50; 3 L.W. 115; (1916) 1 M W N. 79.
(4) 45 Ind Cas 535; 23 M. L. T. 307; (1918) M. W. N 703.
(5) 37 Ind Cas. 321; 43 C 1031; 20 C W N 1.8; 14 A.L.J.822; 20 M.L.T.78; 12 N.L.R 113; (1916) 2 M.W.N.6; 18 Bom. L.R.621; 4 L.W 114; 24 C L J. 207; 31 M L J. 4 5; 43 I.A 151 (P. C).

* Page of 23 M. L. T. (*Ed.*)

v. *Savitri Ammal* (6), Sankaran Nair, J., held that a document effecting merely a division in status did not require registration and in *Ayyakutti Mankondan* v. *Periasami Koundan* (7) Spencer, J., adopted the same view and referred with approval to *Subrahmania Aiyar* v. *Savitri Ammal* (6). Sadasiva Aiyar, J., took a different view and the difference of opinion between the two learned Judges led to the Letters Patent Appeal. In *Pothi Naicken* v. *Nagama Naicker* (8) Sankaran Nair and Oldfield, JJ., differed, the former adhering to the view already expressed by him, and this difference of opinion led to the other Letters Patent Appeal. Speaking for myself, with great respect, I am inclined to agree with Sankaran Nair, J., and Spencer, J., for, in the words of Sankaran Nair, J., the alteration in the nature of the estate is an incident attached by Hindu Law to the divided status of the members of a Hindu family. A document merely creating a separation in status does not itself create any interest in immoveable property. Such an interest is created not by virtue of the instrument but by the operation of the rules of the Hindu Law. Were it necessary to decide this question, we might refer it to the decision of a Full Bench, but it seems to me that for the determination of this case, the question as presented to us in the arg ment does not arise.

It has been repeatedly pointed out that an agreement between all the co-parceners is not essential to the disruption of the joint status; and the separation, so far as the separating member is concerned, is a matter of individual volition. A very clear exposition of this principle is contained in the judgment of their Lordships of the Privy Council in *Giraj Bai* v. *Sadashiv Dhundiraj* (5). At page 1050*, their Lordships observe: "Some of the Courts in India have supposed Lord Westbury's expressions in *Appovier* v. *Rama Subba Aiyan* (1) to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view." Then, it is pointed out that the intention to separate may be evidenced in different ways, either by explicit declaration or by conduct and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. To the same effect was the law laid down in *Suraj Narain* v. *Iqbal Narain* (9): "What may amount to a separation," their Lordships say, "or what conduct on the part of some of the members may lead to a disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common must depend on the facts of each case. A definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect, the intention must be unequivocal and clearly expressed."

These, and similar observations, make it perfectly clear that an inference of intention may be derived either from declarations or from conduct. For effecting a division in status, in addition to conduct or declaration, the intention must be unequivocally and clearly expressed to the other members of the family. For ascertaining whether a deed amounts to such conduct or contains evidence of it, or contains declarations of intention, I fail to see why it should not be looked at although it may refer to immoveable property and is not registered. Coupled with declarations or conduct, there must be a communication of intention to the other members, then alone a division in status would result. A document, therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status, and I find no difficulty in holding that Exhibit V which, as I already pointed out, is not an agreement between all the members of the family, and does not, therefore, as such, operate to create a division in status, is admissible in evidence for the purpose of proving the declarations of the conduct of the executants. It was argued in *Natesa Iyer* v. *Subramania Iyer* (4), already referred to, that an unregistered document was inadmissible to evidence a unilateral declaration and the

(6) 3 Ind Cas. 32[illegible]; 19 M.L.J. 228; 4 M. L. T. 354.
(7) 24 Ind. Cas. 771; 1 L. W. 31; 15 M. L. T. 163.
(8) 28 Ind. Cas. 625; (1915) M. W. N 303; 17 M. L. T. 300: 28 M. L. J. 423.
(9) 18 Ind. Cas. 30; 35 A. 80; 40 I. A. 40; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 2[illegible] M. L. J. 34[illegible]; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).

* Page of 43 C. (*Ed.*)

argument was rejected, the learned Judges observing: " We are unable to hold, therefore, that the document cannot be looked into to ascertain the intention of the executants." Section 49 (*c*) of the Registration Act enacts: " No document required by section 17 to be registered shall be received as evidence of any transaction affecting such property." The document containing a declaration or which affords evidence of conduct is not tendered *as* evidence of a transaction but *in* evidence; in other words, the section makes inadmissible a document which records a transaction affecting immoveable property. It does not mean that no single piece of evidence affecting immoveable property can be admitted, if the evidence is contained in a writing which is not registered. For instance, if the question to be decided is, whether a gift of a property is real or *benami* and if a letter written by the donor to the donee is sought to be put in evidence it cannot be ruled out on the ground that it affects immoveable property. What is prohibited by the section is, receiving a document as evidence of a transaction, not merely receiving it in evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided.

Then there is another aspect of the question to be considered. It is said that the document itself refers to immoveable property and we cannot, therefore, look at it for any purpose whatsoever. This argument appears to me wholly untenable, in view of the decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal* (10) where their Lordships, holding that the recitals in certain petitions could not be used as evidence of a gift, still held that the petitions could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee.

Now, turning to Exhibit V it affords clear evidence of conduct from which an intention to divide on the part of of the executants is deducible and the declarations in it also lead to the same inference. Lakshminarayan, the first defendant, and Sitaramayya, the deceased husband of the second defendant, who are the executants, begin by describing the document as a " List of shares of division". Lands are first divided, then the residential house. The debts are said to amount to Rs.1,060-14-10. They are divided and the document contains the statement: "Both of us have agreed to the said shares and effect settlement without any dispute whatever." The treasure-box and cart also divided and the document contains the further recital, " out of the hayricks, the northern side of the hayrick has fallen to Lakshminarayan's share and the southern side to Sitaramayya's share." All the co-parceners not being parties to this document, it did not effect an immediate division in status, but the document is the clearest possible indication of the intention of the executants to remain divided.

We have been referred to some evidence that this intention has been communicated to the plaintiff, but the question was not definitely before the minds of the parties and it seems to me that the proper order to make would be to direct an additional issue to be raised, whether there was a division in status between the members of the joint family during the lifetime of second defendant's husband and to allow the parties to adduce evidence in regard to this issue. It is scarcely necessary to add that, to effect a division in status a document is not necessary and evidence may be given of acts of parties or declarations independent of any document. As the attention of the Subordinate Judge was not directly called to this question, there being no issue upon the point, and the District Judge has altogether failed to consider it, I think the course suggested would be the proper cours to follow. The order of the District Judge remanding the suit for disposal will stand, but the Court of first instance will be directed to frame an additional issue in the terms already mentioned and to try it.

Spencer, J.—I agree with my learned brother both as to the admissibility of Exhibit V to prove division of status and as to the order proposed by him to be made for an additional issue to be framed.

I adhere to the opinion which I expressed in *Ayyakutti Mankondan* v. *Periasami Koundan* (2), following what Sankaran Nair, J., said in *Subrahmania Aiyar* v. *Savitri Ammal* (6), that even an unregistered document can be used as evidence of an intention on the part

(10) 53 Ind. Cas. 901; 43 M. 244; (1 19) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22. Bom. L. R. 444; 46 I. A. 285 (P. C.).

of members of an undivided family to become divided in status. I am glad to find that my learned brother agrees with the opinion which I then gave and that there have been several later pronouncements of great weight which tend to show that my view was correct.

I have the highest respect for the opinion of Sadasiva Aiyar, J., but I think he stretched too widely the meaning of the verb "affect" in section 49 of the Registration Act. All sorts of transactions may remotely affect immoveable property. Section 49 of the Registration Act has to be read in the light of section 17 of the same Act and section 91 of the Evidence Act. If this is done, the word "affect" will be seen to be only a compendious term for expressing the longer phrase, of "purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent." Thus, applications for the mutation of names in the Government registers or agreements to become divided in status may be said to "affect", in an indirect sense, immoveable property but they do not themselves purport to pass any right to immoveable property and so do not require to be registered. The decision of the Privy Council in *Varada Pillai* v. *Jeevaratnammal* (10)hasmade this clear as regards the former kind of documents. On the same principle, I think that documents which are instruments of partition, as defined in section 2 (15) of the Stamp Act, that instrument whereby co-owners of any property divide or agree to divide such property in severalty, are required by section 17 of the Indian Registration Act to be registered when the property to be divided is immoveable property over Rs. 100 in value, and if they are not so registered they cannot, by reason of section 49, be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving divison of status among the parties to the documents. When so used they do not "affect" immoveable property nor is the division of status a "transaction affecting immoveable property" in the sense intended by the Act to be given to the word "affect". Documents that do not fall under the abcve description are not required to be registered at all, and are admissible in evidence without registration. All costs hitherto incurred to be costs in the cause.

V. N. V. *Order accordingly*

W. C. A.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL, No. 164 OF 1921.

December 7, 1922.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Lala KHUNNU MAL AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

INDARPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84, 103—Deposit under s. 83—Minor mortgagee—Cessation of interest—Appointment of guardian.

In the case of a deposit, under section 83, Transfer of Property Act, where the mortgagee is a minor, interest does not cease to run under section 84 of the Act, unless the depositor gets a guardian of the minor appointed under section 103 of the Act, inasmuch as no one can withdraw the deposit on behalf of the minor unless a guardian is appointed by the Court. (p. 279, col. 2.)

Where the mortgagee is a person who is unable to draw the money out of Court, it is necessary that a guardian *ad litem* should be appointed, and, therefore, unless such a guardian is appointed it cannot be said that the mortgagor has done all that was necessary for him to enable the mortgagee to draw the money. (p 279, col. 2.)

Section 103 was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or a deposit, and it could not have been the intention of the section that the mere making of an application would be sufficient, but that there should be a person appointed by the Court to whom a tender could be made or by whom a deposit could be taken out of Court. (p. 270, col. 2; p 280, col. 1.)

When a guardian has been appointed by the Court under section 103, Transfer of Property Act, it is open to the person making a deposit of the mortgage-money to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian, and in a case where such a deposit has been made and the full amount has been deposited on the date of the appointment of a guardian, further

interest on the principal amount of the mortgage ceases under the provisions of section 84 of the Act. (p. 280, col. 1.)

Pandurang Babu Parab v. *Mahadeji Mareshvar Gokhale*, 27 B. 23; 4 Bom. L. R. 714 and *Sheo Saran Chaudhri* v. *Ram Lagan Das*, 64 Ind. Cas. 413; 19 A. L. J. 852; 44 A. 64; 1922 A. I. R. (A.) 355, relied upon.

Letters Patent Appeal under section 10 from a judgment of Mr. Justice Lindsay, reported as 64 Ind. Cas. 907.

Mr. *Durga Charan Banerji*, for the Appellants.

Mr. *Peari Lal Banerji*, for the Respondents.

JUDGMENT.

Banerji, J.—This appeal under the Letters Patent has been brought in consequence of a difference of opinion between two learned Judges of this Court. The suit was instituted by the plaintiffs to recover money due upon their own mortgage and to redeem an earlier mortgage. The controversy before us relates to the claim for redemption of the earlier mortgage. The mortgage in favour of the plaintiffs was made on the 7th of September 1913, and it provided that the mortgagee should withhold out of the consideration for the mortgage Rs. 2,425 payable upon an earlier mortgage of 1910. On the 24th of September 1913 the present plaintiffs made an application to the Court under section 83 of the Transfer of Property Act, and offered to deposit Rs. 2,425 mentioned above as the amount due to the prior mortgagees. The actual deposit was made the following day. Two of the mortgagees happened to be minors, and an application was made to appoint a guardian *ad litem* to the minors. Notice could not be served and various steps were taken and the matter was prolonged till the 15th of May 1914, when the father of one of the minors was appointed his guardian *ad litem*. The mortgagees refused to withdraw the money deposited on the ground that it was not sufficient to discharge the mortgage. After this, the plaintiffs did nothing until they instituted the present suit in 1919.

The question which was raised in that suit was whether interest should have ceased from the date of the deposit on the 25th of September 1913 On this point the lower Courts differed in opinion. The lower Appellate Court held that additional interest was payable and interest did not cease from the date of the deposit. Upon second appeal to this Court the learned Judges before whom the case came (Lindsay and Stuart, JJ.) differed in opinion; the former held that the view taken by the Court below was correct.

We have considered the matter and we agree with the view taken by Mr. Justice Lindsay. Section 84 provides that in the case of a deposit made under section 83 interest shall cease from the day on which the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court. Where the mortgagee is a person who is unable to draw the money out of Court, it is necessary that a guardian *ad litem* should be appointed—and, therefore, unless such a guardian was appointed it cannot be said that the mortgagor had done all that was necessary for him to enable the mortgagee to draw the money. Where the mortgagee happens to be a person incapable of entering into a contract, section 103 lays down the mode in which the mortgagor has to act in order to enable the mortgagee to take away the deposit made in Court. According to the provisions of that section, in the case of such a mortgagee, the mortgagor has to apply to the Court to have a guardian appointed in the manner provided for in Chapter XXXI of the Code of Civil Procedure which now corresponds to O. XXXII of the present Code of Civil Procedure. Under that Order the Court may appoint a guardian for the suit upon application made by the plaintiff or by the guardian. In a case like the one before us it was the duty of the present plaintiffs, who stood in the shoes of the mortgagors, to apply to the Court to have a guardian appointed inasmuch as no one could withdraw the deposit on behalf of the minors unless there was a guardian appointed by the Court. It seems to us that the mere fact of making an application would not enable any one to withdraw the money on behalf of the minors unless a person was appointed guardian *ad litem* by the Court. It was, therefore, incumbent on the mortgagor, or his representative, to see that a proper guardian was appointed by the Court. It seems to us that section 103 was intended to provide for preliminary proceedings to

be adopted by a mortgagor before making a tender or a deposit, and it could not have been the intention of the section that the mere making of an application would be sufficient but that there should be a person appointed by the Court to whom a tender could be made, or by whom a deposit could be taken out of Court.

The question was thoroughly considered by the Bombay High Court in the case of *Pandurang Babu Parab* v. *Mahadaji Moreshvar Gokhale* (1) and we agree with much of what was said by the learned Chief Justice in that case. Mr. Justice Stuart in his dissentient judgment refers to the fact that in some cases considerable inconvenience might arise by reason of a proposed guardian improperly refusing to act as guardian. If such a case arises it will be in the power of the Court to appoint an Officer of the Court as guardian *ad litem* with effect from the date on which the proposed guardian improperly refused to act on behalf of the minor, and in that way the inconvenience which repeated refusals by proposed guardians might cause may satisfactorily be remedied. When a guardian has been appointed by the Court it should be open to the person making a deposit of the mortgage-money, to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian, and in a case where such a deposit has been made, and the full amount has been deposited on the date of the appointment of a guardian further interest on the principal amount of the mortgage should, under the provisions of section 84, cease. Our attention has been drawn to the case of *Sheo Saran Chaudhri* v. *Ram Lagan Das* (2) decided by Mr. Justice Lindsay and Mr. Justice Stuart. In that case an application was made under section 83 of the Transfer of Property Act, and the Court was asked to issue notice to the mortgagee who was a minor under the guardianship of his father. It was held that the application was irregular, inasmuch as no application to have a guardian appointed under section 103 had been made, and that it was not sufficient merely to state in the application under section 83 that the mortgagee was a minor under the guardianship of his father and leave it to the Court to take steps to appoint a proper person to represent the minor. Agreeing as we do with the opinion of Mr. Justice Lindsay, we must dismiss the appeal with costs including fees on the higher scale.

S. D.

Appeal dismissed.

(1) 27 B. 23; 4 Bom. L. R. 714.

(2) 64 Ind. Cas. 413; 19 A. L. J. 852; 44 A 64; (1922) A. J. R. A.) 355.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 190 AND 191 OF 1920 AND CIVIL REVISION NO. 199 OF 1920.

December 6, 1922.

Present:—Mr. Justice Das and Justice Sir John Bucknill, KT.

IN F. A. NO. 190 OF 1920.

MUHAMMAD WAHEB HUSSAIN—PLAINTIFF—APPELLANT

versus

Saiyid ABBAS HUSSAIN AND ANOTHERS—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS

IN F. A. NO. 191 OF 1920.

Haji Saiyid ALI NAWAB—DEFENDANT—APPELLANT

versus

Saiyid ABBAS HUSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN C. R. NO. 199 OF 1920.

Saiyid AHAMAD NAWAB HUSSAIN—PETITIONER

versus

Saiyid ABBAS HUSSAIN ANDOTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 92, suit under—Departure from arrangement of author of trust—Jurisdiction of Court—Scheme, framing of—Court, duty of—Decree, form of.

The institution of a suit under the provisions of section 92 of the Civil Procedure Code attracts the jurisdiction of the Court, and the Court has complete power to make such appointment of a trustee as it considers proper in the circumstances, though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust, but, except for a very strong reason, the Court ought not to depart from the arrangement contemplated by the settlor. (p. 281, col. 2.)

Where in a suit under section 92 of the Civil Procedure Code the Court refuses to frame a scheme to safeguard the interest of the trust, it declines a

jurisdiction which clearly it is its duty to assert. The fact that the trust deed does not contemplate a scheme is no reason why a scheme should not be framed by the Court. (p. 282, col. 2)

In a suit for the administration of a public trust, it is necessary that in the decree liberty should be reserved to the parties to apply from time to time and so often as may be necessary, for the direction of the Court for administering the trust. (p. 282, col. 2.)

Appeal from an order of the District Judge, Muzaffarpur, dated the 10th July 1920.

Messrs. *Akbari* and *Hasan Jan*, for the Appellants, in F. A. No. 190 of 1920.

Messrs. *Manoharlal* and *S. C. Mitter*, for the Respondents.

Messrs. *Sultan Ahmad*, *Tahir* and *Ali Khan*, for the Appellant, in F. A. No 191 of 1920.

Messrs. *Manoharlal* and *S. C. Mitter*, for the Respondents.

Messrs. *Sultan-ud-Din Hussain*, and *Bhagwan Prasad*, for the Petitioner, in C. R. No 199 of 1920.

Mr. *S. C. Mitter*, for the Opposite Party.

JUDGMENT.

Das, J.—These appeals raise three important questions; first, the validity of the appointment of Abbas Hussain as the *mutwalli* of the endowment; secondly, the propriety of the order of the learned District Judge in directing Haji Syed Ali Nawab, appellant in First Appeal No. 191 of 1920, to pay to the plaintiffs the costs of the suit; and, thirdly, the necessity of framing a scheme or the administra ion of the trust funds. The cross-objection presented on behalf of Abbas Hussain raises the question whether the learned District Judge should not have directed Haj Syed Ali Nawab to render an account of his dealings with the trust estate.

It will be convenient, first, to dispose of the cross-objection. I think, there was more or less an understanding between the parties that, if Haji Syed Ali Nawab voluntarily tendered his resignation of his office, the plaintiffs would waive the question of accounts as against him. The order of the 10th December 1919 sugges's that there was such an arrangement between the parties. I must assume that the learned Judge, in declining to direct an account as against Haji Syed Ali Nawab, had in his mind the existence of such an arrangement. The cross-objection must be dismissed.

Coming now to the appeals, the question most seriously pressed before us is, that the learned District Judge should not have set aside the election of Ahmed Nawab by the respectable *Shiahs* of Muzaffarpur, and appointed Abbas Hussain as the *mutwalli* of the endowment. As Abbas Hussain is now dead, I do not think that it is necessary for us to determine this question. If it was necessary for us to determine this question, I would find it dfficult to maintain the order of the learned District Judge. I must not, however, be understood to assent to the proposition that the Court has no power to depart from the arrangement contemplated in the *wakfnamah*. The institution of a suit under the provision of section 92 of the Civil Procedure Code attracts the jurisdiction of the Court, and the Court has complete power to make such appointment as it considers proper in the circumstances, though the appointment may involve a departure from the arrangement contemplated in the constitution of the trust. There is no legal restriction in the power of the Court; but, although there is no legal restriction, the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. The deed of trust vests the power of appointment in the respectable *Shiahs* of Muzaffarpur. The respectable *Shiahs* of Muzaffarpur, by a majority of votes, elected Ahmed Nawab as the *mutwalli* of the endowment. Although the power of the Court was in no way restricted, still, the Court should have been more careful in enquiring whether it was necessary that the election of Ahmed Nawab be set aside, and another appointment made by it. The learned Judge thought that Ahmed Nawab had procured his election by offering bribes to the electors. If he is right in his view that bribes were offered by Ahmed Nawab, we could not interfere with the exercise of his discretion in the matter But I have anxiously considered the evidence in the case, and I have come to the conclusion that the evidence, even if believed, does not establish the guilt of Ahmed Nawab in the matter. It is unnecessary to pursue the subject any further; for, in my opinion, Abbas Hussain being dead, the question does not arise for our consideration in these appeals. The learned Government Advocate, indeed, insisted that we ought to hold that Ahmed Nawab was properly elected in a constitu-

tional way; but, as I have said before, the power of the Court, in the matter of the appointment, was unrestricted; and, though, if we had to decide the question for the first time, we might say that there was nothing in the case which would induce us to set aside the election of Ahmed Nawab, we could not, on the materials before us, go further and hold, that the Court should have appointed Ahmed Nawab as the *mutwalli*. All that we need say at this stage is this: that, in the fresh election which must be held it will be open to Ahmed Nawab to offer himself as a candidate, and that the Court, in making the appointment, ought to give due weight to the wishes of the respectable *Shiahs* of Muzaffarpur. The considerations which weighed with the learned District Judge are not, in my opinion, sufficient to disregard the arrangement contemplated in the constitution of the trust. I am, of course, not accepting his finding that Ahmed Nawab secured his election by offering bribes.

The next question is, whether the Court was right in directing Haji Syed Ali Nawab to pay the costs of the suit. The costs were in the discretion of the learned Judge, and I am not prepared to say that the learned Judge exercised his discretion unreasonably. It is quite true that Haji Syed Ali Nawab tendered his resignation of his office, and that his resignation was accepted by the Court. But on the finding of the Court, the suit was an entirely proper one, and was rendered inevitable by reason of the gross mismanagement of the trust estate by Haji Syed Ali Nawab.

First Appeal No. 191 of 1920 fails and must be dismissed.

There is an additional question raised in First Appeal No. 190 of 1920, namely, the question whether the learned Judge should have framed a scheme to safeguard the interests of the endowment. The appellant has raised the question in the memorandum of appeal; but Mr. Akbari, appearing on behalf of the appellant, did not press it before us. But since the trust estate is before us, we think it right that we should express our opinion on this point. The view of the learned Judge may be stated in his own words: "The trust-deed does not appear to contemplate any scheme. It says that every trustee is bound to keep accounts of the income and expenditure, so that he may show them in case they are demanded for inspection by the family members or the gentry of the town, or the Court. A suggestion has been put forward that a managing committee should be appointed, but such a body is not contemplated in the deed, and I could not get the names of any three persons willing to act and commanding the confidence of the parties. In the high state of tension now existing in the local *Shiah* community, even if such a committee could be established, it would be liable to develope only into a faction fight. In my opinion, it will be sufficient if a direction is given to the *mutwalli* to frame a budget for each year and to file it and also accounts for the past year in Court where they will be open to inspection and criticism."

It is too late in the day to assert that, because the trust-deed does not contemplate a scheme, a scheme should not be framed by the Court. In refusing to frame a scheme, the learned Judge declined a jurisdiction which clearly it was his duty to assert. It is not, in my opinion, sufficient to direct the *mutwalli* to file his accounts in Court. There ought to be a small committee consisting of three respectable *Shiahs* of Muzaffarpur to check the accounts, as filed in Court, of the *mutwalli*, and to exercise, not control, but superintendence, over the *mutwalli*. I think that this committee should be appointed by the learned District Judge.

The decree is defective in another respect. The suit is one for the administration of a public trust, and it is necessary that liberty to apply should be reserved to the parties. The effect of making such a provision is, that the suit is kept alive and it is possible for the parties to take the direction of the Court from time to time and so often as may be necessary. To take the present case, there is no power in the Court to appoint a successor to Abbas Hussain or to direct a fresh election, since the decree has made no provision for such a contingency. It is to prevent a multiplicity of suits that the Courts in administrative actions, reserve a liberty to the parties to apply from time to time and so of en as may be necessary.

First Appeal No. 190 of 1920 succeeds in part. I would vary the decree passed

by the Court below by providing that a committee of three respectable *Shiahs* of Muzaffarpur be appointed by the learned District Judge to check the accounts of the *mutwalli* as filed in Court and to exercise superintendence over the *mutwalli*, and that liberty be reserved to the parties to apply from time to time and so often as may be necessary.

It will now be open to the parties to apply to the learned District Judge for appointment of a new *mutwalli* in the place of Abbas Hussain and to take immediate steps for the protection and preservation of the trust estate. It will also be open to the parties to apply to the learned District Judge for the appointment of committee to examine and check the accounts of the *mutwalli* as filed in Court and to exercise supervision over the *mutwalli*, and for the framing of rules in this connection.

There will be no order as to costs.

Civil Revision No. 199 of 1920:—This application fails and must be refused. There will be no order as to costs.

Bucknill, J.- I agree.

Appeal No. 190 *allowed in part ;*
Appeal No. 191 *dismissed.*

W. C. A. *Application dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 114 OF 1922.

December 19, 1922.

Present:—Mr. Justice Ryves.

BEHARI LAL—APPLICANT

versus

MAQSOOD ALI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9—Dismissial for default - Restoration.

If, when a civil case is called for hearing, the plaintiff, instead of putting in an appearance in Court, goes to fetch his Pleader appearing in another Court, and in his absence the case is dismissed for default, he is not entitled as of right to have it restored, but the High Court may order its restoration, it in its opinion justice will be done by awarding costs to the defendant to indemnify him for any loss he may have been put to owing to the fault of the plaintiff.

Lalta Prasad v. *Ram Karan*, 14 Ind. Cas. 787; 34 A. 426; 9 A. L. J. 666, followed.

Civil revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 26th September 1922.

Mr. *Ram Nama Prasad*, for the Applicant.

Mr. *S. N. Mukerji*, for the Opposite Party.

JUDGMENT.— This is an application in civil revision, asking this Court to set aside the order of the Judge of Small Causes at Cawnpore, refusing to restore a suit which had been dismissed for default. There is not really any serious dispute as to the facts. The suit was to recover money on a bond. On the date fixed for hearing, the plaintiff was present in Court but he left the precincts of the Court to attend a criminal case in which he was engaged. On return to the Small Cause Court he heard that his case was about to be called on. He went to call his Pleader but the Pleader was at the time engaged in cross-examining a witness in another Court and he was not able to attend the Small Cause Court till after some little time. In the meantime, the case was called on and, as is usual in the *Mofussil* Courts, the names of the parties were called out by the peon outside and inside the Court. The plaintiff was present and must have heard his name being called but he did not go into Court but apparently went after his Pleader. There was a delay of something like 45 minutes before the plaintiff and his Pleader were able to come to the Court and by that time the suit had been dismissed for default. The plaintiff applied to have the order set aside and as the Court put it: "The only ground on which he bases his case is that as his Vakil was engaged he could not attend. But the plaintiff himself could attend. He could take time. Instead of this he deliberately left the precincts of the Court. He did not even respond to the call of the peon while he was a few yards away. The Court had to wait for 45 minutes."

I am not prepared to say that the plaintiff has made out such a case that he could reasonably ask the Court as of right to restore his case, but I think under the circumstances, inasmuch as he was present in Court and had come there for the purpose of prosecuting his case,

and his witnesses were there apparently, at any rate, he was ready to go on with the case and would have done so if his Vakil had been able to come at once, because he was either too timid or too foolish to come into Court without his Vakil and ask for the Court's indulgence, that he should be punished by having his claim dismissed without a hearing and without a possibility of trial. This case is very like the case reported in *Lalta Prasad* v. *Ram Karan* (1) and, so much so, that I feel I ought to follow it. I think justice will be done by putting the plaintiff on terms.

I set aside the order of the Court below and direct the Court to restore the case to its original file and after giving sufficient notice to the parties to proceed with the trial according to law, subject to this proviso that within 15 days of the receipt of this order in the Court below the plaintiff deposits Rs. 50 which will be made over to the defendant in any event to indemnify him for any loss he may have been put to owing to the fault of the plaintiff. If this money is not deposited within the time then this application will be held to have been rejected and no further orders will be necessary, that is to say, if within 15 days' time of the receipt of this order by the Court below the money is not paid into Court, the learned Judge of the Small Cause Court will consider this application rejected and will not proceed with the case. There is no order for costs.

S. D. *Order set aside.*

(1) 14 Ind Cas 187; 34 A. 426; 9 A L. J. 666.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1975 AND 2058 OF 1919.

June 29, 1922.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice B. B. Ghose.

JATINDRA MOHAN CHAKRAVARTI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HON'BLE SIR BIJOY CHAND MAHATAB —PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 167—Annulment of incumbrance—Notice, if essential—Appeal, second—Plaintiff, if can ask for remand for producing new evidence.

The Bengal Tenancy Act makes it imperative that notice as provided by s 167 should be served for the purpose of annulment of an incumbrance. (p 285, col. 2.)

A plaintiff ought to come to Court with a definite statement of facts necessary for him to succeed in his case and with all his evidence, and is not entitled in second appeal to ask for a remand to enable him to prove a fact by new evidence. (p. 286 col. 2)

Appeals against the decrees of the District Judge, Bankura, dated the 8th July 1919, affirming the decrees of the Munsif, Second Court at Bishanpur, dated the 26th January 1918.

Babu *Dwarkanath Chakravarty* (with him Babu *Peary Mohan Chatterjee*), for the Appelant—My heads of defence are:—

(1) That the notices under section 167 of the Bengal Tenancy Act were not properly served.

(2)That they were not served upon all the incumbrances.

(3) That the notices were served too late.

(4) That the suit was barred by limitation.

(5) That the question of the right of occupancy set up by the second class defendants has not been rightly determined by the lower Appellate Court.

(6) That the *thaks* relied upon by the plaintiff do not prove his little.

There is absolutely no evidence on the record to show that the notices to annul the incumbrances were served within one year of the plaintiff's coming to know of their existence. On this ground alone the plaintiff's suit is bound to fail.

Dr. *Dwarkanath Mitter* (with him Babu *Sarat Kumar Mitter*), for the Respondent—On the question of the service of notice

the findings of the Courts below are conclusive.

[GHOSE, J.—In the plaint the plaintiff was bound to state when he came to know of the incumbrances.]

On the evidence which was adduced both the Courts below have held that the provisions of section 167 of the Bengal Tenancy Act were complied with. If there is any doubt in your Lordships' mind as to the exact date on which the plaintiff came to know of the incumbrances the cases may be remanded for a finding on that point.

Then, the last word has not yet been said on the question whether adverse possession is an incumbrance, within the meaning of section 167 of the Bengal Tenancy Act. I would contend that adverse possession is not an incumbrance and consequently no notice was necessary. See *Bipradas Pal Chowdhury* v. *Kamini Kumar Lahiri* (1) and *Manmatha Nath Mitter* v. *Anath Bandhu Pal* (2).

Babu *Dwarkanath Chakravarty* was not called upon to reply.

JUDGMENT.

Ghose, J.— These two appeals are by the defendants and they arise out of two suits brought by the plaintiff for possession of certain lands on the ground that the defendants had been in possession of these lands adversely to the *putnidars* of the *mahals* to which these lands appertain for over twelve years. It is alleged that the *putnis* were created in 1849. The plaintiff purchased these two *mahals* which are named Monoharpur and Bankati in execution of a rent-decree in May 1905. The plaintiff is the Zemindar. The plaintiff says that the defendants are incumbrancers on the lands and he purchased the *mahals* with power to annul all incumbrances under the provisions of the Bengal Tenancy Act. There are two sets of the defendants. The first set alleged that these lands are their *brahmotter* granted to them by a former Raja of Bishanpur in the year 1754 and they gave a permanent lease of these lands in 1843 to the second set of defendants who claim as cultivators. The plaintiff alleges that he had served notice under section 167 of the Bengal Tenancy Act for annulment of the incumbrances and seeks to recover possession of these lands in suit, the area of which in each case is small, being only about 4 *bighas* and 6 *bighas*. The Bengal Tenancy Act makes it imperative that notice should be served for the purpose of annulment of an incumbrance, and sub-section (1) of section 167 of the Act runs in these terms :—

" A purchaser having power to annul an incumbrance under any of the foregoing sections and desiring to annul the same, may, within one year from the date of the sale or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing, requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled." The application, it is alleged, was presented in March 1915, that is, about ten years after the date of the sale. Therefore, it was not done within one year from the date of the sale. The plaintiff can only succeed if he can prove that the application was made within one year of the date on which he first had notice of the incumbrances. In the plaint, the plaintiff does not state anywhere, as he ought to have stated, when he actually had notice of these incumbrances. He states in paragraph 7 of the plaint: " That the plaintiff has now come to know that at the time when the *putni* of the aforesaid two lots was granted, the land of *Mouzah* Monoharpur mentioned in Schedule (*ka*) and of *Mouzah* Bankati mentioned in Schedule (*kha*) were lying *patit* as *khals* and *bunds*. Thereafter, during the period of the *putni*, these were gradually reclaimed and became fit for cultivation and the defendants in collusion with one another trespassed into the lands mentioned in Schedules (*ka*) and (*kha*) and came into possession of these lands without having any right thereto, through the carelessness of the *putnidars* of both the *mouzahs*." In order to enable the plaintiff to succeed in his suit, the plaintiff must apply for the service of notice of annulment under section 167 of the Bengal Tenancy Act within one year of his knowledge of the incumbrance. The judgment of the lower Appellate Court on this point is his :—

"The learned Pleader for the appellant

(1) 66 Ind. Cas. 674; 48 I. A. 499 at p. 507: 41 M. L. J. 638; 15 L. W. 180; 30 M. L. T. 138; 20 C. W. N. 465; 49 C. 27; 4 U. P. L. R. (P. C.) 53; (1922) A. I. R. (P. C.) 48 (P. C.).

(2) 50 Ind. Cas. 222; 23 C. W. N. 201.

drew my attention to the fact that there was no evidence in the case to show that notices under section 167 of the Bengal Tenancy Act had been served within a year of the plaintiff's coming to know of the existence of the incumbrances. But the evidence of the plaintiff's Amin, Dina Nath Bhadra, would show that he came to know of these incumbrances when surveying the *putni taluks* on behalf of his master only in Falgoon 1321 B. S., and this was only a few months before the notices under section 167 of the Bengal Tenancy Act were taken out for service." The judgment, therefore, does not state anything about the date of the plaintiffs' knowledge of the incumbrance, but only speaks of the knowledge of the plaintiff's Amin, Dina Nath Bhadra. Therefore, the finding of the learned Judge is not sufficient for the purpose of holding that the notice, as required under section 167 of the Bengal Tenancy Act, was served within one year of the knowledge of the plaintiff. We had the evidence read out to us. The Amin, Dina Nath Bhadra, does not himself state anything about his knowledge of the incumbrance, but only says that he came to know the lands in Falgoon 1321 B.S., when he was sent there to survey the *mouzah*. There were other local agents of the plaintiff on the spot and, therefore, the fact that the Amin did not know anything of the lands before 1321 B. S., does not entitle the plaintiff to bring the suit on the basis of the notice alleged to have been served, as there is no evidence to show that applications for service of the notices were made within the time prescribed by the Act. This alone is sufficient to dispose of the appeals and on this ground only the plaintiff's suits are liable to fail.

I ought to state that several other points were urged on behalf of the appellants in support of their appeals, but, having regard to our decision on the question of notice, I do not think that it is necessary for us to decide the other questions raised. It was urged on behalf of the respondent that there ought to be a remand in order to enable the plaintiff to adduce evidence of the facts required to be proved under the Act, on the ground that both the Courts below held on the evidence which was adduced that the notice was served within the time limited by the provisions of section 167 of the Bengal Tenancy Act. But, having regard to the fact that the plaint itself does not state when the plaintiff had notice of the incumbrance and the fact that, although this question was disputed from the very commencement by the defendants, the plaintiff did not produce the evidence that was necessary to establish his right, we do not think that the plaintiff can ask for a remand in order to prove this fact by new evidence at this stage of the proceedings, specially as this suit was instituted in 1916, that is, about eleven years after the date of the plaintiff's purchase of the *putni* and the litigation for lands of comparatively small value has now been going on for about six years. The plaintiff ought to have come to Court with a definite statement of facts necessary for him to suceed in his case and with all his evidence.

It is also urged on behalf of the respondent that the interest which the defendants have acquired is not an incumbrance under the provisions of section 161 of the Bengal Tenancy Act and, therefore, it was not necessary for him to serve any notice as provided under section 167 of the Bengal Tenancy Act in order to succeed in ejectment. Even assuming that there is substance in this argument, it is not open to him now to raise the question, he having come to Court on the allegation that the defendants were incumbrancers and that the plaintiff was entitled to possession of the lands having, as he said, annulled the incumbrance as provided under the Bengal Tenancy Act. We are of opinion that the plaintiff is not entitled at this stage to change his whole case and rely upon some other title.

The appeals are, therefore, decreed and the suits of the plaintiff dismissed with costs in all the Courts.

Sanderson, C. J.—I agree.

B. N. *Appeal decreed.*

RAM DAYAL *v.* MITHOO LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1080 OF 1921.

December 8, 1922.

Present:—Mr. Justice Gokul Prasad.

RAM DAYAL—PLAINTIFF—APPELLANT

versus

MITHOO LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law – Alienation—Gift by widow—Assent by next reversioner—Estoppel – Relinquishment.

A reversioner's assent to a gift by a widow does not estop him from challenging the validity of the gift.

The consent of a next reversioner does not validate a gift which is a transfer without consideration, nor can his assent amount to a relinquishment, because, as a reversioner he has no vested interest to relinquish.

Rangasami Gounden v. *Nachiappa Gounden*, 50 Ind. Cas. 498; 17 A. L. J. 536; 36 M. L. J. 493; 20 C. L. J. 530; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5, 10 L. W. 105; 46 I. A. 72 (P. C.), followed

Second appeal from the decree of the District Judge, Farrukhabad, dated the 11th April 1921.

The Hon. Mr. *N. P. Asthana*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of a *zemindari* share belonging to one Nand Ram as purchaser of the property from the reversioner of Nand Ram. It appears that Nand Ram died some time ago leaving a widow *Musammat* Gaura and a brother's daughter *Musammat* Chunna. On the 16th of October 1916 *Musammat* Gaura made a gift of the property in dispute to her husband's brother's daughter *Musammat* Chunna. Gaura died in October 1919 and Manbhawan was at that time the next reversioner to the estate of Nand Ram. He has sold the property in dispute to the plaintiff. *Musammat* Chunna has also died and her husband, the defendant No. 1, Muthu Lal, is in possession of the property. The plaintiff now brings the suit for possession. The points taken in defence were (1) that the gift by *Musammat* Gaura was in pursuance of the Will of her husband Nand Ram, and (2) that Manbhawan had assented to the gift in mutation proceedings and taken Rs. 50 and that the plaintiff was, therefore, estopped from contesting the validity of the gift. The Trial Court found in favour of defendant on both the points and dismissed the suit. On appeal by the plaintiff the lower Appellate Court has come to the conclusion that Nand Ram did not make any oral gift as alleged by the defendants but it confirmed the decree of the First Court on the ground that Manbhawan and his successor the plaintiff are estopped from pleading the invalidity of the gift because of the consent given in the mutation proceedings by Manbhawan.

The plaintiff comes here in second appeal and his first contention is that no question of estoppel arose in the case and reliance is placed in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). It is true that the consent of the body of reversioners would not validate a gift which is a transfer without consideration and the effect of the consent of the reversioners is only to show that the transfer was a valid one and might be taken to amount to this that the transfer was justified by necessity but this could only be in the case of transfers in which consideration passed. The mere consent of a next reversioner to a gift, however, would not validate it, nor could the assent of the next reversioner amount to a relinquishment because he had no vested interest which could be relinquished. In this case the position of the defendant has not been altered by any act of the plaintiff. He was a gratuitous transferee and his position has not been changed for the worse because of any act of the plaintiff. The lower Appellate Court was, therefore, wrong in holding that the plaintiff, the transferee from Manbhawan, is estopped from challenging the validity of the gift in favour of the predecessor-in-title of defendant No. 1. I, therefore, allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's claim with costs in all Courts including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

(1) 50 Ind. Cas. 498; 17 A. L. J. 536; 36 M. L. J. 493; 20 C. L. J. 530; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 353 OF 1922.
September 13, 1922.
Present—Mr. Justice Oldfield.
LAKSHMANA PILLAI AND ANOTHER—PETITIONERS
versus
APPALWAR ALWAR AIYENGAR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Withdrawal of suit—Application to withdraw whether terminates proceedings—Withdrawal of petition for withdrawal, when permissible.

The presentation of an application by a plaintiff for the withdrawal of his suit, does not automatically terminate the proceedings in the suit, inasmuch as under rule 1 (3) of O. XXIII of the Civil Procedure Code, the withdrawal is not complete until the Court has made its award of costs. Where, therefore, a plaintiff applies for withdrawal on condition that the suit is dismissed without costs, unless and until the Court signifies its intention to pass such an order, the petition of withdrawal does not operate to terminate the proceedings in the suit, and it is open to the plaintiff, before such an order is made, to withdraw the petition for withdrawal.

Rajah Shumsher Bahadoor v. *Mirza Mahomed Ali Beg*, 2 Agra H. C. R. 158, *Rambhuros Lall* v. *Gopee Beebee*, 6 N. W. P. H. C. R. 66, *Mukkammal* v. *Kalmuthu Pillay*, 15 Ind. Cas. 858; (1912) M. W. N. 997, *Raj Kumari Debi* v. *Nritya Kali Debi*, 7 Ind. Cas. 892; 12 C. L. J. 434, referred to.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated th· 30th January 1922 of the District Court, Tinnevelly, in I. A. No. 822 of 1921 in Original Suit No. 4 of 1920.

Mr. *T. R. Ramachandra Iyer*, for the Petitioner.

Messrs. *T. Narasimha Ayyangar*, *Chidambaram Pillai* and *Markandam Pillai*, for the Respondent.

JUDGMENT.—Plaintiffs, here respondents, on 21st April 1921, presented a petition withdrawing their suit. No order was passed on it at once. But on the 29th July 1921 the 2nd plaintiff applied to withdraw from that withdrawal. The lower Court, in the order I am asked to revise, has dismissed the first of these applications as withdrawn and presumably intends to proceed with the trial.

The argument rejected by the lower Court was, generally, that authority does not recognise a withdrawal from the withdrawal of a suit. On general prinicples, there does not seem to be any reason why such a withdrawal should not be recognised, if always there is no question of undue prejudice to any other party to the proceedings. Argument here has been based rather on what was implied in the argument before the lower Court that the original withdrawal must be regarded as terminating automatically the proceedings in the suit and involving the suit's immediate dismissal; and that, therefore, at the time, when the second withdrawal petition was filed, there were no proceedings pending on which it could operate and there was no previous withdrawal petition undisposed of, of which it could effect withdrawal.

O. XXIII, r. 1 (1) of the present Code provides that after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim, and in r. 1 (3) there is provision for the plaintiff's liability for such costs as the Court may award. The existence of the second provision suggests that the withdrawal cannot be complete until the Court has made its award as to costs. It is not necessary, for reasons which will appear, to express a final opinion on the question whether, generally, the plaintiff may withdraw his withdrawal at any time before the decree, including the award of costs, is passed, in case, as may well happen, he prefers continuing the litigation to complying with the Court's order as to costs. Authority in the appellant's favour consists in the judgment in *Rajah Shumsher Bahadoor* v. *Mirza Mahomed Ali Beg* (1) but considerable doubt has been thrown on that decision by *Rambhuros Lall* v. *Gopee Beebee* (2). On the other hand, there is in favour of the respondent the judgment of Sundara Iyer, J., in *Mukkammal* v. *Kalimuthu Pillay* (3) and *Rajkumari Debi* v. *Nritya Kali Debi* (4). Generally, therefore, I should hold that the lower Court's decision is correct.

In the present case, however, the question arose in a very limited way. For the

(1) 2 Agra H. C. R. 158.
(2) 6 N. W. P. H. C. R. 66.
(3) 15 Ind. Cas. 852; (1912) M. W. N. 997
(4) 7 Ind. Cas. 892; 12 C. L. J. 434.

plaintiff's withdrawal was in the following terms : " The suit is withdrawn : it may be dismissed without costs." Mr. Ram Chandra Iyer on behalf of the appellants has, no doubt, asked me to read this as expressing by the first sentence an unconditional withdrawal, the second sentence containing merely a suggestion as to costs, which might or might not receive effect. But the petition is not, in my opinion, capable of that construction. I can understand the plaintiffs as meaning only that the suit is withdrawn on condition that it is dismissed without costs. This is material. For at the date of the petition, 21st April 1921, the suit has been pending since 19th March 1920 and a majority of the defendants had notice and had appeared by Vakils and some of them had filed written statements. In fact, but for the death of a defendant and the necessity for joining his legal representatives the issues would have already been framed. It is, therefore, clear that an order, such as the plaintiffs proposed, dismissing the suit without an order as to costs, that is, without making the plaintiffs liable for the costs of the defendants, would have been most unfair; and, in fact, although Mr. Ram Chandra Iyer's clients, the present appellants, now say that they do not want costs, the 10th defendant's Vakil pressed for them and it is possible that other defendants also would have done so. Taking the withdrawal petition as conditional on the passing of an order regarding costs to the effect specified in it, I must hold that, unless and until the Court signified its intention to pass such an order, the petition could not operate as a termination of the suit. That being so, and the suit still being pending on the date of the petition withdrawing the withdrawal, there was no obstacle to the lower Court in the exercise of its discretion dealing with the latter petition and dismissing the former and continuing the trial. No ground for revision has been made out. The revision petition, therefore, must be dismissed with costs.

V. N. V.
W. C. A.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 891 OF 1921.
December 12, 1922.
Present:—Mr. Justice Gokul Prasad.
ALI AHMAD AND OTHERS—DEFENDANTS-APPELLANTS
versus
KISHAN PRASAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court—Admission of additional evidence—Reasons not recorded—Findings vitiated.

The admission of additional evidence by an Appellate Court without recording reasons therefor vitiates the findings of the Court; [p. 290, col. 1.]

Hansraj v. *Shiam Sunder*, 63 Ind. Cas. 423; 19 A. L. J. 407, followed.

Second appeal against a decree of the Second Additional District Judge, Aligarh, dated the 3rd March 1921.

Mr. *Panna Lal*, for the Appellant.
Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants arising out of a suit for possession and profits brought by the plaintiff-respondent. The plaintiff claims under a sale-deed in his favour by Johari made in the year 1912. The defendants deny the title of the plaintiff or his transferor and plead title in themselves and possession for more than 12 years. The First Court, in a careful judgment and after giving the parties the fullest opportunity of producing evidence, came to a conclusion adverse to the plaintiffs. I have read the whole of the order-sheet in the case very carefully, and I was led to do so because of the remark in the judgment of the lower Appellate Court that the suit was tried very perfunctorily by the Munsif and this led to the admission of the additional evidence in appeal. The lower Appellate Court examined two new witnesses and admitted three documents as additional evidence when the case was before it in appeal. There might be some excuse for examining the two witnesses, one of whom was the vendor of the plaintiff but there is absolutely no reason given by the Judge for admitting the additional documentary evidence. This admission of additional evidence, at least so far as the documents are concerned, is contrary to the provisions of O. XLI, r. 27 of the Code of Civil Procedure

and the admission of such additional evidence has certainly prejudiced the defendants who had got a decree in their avour from the Trial Court. This appeal should have been decided without the admission of additional evidence. As to the admission of oral evidence the only reason which the learned Judge gives or admitting it is that it was necessary to enable him to pronounce judgment, but as to the documentary evidence he does not give even this reason, if it is a reason at all. I think the findings of the lower Appellate Court are vitiated by the admission of additional evidence without sufficient reason, see the case of *Hansraj* v. *Shiam Sunder* (1). I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and send the case back to it for trial according to law after eliminating from its consideration the additional documentary evidence received by it in appeal. Costs here and hitherto will abide the event.

S. D.

Case remanded.

(1) 63 Ind. Cas. 423 ; 19 A. L. J. 407.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1272 OF 1920.

June 12, 1922.

Present :— Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

MONOHAR PESHAKAR—DEFENDANT NO. 2—APPELLANT

versus

HARAN CHANDRA KARMAKAR—PLAINTIFF—RESPONDENT.

Partition suit—Final decree not appealed against—Appeal against preliminary decree, if maintainable

An appeal against a preliminary decree in a suit for partition presented after the passing of a final decree in the suit is not maintainable unless there is also an appeal against the final decree. [p. 291, col 1.]

Baikuntha Nath Chowdhury v. *Ramanand Patnaik*, 61 Ind. Cas. 923 ; 33 C. L. J. 414 ; 25 C. W. N. 776; 48 C 1036, *Sadhu Charan Datta* v. *Hara Nath Datta*, 27 Ind. Cas. 135 ; 20 C. W. N. 231 *Khirodamoyi Dasi* v. *Adhar Chandra Ghose*, 21 Ind. Cas. 516 ; 18 C L. J. 321 and *Mackenzie* v. *Lala Narsingh Sahai*, 1 Ind. Cas. 413 ; 10 C. L. J. 113 ; 36 C. 762, followed.

Appeal against the decree of the Subordinate Judge, Third Court, Mymensingh, dated the 21st January, 1920, affirming that of the Munsif, First Court, at Tangail, dated the 6th May 1919.

Babu *Mahendra Nath Roy* (with him *Manmatha Nath Roy*), for the Respondents—I beg to raise a preliminary objection to the hearing of the appeal, which does not lie. The facts are shortly these. The appeal arises out of a partition suit. The preliminary decree was passed on 6th May 1919 which was affirmed in January 1920. Final decree was signed on 30th March 1920. The present appeal by the defendant was preferred from the preliminary decree on 7th May 1920 after the final decree was passed. No appeal has been preferred against the final decree. Under the circumstances, the present appeal is incompetent. Refers to *Baikuntha Nath Chowdhury* v. *Ramanand Patnaik* (1), *Sadhu Charan Datta* v. *Hara Nath Datta* (2), *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (3), *Mackenzie* v. *Lala Narsingh Sahai* (4), *Atul Chandra Singha* v. *Kunja Behari Singha* (5), *Bhagaban Chandra* v. *Ishan Chandra* (6) and *Ugra Narain Singh* v. *Basant Narain Singh* (7).

Babu *Samarendra K. Dutt*, for the Appellants.—Regard being had to the concensus of opinion of our Court on the point. I do not think I can urge the point, But I

(1) 61 Ind. Cas. 923 ; 33 C. L. J 414 ; 25 C. W. N 776; 48 C. 1036
(2) 7 Ind. Cas. 135 ; 20 C. W. N. 231.
(3) 21 Ind, Cas. 516 18 C. L. J. 321
(4) 1 Ind. Cas. 413 ; 10 C. L. J. 113 ; 36 C. 762
(5) 30 Ind. Cas. 321 ; 22 C. L. J. 90.
(6) 46 Ind. Cas. 802 ; 22 C. W. N 831
(7) 19 Ind. Cas. 030; 17 C. W. N. 868 ; 18 C. L. J. 209.

submit the memo. of appeal could be turned into one against the final decree. My client is a *parda-nashin* lady.

JUDGMENT.—This is an appeal against a preliminary decree for partition.

A preliminary objection is taken on behalf of the respondent that the appeal is not maintainable, on the ground that no appeal had been preferred against the final decree passed in the suit before this appeal was preferred.

It appears that a preliminary decree for partition was passed on the 6th May 1919. That decree was affirmed on appeal on the 21st January 1920. On the 20th March 1920 the final decree was passed and the final decree was drawn up and signed on the 31st March 1920. The present appeal was filed on the 7th May 1920, from the decree of the lower Appellate Court affirming the preliminary decree passed by the Court of first instance, but no appeal has been preferred against the final decree.

It will appear from the dates mentioned above that the final decree for partition was passed by the Court of first instance before this appeal was preferred, and in such circumstances it has been held in a series of cases that the appeal is not maintainable, that is to say, an appeal against a preliminary decree is not maintainable unless there is also an appeal against the final decree. [See the cases of *Baikuntha Nath Chowdhury* v. *Ramanand Patnaik* (1), *Sadhu Charan Datta* v. *Hara Nath Datta* (2), *Khirodamovi asi* v. *Adhar Chandra Ghose* (3) and *Mackenzie* v. *Lala Narsingh Sahai* (4).]

That principle is not disputed by the learned Pleader for he appellant. But he urges that he might be allowed to amend the memorandum of appeal so as to turn it into an appeal not merely against the preliminary decree but also against the final decree, if he can show sufficient reason for not having preferred an appeal against the final decree so long.

But, apart from other considerations, the appeal against the final decree passed by the Court of first instance in the present case will lie not to this Court but to the lower Appellate Court. That being so, any amendment of the memorandum of appeal, even if allowed, would be of no use.

The appeal must, therefore, fail on the preliminary objection and is, accordingly, dismissed with costs.

Appeal dismissed.

B. N.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1625 OF 1920.

October 23, 1922.

Present :—Mr. Justice Rafique and Mr, Justice Stuart.

JHUNWA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL BOARD, DHAMPUR—DEFENDANT—RESPONDENT.

U. P. Municipalities Act (11 of 1916), s. 326- Right to collect carcasses of dead animals, nature of Suit relating to such right—Limitation.

The right to collect carcasses of dead animals within a Municipality is not a right relating to immoveable property, and a suit relating to the collection of such carcasses must be brought within the special period of limitation prescribed by section 326 of the U. P. Municipalities Act. [p. 292, col. 1,]

Second appeal from a decree of the Additional Judge, Moradabad, dated the 12th June 1920.

Mr. *U. S. Bajpai*, for Mr. *P. L. Banerji*, for the Appellants.

Mr. *Iqbal Ahmed*, for the Respondent.

JUDGMENT.—The two Appeals Nos. 1625 and 32 of 1921 are connected and arise out of one suit brought by the plaintiffs-appellants against the Municipal Board of Dhampur and the lessee from the Board for a declaration that the plaintiffs-appellants were entitled to collect the carcasses of dead animals within the Municipal Board of Dhampur and that the lease granted by the Municipal Board to Buddhan was invalid and inoperative against the plaintiffs and should be cancelled. They further asked for damages and a perpetual injunction against the Board preventing them from issuing any fresh leases.

The learned Munsif decreed the suit.

On appeal the learned District Judge dismissed the suit on the ground that it was barred by limitation under section 326 of the Municipalities Act. There were two appeals before the learned District Judge, as the Municipal Board and the lessee had filed separate appeals. Both the appeals were decreed by the learned District Judge and the plaintiffs have, therefore, preferred

these two connected appeals. The point raised in both of them is the same, namely, that section 326 of the Municipalities Act does not apply to the case of the plaintiffs. The contention is, that the right to collect the carcasses within the Municipal bounds of Dhampur is a right relating to immoveable property, while the provisions of section 326, with regard to six months' limitation, apply to other actions than those relating to immoveable property, or any title to the immoveable property. The learned Vakil for the plaintiffs-appellants contends that, as soon as an animal dies, and its carcass falls to the ground, the right to collect that carcass from the ground is a right relating to immoveable property. We are unable to agree with his contention. The mere fact of the carcass being on the ground and being collected from the ground would not show that it is attached to the soil, or the right to collect the carcass is a right appertaining to immoveable property. In our opinion, the claim of the plaintiffs-appellants was rightly dismissed as barred under section 326 of the Municipalities Act. The appeal, therefore, fails and is dismissed with costs, including fees in this Court on the higher scale.

It has been brought to our notice that there is a deficiency of Court-fees in the appeal of the Municipal Board filed in the lower Court which should be made good here. The decree of this Court shall not be prepared until this deficiency is made good by the Municipal Board. It will then be recoverable as costs from the opposite party.

W. C. A. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 546 OF 1921.

December 12, 1922.

Present:—Mr. Justice Stuart.

DEOKI DUBE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMA DAT AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition proceedings—Question of proprietary title decided by Assistant Collector—Partition not confirmed by Collector—Suit in Civil Court.

A suit to decide a question of proprietary title, which has been raised in partition proceedings before a Revenue Court, cannot be entertained by a Civil Court unless and until it has authority from the Revenue Court to entertain it. [p. 293 col. 1.]

Where a question of proprietary title, raised in partition proceedings before an Assistant Collector, is determined by that officer himself, but his decision is not confirmed by the Collector under section 131 of the U. P. Land Revenue Act, a suit to obtain title to the property is barred by section 233 (*k*) of the Act. [p. 293, col. 2.]

Second appeal from a decree of the Subordinate Judge, Basti, dated the 8th September 1920.

Messrs. *Jang Bahadur Lal* and *Shiva Prasad Sinha*, for the Appellants.

Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—The facts in the connected Second Appeals Nos. 546 and 547 of 1921 can be stated very shortly:—The plaintiffs-appellants in these two appeals are Deoki Dube and others. They lay claim to 8 *biswas* and 12 *dhurs* in one *mahal* and 5 *biswas* and 14 *dhurs* in another *mahal*. They are co-sharers in the village Narhi Buzurg. The defendants are also co-sharers. The dispute arose in this manner. In 1913 one of the defendants applied for an imperfect partition of the village under the provisions of Chapter VII, Local Act III of 1901. The plaintiffs joined in the application, and during those proceedings they laid claim as proprietors to the plots in question. Their proprietary title was questioned. A situation then arose, such as is contemplated in section 111 of the Act, and it was open to the Revenue Court to postpone decision until the question of proprietary title had been decided by a competent Civil Court, or to force the parties into a Civil Court within three months for determination of the question, or to decide the question itself. It clearly did not take either of the first two courses, and, in so far as I have been able to ascertain from the record, the Assistant Collector conducting the partition proceedings decided these questions adversely to the plaintiffs. The plaintiffs in 1917 instituted suits in the Court of the Munsif to obtain title to the property. The Munsif found on the 28th February 1918 that these suits were barred by the provisions of section 233 (*k*) of the Act, and his decision has been upheld by the lower Appellate Court.

It is argued before me that, so far, the partition proceedings have not become complete as they have not been confirmed by

the Collector under section 131. On the record there is no evidence that they have been confirmed by the Collector. The learned Counsel for the respondents is instructed that they have been confirmed, but there is nothing on the record to show this, and I must take it, on the facts before me, that they have not been confirmed. It, therefore, remains to be decided whether section 233 (*k*) has application in a case such as this, in which a question of proprietary title is raised before the Revenue Court and the Revenue Court has refused impliedly to permit its decision by a Civil Court, and has proceeded to determine the question itself, but where the decision has not become final. I think the section has application and must have application for the following reasons :—As I read section 111 the determination of a question of proprietary title which arises in partition proceedings under Chapter VII is with the Revenue Court, unless or until the Revenue Court has divested itself of jurisdiction to decide the question by referring its decision to a Civil Court. In every case, a suit to decide a question of proprietary title which has been raised in such partition proceedings cannot be entertained by a Civil Court unless and until it has authority from the Revenue Court to entertain it. It is clear that if any other view were taken an impossible situation would arise. During the partition proceedings the same point might be the subject of decision both in a Civil Court and in a Revenue Court, and if the decisions arrived at were different, there is nothing to show which decision would prevail. Therefore, I consider that the Courts below were correct. If the question has not yet been decided in the partition proceedings the plaintiffs must wait until it is decided ; when it is decided it will be open for them, if they are dissatisfied with the decision, to appeal against that decision under section 112. I am not in a position to know whether they will have any remedy if the question has already been decided finally by the Revenue Court, and they have not appeared. In any circumstances, these appeals fail and are dismissed with costs which include fees on the higher scale.

S. D. *Appeals dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 323 OF 1922.

May 5, 1922.

Present—Mr. Justice Devadoss.

FRASER AND ANOTHER—PETITIONERS

versus

KRISHNASWAMI IYER AND OTHERS.

PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Receiver—Property in possession of Receiver, whether liable to judicial process Status of Receiver—Execution proceedings—Refusal to implead Receiver as party—Material irregularity.

There can be no attachment and sale of property in the possession of a Receiver in execution of a money-decree without the leave of the Court appointing the Receiver, as property in his hands is exempt from judicial process, except to the extent permitted by the appointing Court. [p. 294, col 2.]

Levenia Ashton v. *Madhabmoni Dasi*, 5 Ind. Cas 390 ; 14 C. W. N. 560 ; 11 C. L. J. 489, *Trye* v. *Trye*, (1851) 13 Beav. 422 ; 20 L. J. Ch. 368; 15 Jur. 809; 50 E. R. 163; 88 R. R. 526, *De Winton* v. *Brecon*, (1860) 28 Beav. 200; 6 Jur (N. S.) 1046 ; 8 W. R. 385; 12 6 R. R. 88; 54 E. R. 342 and *Lane* v. *Sterne*, (1862) 3 Giff. 629 ; 9 Jur. (N. S.) 320; 10 W. R. 555; 66 E. R. 559; 133 R. R. 207, relied on.

Hem Chunder Chunder v. *Prankristo Chunder*, I. C. 403, 1 Ind. Dec (N. S.) 252, not followed.

A Receiver appointed by the Court takes possession of property on behalf of the Court, and is not the legal representative of any party, nor is he a new party to the proceedings. He represents all the parties and his duty is that which is assigned to him by the Court. [p. 296, col. 1.]

Thakur Prasad v. *Fakirullah*, 17 A. 106 ; 5 M. L. J. 3 ; 22 I. A. 44 ; 6 Sar. P. C J. 526; 8 Ind. Dec. (N S.) 393 (P. C.) and *Bryant* v. *Bull*, (1878) 10 Ch. D. 153 at p. 155 ; 48 L. J. Ch. 325; 39 L. T. 470 ; 27 W. R. 246, distinguished.

A Receiver in a partition suit is entitled to be added as a party in execution proceedings in a mortgage suit concerning the properties in his possession, and in refusing to add him as a party the Court acts with material irregularity, within the meaning of section 115 of the Civil Procedure Code. [p. 296, col. 2.]

Petition, under section 115 of Act V of 1908, and 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Mayavaram, in Execution Appeal No. 130 of 1922, in Execution Petition No. 182 of 1921, in Original Suit No. 11 of 1916, on the file of the Court of the Subordinate Judge, Kumbakonam.

Mr. *S. Doraisami Ayyar*, for the Petitioner.

Messrs. *T. R. Venkatarama Sastry*, *A. Krishnaswami Ayyar* and *Sivaramakrishana Ayyar*, for the Respondents.

FRASER *v.* KRISHNASWAMI IYER.

JUDGMENT.—This is an application under section 115, Civil Procedure Code, of the Receivers appointed by the High Court in Civil Suit No. 655 of 1921, to revise the order of the Subordinate Judge of Mayavaram, refusing to make the petitioners parties to execution proceedings pending before him in Execution Appeal No 130 of 1922. This petition came up for admission on 1st May 1922 with an application for stay of proceedings. As the contesting respondent appeared in the Court and offered to take notice, I directed the petition to be heard on 3rd May 1922.

The facts of the case are, that the plaintiff in Original Suit No. 111 of 1916, on the file of the Kumbakonam Subordinate Judge's Court, obtained a decree on a simple mortgage-bond against the members of the well-known Nadar family of Tanjore on 12th April 1917 and on 13th September 1920 a final decree was passed in the suit, and on 7th November 1922 an order for sale was made. The sale was fixed for 30th January 1922 and it was adjourned to 20th March 1922. Disputes having arisen between the members of the family, Civil Suit No. 655 of 1921 was filed in the High Court for a partition of the family property. The present petitioners were appointed Receivers on 27th January 1922 and the order appointing them was appealed against and it came up before the Court of Appeal on 16th February 1922, and it is now settled that the Receivers should continue to be in possession of the properties. On 20th March 1922 the Receivers applied to the Mayavaram Sub-Court for being made parties to the execution proceedings and the Subordinate Judge declined to make them parties. The sale, too, was proceeded with and was concluded on 27th March 1922 and the mortgaged property was sold for Rs. 1,10,000 to thirteenth respondent hereto.

It is urged on behalf of the petitioners that the lower Court acted without jurisdiction in refusing to make them parties, and as the properties of the Nadar family are all in the hands of the Receivers no sales could take place without their being on record. It is further argued that the Receivers could have paid off this debt, or, at least, could have secured a better price for the properties which they value at Rs. 2,00,000, *vide* paragraph 12 of the affidavit. The property now brought to sale by the Subordinate Judge's Court of Mayavaram is one of the items of properties which are the subject-matter of the suit now pending before the High Court.

Mr. Doraiswami Aiyar, who appears for the petitioners, relies on *Levenia Ashton* v. *Madhabmoni Dasi* (1) and contends that it was the duty of the Court to make the Receivers parties to the execution proceedings. It may be taken as well settled law that there can be no attachment and sale of the property in the possession of a Receiver in execution of a money-decree without the leave of the Court appointing the Receiver. To quote the learned Judges of the Calcutta High Court, "The general rule is well-settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. *Trye* v. *Trye* (2), *De Winton* v. *Brecon (Mayor of)* (3), *Lane* v. *Sterne* (4). It has even been affirmed that though an attachment was levied on property before the appointment of the Receiver, it is within he sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. On this principle it has been held that property in the hands of a Receiver though subject to a paramount judgment, cannot be sold under execution without the leave of Court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution Court. It is unnecessary to examine the various authorities relied on by the learned Judges of the Calcutta High Court. The question here is, whether a mortgagee decree-holder is bound to apply to the Court appointing the Receiver for redress or whether he can proceed to sell the mortgaged property in execution of a decree for sale. The only authority that seems to support the contention of the respondent is the judgment of

(1) 5 Ind. Cas. 390; 14 C. W. N. 560; 11 C. L. J. 489.
(2) (1851) 13 Beav. 422; 20 L. J. Ch. 368; 15 Jur. 809; 50 E. R. 163; 88 R. R. 526.
(3) (1860) 28 Beav. 200; 6 Jur (N S.) 1046; 8 W. R. 385; 126 R. R. 88; 54 E. R. 342.
(4) (1862) 3 Giff. 620; 9 Jur. (N S.) 320; 10 W. R. 555; 66 E. R. 559; 133 R. R. 207.

a single Judge of the Calcutta High Court in *Jogendra Nath Gossain* v. *Debendra Nath Gossain* (5). The facts of that case are that, pending partition proceedings and after the appointment of the Receiver, two of the co-sharers mortgaged their interest in the undivided properties; some of the mortgaged properties being within the jurisdiction of the Alipore Court, the mortgagee instituted his suit in that Court and sought to bring to sale the particular properties mentioned in the rule, some of which are situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of paying off the judgment-creditor, applied to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of the High Court would amount to contempt of Court. Mr. Justice Sale, in discharging the rule, observed as follows: - "This is not a case where the judgment creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognise attachment of the properties in the hands of its Receiver, under process issued without sanction or leave by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case there is no reason for restraining the sale. The case of *Hem Chunder Chunder* v. *Prankristo Chunder* (6) is distinguishable inasmuch as the udgment-creditor in that case, if he had proceeded to execute his decree in the Mofussil Court, could have done so only by way of attachment and sale. Under the Transfer of Property Act no attachment is necessary, and the reason for the course adopted in the former case does not now exist." The reasoning of the learned Judge is that, as no attachment was necessary in a mortgage suit, the sale could be proceeded with, notwithstanding the fact that the property was in the possession of the Receiver. In that case only two of the co-sharers had mortgaged their interest. In the present case all the sharers were parties to the mortgage and all thier properties are in the hands of the Receivers. Moreover, the Receivers were appointed for the purpose of safeguarding the interests of all the parties to the suit, and if an inferior Court is allowed to sell the properties merely because there is a mortgage-decree the object of appointing a Receiver in a partition suit would become infructuous, and it cannot be the policy of the law to allow the property to be sold by different Courts when that property is in the hands of a Receiver. The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of the Receiver without the sanction of the Court which appoints him. Moreover, after attachment and sale, possession of the property sold cannot be obtained by an auction-purchaser without applying to the Court which appointed the Receiver. That being so, with very great respect to the learned Judge, it is difficult to follow the distinction which he makes between execution in respect of a simple money-decree and execution in pursuance of a mortgage-decree. The possession of the Receiver being the possession of the Court, no Court can interfere with that possession in any manner without the leave of the Court. The property being *in custodia legis* it would require very strong authority for holding that a mortgagee could set at naught the ordinary principle which prevent process being issued against the property in the hands of the Receiver without the leave of the Court appointing him simply because there is a mortgage in his favour. Mr. Venkatarama Sastri, who appears for one of the members of the family, relies upon various passages in Kerr on Receivers and High on Receivers, and it is unnecessary for me to refer to them. One passage from a well-known book is sufficient for the present purpose: "Property in the possession of a Receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment, though the levy was made before the Receiver was appointed". Alderson on Receivers, page 229.

It is argued by Mr. Krishnaswami Aiyar,

(5) 26 C. 127; 3 C W. N. 90; 13 Ind. Dec. (N. S.) 680.

(6) 1 C. 403; 1 Ind. Dec. (N. S.) 252.

who appears for the auction-purchaser, that there is no provision of law for making the Receiver a party to execution proceedings, and that O. I, r. 10, has no application to execution proceedings, that section 141, Civil Procedure Code, cannot help the petitioners on the principle of the decision of the Privy Council in *Thakur Prasad* v. *Fakirullah* (7) and that section 146 can have no application to the present case. The fallacy of this argument lies in the assumption that the Receiver is a new party.

When a Receiver is appointed by a Court he takes possession of the property on behalf of the Court and he is not a party in the sense in which O. I is understood. The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court. It is further contended by Mr. Krishnaswami Iyer that the Receiver has to respect the orders made before his appointment and relies upon *Bryant* v. *Bull* (8). Vice-Chancellor Bacon, in delivering the judgment, says: "The appointment of a Receiver is a matter which does not concern mortgagees or prior incumbrancers, for a Receiver in the exercise of his authority will be obliged to respect former orders of the Court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit, so that that circumstance occasions no kind of difficulty". From this passage it cannot be inferred that a mortgagee can proceed with the execution of a decree in his favour without the leave of the Court appointing the Receiver. *Duke of Buccleuch (The)* (9) is quoted by Mr. Doraiswami Iyer for the purpose of showing that the execution proceedings are a continuation of the suit and any party can be added at any stage of the proceedings. That case has no application to the present case, as in that case assessment of damages was left over; until the assessment of damages was completed it could not be said that the suit had come to a termination. But in this case the mortgage-suit of the Kumbakonam Court had come to a termination when the final decree was passed and there was no more to be done in the suit. But, as I hold that the Receivers are not new parties to the suit, I think O. I, r. 10, does not stand in the way of their being made parties. Considering the fact that the very object of the appointment of the Receivers was to safeguard the interests of all the members of the family and to liquidate the debts in the best manner possible it was the duty of the Subordinate Judge of Mayavaram to have made them parties to the execution proceedings, for the sale itself is liable to be defeated, for want of necessary parties and, in any case, possession of the properties sold by Court could not be obtained without the leave of the High Court which appointed the Receivers. Considering the complications that might arise hereafter, I consider that the Subordinate Judge acted with material irregularity in refusing to make the Receivers parties to the execution proceedings I, therefore, set aside the order of the Subordinate Judge and direct him to make the Receivers parties to the execution proceedings and proceed according to law. I allow the petition with costs. The thirteenth respondent will pay the costs of this petitioner.

V. N. V.
W. C. A. *Petition allowed.*

(7) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44: 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

(8) (1878) 10 Ch. D. 153 at p. 155; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.

(9) (1892) Probate 201; 61 L. J. P. D. & A. 57; 40 W. R. 455.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 667 OF 1921.
December 5, 1922.
Present:—Mr. Justice Stuart.
Syed SHAMSHUL HASAN AND OTHERS —PLAINTIFFS—APPELLANTS
versus
SYED HASAN—DEFENDANT—RESPONDENT.

Muhammadan Law—Dower—Remission—Burden of proof Marz-ul-maut– *Pregnancy.*

When a claim for dower is met by the reply that the dower has been remitted, it is for the person who claims dower to prove that the alleged

remission was vitiated because it was made by a person suffering by mortal illness. [p. 298, col 1.]

It is not the Muhammadan Law that a woman who is pregnant is considered to be suffering from a mortal disease. According to that law the danger does not begin until the pains of labour begin. Therefore, to apply the doctrine of *marz-ul-maut* to the relinquishment of her dower by a woman, it is essential to establish that the relinquishment was made after the pains had come on. [p. 298, col. 1.]

Second appeal against a decree of the Additional Judge, Moradabad, dated the 28th January 1921.

Mr. *Mushtaq Ahmad*, for the Appellants.

Mr. *M. A. Aziz*, for Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The facts of the suit out of which these two appeals arise are these: The plaintiffs are the sons of Saiyid Muhammad Hussain, deceased. Their mother Khedijatul Kubra, the wife of Muhammad Hussain, died on the 29th of November 1906. They sue the estate of their deceased father for their share of their mother's dower. Their suit has been dismissed by the learned District Judge in appeal on the ground that Khadijatul Kubra had relinquished all claim to dower in favour of her deceased husband and that the suit was time barred. The plaintiffs appeal here.

I need not go into the second point, as, in my opinion, they fail on the first, on the findings of fact of the lower Appellate Court. The lower Appellate Court believed the evidence of a woman called *Musammat* Jhamman who was married to Muhammad Hussain's cousin. According to this witness she was present at the time that Khadijatul Kubra relinquished her claim to dower in favour of her husband. The circumstances were these: Khadijatul Kubra was pregnant and expecting to be delivered. Her time drawing near, a midwife was called in. The midwife advised obtaining the attendance of a lady Doctor. A lady Doctor came accordingly. Khadijatul Kubra relinquished her claim to dower in favour of her husband. A daughter was born to her. She died directly afterwards. I have stated these facts baldly for the reason that the witness gave the facts in this manner. I have been through the vernacular statement of her evidence carefully. From it, it is impossible to say, whether Khadijatul Kubra relinquished her claim to dower before or after the lady Doctor arrived. It is impossible to say how long the lady Doctor was in attendance. She may have been in attendance for 10 days; she may have been in attendance for 2 days, or even a shorter time, the witness does not say. It is impossible to determine from this evidence the period between the commencement of the labour pains and the death of the woman, and there is nothing in this evidence to show that Khadijatul Kubra relinquished her claim to dower, after the pains of labour had begun.

Now, the sole point taken in this appeal is that the doctrine of *marz-ul-maut* applies to this case. It is not open to the appellants to suggest, in view of the finding of fact, that Khadijatul Kubra did not relinquish her claim to dower in favour of her husband. The finding of fact is clear that she did. So they have fallen back on the pleas that the disposition was only valid in respect of a portion of the property, or that it was altogether invalid, because she was suffering from a mortal sickness which ended fatally. It is to be noted that the plea of renunciation of dower was put in the forefront of the defendant's reply. This will be seen from the second paragraph of the written statement. A perusal of the judgment of the Trial Court shows no reference to the doctrine of *marz-ul-maut* having been invoked in favour of the plaintiffs. The point taken before the Trial Court was that the witnesses who deposed that such a relinquishment had been made were unreliable. That plea found favour with the Trial Court who decided that they were unreliable. The defendants appealed to the learned District Judge on the question of fact that the witnesses were reliable and there is nothing to show from the judgment of the District Judge that the plaintiffs replied in argument that, even if they were reliable, it was a matter of no consequence, as the relinquishment was invalidated under the doctrine of *marz-ul-maut*. As far as I can see, the point now taken in second appeal has been taken for the first time, but in view of the fact that the plaintiffs could not be expected to state this plea in their plaint, and in view of the fact that the original decree

was in their favour, I recognise that they might have had some difficulty in putting the point forward until now. I have, therefore, permitted it to be argued, but, having permitted it to be argued, I have to look at the exact law on the subject and to see how far the evidence, which has been accepted by the lower Appellate Court, supports the plaintiffs' plea, recollecting that it was for the plaintiffs to bring out in evidence the points on which they rely. It is obvious that, when a claim for dower is met by the reply that the dower has been remitted, it is for the person who claims on account of dower then to prove that the remission of the dower is vitiated because it was made by a person suffering from a mortal illness. So, it was for the plaintiffs to bring out the facts to prove their plea. As I have said, there is nothing to show that the pains of labour had commenced before the woman relinquished her claim. *Musammat* Jhamman told the Court that Khadijatul Kubra became apprehensive when the lady Doctor was sent for and was afraid that there was a chance that she might die, but that otherwise she was all right, and she went on further to say that Khadijatul Kubra was perfectly well until the lady Doctor arrived and from her evidence, vague as it is, it would appear that the deceased suddenly collapsed after the labour pains began. Now it is not the Muhammadan Law that a woman who is pregnant is considered to be suffering from a mortal disease and, on the face of it, it would be an absurdity to suppose such a doctrine. The Muhammadan Law, as I understand it, takes the common sense view that the danger does not begin until the pains begin. The pains of labour, as is well-known, are the pains produced by the contraction of the uterus in expelling the child. They come on a comparatively short time before the child is born. In Ameer Ali's Muhammadan Law, Volume I, 4th Edition, page 61, there is an extract from the Radd-ul-Muhtar which gives the law upon the subject:—"The dispositions of a (pregnant) woman in labour is valid in respect of a third of her property; but they become operative as to the whole on her recovery; so in the *Jauharat-in Nayyireh*. And if a (pregnant) woman makes a gift of her dower to her husband whilst suffering from the pains of labour, and dies during the *nifas* the gift is not valid; so in the Sirajia." It is thus absolutely essential to invalidate the relinquishment to establish that the relinquishment was made, after the pains had come on, and, on the evidence which was believed by the lower Appellate Court, there is nothing to show that the relinquishment was made after the pains had come on. It was for the plaintiffs to establish this point. This decision is sufficient to dispose of these two appeals which are dismissed with costs which include fees in this Court on the higher scale.

S. D.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 59 OF 1922.

October 25, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

M. NARASAYYA AND OTHERS—COUNTER-PETITIONERS—APPELLANTS

versus

A. VENKATAPPA—PETITIONER—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 17—Selection of guardian—Minor's welfare paramount consideration—Presumptive heir to minor's property, if suitable guardian.

Where the claims of distant relations for the guardianship of a minor have to be compared, there is no question of preference other than what arises from a consideration of the minor's welfare.

A presumptive heir to the properties of a minor is not a suitable person to be appointed guardian of his person.

Sami Row v. *Eluvatha Row*, 16 M. L. J. 357, *Kristo Kissor Neoghy*, v. *Kadermoyi Dossee* 2 C. L. R. 583 and *Krishnasami Chetty* v. *Cottah Mangamma*, 10 Ind. Cas. 283; (1911) 1 M. W. N. 365, followed.

Appeal against an order of the District Court, Anantapur, in Original Petition No. 41 of 1920, dated 29th November 1921.

JUDGMENT.—The learned District Judge appears to have selected the petitioner to be guardian of the minor's person

chiefly on the ground that, as he says, " he would under Hindu Law be the preferable guardian."

But, in fact, first counter-petitioner, who is his mother's brother, is more nearly related to the minor, and when the claims of distant relations like petitioner and second and third and sixth counter-petitioners have to be compared, there is no question of preference other than what arises from a consideration of the minor's welfare, which is made the paramount consideration under section 17 (1) and (2) of the Guardians and Wards Act.

It has been often laid down that the presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death [See *Sami Row* v. *Eliavatha Row* (1), *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (2), *Krishnaswami Chetty* v. *Cottah Mangamma* (3).] The petitioner, as the nearest agnate, is in this case the person who would succeed to the minor's property if anything happened to the minor.

The first counter-petitioner is unmarried and in a dependent position. The minor is of tender age and will need maternal care for some years to come. Such care is not to be looked for from first counter-petitioner, or from the minor's step-sister, a girl of sixteen who lives half the year with petitioner's witness No. four, who is himself not a near relation, and she, further, is of marriageable age and likely not to remain long in petitioner's house.

The second and sixth counter-petitioners are not shown to have any particular qualification and they are very near heirs, though not the next presumptive heirs.

Under these circumstances, we think that the fifth counter-petitioner, whose brother has married the third counter-petitioner's daughter, is the person who is likely to be the most disinterested protector of the minor's person.

The District Judge's order appointing the petitioner guardian of the minor's property will stand upon the conditions set out at the end of his order, but, in reversal of his order, we appoint the fifth counter-petitioner guardian of the minor's person. The order allowing Rs.10 per mensem for the maintenance of the minor and his step-sister will be altered by providing Rs. 5 for the minor and Rs. 5 for Narasamma. This will be an ample sum, in our opinion, for the minor's maintenance in view of the fifth counter-petitioner's offer to maintain the minor at his own cost. Each party to bear their own costs in this and in the lower Court.

V. N. V. *Order modified.*

(1) 16 M. L. J. 357.
(2) 2 C. L. R. 583.
(3) 10 Ind. Cas. 283 : (1911) 1 M. W. N. 365.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 207 OF 1921.
November 13, 1922.

Present :— Mr. Justice Gokul Prasad.

KULDIP CHAUBE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGNANDAN CHAUBE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Joint holding One co-sharer in possession of specific plot or holding—Possession of plot wrongfully taken by another co-sharer—Suit for exclusive possession—Partition in Revenue Courts, whether necessary

If in a suit for exclusive possession of a plot of land, it is proved that the land was the *khudkasht* of the plaintiff and that the defendant had wrongfully dispossessed him and taken possession of the property, the plaintiff is entitled to the decree prayed for and cannot be compelled to sue for partition in the Revenue Court.

Second appeal against a decree of the District Judge, Azamgarh, dated the 9th December 1920.

Mr. *N. Upadhiya*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT. This was a suit by the plaintiffs for exclusive possession of plot No. 248 which they alleged was their *khudkasht* land and from which the defendants had wrongfully ejected them. The defendants pleaded that the land belonged to a joint *khata* and the plaintiffs had wrongfully brought the suit for exclusive possession.

FAIJADDIN *v.* AGNI KUMAR SARMA.

The first Court held that the land was not the *khudkasht* of the plaintiffs, but as it formed part of a joint *khata* the plaintiffs were entitled to a joint possession and decreed the claim for joint possession.

On appeal the learned District Judge came to the conclusion that the land had been in possession of the plaintiffs and their father for 19 years and was their *khudkasht*. On this finding he decreed the appeal and gave the plaintiffs a decree for exclusive possession as prayed. The defendants come here in second appeal and say that the sole remedy of the plaintiffs was to have a partition made by the Revenue Courts as co-sharers. I do not see why the plaintiffs should not be given a decree for exclusive possession when the defendants have been found to have wrongfully dispossessed them and taken exclusive possession of the property. If the defendants had, in the first instance, applied for partition that would have been all right and they would then have got the rights of the parties adjusted but the defendants should not, by taking the law into their own hands and wrongfully dispossessing the plaintiffs, be allowed to compel the plaintiffs to sue for partition in the Revenue Courts. There is no force in this appeal. I, therefore, dismiss it with costs.

S. D.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2011 OF 1920.

June 6, 1922.

Present:—Mr. Justice Suhrawardy.

FAIJADDIN—DEFENDANT NO. 1—APPELLANT

versus

AGNI KUMAR SARMA AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Landlord and tenant—Suit for rent—Collection paper, evidentiary value of—Bengal Tenancy Act (VIII of 1885), s. 29, applicability of—Absence of proof of original jama*—Remand—Inadmissible evidence forming basis of decision—Decision supported by other evidence.*

Rent collection papers which are not proved by persons who made the collections, cannot be treated as independent evidence of the fact that the rent was realised at the rate mentioned in those papers. [p. 301, col. 2.]

Where the lower Appellate Court in coming to a decision in a case is materially influenced by a piece of evidence which is found to be inadmissible by the High Court, the case should be remanded to the Court below for a proper consideration of the evidence which is admissible and come to a decision on it. [p. 302, col. 1.]

But there need not be a remand where, after excluding the inadmissible evidence, the conclusion of the Court below is supported by other evidence on the record. [p. 302, col. 1.]

Womes Chunder Chatterjee v. *Chundee Churn Roy Chowdhry*, 7 C. 293; 3 Ind. Dec. (N. S.) 737, relied on.

Where there is no evidence to prove the original *jama*, section 29 of the Bengal Tenancy Act does not apply. [p. 303, col. 1.]

Appeal against the decree of the Sub-Judge, Tipperah, dated the 18th May, 1920, reversing that of the Munsif, Sixth Court, at Comilla, dated the 10th of April 1919.

Babu *Birendra Chandra Das*, for the Appellant. The defendant No. 1 is the appellant. The plaintiffs who are *dar ijaradars* for a term of years sued for recovery of arrears of rent for 1321-1323 B. S. at the rate of Rs. 35-13-6 per annum. The defendants alleged that the rate was not as stated by the plaintiffs but was Rs. 25-11-0 per annum. The plaintiffs produced some collection papers of previous *dar ijaradars* in support of their claim while the defendants produced some rent-receipts prior to 1305 B. S. to prove the rates alleged by them. The learned Munsif held that the initial rent of the *jote* was Rs. 25-11-0, that the collection papers proved by the plaintiff did not uniformly show a *jama* of Rs. 35 but that there were enhancements and that as the successive enhancements exceeded 2 annas in the rupee and were not made by the registered instruments, the plaintiffs could not, under section 29 of the Bengal Tenancy Act, get a decree at the rate of Rs. 35 and odd. He decreed the suit at the rate admitted by the defendants. On appeal by the plaintiffs the learned Subordinate Judge held that the collection papers of the last 20 years produced by the plaintiffs, some of which were proved by the Tahsildar, showed that the

annual rent was Rs. 35, that the defendants could not produce any *dakhila* after 1305, that there was no evidence to prove that original *jama* was Rs. 25, that it appeared from the collection papers that the original *jama* for *nal* lands was Rs. 29 beside the *jama* on *bhitti* lands, that the *talab bakis* of the plaintiffs showed that some new lands were ordered, but, that there was no other independent evidence to show increase in area. The present appeal is against the said decision by defendant No. 1.

My submission is that the learned Subordinate Judge erred in holding that the collection papers for 20 years showed that the rent was Rs. 35. Some showed Rs. 32, some showed Rs. 34, etc. The learned Munsif has found that they did not show a uniform rate. I submit, those collection papers which have not been proved by persons making the collection could not be treated as independent evidence. Refers to section 34 of the Indian Evidence Act; *Roushan Bibee* v. *Hurray Kristo Nath* (1), *Akhil Chandra Chowdhry* v. *Nayu* (2), *Mahomed Mahmood* v. *Safar Ali* (3). As regards the papers proved by the Tahsildar, they were merely generally proved. Refers to *Hingu Miya* v. *Heramba Chandra* (4), *Imambandi* v. *Matasuddi* (5). My third contention is, that the initial rent being Rs. 29 and there being no legal evidence to prove increase in area the rent claimed is excessive under section 29 of the Bengal Tenancy Act. Refers to *Bepin Behari Mondol* v. *Krishna Dhone Ghose* (6).

Babu *Rupendra Kumar Mitter*, for the Respondent.—There is evidence on the record from which the Appellate Court could find that the rent was Rs. 35. That finding is conclusive. As regards the collection papers, objection as to mode of proof must be taken at the earliest possible opportunity. The objection cannot be taken now. Refers to *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (7), *Ambar Ali* v. *Lutfe Ali* (8). There is no evidence as to the initial rent. It has been found that the area has increased. Therefore, section 29 has no application.

Babu *Birendra Chandar Das*, replied in brief.

JUDGMENT.—The suit that gave rise to this appeal was one for recovery of rent, brought by the plaintiff on the allegation that the rent of the holding in the occupation of the defendant was Rs. 35, odd. The defence was that the rent was Rs. 25-11. The Court of first instance dismissed the plaintiff's suit, but that decision was reversed by the lower Appellate Court on appeal. Exception has been taken to the judgment of the lower Appellate Court on three grounds; first, that that Court has erred in saying that the collection papers filed by the plaintiff for the last 20 years or more prove that the annual rent is Rs. 35-13-6. My attention has been directed to an entry more than 30 years ago where the rent of the defendant or his predecessor is given as Rs. 32-8-0 There may be slight discrepancies, as it has been pointed out that on one occasion rent was mentioned as Rs. 34, odd. The variation may be due to temporary variation in area or some other cause. But the main fact remains that the collection papers do show payment of rent at Rs. 35 and odd. The consideration of this question, however, becomes of less importance when we examine the second point which is, that the collection papers, which have not been proved by persons who make the collections, should not have been treated as independent evidence of the amount of rent realized from the defendant. There is a great deal of force in this contention, The only evidence we have on the record is the evidence of Nishi Kant, the Officer of the plaintiff who produced the collection papers, to prove that they were filed in his presence in the Zemindar's *sherista* by the former *dar ijaradars*, and he also testifies to the signatures of some of the *dar ijaradars*. He, however, does not prove that the rent was realized from the defendant by the

(1) 8 C. 926 at p. 931; 4 Ind. Dec. (N. S.) 598.
(2) 10 C. 248; 8 Ind Jur. 305; 5 Ind. Dec. (N. S.) 166.
(3) 11 C. 407; 5 Ind. Dec. (N. S.) 1031.
(4) 8 Ind. Cas 81; 13 C. L. J. 139 at p. 142.
(5) 13 Ind. Cas. 678; 15 C. L. J. 621.
(6) 9 C. W. N. 265; 1 C. L. J. 10; 32 C. 395 (F. B).
(7) 7 C. 293; 3 Ind. Dec. (N. S.) 737.
(8) 41 Ind. Cas. 116; 25 C. L. J. 619; 21 C. W. N. 996; 45 C. 159.

dar ijaradars at the rate mentioned in the collection papers. If the decision of the learned Subordinate Judge were based chiefly on the collection papers, or that the entries in the collection papers had materially influenced his judgment, I would have felt it my duty to remand the case to the Court below for a proper consideration of the evidence which is admissible and come to a decision on it. But, on reading the learned Judge's judgment as a whole, it appears to me that what greatly influenced him in coming to the conclusion at which he arrived was not the collection papers but some other facts, as, that the defendant did not produce a single *dakhila* for the last 20 year in support of his, and the rebuttal of the plaintiff's case. He produced some *dakhilas* anterior to 1305 granted by some *dar ijaradars*, the genuineness of which the learned Judge doubts. This is a fact upon which the learned Judge placed great reliance. The non production of documents of this character no doubt tells greatly against the truth of the defendant's case. The learned Judge was perfectly entitled in law to draw an adverse inference. This is apparent from the concluding part of his judgment. He says: "Considering the entire evidence on the record, and having regard to the fact that the defendant could not prove by a single *dakhila* what rent they paid for the last 20 years, I find that the plaintiffs are entitled to the rent at the rate claimed." This clearly shows that the learned Judge's judgment was based more upon the non-production of the *dakhilas* by the defendant than on any other evidence on the record.

There is another piece of evidence in which the learned Judge has relied and relied very correctly, namely, the evidence of the witness Nishi Kanta who himself realized the rent at the rate claimed for the last 12 years. He has further produced and proved some papers which completely support the plaintiff's case. There is direct evidence of this witness to prove realization of rent at the rate claimed for the last 12 years supported by papers written by him, the genuineness of which has not been questioned. This has apparently induced the learned Judge to find for the plaintiffs where there is no evidence worth the name adduced by the defendant to contradict it. I am, therefore, of opinion that this is a case in which I am entitled to follow the rule laid down by Garth, C. J., in the case of *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (7). On this point reliance is placed in the case of *Ujir Ali Sirdar* v. *Shadhai Belara* (9). It is clear from a perusal of the judgment of this Court in that case that the evidence held to be inadmissible was of such a character that their Lordships could not declare that the Judge in that case could have, excluding that evidence, arrived at a similar conclusion on a re-consideration of the case. In the present case, as I have observed, the lower Appellate Court was mainly influenced by the absence of evidence on behalf of the defendant and the positive evidence of Nishi Kanta and his papers in support of the plaintiff's case. In my judgment, it will serve no useful purpose to remand the case for a re-consideration of the evidence.

The third point taken is that the defendant's original rent was Rs. 29, whereas in decreeing the plaintiff's present claim at Rs. 35 and odd the Court below has contravened the provisions of section 29 of the Bengal Tenancy Act. The defendant's case was that his rent was Rs. 25-11. With regard to that the learned Judge observes that there is no evidence, however, worthy of reliance to prove that the *jama* was ever Rs. 25-11. The defendant now says that his rent was Rs. 29, because he finds some entries to that effect in the collection papers which he challenges in the same breath as inadmissible in evidence. I am not prepared to give effect to this contention. The finding of the learned Judge being in effect that there is no evidence to prove the original *jama* section 20 will have no application. The learned Judge goes on to hold that it appears from the collection paper that the *jama* of the *nal* lands was Rs. 29 besides the *jama* of *bhitti* lands, and, relying on one of those papers, he says that some new lands were added which were taken from other persons' *jama*, and this accounts for the increase of rent in the collection papers. If the defendant wants to rely on the collection papers for the proof of the original *jama* he has

(9) 68 Ind Cas 1003; 35 C. L. J. 182; (1922) A. I. R. (C) 185.

to accept all these descriptions contained in those papers as correct. But as the learned Judge finds there is no evidence that the original *jama* was as the defendant stated, I do not think that section 29 of the Bengal Tenancy Act will have any application in this case.

All the grounds taken against the judgment of the lower Appellate Court having failed, this appeal is dismissed with costs

Appeal dismissed.

B. N.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 93 OF 1922.

December 9, 1912.

Present:—MR. Pipon, J. C.

GELA RAM—DEFENDANT—APPELLANT

versus

JHANGI RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XX, r. 11—Instalments—Defendant claiming lenient treatment—Burden of proof—Facts disentitling defendant to lenient treatment.

Where a defendant claims the assistance of the Court in the matter of fixing instalments for the payment of a decretal debt, the burden of proof lies heavily upon him to show that he is entitled to specially lenient treatment. The fact that the decretal amount represents a debt which has been accumulating for a considerable time, would of itself afford no ground for according lenient treatment, and the fact that the defendant disposed of his property, whether fraudulently or otherwise, immediately he became aware that a suit was about to be instituted, would disentitle him to such treatment. [p. 304, col. 1.]

Appeal from an order of the District Judge, Bannu, dated the 4th July 1922, passing a decree for recovery of Rs 5,709-14 against the defendant-appellant with interest at the rate of 15 annas per cent, per mensem up to realization of the above decretal amount.

Pandit *Mul Chand*, for the Appellant.

JUDGMENT.—On this appeal the learned Counsel for the appellant argues two grounds only, (1) that the Court should have fixed instalments for payment of the decretal amount, and (2) that interest from the date of the decree to realization should not have been allowed and that the interest allowed is excessive. It is argued in support of both these grounds that the Trial Court has come to certain conclusions which are not justified by the record and which wrongly influenced it in refusing to extend lenient treatment to the appellant. The most important point in this connection is the fact that the appellant is shown to have transferred his property to certain of his relatives just before the institution of the suit. The suit was instituted on the 8th of March 1922. On the 2nd of March he mortgaged a house to Khem Chand for Rs. 5,000 and on the 3rd of March he sold a shop to Daulat Ram for Rs 3,000. Both Khem Chand and Daulat Ram, the transferees, are near relatives of the appellant. It is contended that the Trial Court had no justification in holding that these transfers were fictitious and that no issue was framed on this point. I cannot agree, however, that it was necessary to frame an issue. The Court was merely considering the question as to whether the defendant deserved the assistance of the Court in relieving him of a burden to which he was clearly adjudged liable. In such circumstances, the grant of instalments is purely discretionary. It may be conceded that there is no justification for a definite finding that the transfers to Khem Chand and Daulat Ram were actually fictitious. But assuming for the moment that they were genuine, either the defendant obtained a sum of money more than sufficient to cover the decree 5 or 6 days before the institution of the suit, or, as is alleged by his Counsel, he was satisfying an antecedent debt to Khem Chand and Daulat Ram and was thereby giving preference to one set of creditors. It cannot be denied that the latter explanation is extremely suspicious, and even if it be accepted, it appears to me that the plaintiff in this case is perfectly entitled to oppose the extension of lenient treatment to the defendant on the ground that his own interests have been deliberately sacrificed to other creditors whom the defendants, for family reasons, desired to favour. It appears to me perfectly legitimate to consider these transfers, which, though they may not have been proved

by evidence to be fraudulent, were certainly intended to defeat the plaintiff's claim, as depriving the appellant of any right to specially lenient treatment which in itself would prejudice the plaintiff. Another ground which the Court took into consideration was that the defendant's father was a rich man holding a high position. The learned Counsel for the appellant argues that admittedly father and son are not joint, and that the father is not obliged to assist in clearing off his son's debts. This argument appears to me to confuse the question of the legal liability of the father towards the son's debts, and the general position of the defendant that he claims the assistance of the Court. The burden of proof lay very heavily upon the defendant to show that he was entitled to exceptionally lenient treatment. It appears to me that the argument that his father is a rich man is, so far as the plaintiff is concerned, a perfectly legitimate weapon to oppose the defendant's contention. The only other ground on which the present appeal can be argued is that the decretal amount represents a debt which has been accumulating since 1919, that no lump sum was advanced to the defendant and that the resulting debt is largely composed of interest. These pleas, which amount to little more than an appeal *ad misericordiam*, do not appear to me to carry any weight in view of the manner in which this suit has been resisted, and the conduct of the defendant in disposing of his property, whether that disposal was fraudulent and fictitious or otherwise, immediately he became aware that the suit was about to be instituted. The interest allowed from the date of the decree to realization is at annas 15 per cent. per mensem and is by no means excessive. I can, therefore, see no valid ground on which this appeal can succeed, and it is, therefore, rejected.

W. C. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2230 OF 1920.

July 5, 1922.

Present.—Mr. Justice C. C. Ghose and Mr. Justice B. B. Ghose.

SARAT CHANDRA MAJUMDAR AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

PRASANNO KUMAR GOPE—PLAINTIFF AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Abandonment—Question of fact—Bengal Tenancy Act (VIII of 1885), s. 87.

The question whether there has been an abandonment or not is in each case a question of fact. [p 305, col. 1.]

Monohar Pal v. *Ananta Moyee Dasya*, 20 Ind. Cas. 198; 17 C. W. N 802, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Faridpur, dated the 12th May 1920, affirming that of the Munsif, Third Court, at Madaripur, dated the 24th November 1919.

Babu *Trailokya Nath Ghose*, for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for declaration that an entry in the Record of Rights is wrong. Upon the findings it is a clear case that the land is in possession of a mortgagor. Therefore, we are entitled to *khas* possession inasmuch as the creation of the usufructuary mortgage amounts to abandonment by plaintiff. Refers to *Krishna Chandra Datta Chowdhury* v. *Khiran* (1), *Rasik Lall Dutt* v. *Bidhu Mukhi Dasi* (2), *Nurendro Narain Roy* v. *Ishan Chunder Sen* (3). Both the Courts are wrong in holding that this point cannot be entertained, see *Kali Charan Ghosh* v. *Arman Bibi* (4).

Babu *Kali Kinkar Chakrabarty*, for the Respondents, was not called upon to reply.

JUDGMENT.—The substantial point which has been argued in this appeal by Babu Trailokya Nath Ghose on behalf of the appellants is that the lower Appellate Court has not sufficiently considered the question of abandonment by the plaintiff

(1) 10 C. W. N. 499; 3 C. L. J. 222.
(2) 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094.
(3) 22 W. R. 22; 13 B. L. R. 274 (F. B.).
(4) 4 Ind. Cas. 473 13 C. W. N. 220; 5 M. L. T. 276.

under section 87 of the Bengal Tenancy Act. The passage in the judgment of the lower Appellate Court to which exception has been taken runs as follows: "It has been proved that defendants Nos. 4 and 5 possess under the plaintiff and they have not abandoned, they hold other lands of plaintiff under Jnan Majumdar and they never surrendered the lands. No case of abandonment by plaintiff can be entertained." The facts are as follows: Defendants Nos. 4 and 5 are *bargadars* under the plaintiff. The plaintiff executed a mortgage of the holding in favour of one Jnanendra. Defendants Nos. 4 and 5 now hold under the plaintiff's mortgagee Jnanendra. Now, these being the facts, the lower Appellate Court held that, so far as defendants Nos. 4 and 5 are concerned, it was quite clear that they had not abandoned and the last sentence in the judgment of the Lower Appellate Court to which we have referred meant that, so far as the plaintiff was concerned, there had been no abandonment of the holding by the plaintiff. Whether there has been an abandonment or not is in each case a question of fact. See in this connection the decision in the case of *Monohar Pal* v. *Anunta Moyee Dasya* (5). In that view of the matter it would appear that no real complaint can be made against the judgment of the lower Appellate Court. But the matter does not rest there. The question of abandonment was not specifically raised in the written statement. So far as one can gather from the judgment of the Court of first instance, no specific issue regarding this question was framed and, in the circumstance, it is difficult to say that the judgment of the lower Appellate Court is wrong on the question to which our attention has been drawn.

In that view of the matter, the appeal fails and must be dismissed with costs.

W. C. A.

Appeal dismissed.

(5) 20 Ind. Cas. 198; 17 C. W. N. 802.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 84 OF 1922.

September 15, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

PONDURI ADEYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

JALADI BURRAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 107—Presumption of death—Hindus—Rule of Hindu Law, whether applicable.

The rule of Hindu Law, of allowing 12 years to elapse before a person who is absent is to be taken as dead is no longer applicable to Hindus after the passing of the Evidence Act. [p. 306, col. 2]

Dharup Nath v. *Gobind Saran*, 8 A. 614; A. W. N. (1886) 239; 5 Ind. Dec. (N. S.) 171, *Parameshar Rai* v *Bisheswar Singh*, 1 A. 53 (F. B.); 1 Ind. Dec. (N. S.) 65, *Dhondo Bhikaji* v. *Ganesh Bhikaji*, 11 B. 433; 6 Ind. Dec. (N. S.) 284, *Mazhar Ali* v. *Budh Singh*, 7 A. 297 (F B.), A. W .N. (1884) 333; 4 Ind. Dec. (N. S.) 422, referred to.

Junmajoy Mojoomdar v. *Keshub Laul Ghose*, 2 B. L R. A. C. J. 134; 10 W R. 484; 1 Ind. Dec. (N. S.) 737 and *Goroo Dass Nag* v. *Motee Lall Nag*, 6 B. L. R. App. 16; 14 W. R. 468, not followed.

Appeal against an order of the District Court, Guntur, in Appeal Suit No. 181 of 1921, preferred against a decree of the Court of the Second Additional District Munsif, Guntur, in Original Suit No. 157 of 1920.

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

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—This is an appeal against an order of remand passed by the District Judge of Guntur in a suit brought by the plaintiffs to recover the properties of one Thirupathayya, deceased, as the persons entitled to them as his heirs or nearest reversioners. The plaintiffs' case is, that their father, Kotayya, and the deceased Thirupathayya's father, Virayya were divided brothers, that Virayya died long ago, that Thirupathayya died nine months before suit, and that their father, Kottayya, had not been heard of for nearly ten years before the date of suit. They, therefore, claimed that it should be presumed that Kottayya was dead and that they were thus the nearest reversioners to Thirupathayya.

Defendants denied the allegation that Kottayya was not heard of for some years and on that an issue was framed: "Whether plaintiff's father Kotayya was not heard of for ten years as alleged in the plaint?" The District Munsif tried this issue and held

that, even if Kottayya had not been heard of for ten years, there was no presumption as to the exact date of his death and that, as plaintiffs were claiming as the heirs of Thirupathayya, they were bound to show that Kottayya died before Thirupattayya and, in that view of the issue, he dismissed the suit.

The District Judge has now held in appeal on the question of fact that Kottayya was not heard of for over ten years and that plaintiffs are, therefore, the nearest reversioners to the deceased Thirupathayya, and has remanded the case for disposal on the remaining issues raised. It is difficult to see exactly what importance there is in the fact that Kottayya died before Thirupathayya. It makes no difference in the rights of the plaintiffs in this case. So far as appears from the allegations in the plaint and in the written statement, whether Kottayya should be taken as dead before or after, plaintiffs will be the persons entitled to succeed. It is not alleged anywhere that there are other heirs who would come in in any event. If we apply the presumption that arises under section 107 of the Evidence Act, that, no doubt, does not enable us to say exactly when Kottayya should be taken to have died. See *Veeramma* v. *Chinna Reddi* (1), *Muhammad Sharif* v. *Bande Ali* (2) and *Narki* v. *Phekia* (3). But it certainly enables us to say that before the date of the suit he must be treated as dead. That being so, plaintiffs would come in as heirs of Thirupathayya or of their own father and be entitled to sue.

One argument requires to be noticed in this connection. It was urged that the rule under section 107 of the Evidence Act does not apply to this case, as it is a case regarding inheritance of properties of a deceased Hindu and, therefore, the rule of the Hindu Law governing the question as to what length of time should elapse before a man unheard of should be treated as dead should be applied, that rule is that at least twelve years should elapse. Some authorities have been cited to us by Mr. Ramadoss in support of his contention that we should apply the 12 years' rule and not the seven years' rule under section 107 of the Evidence Act. *Junmajoy Majoomdar* v. *Koshub Laul Ghose* (4), *Goroo Dass Nag* v. *Motee Lall Nag* (5). These cases, it will be noticed, were before the Evidence Act I of 1872 was passed, as pointed out in the case brought to our notice on the opposite side, *Dharup Nath* v. *Gobind Saran* (6). They cannot, therefore, be taken as of any authority after the passing of the Evidence Act. The case of *Parameshar Rai* v. *Bisheswar Singh* (7) was also cited to us, but there the decision was not that the 12 years' rule should be applied but the seven years' rule in the particular circumstances of the case. The observation by the learned Judges, especially of Spankie, J., was in favour of the contention that the seven years' rule applies. We are dealing here not with any question of inheritance or succession under the Hindu Law but only with a question of a rule of evidence and the Hindu Law will not apply. That view has been accepted and expressly followed by Sir Charles Sargeant, C.J., and Nanabhai Haridas, J., in *Dhondo Bhikaji* v. *Ganesh Bhikaji* (8). Again, in *Mazhar Ali* v. *Budh Singh* (9), the question had to be considered with reference to Muhammadan Law, and it was held by that Court that the rule of Muhammadan jurisprudence of allowing ninety years to pass before a person who is absent is to be taken as dead was only a rule of evidence and was no longer applicable after the passing of the Evidence Act.

In these circumstances, we hold that the twelve years' rule cannot now be applied at all, but we should apply the rule under the Evidence Act, and, accepting the District Judge's finding that Kottayya was not heard of for the last ten years, he must be presumed to have died on the date of suit. Plaintiffs, therefore, are entitled to maintain the suit and the order of the District Judge is correct.

We dismiss this appeal against order and direct the appellants to pay the costs of the respondents.

V.N.V. *Appeal dismissed.*

(1) 16 Ind. Cas. 43; 37 M. 440; 23 M. L. J. 443.
(2) 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052.
(3) 5 Ind. Cas. 709; 37 C. 103; 14 C. W. N. 341; 11 C. L. J. 138.
(4) 2 B. L. R. A. C. J. 134; 10 W. R. 484; 1 Ind. Dec. (N. S.) 737.
(5) 6 B. L. R. App. 16; 14 W. R. 468.
(6) 8 A. 614; A. W. N. (1886) 239; 5 Ind. Dec. (N. S.) 171.
(7) 1 A. 53 (F. B.); 1 Ind. Dec. (N. S.) 65.
(8) 11 B. 433; 6 Ind. Dec. (N. S.) 284.
(9) 7 A. 297 (F. B); A. W. N. (1884) 333; 4 Ind. Dec. (N. S.) 422.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1328 TO 1330 OF 1920.

June 13, 1922.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Pearson.

ROY JATINDRA NATH CHOUDHURY AND ANOTHER—PLAINTIFFS NOS. 1 AND 2, —APPELLANTS

versus

AZIZARRAHAMAN SHANA—DEFENDANT AND OTHERS—REMAINING PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 11—Res judicata Bengal Tenancy Act (VIII of 1885), s. 106 Relation of landlord and tenant—Decision of Revenue Officer, if operates as res judicata.

The decision of a Revenue Officer under section 106 of the Bengal Tenancy Act on the question whether the relation of landlord and tenant existed between the parties, operates as *res judicata* under section 11 of the Code of Civil Procedure. [p. 308, col 1.]

Dharani Kanta Lahiri v. *Gaber Ali Khan*, 30 C. 337 at p. 364; 7 C. W. N. 33, distinguished.

Kamlanand Singh v. *Prem Lal Ganesh*, 9 Ind. Cas. 651, followed.

Aswini Kumar Aich v. *Sarada Charan Basu*, 37 Ind Cas. 253; 24 C. L. J. 79 at p. 82, referred to.

Appeals against the decrees of the Additional Subordinate Judge, Khulna, dated the 31st January 1920, modifying that of the Munsif, Second Court, at Satkhira, dated the 23rd December 1918.

Babu *Lalit Mohun Banerjee* (with him Babus *Apurba Charan Mookerjee*, *Monmohun Roy Choudhury* and *Durga Ch. Roy Choudhury*, for Babu *Aswini K. Gupta*), for the Appellants.—Theplaintiffs are the appellants. The appeal arises out of suits for ejectment. First Court decreed. On appeal it has been reversed. The question is whether the decision of a Revenue Court would operate as *res judicata*. The parties were not exactly the same nor were the holdings. I submit the decision of a Revenue Court cannot operate as *res judicata*. Refers to *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (1). The decision in *Kamlanand Singh* v. *Prem Lal Ganesh* (2) is a mere *obiter dictum*.

The decision under section 106, Bengal Tenancy Act, was to the effect that the relationship of landlord and tenant exists. I want to eject him as he is a purchaser of a non-transferable holding. I submit that decision does not operate as a bar under section 109, Bengal Tenancy Act, against me. He may be a tenant. But that does not deprive me of my right to evict him. See *Aswini Kumar Aich* v. *Sarada Charan Basu* (3). The two suits are entirely of different natures. Then as to the transferability of the holding the evidence is very meagre. Even if the documents be assumed to be good evidence, they would merely affect the original tenant and not the transferee.

No one appeared for the Respondent.

JUDGMENT.—These appeals arise out of three suits to eject the defendant from the holdings in suit, the plaintiff's case being that the tenant who held the lands under them had no transferable interest in the same and abandoned the holdings after selling them to the defendant, and that the latter, therefore, had acquired no right under his purchase but was merely a trespasser on the land.

The defence was, that the defendant was a tenant and could not be ejected as a trespasser. Among other things, the defendant relied upon a decision in a proceeding under section 106 of the Bengal Tenancy Act in his favour.

It appears that the defendant was entered in the Record of Rights as tenant of the lands and this was after the purchase of the holding by the defendant. The plaintiff thereupon brought a suit under section 106 of the Bengal Tenancy Act for the correction of the entry, on the ground that the defendant was not a tenant. The Revenue Officer, under section 106, decided that the defendant was a tenant and that the entry in the Record of Rights was correct.

Now, the present suit is based upon the ground that the defendant is not a tenant but a trespasser and is, therefore, liable to be ejected. As stated above, the question whether he was a tenant or not was directly raised and decided in the proceedings under section 106. The Court below in the present case has held that the decision operated as *res judicata*.

The plaintiff has appealed to this Court, and has relied upon the case of *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (1) where, at page 364,* it is stated that, although the deci-

(1) 30 C. 339 at p. 364; 7 C. W. N. 33.
(2) 9 Ind. Cas. 651.
(3) 37 Ind. Cas. 253; 24 C. L. J. 79 at p. 82.
*Page of 30 C.—(*Ed.*).

sion of the Revenue Officer under section 105 (it was a case under section 105) has the effect of a decree of a Civil Court under section 107 of the Bengal Tenancy Act, it does not operate as *res judicata* under section 13, Civil Procedure Code. It is to be observed that that was a decision under the Tenancy Act as it stood before the amendment of 1898.

Section 107 of the Bengal Tenancy Act provides that in all proceedings under sections 105, 105A and 106, the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and his decision in every such proceeding shall have the force and decree of a Civil Court in a suit between the parties, and subject to the provisions of sections 108 and 109A, shall be final.

Now, these words " subject to the provisions of sections 108 and 109A shall be final" were added by Act III B.C. of 1898. They were not in the section when the case of *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (1) was decided. That is the ground upon which that case has been distinguished by the Patna High Court in the case of *Mahendra Narayan Ray* v. *Girish Chandra Kar* (4). There it was pointed out that the words " shall be final" were imported into section 107 with a view to give finality to a decision arrived at by a Revenue Court or by the Special Judge on appeal.

Then, section 109 of the Bengal Tenancy Act lays down that, subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, sent, instituted or proceedings taken under sections 105 to 108 (both inclusive).

There can be no doubt that the question whether there was a relation of landlord and tenant between the parties was a question which was within the jurisdiction of the Court of the Revenue Officer to decide under section 106 of the Bengal Tenancy Act. In fact, the section clearly lays down that a dispute as to whether the relation of landlord and tenant exists may be decided by the Revenue Officer.

We may refer to the case of *Kamlanand Singh* v. *Prem Lal Ganesh* (2) (Second Appeal No. 539 of 1909 decided by Woodroffe and Carnduff, JJ., on the 20th February 1911) in which it was laid down that when proceedings have been taken before a Settlement Officer in respect of any matter under section 109 of the Bengal Tenancy Act, a Civil Court is precluded from entertaining a suit concerning such matter.

Reference may also be made to the case of *Sheodhani Pandey* v. *Beni Pershad Keori* (5).

Apart from this, the Court below finds upon the evidence that the *jama* was transferable.

The appeals accordingly fail and are dismissed without costs as the respondent does not appear.

B. N.

Appeals dismissed.

(4) 46 Ind. Cas. 125; 3 P. L. J. 379.

(5) 16 Ind. Cas. 935; 16 C. L. J. 67.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1172 OF 1921.

December 20, 1922.

Present:—Mr. Justice Gokul Prasad.

B. TULSI PRASAD SAHAI—PLAINTIFF—APPELLANT

versus

RAMRAJ AHIR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 177, cl. (e), 198—Title of landlord repudiated—Third person's title pleaded—Third person not made party to suit—Question of title raised and decided—Appeal.

If in an ejectment suit, under section 58 of the Agra Tenancy Act, the defendant repudiates the title of the landlord and pleads the title of a third person, a question of proprietary title is raised and the fact that the person whose title is pleaded as *jus tertii* is not impleaded in the suit,

makes no difference. When in such a case the question of proprietary title is not only raised but decided by a Revenue Court, an appeal lies to the District Judge. The remedy under section 198 of the Tenancy Act is an additional remedy and it does not prevent an appeal lying to the District Judge under section 177, clause (*c*) of the Act.

Second appeal from a decree of the Additional Judge, Gorakhpur, dated the 28th of April 1921.

Mr. *Lakshmi Narain Tewari*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for ejectment under section 58 of the Tenancy Act brought in the Revenue Court. The defence pleaded was that the relationship of landlord and tenant did not subsist between the parties, that the land in dispute belonged to another village and that the defendant had been paying rent to the landlord of that village. The First Court came to the conclusion that the land in dispute appertained to the village of the plaintiff and decreed the claim. On appeal the lower Appellate Court has come to an opposite conclusion, has allowed the appeal and dismissed the plaintiff's claim. The plaintiff comes here in second appeal and his contention is that no appeal lay to the District Judge but that the appeal, if any, lay to the Commissioner under Serial No. 29 of the Fourth Schedule to the Tenancy Act. The learned Vakil for the appellant has drawn my attention to section 198 of the Tenancy Act which deals with cases where the defendant raises a question of title and says that no appeal lies in a case covered by section 198, as the only remedy provided by that section is a suit for declaration of title in the Civil Court. On the other hand, Mr. Harnandan Prasad, the learned Vakil for the respondent, has invited my attention to the case of *Parbhu Narain Singh* v. *Baldeo Prasad* (1). That case is similar to the present case except that in that case the rival Zemindar whose title was set up by the defendant was also made a party. The question, however, arises whether the mere fact that the person whose title was pleaded as *jus tertii* has been impleaded in the suit makes any difference. There is no doubt that when the defendant pleads the title of a third person and repudiates the title of the plaintiff, the alleged landlord, a question of proprietary title is raised, and it cannot be said that no question of proprietary title has been raised, or decided. In this case the question of proprietary title was not only raised but was decided by the First Court, and, therefore, in order to reconcile the provisions of sections 198 and 177 of the Tenancy Act, I come to the conclusion, although not without hesitation, that in the present case an appeal did lie to the District Judge. The remedy under section 198 of the Tenancy Act is an additional remedy but it does not prevent an appeal lying to the District Judge under section 177, clause (*c*). I might also note that another ground has been taken that the Court below has not followed the procedure expressly laid down by section 198. I do not think there has been such an irregularity in procedure as would warrant me in setting aside the decree of the lower Appellate Court. I, therefore, dismiss this appeal with costs.

S D. *Appeal dismissed.*

(1) 8 Ind. Cas. 817; 8 A. L. J. 36; 33 A. 260.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1725 OF 1920.

June 19, 1922.

Present:—Mr. Justice B. B. Ghose.

HARIDAS GHOSE MRIDHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOURI CHARAN GHOSE MRIDHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—Right of way over waste land—Absence of regular and defined pathway—Acquisition of right by prescription.

HARIDAS GHOSE *v.* GOURI CHARAN GHOSE.

The fact that there is no regular and defined pathway over a piece of waste land, would not prevent the acquisition of a right of way over that land by prescription. [p. 311, col. 2.]

Lakhi Kanta Roy v. *Raj Chandra Saha* 46, Ind. Cas. 374; 22 C. W. N. 922, *Wimbledon and Putney Commons Conservators* v *Dixon*; (1876) 1 Ch. D. 362; 33 L. T. 670; 45 L. J Ch. 353; 24 W. R. 466, *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty*, 4W. R. 49 and *Radhanath Sugracharji* v *Baidonath Seal Kabiraj*; 3 B. L. R. App. 118, referred to.

If the plaintiff in a suit to establish such a right states the two *terminii* of the pathway, his right ought not to fail simply on the ground that the pathway passes over a piece of waste land in different tracks. [p. 311, col 2.]

Appeal against the decree of the Subordinate Judge, Second Court, Hooghly, dated the 31st March 1920, reversing that of the Munsif, Third Court, at Serampore, dated the 19th of May 1919.

Babu *Sib Chandra Palit* (with him Babu *Nani Lal Dey*), for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for establishment of a right of easement to pass over the lands of the defendants as well as to pass water over it. First Court decreed the suit. On appeal the suit was dismissed. I submit when the two *terminii* are known I am entitled to a decree. The Judge has wrongly held that I have got to prove the length of the passage. Refers to *Lakhi Kanta Roy* v. *Raj Chandra Saha* (1). I submit the case should go back for findings upon the points raised.

Babu *Hari Charan Ganguly*, for the Respondents.—The case is concluded by findings of fact. The case of *Wimbledon and Putney Commons Conservators* v. *Dixon* (2) does not apply. The finding is that there has been a track in recent times and that there was another pathway which is still being used. He has found that plaintiff's user did not amount to acquisition of prescriptive right. He says there is no defined way. Here the two *terminii* have not been proved. Refers to *Goluck Chunder Chowdury* v. *Tarinee Churn Chuckerbutty* (3), *Radhanath Sugracharji* v. *Baidonath Seal Kabiraj* (4). Plaintiff must prove the particular line on which the right is exercised. Refers to Gale on Easements (9th Edition) 340, *Leslie's Settlement Trusts, In re* (5). In the plaint also they do not set out the *terminii*.

Babu *Sib Chandra Palit* replied in brief.

JUDGMENT.—This appeal arises out of a suit for establishment of a right of easement to pass over the land of the defendants as well as the right to pass water over it. The Court of first instance made a decree in favour of the plaintiffs. On appeal by the defendants, the judgment has been reversed by the Subordinate Judge. The plaintiffs appeal to this Court and their appeal is only with regard to the right of way, as it is admitted that the finding of the learned Subordinate Judge as regards the right of passage of water is conclusive as a question of fact.

The main contention of the plaintiffs is that the Subordinate Judge has fallen into an error in deciding the case, as he was of opinion that, if there was not a regular or defined pathway over the waste land of the defendants which is said to be the servient tenement, no right of easement can be acquired by the dominant owner. It is contended, on the other hand, by the respondents that this appeal is concluded by the findings of fact of the Subordinate Judge which amount to this, that the plaintiffs have not been able to prove the user necessary for the purpose of acquiring a right by prescription. The Subordinate Judge begins his judgment by stating the points urged before him and they are, first, that the existence of the pathway has not been proved and the evidence does not show any definite route, and that the decree cannot be sustained; second, that the suit is time-barred, and, third, that the right to discharge water has not been proved.

With regard to the third point it is not necessary to state anything further because no question arises with regard to it in this appeal. The Subordinate Judge has not come to any decision with regard to the second point, because he thought that his decision on the first point was quite enough to dispose of the suit. The first point that was urged before him was, as

(1) 46 Ind. Cas. 374; 22 C. W. N. 922.
(2) (1876) 1 Ch. D. 362; 33 L. T 679; 45 L. J. Ch. 353; 24 W. R. 466.
(3) 4 W. R. 49.
(4) 3 B. L. R. App. 118.
(5) (1876) 2 Ch. D. 185; 45 L. J. Ch 668; 34 L. T. 239; 24 W. R. 546.

I understand it, directed against the existence of the pathway, and the fact that no definite route has been shown by the evidence was said to be quite enough for the dismissal of the suit. Then, the finding of the Subordinate Judge on the question is stated thus: "The whole evidence carefully analysed would at once show that there was no regular definite pathway but that there was a piece of waste land over which the people used to pass in recent times and that the passage to the north of Dayaram's house was used before and can be and is being used now. I am of opinion that the evidence does not satisfactorily establish that any defined pathway, as claimed, ever existed and that the plaintiff ever used that so as to acquire any right of easement." Then, lower down, the learned Judge sums up by saying:— "The whole evidence leaves no doubt that there was no regular and defined pathway as has been claimed and that the passage for water has not been satisfactorily established." As I understand his judgment, the learned Subordinate Judge seems to be of opinion that, if there is no regular and defined pathway over a piece of waste land no right of easement of way can be acquired by prescription, and his finding does not amount to what has been contended for on behalf of the respondents, that the plaintiffs have not acquired the right of way by such user and for such period as is required under the law. Stress is also laid on behalf of the respondents on the expression that the people used the path in recent times over this servient tenement as showing that the plaintiffs could not have acquired an easement by long user. But the learned Subordinate Judge does not find that the user is only within the period of 20 years. Then, with regard to the other passage quoted above, it can hardly be said that it amounts to a finding of fact that there has not been such user as would give rise to a right by prescription, because the learned Judge begins by saying that any definite pathway as claimed has not been established. Therefore, there is no doubt in my mind that the learned Judge addresses himself only to the question as to whether the right of easement can be claimed when there is no regular and defined pathway; and, having held that in such a case no right of easement can be acquired, he does not proceed to deal with all the other questions necessary to be found in order to deal with the right of easement claimed by the plaintiffs and this appears all the more so, because it is a judgment of reversal. It is, therefore, necessary to see whether the proposition of the learned Subordinate Judge that there being no regular defined pathway a right of way cannot be acquired as an easement is correct. It is not necessary for me to discuss this question at any considerable length having regard to the fact that it has been held that in such a case an easement of way can be acquired, *Lakhi Kanta Roy* v. *Raj Chandra Saha* (1), following the observations of Lord Justice Mellish in *Wimbledon and Putney Commons Conservators* v. *Dixon* (2). The learned Vakil for the respondents relies upon two cases, *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* (3) and *Radhanath Sugracharji* v. *Baidonath Seal Kabiraj* (4). I do not think those cases laid down any different principle of law from that enunciated by Lord Justice Mellish which was followed in the case of *Lakhi Kanta Roy* v. *Raj Chandra Saha* (1).

It is next contended on behalf of the respondents that the plaintiffs have not stated the two *terminii* of the alleged pathway in order to bring their case within the rule laid down in *Lakhi Kanta Roy* v. *Raj Chandra Saha* (1). On the other hand, the plaintiffs urged that they have done so. That question has not been gone into by the Subordinate Judge. If the plaintiffs had stated the two *terminii* of the pathway they claimed their suit ought not to fail simply on the ground that the pathway passed over a piece of waste land in different tracks, and if they succeed in establishing their right otherwise, then they are entitled to a right of way in the manner laid down in the case cited above.

The decree, therefore, of the Subordinate Judge is set aside and the appeal is sent back to him for re-hearing on all the points involved in the case and to decide it according to law.

The costs will abide the result.

B. N.

Decree set aside.

MUAZAM SHER *v.* FAZAL RAHMAN.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 134 OF 1921.

July 28, 1922.

Present.—Mr. Pipon, J. C.

MUAZAM SHER—PETITIONER

versus

Sheikh FAZAL RAHMAN AND OTHERS—RESPONDENTS.

Pre-emption—Sheikhs *notified as agriculturists, who are—Conversion of* Sikh *to Islam Assumption of title of* Sheikh—*Convert, whether member of agricultural tribe Interpretation of Statutes—Distinct meanings—Duty of Court.*

The Local Government of the N.-W. F. Province in notifying the Sheikhs as members of an agricultural tribe, intended, by the term "Sheikhs," to designate certain tribes who had been settled in those districts under conditions similar to those of other tribes and who owned land and followed the profession of agriculture; it did not intend to include non-agriculturists who became "Sheikhs" by conversion. A Sikh, therefore, who, on his conversion to Islam, is given the honorific title of "Sheikh" does not thereby come within the notification and place himself in the category of Sheikhs notified as an agricultural tribe, so as to entitle him to claim pre-emption in respect of agricultural land [p. 313, cols. 1 & 2.]

In the N.-W. F. Province Sikhs are not members of an agricultural tribe. [p. 312, col. 2.]

When in a Statute, or in an official notification having the force of law, a term is used which is capable of two absolutely distinct meanings, it is for the Courts to determine which is correct. [p. 313, col. 2.]

Revision of an order of the Divisional Judge, Derajat Division, Dera Ismail Khan, dated the 28th April 1921, reversing an order of the Tahsildar, Munsif, Third Class, Kohat, dated the 18th January 1921.

Messers. *Vaughan* and *Jai Deva*, for the Petitioner.

Mr. *Saad-ud-din Khan*, K. S., for the Respondents.

JUDGMENT.—This order will dispose of three revisions, Nos. 133, 134 and 146, in all of which the question to be decided is the same. Sheikh Fazal Rahman, a resident of the Kohat District, lodged a pre-emption suit for certain agricultural land situated in the Kohat District. The suit was resisted *inter alia* on the ground that the plaintiff was not a member of an agricultural tribe, and that, therefore, he was debarred by section 11 of Act II of 1905 from exercising pre-emptive rights. The Trial Court held that the plaintiff was not so debarred, inasmuch as he was a Sheikh, and that Sheikhs had been notified as an agricultural tribe in the Kohat District under the Local Government Notification No. 5345, dated the 21st November 1908. The suit, however, was dismissed upon another ground. On appeal the Divisional Court decreed the claim, but did not specially consider the question as to whether the plaintiff was debarred from suing as a non-member of an agricultural tribe. I have entertained these applications for revision, as the ruling published as *Muhammad Khan* v. *Sardar* (1) is an authority for holding that the exclusion of a person who is not a member of an agricultural tribe is an absolute one, and does not depend upon pleadings. A Court is bound to consider the question *suo moto*.

The plaintiff, in these cases, was born of a Sikh father, and was himself a Sikh up to the time of his conversion to Islam. It was on his conversion that he received the usual title of Sheikh which is universally applied in India to all converts to Islam. It may be mentioned that, unless he establishes his status as a member of an agricultural tribe, he admittedly cannot exercise pre-emption, as he has not fulfilled the proviso to section 11, and is admittedly not of the same tribe as the vendor. Sikhs are not members of an agricultural tribe in any part of the Frontier Province. The only question, therefore, which I have to consider is, whether conversion to Islam and the consequent assumption of the title of Sheikh *ipso facto* places the convert in the category of Sheikhs notified as an agricultural tribe.

The term "member of an agricultural tribe" has, under section 3 of Act II of 1905, the meaning assigned to it by the Punjab Alienation of Land Act of 1900. Under section 4 of the latter Act it is for the Local Government to determine by notification what bodies of persons are to be deemed agricultural tribes. This definition of a member of an agricultural tribe led originally to some difficulty in the Peshawar and Kohat Districts of the N.-W. F. Province. The Punjab Alienation of Land Act, when adopted in this Province, was extended only, in the first instance, to the Hazara, Bannu and Dera Ismail Khan Districts. The residents of the Peshawar

(1) 5 Ind. Cas. 249; 7 P. R. 1910; 14 P. W. R. 1910; 49 P. L. R. 1910.

and Kohat Districts, however, after the passing of Act II of 1905, continued, as before, to exercise their ordinary rights of pre-emption in respect of agricultural land.. Eventually, a test case came before the Judicial Commissioner of this Province in which it was held that, inasmuch as no notification of agricultural tribes had been published by the Local Government under the Punjab Alienation of Land Act in respect of the Peshawar and Kohat Districts, every resident of these two Districts must be regarded as "a person other than a member of an agricultural tribe" within the meaning of section 11 of Act II of 1905. This ruling had the practical effect of depriving the great body of agriculturists in the Peshawar and Kohat Districts of all their rights of pre-emption. The Local Government was obliged, therefore, to correct this obvious anomaly, and proceeded to notify certain tribes in these two districts as agricultural tribes. But it, at the same time, excluded these two districts from the operation of all other sections of the Alienation Act except sections 4, 10 and 16. This restored ordinary pre-emption rights to the genuinely agricultural tribes in the Peshawar and Kohat Districts and section 11 of Act II of 1905 became confined to its normal operation. Among the tribes notified as agricultural in the Kohat District are "Sheikhs including Koreshis."

It is not seriously denied by the learned Counsel for the respondent that the Local Government intended by the term "Sheikh" to designate certain tribes in the Kohat and Peshawar Districts who had been settled in the district under conditions similar to those of other tribes, and who owned land and followed the profession of agriculture, and that it did not intend to include non-agriculturists who became "Sheikhs" merely by the fact of conversion. Indeed, this position is so obvious that it would hardly seem to require discussion. It is almost impossible to conceive that any Government would adopt an attitude which implied the encouragement of conversion to a particular religion, and that it desired to utilize the provisions of the Land Alienation Act for this purpose. The obvious corollary of including Sheikhs by conversion in the tribe of Sheikhs notified as agricultural would be that any persons of any nationality or religion (except, it may be mentioned, Muhammadans) could become members of an agricultural tribe in the N.-W. F. Province by the mere fact of conversion, though complete strangers to the Province and even to India, and though they might have no possible connection with land or with agriculture. The idea is almost fantastic.

The learned Counsel for the respondents, however, argues that it is not for a Civil Court to go beyond the exact terms of the notification of a Local Government which has unrestricted authority under section 4 of the Land Alienation Act to determine what bodies of persons are agricultural tribes. It is contended that the term "Sheikhs" is actually used, and that, however anomalous the result may be, converts are Sheikhs by universal acknowledgment in India, and that they, therefore, come under the terms of the notification as it stands. It is suggested that the present case is parallel to that which I have alluded to above in which the Judicial Commissioner of this Province exposed the anomalous results of the action of the Local Government with regard to the definition of agricultural tribes, and thereby ensured that the notification published should be amended. I cannot accept this argument. It is obvious that the word "Sheikh" has two meanings which have no connection of any kind *inter se*. There are a number of tribes domiciled in the N.-W. F. Province who are known as "Sheikhs," but whose origin is not directly connected in any way with recent conversion to Islam. The Koreshi, Saddiqi and Ansari Sheikhs are instances of this. The word "Sheikh" in itself has no direct connection with conversion. It is an Arabic word with an honorific meaning, and it is used in Arabic in the ordinary salutation exchanged between friends on meeting. When in a Statute or in an official notification, having the force of law, a term is used which is capable of two absolutely distinct meanings, it is for the Courts to determine which is correct. In the present case there is really not even an ambiguity. The notification is one which refers to *tribes*, not to individuals, and there is good authority for the view that a person who claims to benefit by reason of his tribe must show not only that he bears the name

of that tribe, but that he actually belongs to it. The designation of certain bodies of persons as members of an agricultural tribe is unequivocally based upon an ethnological and communal distinction, and upon no other. There is not the least doubt that even a Sheikh who bore the title not by reason of conversion, but by reason of his membership of some tribe of Sheikhs domiciled in another part of India, could not claim to be a member of the agricultural tribe of Sheikhs, as notified in the Peshawar and Kohat Districts. When a person claiming the privileges of an agricultural tribe of the Kohat District is not even a member of any tribe of Sheikhs, but has merely received the appellation of "Sheikh" by reason of conversion, it is inconceivable that he can thereby assume membership of the notified agricultural tribe. His title of Sheikh, however universally conceded by the public, is nothing more than an honorific appellation. It can no more alter the legal status of the recipient than any other appellation which is conferred upon him for some reason by popular opinion. I, therefore, hold that the plaintiff in these suits was not a member of an agricultural tribe, and cannot, therefore, without fulfilling the conditions laid down in the proviso to section 11 of Act II of 1905, sue for pre-emption in respect of agricultural land. I, therefore, accept these applications for revision, and, setting aside the order of the Divisional Court, dismiss the suits. The plaintiff will pay the defendant's costs throughout.

Suits dismissed.

W. C. A.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 305 OF 1919.

June 2, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

KHAGENDRA NATH MUKHERJEE—DEFENDANT NO. 1—APPELLANT

versus

KHETRA NATH PAL, ALSO KNOWN AS KHETRA MOHAN PAL, AND OTHERS—RESPONDENTS.

Proba'e and Administration Act (*V of* 1881), *ss.* 112, 116—*Succession Act* (*X of* 1865), *ss.* 292, 296 *Legacy - Vested interest—Legacy, transfer of — Assent of executor*

Where a Will creates a vested interest in a legatee in the subject-matter of a legacy, he has a transmissible interest, subject to the reservation that the legacy, whether in his hands or in the hands of his transferee, may be imperilled to the extent necessary for the due administration of the estate by the executor. [p. 317, col. 2]

As a protection to the executor, the law ordains that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered; and in the case of the outlawry of the legatee it is subject to the forfeiture [p. 317 col 1]

Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the Will, and hence if the legacy is void, the assent avails nothing. The position cannot consequently be maintained that, till the executor has signified his assent, express or implied, the legatee has no interest whatever in the subject-matter of the legacy. Before such assent by the executor the legacy can form the subject-matter of a valid mortgage by the legatee [p. 317, cols 1 & 2.]

(Case law reviewed)

Appeal against the decree of the Subordinate Judge, 3rd Court, 24-Parganas, dated the 16th of September 1919.

Dr *Sarat Chandra Basak* (with him Babu *Surya Kamar Aich* and *Prosanto Bhusan Gupta*), for the Appellant. The defendant No. 1 is the appellant. The appeal arises out of a suit for mortgage. The facts of the case are shortly these: Chandra Kanta Mookerjee of the Mookerjee family of Jarai died leaving a widow Kiranmoyi and two sons Parbati and Harendra. Parbati had two sons. Harendra died leaving four sons, Makhan, Khagendra, Kumudindu and Mohan Lal. The last three are defendants Nos. 1-3 in the present suit. Makhan died leaving a widow Sarat Kumari and two infant sons, Amarnath and Anathnath, who are defendants Nos. 4 and 4 (*a*). The defendant No. 5 is a trustee to the estate of the defendants and was appointed as such in 1907. Now, Kiranmoyi died leaving a Will by which she bequeathed 6 annas of her properties to the two sons of Parbati in equal shares and 10 annas in equal shares to the four sons of Harendra. The Will was dated the 8th of August 1894. Probate of

the Will was granted to the sole surviving executor Parbati Charan by this Court on 13th April 1896. The grandsons of the testatrix brought a suit for construction of the Will, for accounts and administration of the estate in 1900 against Parbati. A preliminary decree was passed in 1902 but the final decree has not yet been made. Now, the four sons of Harendra executed a mortgage in favour of the plaintiff on 11th April 1908 for Rs. 15,000. The present suit was brought on 15th April 1912 and was decreed *ex parte* on 22nd July 1912. Defendant No. 5, the trustee, then applied to set aside the decree which was rejected on 16th February 1914. The defendant No. 2 applied to set aside the decree, the suit was restored and was decreed on 19th June 1915 against defendant No. 2 and *ex parte* as against others. On 6th July 1918 the defendant No. 1 applied to have that decree set aside and the suit was restored and again decreed on 16th September 1919. The present appeal is against that decree. My submission is twofold. The first point is that the mortgage was void and unenforceable in respect of one of the properties which devolved on the mortgagors as legacy under the Will of Kiranmoyi. At the date of the mortgage the executor had not yet assented to the legacy. I submit the assent of the executor is necessary to complete the legatee's title. Refers to section 112 of the Probate and Administration Act. The interest of the mortgagors would, therefore, be a mere *spes successionis* which cannot be transferred like the interest of a Hindu reversioner. Refers to *Annada Mohan Roy* v. *Gour Mohan Mallik* (1). My next point is, no consideration passed and hence mortgage is not enforceable.

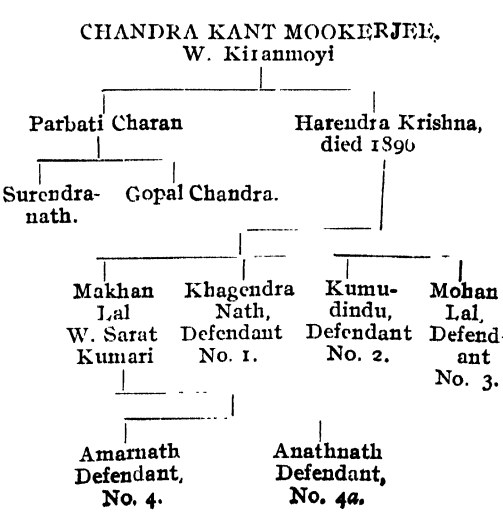
Babu *Mohendra Nath Roy* (with him Babu *Hemendra Nath Sen*), for the Respondents.—As regards the first point, I submit the mortgagors became the absolute owners of the property mortgaged by virtue of the Will of their grandmother. The assent of the executor relates back to the death of the testator. Refers to section 116, Probate and Administration Act. The assent certainly does not and cannot create any new title. It simply perfects the title acquired under the Will. Refers to Williams on Executors, Part III, Book III, Chapter IV, section III; section 106 of the Indian Succession Act. I submit the first contention of the other side must fall through, as it would be against principles and the object of the Legislature to facilitate the performance of duties by executors and administrators would be frustrated.

As regards the second point urged by the other side, I submit the evidence on the record conclusively shows how the payment was made by a cheque which was endorsed in favour of the mortgagor's Solicitor and even the trustee's account-books prove the payment of the amounts and signatures of the mortgagors. On the face of these evidences, I submit, they cannot say that there was no payment.

Dr. *Sarat Chandra Basak*, replied in brief.

JUDGMENT.

Mookerjee, J.—The facts material for the determination of the questions in controversy in this appeal in a mortgage suit lie in a narrow compass and may be briefly recited. On the 11th April 1908 four brothers, Makhanlal, Khagendranath, Kumudindu and Mohanlal, members of the family of Mookerjee's of Janai, in the District of Hoogly, executed a mortgage-bond in favour of the plaintiff to secure a loan of Rs. 15,000 which was to carry interest at 9 per cent. per annum with annual rests, and was made re-payable on the 31st March 1912. The relationship of the members of the family of the mortgagors may be gathered from the following pedigree:—



(1) 65 Ind. Cas. 27; 48 C. 536; 25 C. W. N. 496 33 C. L. J. 457.

On the 15th April 1912 the mortgagee commenced this litigation against five defendants; the first three were the three surviving mortgagors; the fourth group included the two infant sons of the deceased mortgagor, represented by their mother as certificated guardian; the fifth defendant was one Bhattacharjya, who had been appointed by the mortgagors on the 14th June 1907 as trustee of their estate. The defendants resisted the claim on a variety of grounds; two of these only have been pressed in this Court and need be mentioned here, namely, first, that the mortgage was void and unenforceable in respect of one of the properties which had been received by the mortgagors as legacy under the Will of their paternal grandmother, inasmuch as, at the date of the mortgage, the executor had not assented to the legacy; secondly, that the alleged consideration had not been paid by the mortgagee to the mortgagors. The Trial Court found in favour of the plaintiff and the suit was decreed *ex parte* on the 22nd July 1912. The trustee defendant applied to set aside the *ex parte* decree, but the application was rejected on the 19th February 1914. The second defendant then applied to have the decree vacated, and his effort was successful. The suit was restored on the 18th July 1914, and was ultimately decreed on the 19th June 1915 on contest against the second defendant and *ex parte* against the other defendants. On the 6th July 1918, the first defendant applied to have the *ex parte* decree set aside, and the suit was restored on the 31st August 1918. On re-trial, the suit was again decreed on the 16th September 1919. The present appeal is directed against that decree and has been attempted to be supported on the two grounds previously mentioned.

As regards the first point, it is not disputed that Kiranmoyi Debi, the paternal grandmother of the mortgagors, made a testamentary disposition of her properties on the 8th August 1894. The Will was proved in due course in this Court, and on the 13th April 1896 Probate was granted to the sole surviving executor, Parbati Charan Mookerjee. In 1900, a suit was instituted against the executor by the grandsons of the testatrix for construction of the Will, for ascertainment of the rights of the parties thereunder, for account and administration of the estate, and for incidental reliefs. A preliminary decree was made in this administration suit on the 3rd September, 1902; but no final decree, we were informed, had been made at the date of the commencement of the present litigation. The testatrix by her Will directed the executor to divide her estate in the manner following, namely, six annas in equal halves to the two grandsons by her son Parbati Charan, and ten annas in equal shares to her four grandsons by her son Harendra Krishna. After providing for the payment of annuities to various relations, the testatrix proceeded to direct that the grandsons "shall become the absolute owners of the surplus of my estate left after payment of the moneys in the preceding paragraphs." The properties thus received by the grandsons admittedly included Sarasamuri which was given by way of security to the plaintiff on the 11th April 1908. The mortgagors now contend that, at the date of the mortgage, their title as legatees was still inchoate as the executor had not assented thereto.

Section 112 of the Probate and Administration Act, which corresponds to section 292 of the Indian Succession Act, provides that the assent of the executor is necessary to complete a legatee's title to his legacy. Section 110 of the Probate and Administration Act, which corresponds to section 296 of the Indian Succession Act, lays down that the assent of the executor to a legacy gives effect to it from the death of the testator. The reason for this rule is best stated in the words of the fifth note by Serjeant Williams to *Duppa* v. *Mayo* (2); Williams on Saunders, Volume 1, page 427: "if a man devises his chattels, real or personal, or gives any specific legacy, the legatee cannot either enter into the land if it be a chattel real, or take the legacy without the consent of the executor. For, the personal estate being liable in the hands of the executor to the payment of the testator's debts, he must take care to satisfy the debts before he pays the legacies. The law, therefore, requires the assent of the executor to such legacies, otherwise he may be guilty of a *devastavit* and liable *de bonis propriis* without any fault in him. The legatees have no property in the legacies by

(2) (1670) 1 Saunders 275; 85 E. R. 336.

the devise until the assent, though they have an interest in them." The authority mentioned in support of these propositions is the case of *Eeles* v. *Lambert* (3) which was repeatedly argued before the Court of the King's Bench. The essence of the matter is that, as a protection to the executor, the law ordains that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered; and in the case of the outlawry of the legatee it is subject to the forfeiture. This is stated explicitly in the classical work on "Office and Duty of Executors," which bears the name of Thomas Wentworth, but is attributed to Mr. Justice Dodderidge, and was the leading authority on the subject during the seventeenth and eighteenth centuries (14th Edition, page 69). It was also treated as good law by Sir Samuel Toller in his work on the Law of Executors and Administrators, 5th Edition (1822), page 307. The substance of the matter is put tersely in Bacon's Abridgment (1832), Volume III, p. 520 in the following statement, "and as the law makes it a *devastavit* in the executor to pay legacies before debts, so it prohibits the legatee from meddling with the legacy without the assent of the executor; and, therefore, it hath been holden, that if a legatee takes possession of the thing devised without the assent of the executor, then he may have an action of trespass against him. But, as it is the Will of the testator which gives the interest to the legatee so this matter of assent seems only a perfecting act for the security of the executor, and therefore, the law does not require any exact form in which it is to be made." In other words, though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the Will, and hence if the legacy is void, the assent avails nothing; see *Crist* v. *Crist* (4) and the notes thereon; see also Williams on Executors, Part III, Book III Chapter IV, section III: Redfield on Wills, Volume II, page 461. The position cannot consequently be maintained that, till the executor has signified his assent, express or implied, the legatee has no interest whatever in the subject-matter of the legacy, and hence the view was supported by Sir Samuel Toller (Executors, page 311) that the assent of an executor shall have relation to the time of the testator's death and such assent shall by relation confirm an intermediate grant by the legatee of his legacy. The same view was adopted in *Brock* v. *Sims* (5), *Moore* v. *Barry* (6); see also Wentworth on Office of Executor, 69, 445, and the remark of Gibbs, C. J. in *Doe* v. *Sturges* (7). We need not here discuss the question raised in *Rex* v. *Commissioners for Special Purposes of Income Tax* (8) how far the doctrine of relation back of the executor's assent to the testator's death applies to the case of a residuary bequest. This, at any rate, is plain that where, as in the case before us, the Will creates a vested interest in the legatee in the subject-matter of the legacy (*cf.* section 106 of the Succession Act), he has a transmissible interest, subject to the reservation that the legacy, whether in his hands or in the hands of his transferee, may be imperilled to the extent necessary for the due administration of the estate by the executor. A more extended interpretation of section 112 of the Probate and Administration Act, as Beaman, J., pointed out in *Hasanalli Moledina* v. *Popatlal Parbhudas* (9), would be absurd even though it might be defended as strictly logical. When we are invited to interpret section 112, we cannot overlook that it is a provision inserted in a Statute enacted for the grant of Probate of Wills and Letters of Administration to the estate of deceased persons, and that the object of these statutory provisions is to facilitate the performance of their duties by executors and administrators. In such circumstances, it would be an unreasonable construction of the Statute

(3) (1646) Style 37, 54. 73; Aleyn 38; 82 E. R. 512, 525, 540, 904.
(4) (1849) 1 Ind. 570; 50 Am. Dec. 481.
(5) (1842) 1 Speers. S. C. 49.
(6) (1830) 1 Bailey S. C. 504.
(7) (1816) 7 Taunt 217; 2 Marsh. 505; 17 R.R. 491; 129 E. R. 87.
(8) (1920) 1 K B. 468; 89 L. J K. B, 194 122 L. T. 389; 64 S. J. 207; 36 T. L. R. 123.
(9) 17 Ind. Cas. 17; 37 B. 211; 1 Bom. L. R. 782.

to hold that, notwithstanding the express provisions of the Will, the legatee has no interest in the subject-matter of the legacy. From this standpoint, no useful analogy can be drawn from the long series of decisions of the Judicial Committee reviewed in *Annada Mohan Roy* v. *Gour Mohan Mallik* (1), which affirm the well-known proposition that the interest of a Hindu reversioner expectant on the death of a limited owner is not a vested interest but is a mere *spes successionis* which cannot be sold, mortgaged or otherwise assigned. In our opinion, the interest taken by the mortgagors in the present case in the estate of their paternal grandmother could form the subject-matter of a valid mortgage. This view accords with that adopted by a Full Bench of the Court of Appeals of New York in *Drake* v. *Page* (10). In that case, a Will devised the residue of the testator's estate to four persons, share and share alike. A subsequent clause empowered the executors to sell a portion or all of the land for the payment of debts, in case the personalty should prove insufficient, and also authorized them to partition the land among the four devisees after the payment of all such debts and expenses. Parker, J., held that the land vested in the devisees, subject to the execution of the power by the executors, and that consequently a mortgage executed by one of the devisees before partition, on the undivided one-fourth interest, was valid. The principle applied was that the assignee would only acquire the right to succeed to that to which his assignors would become entitled on the distribution. To the same effect is the decision in *Davis* v. *Wilson* (11), where, in similar circumstances, Barker, J., held that the interest of the legatee could be alienated because it was unquestionable that every kind of interest in real estate might be mortgaged, if it was subject to sale and assignment. Reference was made to the decision in *Overton* v. *Means* (12), where the doctrine had been recognised that "whether an interest by devise in lands was vested or contingent, it was vendible, subject to sale for the satisfaction of debts." We hold accordingly that the appellant cannot successfully impeach the validity of the mortgage created by himself in favour of the plaintiff, who is entitled to cut off the equity of redemption in the present litigation. We are not concerned with the question, how far the mortgagee or the purchaser at the sale in execution of the mortgage-decree, may be affected by orders in the administration suit which was commenced twenty years ago and has not yet resulted in a final judgment.

As regards the second question the Subordinate Judge has held that there is conclusive evidence of payment of consideration. The mortgage-deed recites the payment of consideration by means of a cheque drawn on the Chartered Bank of India, Australia and China. The cheque was drawn in favour of Babu Taraprosanna Chatterjee, at that time a Vakil of this Court and now a member of the Judicial Service. He acted as the agent of the plaintiff in the transaction. He endorsed the cheque in favour of Babu Monmotha Nath Ganguli who acted as the Solicitor of the mortgagors. The cheque was cashed, and the amount has been traced in the account-books of the trustee defendant, who spent the money on account of the other defendants. These books are proved to bear their signatures, notwithstanding their assertion to the contrary. It is by no means easy to imagine a more idle defence than that put forward by the defendants.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

B. N. *Appeal dismissed.*

(10) (1891) 127 N. Y. 562.
(11) (1903) 115 Ky. 639.
(12) 2 Ky. L. R. 211.

PATNA HIGH COURT.

APPEAL FOR APPELLATE ORDER No. 82 OF 1922.

December 1, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

Babu DHIRAKSHAN SINGH—DEFENDANT No. 1—APPELLANT

versus

Babu TRILOKI PRASHAD SINGH—PLAINTIFF AND OTHERS—DEFENDANTS NOS. 2, 4 AND 5—RESPONDENTS.

Pre-emption—Mokarrari land—Muhammadan Law.

There is no right of pre-emption in *mokarrari* land.

Unless the proprietary possession is transferred, the right of pre-emption does not accrue.

Mohammad Jamil v. *Khub Lal Raut*, 58 Ind. Cas. 534; 5 P. L. J. 740; 2 P. L. T. 138; (1921) Pat. 130, followed.

The law of pre-emption is founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is, therefore, purely a creature of the Muhammadan Law, and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan Law, or beyond the decision of the Courts.

Babu Ram Golam Singh v. *Narsing Sahoy*, 25 W. R. 43, referred to.

Appeal from an order of the District Judge, Shahabad, dated the 16th March 1922, reversing an order of the Subordinate Judge, Second Court, Arrah, dated the 15th March 1921.

Messrs. *Parmeshwor Dyal* and *Nirsu Narain Singh*, for the Appellant.

Mr. *Rai T. N. Sahai*, for the Respondents.

JUDGMENT.

Das, J.—As was pointed out in the case of *Babu Ram Golam Singh* v. *Narsing Sahoy* (1), the law of pre-emption was founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is, therefore, purely a creature of the Muhammadan Law, and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan Law, or beyond the decision of the Courts.

The learned Vakil on behalf of the respondents has not been able to refer us to any case which has held that there is any right of pre-emption in *mokarrari* land. He did rely upon the short notes of a case reported in the Calcutta Weekly Notes, but, for obvious reasons, it is impossible for us to rely upon notes.

On the other hand, it seems to me that the decision of this Court in the case of *Mohammad Jamil* v. *Khub Lal Raut* (2) is decisive on the point. It is true that the plaintiff in that case did not claim the right to pre-empt as a co-partner in the land sold; but the learned Judge discussed the basic principles upon which the law of pre-emption rests and he pointed out that, unless the proprietary possession is transferred, the right of pre-emption does not accrue. That case is an authority for the proposition that the *milkiat* or ownership of the property is *sine qua non* for the exercise of the right of pre-emption and that the pre-emptor must have the *milkiat* or ownership in the property on account of which he claims the right of pre-emption. This view accords with the view of Mr. Ameer Ali expressed in his well-known work on Muhammadan Law. To entitle a person to claim the right of pre-emption, this is what the learned author says in his book, 4th edition, Volume 1, page 712. "The *milkiat* or proprietary interest in the property on which he bases his right must be in him, but it is not necessary that he should be in actual possession of it." And then the learned author, at page 715, says as follows: "As a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity."

We are bound to follow the decision of our Court in the case to which I have referred. I would allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance.

The result is that the suit will stand dismissed with costs in all the Courts.

Adami, J.—I agree.

N. H. *Suit dismissed.*

(1) 25 W. R. 43.

(2) 58 Ind. Cas. 534; 5 P. L. J. 740; 2 P. L. T. 138; (1921) Pat. 130.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 175 OF 1920.

March 24, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

PROBODH CHANDRA DAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BIRSINHA BAGANI AND OTHERS— DEFENDANTS—RESPONDENTS.

Ejectment, suit for—Defendant admitting plaintiff's

PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI.

superior title—Burden of proof—Bengal Tenancy Act (VIII of 1885), s 85—Fixed rate tenant—Permanent under-tenure, creation of.

Plaintiff sued to eject the defendant on the allegation that the plaintiff was a *raiyat* at fixed rates of the land in dispute and the defendant was a transferee of the heirs of one *B.* with whom a Permanent Settlement had been made by the widow of the plaintiff's predecessor some 10 or 12 years before suit, that the widow had no right to make a Permanent Settlement, and that on the death of *B*, the plaintiff had become entitled to recover possession. The defendant admitted the superior title of the plaintiff but alleged that the Permanent Settlement was made with *M*, the father of *B*, that it created a transferable interest and that he was not liable to ejectment. The lower Appellate Court holding that the plaintiff had failed to prove that settlement was made by the widow with *B* some 10 or 12 years ago, dismissed the suit. On second appeal:

Held, that as the defendant admitted the plaintiff's superior title to the land, it was for him to prove the existence of a tenancy entitling him to retain possession, that the plaintiff's main case was that the defendant was a trespasser and had no right to remain on the land and the finding that the plaintiff's case as regards settlement had not been proved was not sufficient for the dismissal of the suit.

Narsingh Singh v. *Dharam Thakur*, 9 C. W. N. 144, referred to.

Section 85 of the Bengal Tenancy Act does not bar a *raiyat* at fixed rates from making a Permanent Settlement with the under-*raiyats* or giving the under-*raiyats* a transferable and heritable interest in the land. [p. 327, col. 1.]

Appeal against a decree of the Subordinate Judge, Second Court at Howrah, in Hoogly, dated the 18th of November 1910, reversing a decree of the Munsif, First Court at Howrah, dated the 10th of April 1918.

Dr. *Dwarka Nath Mitter* (with him Babu *Bejoy Kumar Bhattacharjee*), for the Appellants.—The plaintiffs are appellants. The appeal arises out of an action in ejectment. The plaintiffs' case was that they were *raiyats* at fixed rates and that the defendants were under-*raiyats*. The original settlement of our superior interest was with Bhagirath, who was succeeded by Kshetra Mohan, whose widow settled with defendant's predecessor. The defence was that the plaintiffs were tenure-holders and that the interest of Bolaram, the original tenant, their predecessor, was permanent and transferable. Hence they were not liable to be ejected. My submission is that Drabamayee could not make a Permanent Settlement. It having been found that we are *raiyats* at fixed rates the Courts below ought to have held that we are occupancy *raiyats*. The defence should make out their title to hold land. Refers to *Narsing Narain Singh* v. *Dharam Thakur* (1). They have admitted our title. The case should go back.

Babu *Ram Charan Mazumdar* (with him Babu *Narendra Nath Chaudhury* for Babu *Jitendra Lal Banerjee*), for the Respondents.—The appeal is concluded by findings of fact. As regards the first point, section 85, Bengal Tenancy Act, does not preclude a Permanent Settlement with an under-*raiyat*. As regards the second point, it has been found that plaintiffs have failed to prove that they are occupancy *raiyats*. I submit, no case for a remand has been made out.

Dr. *Dwarka Nath Mitter*, replied in brief.

JUDGMENT.—The plaintiffs brought this suit to eject the defendants on the allegation that the plaintiffs were *raiyats* at fixed rates of the land in dispute and, that the defendants were either heirs or transferees of the heirs of one Bolaram Das with whom the under-*raiyat's* settlement had been made. According to the plaintiffs, the original settlement of their superior interest was with Bhagirath Das. Bhagirath Das was succeeded by Kshetra Mohan and the settlement with the predecessor of the defendants was made by Drabamayee, the widow of Kshetra Mohan. They alleged that Drabamayee could not make a Permanent Settlement, and, therefore, on the death of Bolaram with whom the settlement was made the landlords had the right to recover possession. The defendants contended that the interest of the plaintiffs was that of tenure-holders, and that the Permanent Settlement was made with Beni Madhab, the father of Bolaram, that this settlement created a transferable interest and that the defendants, therefore, are not liable to ejectment on the death of Bolaram. It is found that the plaintiff's interest is that of a *raiyat* at fixed rates.

On behalf of the appellants it is contended that it should have been held that the plaintiffs' interest was that of an occupancy

(1) 9 C. W. N. 144.

raiyat. But having regard to the pleadings we think, that the learned Subordinate Judge was right in holding that the plaintiffs could not claim a lower status than that set out in the plaint. Taking it that the plaintiffs are *raiyats* at fixed rates it follows that the defendants are under-*raiyats*. But it also follows that section 85 of the Bengal Tenancy Act does not bar the predecessor-in-interest of the plaintiffs from making a Permanent Settlement with the under-*raiyats* or giving their under-*raiyats* a transferable, heritable interest in the land. The rights of the plaintiffs, therefore, to eject the defendants depends on the nature of the settlement made with their predecessor. The learned Subordinate Judge has held that, as the plaintiffs failed to prove that settlement was made by Drabamayee with Balaram 10 or 12 years ago as alleged in the plaint, therefore, the plaintiffs' case must fail. With this decision we are unable to agree. On the admitted facts, that the plaintiffs had superior title to the land, it is for the defendants to prove the existence of a tenancy, which will entitle them to retain possession ; see *Narsing Narain Singh* v. *Dharam Thakur* (1). It is not sufficient to find that the plaintiffs' case as regards settlement has not been proved. The plaintiffs' main case is, that the defendants are on the land, and that they are trespassers with no rights to remain on the land. The defendants admitted the plaintiff's superior title to the land, and it is for them to show that they have a right to remain. The learned Subordinate Judge has come to no finding, whether they, the defendants, have succeeded in establishing any such right or not. It will be necessary, therefore, to remand the appeal for re-hearing and decision as to the rights of the defendants on the land. If the defendants succeed in proving a tenancy, which will enable them to resist the plaintiffs' suit in ejectment the order passed by the learned Subordinate Judge will be a proper order. If, however, the defendants are unable to establish a tenancy, which gives them the right to remain on the land, then the appeal should be decreed, and the decree of the Munsif upheld.

We accordingly decree this appeal in these terms—the decree of the lower Appellate Court is set aside and the appeal remanded to that Court for re-hearing. The question whether the parties should or should not be allowed to adduce any further evidence is a matter within the discretion of the lower Appellate Court.

The costs of this Court will abide the result.

N. H. *Appeal decreed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL, NO. 329 OF 1922.

December 21, 1922.

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

B. AMBIKA PRASAD AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

B. JHINAK SINGH AND ANOTHER—OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XLI, r. 4—Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties—Death of joint plaintiff before hearing of appeal, effect of—Abatement of appeal—Decree passed in ignorance of fact of death, validity of.

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, r. 4 of O. XLI of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. [p. 323, cols. 1 & 2.]

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. [p. 323, col. 2.]

Balaram Pal v. *Kanysha Majhi*, 53 Ind. Cas. 548, followed

Imam-ud-din v. *Sadarat Rai*, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228, distinguished.

Execution second appeal from the decree of the First Additional Judge, Gorakhpur, dated the 23rd January 1922.

Dr. *S. N. Sen*, for the Appellants.

Mr. *N. P. Upadhiya*, for the Respondents.

JUDGMENT.—The three execution appeals, Nos. 329, 330 and 271 of 1922, arise out of two pre-emption decrees passed by the lower Appellat Court on the 9th April 1921.

It appears that one Damri Singh executed a deed of sale on the 20th of May 1919 in respect of a portion of his landed property in favour of Jhinak Singh and Udit Narain Singh. On the 18th May 1920 and the 21st June 1920 respectively two suits were instituted by two sets of plaintiffs, the co sharers of Damri Singh, the vendor, for the recovery of possession of the property conveyed by the sale-deed of the 20th May 1919 on the ground of pre-emption. Ramharan was the plaintiff in one suit and Ambika Prasad, Ram Charittar Singh, and Hubedar Singh were plaintiffs in the second suit. The vendees resisted the claim by the denial of the custom of pre-emption set up in the two plaints. The learned Munsif, in whose Court the two suits were filed, came to the conclusion on the evidence in the case that no custom of pre-emption prevailed in the village where the property in question was situate. He accordingly dismissed the two claims. Two appeals from the two decrees of the Munsif were preferred to the District Court. Ram Baran preferred an appeal from the decree dismissing his suit and the second appeal was preferred by Ambika Prasad alone. He, however, stated that he was appealing on his own behalf and on behalf of his two co-plaintiffs, namely, Ram Charittar Singh and Hubedar Singh, though he did not make them respondents in the appeal. The two appeals were heard and disposed of together by the learned District Judge on the 9th April 1921. He disagreed with the Court of first instance and found that the custom of pre-emption obtained in the village and decreed the two appeals. In case of Ram Baran the decree was that he should pay one-fourth of the sale consideration within the specified period and recover possession of one-fourth of the property in suit. In the appeal of Ambika Prasad the decree was that he (Ambika) and his co-plaintiffs, Hubedar Singh and Ram Charittar Singh, should deposit the three-fourths of the sale consideration within the period specified in the decree and recover three-fourths of the disputed property. The decree-holders in the two appeals deposited their respective amounts of consideration money within the prescribed period and were duly put in possession of the disputed property in proportion to the shares decreed to them. Subsequently, two applications were made by the judgment-debtors, *i. e.*, the vendees, to the Court of the Munsif who had executed the two decrees asking for restitution of the property on the allegation that the decrees that had been executed were incapable of execution for the reason that Hubedar Singh had died prior to the passing of the decrees by the learned District Judge on the 9th April 1921 in the appeals of Ram Baran and Ambika Prasad. The learned Munsif allowed the request of the judgment-debtors to this extent that he restored one-fourth of the property to them, *i. e.*, the share of Hubedar Singh. The judgment-debtors preferred two appeals on the Execution Side to the Court of the learned District Judge. A third appeal was preferred by Ambika Prasad to the same Court objecting to the restoration of the share of Hubedar Singh to the vendees, the judgment-debtors. The learned District Judge disposed of the three appeals together by one order. He was of opinion that Hubedar having died prior to the passing of the decree on the 9th April 1921 the two decrees in both the appeals of Ambika and Ram Baran were a nullity and, therefore, could not be executed. He allowed the appeals of the judgment-debtors and dismissed the appeal of Ambika Prasad. We have, therefore, three appeals before us, two by Ambika Prasad and one by Ram Baran. We take up the two appeals of Ambika Prasad first. It is contended on behalf of Ambika Prasad that the omission to bring to the notice of the Court the death of Hubedar Singh prior to the 9th April 1921 and to bring the legal representatives of Hubedar Singh, deceased, on the record does not vitiate the decree of the 9th April 1921. The right to claim pre-emption was a joint right of Ambika Prasad, Ram Charittar and Hubedar Singh, and if Hubedar Singh had not joined in the suit or if he had died prior to the passing of the decree the right of pre-emption remained intact with Ambika Prasad and Ram Charittar. It is further urged that it was the duty of the vendees judgment-debtors to call the attention of the learned District Judge to the omission by Ambika Prasad to bring the legal representatives of Hubedar Singh on the record and to have the decree amended. The vendees could not object nor could the Executing Court decline to execute the decree of the 9th April 1921 as it stood. It is argued that a Court executing the decree

cannot go behind the decree. If there is any legal defect in the decree it is not for the Executing Court to rectify it but the proper course is to ask the Court which has passed the decree to amend or rectify it. On the other hand, the argument for the vendees is that the decree against a dead person is a nullity. Further, it is said that the right of pre-emption was not a joint right of Ambika Prasad, Ram Charittar and Hubedar in the sense that if one fell out or declined to sue or died during the pendency of the suit the right survived to the other two. Nor was it a right that was so divisible that Hubedar's share could be described as one-fourth. In any case, strong stress is laid upon the fact that the decree of the 9th of April 1921 in the appeal of Ambika Prasad was passed after the death of Hubedar and, therefore, it is a nullity. In support of this contention reliance is placed on the case of *Imam-ud-din* v. *Sadarat Rai* (1). That case is a converse of the present one. In that the decree was passed by a Bench of this Court in ignorance of the fact that one of the respondents was dead. Subsequently, an application was made for review and the question was raised whether the decree was a good and valid decree. It was held by two learned Judges of this Court that the decree having been passed against the respondents after one of them had been dead it was a nullity. It might, however, be argued on behalf of Ambika Prasad that the principle underlaying that decision does not apply to his appeal, inasmuch as the decree against the vendees could not be split up,as the shares of the vendees perhaps were not specified in the sale-deed. In the present case Ambika Prasad is not seeking to split up the shares of the vendees but is enforcing his right of pre-emption which he had jointly with Charittar and Hubedar against three-fourths of the disputed property. This objection is sufficiently met by another case, that of *Balaram Pal* v. *Kanysha Majhi* (2). This case seems to us to be absolutely in point. It was laid down there that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, r. 4, O. XLI of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. Further, it was laid down that the effect of allowing an appeal to be heard and decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. We, therefore, are of opinion that the decree in favour of Ambika Prasad, Ram Charittar and Hubedar having been passed after Hubedar had died was a nullity and was not capable of execution. The vendees are entitled to be restored to the three fourths of the disputed property. The appeals of Ambika Prasad, therefore, fail and are dismissed with costs including fees in this Court on the higher scale, if any.

The appeal of Ram Baran stands on quite a different footing. He had brought a separate suit in the Court of the learned Munsif and on his claim having been dismissed had preferred a separate appeal. It is true that his appeal and that of Ambika Prasad were heard together and disposed of by one and the same judgment by the learned District Judge but he was decreed one-fourth share of the disputed property on the payment of one fourth of the sale consideration. He had mentioned in his memorandum of appeal that Hubedar was dead and he was going to bring the legal representatives of Hubedar on the record as respondents in the case. Hubedar was merely a *pro forma* defendant in the suit in the Court of the Munsif and in the appeal of Ram Baran, Hubedar would still have been a *pro forma* respondent. The omission by Rambaran to bring the legal representatives of Hubedar on record as respondents to his appeal would not affect the merits of his appeal. We,therefore, think that any illegality in the decree of Ambika Prasad would not affect the decree in favour of Ram Baran. The order of the learned District Judge allowing restoration to the vendees in respect of the share decreed to Ram Baran, *i.e.*, one-fourth of the disputed property, is erroneous. We, therefore, allow the appeal of Ram Baran with costs including fees in this Court on the higher scale and set aside the order of the learned District Judge with regard to Ram Baran's share.

S. D. *Order accordingly.*

(1) 5 Ind. Cas 897; 32 A. 301; 7 A. L. J. 228.
(2) 53 Ind. Cas. 548.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1847 OF 1919.

March 30, 1922.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice B. B. Ghose.

CHANDRA KUMAR BASU—DEFENDANT NO. 3—APPELLANT

versus

Rani SASHIMUKHI DEBI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 3, O. II, r. 3—Suit for accounts against cashier and for negligence against supervisor—Misjoinder.

A suit for accounts against the plaintiff's cashier and for negligence against his *Sadar Naib* making the latter liable to re-pay to the plaintiffs such sum of money as may have been lost by his failure in his duty to supervise the work of the cashier, is bad for misjoinder of causes of action and parties.

Appeal against a decree of the District Judge, Dacca, dated the 26th of July 1919, affirming that of the Subordinate Judge, Fifth Court, Dacca, dated the 8th April 1918.

Babu *Dwarka Nath Chakrabarti* (with him Babu *Atul Chandra Gupta*), for the Appellant.—The defendant No. 3 is the appellant. The appeal arises out of a suit for accounts and also for money due on such accounts being taken from defendant No. 1 who was a co-sharer of the plaintiff. Defendant No. 3 is the *Sadar Naib* of defendant No. 1. There ought not to have been any decree against me. Defendant No. 2 is the surety of defendant No. 1. Their case is that if any money is due against defendant No. 1 then I must be held liable as being careless and negligent and having colluded with defendant No. 1 as his superior officer. They have also claimed damages for contributory negligence against me. There is no allegation that I have misappropriated the money. I submit my liability does not arise till defendant No. 1's liability has been established. They ought to bring specific case against me.

Dr. *Dwarka Nath Mitra* (with him Babus *Debendra Nath Mandal* and *DwijendraKumar Dutt*), for the Respondents.—Our case is that the defendants are jointly liable for all damages caused to our estate. He was to have checked the accounts which he not having done, the cashier has misappropriated the money. The causes of action are, no doubt, different but they arise out of the same transaction, and, therefore, they can be joined in same suit. Refers to O. I, r. 3, Civil Procedure Code, *Compania Sansinena* v. *Houlder* (1), *Ramendra Nath Ray* v. *Brojendra Nath Dass* (2), *Krishnajiban Sanyal* v. *Mahammad Masiuddin Mandal* (3).

Babu *Dwarka Nath Chakrabarti* replied in brief.

JUDGMENT.—This is a suit brought by the plaintiffs-respondents for account against defendant No. 1, who was their cashier, and defendant No. 2 with whom in the present appeal we are not concerned, and defendant No. 3, the appellant before us who was the *Sadar Naib*. It is alleged that money is due by defendant No. 1 on account being taken against him and that the appellant, the *Sadar Naib*, is responsible for any loss which the plaintiffs may have sustained through action or omission of their cashier, which loss has been occasioned by his negligence, his duties being, amongst others, to supervise the work and to sign the *jamakharach* of the *Sadar Khazanchi*. An objection has been taken in this appeal to this suit on the ground that it is bad for misjoinder of causes of action and parties. I think this objection is a sound one.

It is a suit for accounts as against defendant No. 1 and a suit for negligence against the appellant who becomes liable to re-pay to the plaintiffs such sum of money as may have been lost by failure of the first defendant to carry out his duty. There having been such a misjoinder the suit has been left, as may be expected, in a very anomalous position. For, so far as I can read the judgment, there is no distinct finding that the appellant is liable for such a sum of money as may be found payable on the account which has been directed by the judgment against defendant No. 1. It may be, so far as I can read the judgment, that the appellant before us may show that he is not liable at all or that he may be liable for a lesser sum than is found upon the account as being that for which defendant No. 1 is liable. At one time I was disposed to think that this might stand in the way of the appellant's appeal. But I think it does not,

(1) (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333.
(2) 41 Ind. Cas. 944; 45 C. 111; 27 C. L. J. 158; 21 C. W. N. 794.
(3) 63 Ind. Cas. 244; 33 C. L. J. 369.

for this reason that there is a decree affecting him and it is found, at any rate, as against him to this extent that it seems to say that, on the final taking of the accounts, he may be liable in respect of some unascertained sum.

In the result, I must hold that the judgment and decree of the lower Appellate Court should be set aside and the suit must be dismissed as regards appellant No. 1, who will be entitled to his costs in both the lower Courts and in this Court.

Ghose, J.—I agree.

B. N. *Suit dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 245 OF 1921.
October 23, 1922.
Present:—Mr. Batten, J. C.

KUNJILAL AND OTHERS—DEFENDANTS —APPELLANTS
versus
PANNALAL AND ANOTHER—PLAINTIFFS —RESPONDENTS.

C.P. Tenancy Act (XI of 1898)—Prior mortgage of tenancy lands Malguzar *not consenting—Validity as against mortgagor—Priority over subsequent mortgage.*

As between the mortgagor and mortgagee a mortgage of a tenancy holding is valid unless and until it is avoided by the *malguzar*. A mortgage which has not been consented to by the *malguzar* will not fail to have priority over a subsequent mortgage simply because it had not been consented to by the *malguzar*.

Appeal from a decree of the District Judge, Nimar, in Civil Appeal No. 142 of 1920 dated the 24th February 1921.

Dr. *H. S. Gour*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—There is no force in this appeal. The first two grounds of appeal contest the finding of fact that the then *malguzar*, Balwantrao, did in 1916 give consent to the mortgage in suit at the time when he compromised the suit which he brought against the mortgagees, because they had not obtained his consent prior to the execution of the mortgage. I can find no ground on which the finding of the lower Appellate Court that the *malguzar* did so consent can be validly attacked; it is a clear finding of fact which is binding on this Court and is, moreover, in my opinion, undoubtedly a correct finding. It is further argued as a point of law that the appellant's mortgage of 1913, which was concurrently consented to by the *malguzar*, has priority over the mortgage of 1908, sued on by the plaintiffs, which was not consented to by the *malguzar* till 1916 after the date of the appellant's mortgage. It is argued that a mortgage which has not been consented to by the *malguzar* must be held to be in abeyance, to have no real existence, and to be in fact void until it is so consented to by the *malguzar* and can, until it is so consented to, have no priority against another mortgagor of a later date. No authority whatever has been cited in support of this proposition, which appears to me to be contrary to the principle that, as between the mortgagor and mortgagee, a mortgage is valid unless and until it is avoided by the *malguzar*.

The appeal is dismissed with costs.

G. R. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 871 OF 1920.

May 19, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

HARA PRASANNA BANDOPADHYA
DEFENDANT NO. 1—APPELLANT
versus
ARAB ALI, AND, ON HIS DEATH, TWO OF HIS HEIRS AND LEGAL REPRESENTATIVES, JABEDA KHATUN AND ANOTHER, MINORS, BY THEIR GUARDIAN *ad litem*, MR. F. B. COUNSEL, THE DEPUTY REGISTRAR OF THIS COURT, AND ABBAS ALI AND OTHERS—PRO FORMA DEFENDANTS AND SABDAR ALI—PLAINTIFF—RESPONDENTS.

Arbitration—All interested persons not joining in application for reference—Court, jurisdiction of, to make reference.

Where all the persons interested do not join in an application for reference to arbitration, the Court has no jurisdiction to make the reference.

Dooly Chand v. *Mamuji Musaji*, 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 387, relied on.

Appeal against the decree of the Subordinate Judge, First Court, Bakarganj, dated the 17th of December, 1919, affirming the decree of the Officiating Munsif, Second Court at Bhola, dated the 31st of January 1919.

Babu *Suresh Chandra Talukdar*, for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for recovery of possession. There was an *ex parte* decree on 9th August 1915, which was restored on 31st July 1916 by the Appellate Court. During that trial the matter was referred to arbitration by persons including present plaintiff, but excepting defendants Nos. 5 to 7. The award was given on 19th December, 1917. The present suit is for the setting aside of the award. When the award was given we adduced *ex parte* evidence also before the Court. Refers to *Lal Mohan Pal* v. *Surya Kumar Das* (1), *Chairman of the Purnea Municipality* v. *Siva Sankar Ram* (2), *Dooly Chand* v. *Mamuji Musaji* (3). The defendants Nos. 5 to 7 never appeared in that suit and, therefore, they cannot be called as interested parties. Refers to *Girija Nath Roy* v. *Kanai Lal Mitra* (4). Then there was also *ex parte* evidence. I submit the absenting defendants were not interested persons. There is the *ex parte* decree. The present plaintiff is now estopped from questioning the decree. Even now he is not present in this appeal.

No one appeared for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.—This appeal is preferred by the defendant whose name is Hara Prasanna Bandopadya. The respondent, Sabdar Ali Chowkidar, who does not appear, was one of the defendants in the suit brought by Hara Prasanna some years ago. That suit was eventually made over to arbitrators on the application of Sabdar Ali and some, but not all, of the other defendants. The decision of the arbitrators was against Sabdar Ali. He made an objection to the award but that was dismissed for default. He made another objection in the course of execution proceedings. That was also rejected. Now, he has brought the suit, out of which this appeal arises, to have the award set aside and the Courts below have set it aside on the ground that three of the defendants in the original suit, that is to say, Nos. 5, 6 and 7, were not parties to the application for reference to arbitration. In support of this view both Courts have referred to several decisions of this Court, one of them is the case reported as *Girija Nath Roy* v. *Kanai Lal Mitra* (4) to which I was a party. The view we took there was that the entire foundation of the Court's jurisdiction to make the reference disappeared when it was found that all the persons interested had not joined in the application. It follows, therefore, that, in my judgment, the decision of the lower Appellate Court

(1) 11 C. W. N. 1152.
(2) 33 C. 899.
(3) 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 387.
(4) 43 Ind. Cas. 169; 27 C. L. J. 339 at p. 343.

is correct and this appeal must be dismissed. We make no order for costs, as Sahdar Ali Choukidar does not appear.

Suhrawardy, J.—I agree.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1533 OF 1920.

July 18, 1922.

Present—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

RAJENDRA NARAYAN CHAUDHURY—DEFENDANT NO. 3—APPELLANT

versus

Khan Bahadur Moulvi ABU NASAR AHIYA—PLAINTIFF AND OTHERS—DEFENDANTS NOS. 1, 2, 4—RESPONDENTS.

Landlord and tenant—Putni, *if can be created over another* putni—*Assignment of* Zemindar's *right to receive rent from* putnidar—*Interest of assignee, if can be sold under Putni Taluks Regulation (VIII of* 1819)—Putni *sale without jurisdiction—Purchaser, position of.*

The Zemindar of a certain estate granted a *putni* lease of the entire 16-annas of the property to the defendants in 1881. *A.* who acquired an interest in 1-anna share of the Zemindary in 1895 created a *putni* in respect of this share in favour of *B.* Thereafter, there was a sale of the interest of *B.* under Regulation VIII of 1819 which was purchased by the plaintiff who then sued the defendants for rent of the *putni* to the extent of 1-anna share:

Held, (1) that the plaintiff had no right to recover rent from the defendants and the relationship of landlord and tenant did not exist between the parties; [p. 330, col. 2.]

(2) that the whole scheme of the Putni Taluks Regulation was that the *putnidar* was the only person whose interest could be sold under the Regulation and not the interest of a person in the position of *B.* by whatever name it might be called. The mere giving of the name of *putni* to the interest of *B.* would not make it a *putni* as contemplated by the Regulation so as to bring into play all the provisions of the law. Therefore, the sale under Putni Taluks Regulation, VIII of 1819 at which the plaintiff had purchased was without jurisdiction and the plaintiff had acquired no title. [p. 330, col. 1.]

The idea of a *putni* being created over another *putni* is absolutely foreign to the scheme of the Putni Taluks Regulation. There can, however, be no objection to the assignment of the right of the Zemindar to receive rent from the *putnidar* which he is entitled to get under the *Putni* Settlement, for example, he may create an *ijara* or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the Zemindar's interest would be entitled to recover rent from the *putnidar* by virtue of the assignment. [p. 329, col. 1.]

Madhu Sudan Chaudhuri v. *Debendra Nath Sarkar*, 66 Ind. Cas. 200; 34 C. L. J. 79; 49 C. 495; (1922) A. I. R. (C.) 412 and *Ramsona Choudhurani* v. *Nabakumar Sinha*, 10 Ind. Cas. 90; 13 C. L. J. 404; 16 C. W. N. 805, referred to.

Johar Mull v. *Bhupendra Nath Basu*, 67 Ind. Cas. 1108; 34 C. L. J. 79, distinguished.

Appeal against a decree of the Subordinate Judge, Second Court, Sylhet, dated the 6th March 1920, affirming that of the Munsif, Fourth Court, Habigunj, dated the 23rd December 1918.

Babu *Hemendra Kumar Das*, for the Appellants.—The defendant No. 3 is the appellant. The appeal arises out of a suit for rent. The facts shortly are these :—

The original owner of the entire Zemendary was Abdul Rahman who granted a *putni* lease of the same to predecessors of defendants. In 1895 Bhuban Babu acquired 1-anna interest in the Zemindary. He granted a *putni* in respect of his share to Fatima Banu. In execution of a decree against Fatima under the Putni Taluks Regulation, her interest was sold and it was purchased by the plaintiff. On that basis the present suit is brought. I deny any relationship of landlord and tenant. The Courts below

have decreed the suit. My submission is that Bhuban Babu was not entitled to create a new *putni* superseding the one made by Abdul Rahman. That *putni* was in respect of the 16-annas of the estate. There cannot be another *putni* in respect of one anna share over the original one. That is against the Putni Taluks Regulation itself and is contrary to the intention of the Legislature. Bhuban Babu could have taken an assignment of the Zemindar's interest. *Madhu Sudan Chaudhuri* v. *Debendra Nath Sarkar* (1). I would submit, therefore, that the *putni* lease granted to Fatima amounted to an assignment of the Zemindar's right to rent from defendants. Therefore, the sale at which plaintiff purchased was held without jurisdiction. Therefore, the plaintiff could not have acquired any title. We cannot sue for setting aside of the sale under section 14 of the Putni Taluks Regulation. Further, Fatima could have no right to recover rent from us. Her interest and that of ours are co-ordinate. Therefore, the plaintiff in that view also is not entitled to maintain the suit. The learned Judge relied upon *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) in support of his judgment. But that case, I submit, has no bearing at all to the present case. I submit, therefore, both Courts have laboured under an erroneous view of the Putni Law. Their decree cannot by any means be supported in law.

Babu *Surendra Nath Guha* (with him Babu *Benoyendra Nath Palit*), for the Respondents.—I submit the Courts below are right in their view. See *Johar Mull* v. *Bhupendra Nath Basu* (3). The case in *Raj Kumar Majumdar* v. *Probhal Chandra Ganguli* (2) is exactly to the point. Bhuban Babu was perfectly entitled to create a new *putni* which cannot be treated as an assignment of the Zemindar's right to rent. The defendants cannot now question the sale. See *Ramsona Choudhurani* v. *Nabakumar Sinha* (4). The sale was held with jurisdiction and my purchase is perfectly valid. I submit I am entitled to rent from them.

Babu *Hemendra Kumar Das*, replied in brief.

(1) 66 Ind. Cas. 200 ; 34 C. L. J. 76.
(2) 9 C. W. N. 656.
(3) 67 Ind. Cas. 108 ; 34 C. L. J. 79; 49 C. 495; (1922) A. J. R, (C.) 412.
(4) 10 Ind. Cas. 90 ; 13 C. L. J. 404 ; 16 C. W.N. 805.

JUDGMENT.

Ghose, J.—This appeal is by the defendant No. 3 and it arises out of a suit for rent brought by the plaintiff under the following circumstances. One Abdur Rahman was the Zemindar of a certain estate. He granted a *putni* lease of the entire 16-annas of the property to the predecessor of the defendants sometime in 1881. Subsequently, one Bhuban Babu acquired an interest in 1-anna share of the Zemindary in 1895. After acquiring this interest, he created a *putni* in respect of this 1-anna share in favour of a lady Amatul Fatima Banu. Sometime after that, Bhuban Babu sold the interest of Amatul Fatima Banu under Regulation VIII of 1819 and it was purchased by the plaintiff. The plaintiff has now sued the defendants for rent of the *putni* to the extent of 1-anna share.

The defendant No. 3 alone contests the plaintiff's claim and he denies the relationship of landlord and tenant and contends that the plaintiff has acquired no interest in the property entitling him to recover rent from him as *putnidar*.

Both Courts below have given the plaintiff a decree for rent. The learned Subordinate Judge relies upon the case of *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) for the proposition that it was open to Bhuban Babu to create a *putni* tenure over the head of the *putni* of the defendants.

It is contended before us by the appellant, first, that Bhuban Babu had no authority to create a second *putni* intervening between the defendant's *putni* and the Zemindar's interest and, secondly, that assuming that the *putni* lease granted in favour of Fatima Banu, the plaintiff's predecessor, amounted to an assignment of the right of the Zemindar to recover rent from the defendants, such interest created in favour of Fatima Banu was not a *putni* lease as contemplated by Regulation VIII of 1819 and the sale held by the Collector under that Regulation of the interest of Fatima Banu at which the plaintiff purchased was without jurisdiction and the plaintiff has ac-

quired no interest whatever by virtue of it. The appellant points out that there are certain other cases which deal with this question and he refers to the cases of *Madhu Sudan Chaudhuri* v. *Debendra Nath Sarkar* (1), *Nilambar Ghosh* v. *Mir Mohasanuddin* (5), *Johar Mull* v. *Bhupendra Nath Basu* (3) and *Jarraw Kuwari Saheba* v. *Hanifuddin Akanda* (6).

With regard to the case of *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2), on which the Subordinate Judge relies, the learned Judges who decided that case speak very generally about the position of a person who accepts a *putni* over the head of another *putni*. They say this: The "creation of two *putnis* one above the other, no doubt, introduces confusion into the ordinary grades and nomenclature of sub-infeudation, yet for the purpose of this suit, all we hold is that the plaintiff's *putni* lease constitutes an intermediate tenure between the Zemindar and "the defendants and that, therefore, the plaintiff is entitled to demand the rent which the defendants are bound to pay to their superior landlord".

Apart from all authority, it would appear that the idea of a *putni* being created over another *putni* is absolutely foreign to the scheme of the Putni Regulation and any one familiar with the status of a *putnidar* would consider this position as anomalous. In the Putni Regulation, a *putnidar* has been given certain rights as against the Zemindar. The *putnidar* is described as a *taluqdar* of the first degree and it is difficult to imagine that a tenure can be created over a *taluqdar* of the first degree. There can, however, be no objection to the assignment of the right of the Zemindar to receive rent from the *putnidar* which he is entitled to get under the Putni Settlement; for example, he may create an *ijara* or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the Zemindar's interest would be entitled to recover rent from the *putnidar* by virtue of the assignment. This position seems to have been made clear in the case of *Madhu Sudan Chaudhuri* v. *Debendra Nath Sarkar* (1), where Mr. Justice Caspersz says that the name given to the assignee of the Zemindar's interest to recover rent is immaterial. The case of *Johar Mull* v. *Bhupendra Nath Basu* (3) does not really touch the question. That is a case in which the defendant claimed a *mukarari* interest and the plaintiff sued for rent as a superior lessee under a lease creating a superior title over the *mukararidar*, and it will be noticed that, in that case, the learned Judges are equally guarded in their language as to the creation of a *putni* interest over another *putni*. In those cases, however, the plaintiff could recover rent on the basis of a title derived from the Zemindar as assignee of the interest of the Zemindar to recover rent from the *putnidar*. But in the present case, the position seems to be somewhat more complicated and one of the complications contemplated in the case of *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) has taken place. The Subordinate Judge finds that Bhuban after his purchase ignored the *putni* of the defendants and granted a new *putni* to Fatima Banu. Therefore, the interest which was created in favour of Fatima Banu by Bhuban was on the same plane as that of the defendants. It would appear, therefore, that Fatima Banu's interest was not superior to that of the defendants. Then, the question comes whether, assuming that it was superior interest, this could be sold under Regulation VIII of 1819. The Collector assumed jurisdiction for the purpose of sale under that Regulation, as the lease created in favour of Fatima Banu does not mention that the interest created in her favour was an interest between the *putnidar* and the Zemindar. The Regulation does not contemplate the sale of such an interest under its provisions and, if it had brought to the notice of the Collector that Fatima s interest was not that of an ordinary *putnidar* but that of one above a *putnidar*, the Collector surely would not have put the provisions of the Regulation in force to effect the sale, as the Revenue Authorities do not recognise such a *putni*. The question, therefore, is whether the plaintiff has acquired any interest

(5) 67 Ind. Cas. 105; 34 C. L. J. 77.
(6) 4 Ind. Cas. 471; 14 C. W. N. 389.

by such sale. Reference has been made on behalf of the respondent to the case of *Ramsona Choudhurani* v. *Nabakumar Sinha* (1) in support of the proposition that a sale under the Regulation can only be questioned by a person entitled to do so under section 14 of the Regulation and that the title of the purchaser under the Regulation sale cannot be questioned collaterally. But the learned Judges in that case observed that the sale must be held with jurisdiction, and the sole question in the present case is whether the Collector had jurisdiction to sell the interest of Fatima Banu under Regulation VIII of 1819. As has been contended by the learned Vakil for the appellant, the defendants do not come under the category of persons who could sue under section 14 of the Putni Regulation for setting aside the *putni* sale. If they had brought such a suit, the obvious answer would have been that they were not affected by the alleged sale and that they had no right to dispute it, nor could any person claiming under the defendants as *dar-putnidar* or a *talugdar* of the third degree known as *se-putnidar* have questioned the sale. If it were held that the interest of Fatima Banu was such as could be sold under Regulation VIII of 1819, serious complications would arise in the relation between the *putnidar* and the Zemindar on the one hand and the subordinate tenure-holders on the other. It seems to me that the whole scheme of the Putni Regulation is that the *putnidar* is the only person whose interest can be sold under the Regulation and not the interest of a person in the position of Fatima Banu by whatever name it may be called. The mere giving of the name of *putni* to the interest of Fatima would not make it a *putni* as contemplated by the Regulation so as to bring into play all the provisions of the law. In my opinion, therefore, the sale under Regulation VIII of 1819 at which the plaintiff purchased was without jurisdiction and the plaintiff has acquired no title. Then, again, the intention of Bhuban Babu was to grant a new *putni* ignoring the *putni* of the defendants, as found by the Subordinate Judge, and it would appear that the interest created in favour of Fatima Banu was co-ordinate with that of the defendants. In this view, Fatima Banu cannot be said to have acquired any interest as against the defendants. In my opinion, the plaintiff has no right to recover rent from the defendants and the relationship of landlord and tenant does not exist between the parties.

The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

Walmsley, J.—I agree.

B. N.

Appeal allowed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 26 OF 1921.

July 19, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

ABDUR SALAM SAHIB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

M. KANDASWAMI CHETTIAR—DEFENDANT—RESPONDENT.

Tenancy—Long possession by tenants—Rent uniform Transfer with landlord's acquiescence—Tenancy, nature of—Question of law.

Although the origin of a tenancy may not be known, yet, if there is proved the fact of long possession of the tenure and the payment of uniform monthly rent by tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature. [p. 331, col. 2]

Whether a tenancy is a permanent or temporary one is a question of law. [p. 331, col. 2]

Afzal-un-nisa v. *Abdul Karim*, 50 Ind. Cas. 749; 47 C. 1; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919; 1 U. P. L. R. (P. C.) 47 and 71; 11 L. W. 176; 13 Bur. L. T. 1; 46 I. A. 131 and *Casperse* v. *Kader Nath Sarbadhikari*, 28 C. 738; 5 C. W. N. 858, relied on.

ABDUR SALAM SAHIB v. KANDASWAMI CHETTIAR.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 15 of 1920.

Mr. *K. Narasimha Iyer*, for the Appellant.

Mr. *N. Ramachandra Iyer*, for the Respondent.

JUDGMENT.

Schwabe, C. J.—I am very loath to disagree with the Judge who heard the evidence on questions of facts, but in this case I do not think that the view I am about to express really differs at all on the question of fact, because I take the facts as found by the learned Judge. On those facts, whether the proper inference is that the tenancy in question is a permanent or temporary one is a question of law and not a question of fact.

The facts of this case, as found, are that a superstructure, described as a *pucca* house, was erected on those premises at least fifty years ago—according to the evidence the period is nearly 100 years. From that date forwards there has always been fixed and paid a monthly ground rent of 14-annas. The tenant from time to time had disposed of his interest. The last tenant sold his interest to the present plaintiff for Rs. 350. During that period the value of the Land in Madras has risen and we are told that the present proper ground value of this land is not 14-annas but Rs. 2.

Now, the question under those circumstances, there being no direct evidence as to what the original tenancy was, is " Is it the proper inference that it is a permanent tenancy or a tenancy of some shorter period." It is put as monthly because the rent was payable monthly. On this matter we are not without authority. A similar case came before their Lordships of the Privy Council in *Afzal-un-nisa* v. *Abdul Karim* (1) In that case, which was in reference to some land in a suburb of Delhi covered by buildings, the facts were that, from 1859 onwards, a uniform rent had been fixed and paid and substantial buildings had been erected without the landlord's objection and they had been dealt with by assignment or mortgage. So far, that case is very like the present. There was one additional fact in that case, namely, that the landlords had in some receipts applied the term 'permanent' to the rent. I do not think that that fact alone would suffice to differentiate this case. But, however that might be, in that case their Lordships of the Privy Council quoted with approval the case of *Casperss* v. *Kader Nath Sarbadhikari* (2) and the part that they quoted with approval is this: " Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature." Every word in that applies to this case and that has the approval of their Lordships of the Privy Council and it seems to me that the only proper inference that could be drawn on the facts of this case is, that the tenancy was a permanent tenancy.

It is suggested in argument that there is something peculiar about Madras in this matter, and that in the City of Madras for some reason permanent tenancy is unknown and can never be. I see no reason for accepting that statement, for one asks oneself "why should there be any difference in this matter between Madras and Delhi and Calcutta?" Human nature is much the same in different Provinces. People do not build valuable houses on other people's land with the knowledge that they may be turned out at a month's notice and with the knowledge that they may only remove their bricks and mortar. Landlords do not go on accepting the same rent year after year when the value of the land is increasing. I see no reason at all to distinguish in this matter between Madras and other towns in this country,

(1) 50 Ind Cas. 749; 47 C. 1; 17 A.L.J.608; 36 M. L. J. 580; 20 P. W. R 1919; 20 M. L. T. 55; 61 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919; 1 U. P. L. R. (P. C.) 47 and 71; 11 L. W. 176; 13 Bur. L. T. 1; 46 I.A. 131 (P.C.).

(2) 28 C. 738; 5 C.W.N.858.

when we have got the facts from which the proper inference to be drawn is that there is a permanent tenancy. Those facts, in my judgment, result in that inference whether it is in Madras or elsewhere. On those grounds, in my judgment, this judgment is wrong and must be reversed with costs here and in the Court below, and the declaration prayed for in the plaint must be granted.

Wallace, J.—I entirely agree and I have nothing to add.

Decree reversed.

V. N. V.
N. K.

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS Nos. 132 AND 133 OF 1922.
November 7, 1922.
Present:—Mr. Justice Das and Mr. Justice Adami.
Pandit RAMESHIVENDRA NARAYAN OJHA AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
Babu AUDH BEHARI SARAN—JUDGMENT-DEBTOR—RESPONDENT.

Execution—Application for sale of property—Subsequent application for arrest of judgment-debtor—Subsequent petition whether continuation of previous application.

An application for execution can only be considered as a continuation of a previous application, when it is similar in scope and character to the former application. [p. 333, col. 1]

Kesho Prasad Singh v. *Harbans Lal*, 53 Ind. Cas. 85; (1920) Pat. 109; 2 P. L. T. 22, followed.

An application for the arrest of a judgment-debtor cannot be said to be in continuation of a previous application which was for sale of the property of the judgment-debtor. [p. 334, col. 2.]

Appeals from an order of the District Judge, Shahabad.

Messrs. *Kulwant Sahay* and *Har Narain Prasad*, for the Appellants.

Messrs. *S. M. Mullick*, *S. N. Ray*, *S. Dayal* and *Satyadeo Sahay*, for the Respondent.

JUDGMENT.

Das, J.—This appeal is directed against an order of the learned District Judge of Shahabad by which he dismissed an application for execution on the ground that it was barred by limitation. The material facts are these:

The appellants obtained a mortgage-decree against the respondent, but it appears that the mortgaged properties had been sold at a revenue sale before the decree was pronounced in the mortgage action. The decree in effect provided that the appellants should proceed against the surplus sale-proceeds in the hands of the Collector. On the 8th of February 1917 the appellants presented an application for execution of the decree. That application was allowed by the Court below but on appeal to this Court the order of the lower Appellate Court was set aside and the appellants were asked to proceed in a particular way by this Court. The present application was then presented for execution on the 22nd January 1921, and the only material question which arises for our consideration is, whether the present application is barred by limitation.

It is conceded by Mr. Kulwant Sahay, who appears on behalf of the decree-holders-appellants, that, unless the present application can be regarded as a continuation of the previous application it must fail. It is necessary, then, to consider what exactly the appellants asked the Executing Court to do by their application which they presented on the 8th of February 1917, and what they have asked the Executing Court to do in the present application.

It will be remembered that the decree was a mortgage-decree, though, in the circumstances which happened, the decree-holders could only proceed against the surplus sale-proceeds in the hands of the Collector. It appears that before they made their application of the 8th of February 1917 they made an effort to withdraw the surplus sale-proceeds from the Collectorate; but they were told that the surplus sale-proceeds had already been withdrawn by the judgment-debtors. In their application of the 8th of February 1917 they recited all the material facts and then asked for the following relief:—

"It is, therefore, prayed that this execution case may be registered and first a

Jaidaal notice may be issued and then properties of the judgment-debtor, as given in the undermentioned inventory, may be attached and sold, and the entire decretal amount with costs and interest of this execution case, as may be found due on an account being made in the office, may be realized".

The judgment-debtor seems to have raised the question whether he had in fact withdrawn the money from the Collectorate. It seems to have been his case that that money was not withdrawn by him but by his wife. That was a question which the Courts below had to determine in the application of the 8th of February 1917. The lower Appellate Court thought that it was unnecessary for it to determine whether the money had in fact been withdrawn by the judgment-debtor or not, and it directed that execution should proceed. The order of the lower Appellate Court, therefore, amounted to this, that the properties of the judgment-debtor, as given in the inventory attached to the application of the 8th of February 1917, should be attached and sold in due course of law. That was the effect of the order of the Court on the application of the 8th of February 1917. As I have stated before, the judgment-debtor appealed to this Court and this Court came to the conclusion that the application in the form in which it was presented to the Court could not be entertained by the Court. This Court pointed out that, primarily, the only decree under execution was the decree under O. XXXIV, r. 4, and that execution could only be taken out against the mortgaged property or against the sum lying in the Collectorate as representing the mortgaged property, and that before any other property could be pursued, an order under O. XXXIV, r. 6 was necessary. This Court thought that a decision on the question as to who had withdrawn the surplus sale-proceeds from the Collectorate was absolutely necessary, and that if the Court in deciding that question came to the conclusion that the money had been withdrawn by the judgment-debtor, it was necessary to make an order upon him to bring that money into Court before a decree under O. XXXIV, r, 6 could be passed against him.

The learned Judges in delivering the judgment of the Court said this:—

"We note that the former decree-holder is dead and that a fresh application will be required for proceeding with the execution of the decree. In dealing with the fresh application the Court below will have regard to our remarks upon the question of the liability of the parties".

The decision of this Court then was this, that the application, in the form in which it was presented by the appellants to the Court, was not maintainable; that it was necessary for them first to establish that the money had in fact been withdrawn by the judgment-debtor and to obtain an order to the effect that the judgment-debtor do bring the money withdrawn by him into Court. On his failure to do so, the decree-holders might then be entitled to a decree under O. XXXI V, r. 6 and to a sale of such of the properties of the judgment-debtor as were not comprised in the mortgage.

The High Court pronounced its order on the 29th of October 1918 and the present application was presented to the Court on the 22nd of January 1921. By their application presented on the 22nd of January 1921 the decree-holders asked for issue of notice under O. XXI, r. 22 and then "by issue of notice of warrant of arrest the entire decretal amount with costs and interest as per account prepared by the Court and as set out below may be awarded.' This application was then an application for arrest and detention in prison of the judgment-debtor; and we have been invited by Mr. Kulwant Sahay to hold that this application must and ought to be regarded as a continuation of the application of the 8th of February 1917.

In my opinion, it is impossible to regard the present application as a continuation of the previous application. Now, it is well-established that an application can only be considered as a continuation of the previous application, when, to quote the words of Mr. Justice Jwala Prasad, in the recent case of *Kesho Prasad Singh* v. *Harbans Lal* (1), it is similar in scope and character to the former application. Now, the former application asked

(1) 53 Ind. Cas. 851 (1920) Pat. 109; 2 P.L.T.22.

the Court, in form and in substance, to sell the properties of the judgment-debtor other than those which were comprised in the mortgage-bond; the present application, in form and in substance, asked the Court to realise the money from the judgment-debtor by his arrest and detention in prison. It is quite impossible, in my opinion, to regard the present application as a continuation of the previous application. Mr. Kulwant Sahay, however, urges before us, that the fact that the decree was obtained by him in this case was a mortgage-decree makes some difference to the case. I am unable to agree with the very ingenious argument that was advanced before us by Mr. Kulwant Sahai. Then, there is another serious objection, and it is this: that if we regard this application as a continuation of the previous application then it is the previous application which must be considered on its merits. Now, that application could never be entertained by the Court, because the decree-holders, without exhausting their remedies under the decree, asked for sale of properties other than those comprised in the mortgage-bond. The decree-holders have not yet asked the Court to compel the judgment-debtor to bring into Court the money, which, according to their allegations, the judgment-debtor had withdrawn from the Collectorate. As was pointed out by this Court, that was the only application which they could have made. In my opinion, it will not assist the decree-holders if we treat the present application as a continuation of the previous application. The question was not argued before the learned Judge in the Court below, but the Court of first instance considered the question and decided it against the decree-holders. In my opinion, the order of the Courts below is right and must be confirmed.

This order will govern Miscellaneous Appeal No. 133 of 1922.

Adami, J.— I agree.

Appeal accordingly.

P. D.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 3267 OF 1921.

August 1, 1922.

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

SATHAPPA CHETTY AND OTHERS—RESPONDENTS - PETITIONERS

versus

S. N. SUBRAMANIAM CHETTY AND OTHERS—APPELLANTS - RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Appeal to His Majesty in Council—Suit for dissolution of partnership and taking of accounts—Suit dismissed as time-barred - Dismissal set aside by High Court on appeal and case remanded—Order of High Court, whether final—Final order, what is.

A suit for dissolution of partnership and taking of accounts was dismissed as being barred by limitation: on appeal the High Court reversed this finding, and remanded the case to the lower Court with a direction to frame a preliminary decree and take further proceedings according to law: against this order application was made for leave to appeal to His Majesty in Council, and the question was whether the order was a "final order" within the meaning of section 109 of the Civil Procedure Code:

Held, that inasmuch as the finding on the question of limitation and its reversal on appeal respectively negatived and declared the plaintiff's right to relief the order sought to be impeached was a final order, and its character was not affected by the direction to frame a preliminary decree and take further proceedings, such direction being merely consequential on the decision [p. 336, col. 1]

An order is final, within the meaning of section 109 of the Civil Procedure Code, if it finally disposes of the right of the parties on the matters in controversy between them in the suit. [p. 336, col. 1]

(Case law referred to and considered.)

Petition, under sections 109, 110 and O. XLV, rr. 2, 3, 8 of the Code of Civil Procedure, praying that, in the circumstances stated therein, the High Court will be pleased to grant a certificate enabling the petitioners herein to appeal to His Majesty in Council against the order of the High Court in Appeal No. 293 of 1919, preferred against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 19 of 1907.

Messrs. *B. Sitaram Rao* and *A. Swaminada Iyer*, for the Appellants.

Mr. *M. Patanjali Sastry*, for the Respondents.

ORDER.—It is not disputed that the provision in section 110, Civil Procedure Code, as to value of subject-matter is com-

plied with in this case. The objection we have to deal with is only that our decision, in respect of which leave is asked for, is not a decree or final order, within the meaning of section 109. Petitioners contend that it is the latter.

In the definition of decree in section 2 (2), Civil Procedure Code, the antithesis is between "final" and "preliminary" decrees of the latter description being defined as those, after which further proceedings have to be taken before the suit can be completely disposed of. But in all the authorities, at present relevant, the opposition is, for our present purpose, regarded as being between "final" and "interlocutory," and "interlocutory" is defined in Wharton's Law Lexicon as, " that which is decided in the course of an action and does not determine it." This definition at first sight differs utterly from the definition "preliminary" in the Code above referred to. But when it was relied on in *Standard Discount Co.* v. *La Grange* (1), it was, as the judgment shows, accepted only subject to the modification that the matter decided does not determine any substantive right of a party, Cotton, L. J., observing that " without using an exhaustive definition, it may be laid down that an order is interlocutory, which directs how an action is to proceed." That authority is important, because it, with others in the same sense, *Salaman* v. *Warner* (2) and *Bozson* v. *Altrincham Urban District Council* (3), was adopted by the Privy Council in *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ralanchand* (4) as the basis for its conclusion that " an order is final, if it finally disposes of the rights of the parties" and this, it may respectfully be observed, is merely a statement of what underlies the decisions in *Rahimbhoy Habibbhoy* v. *Turner* (5) and *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (6), where accounts were ordered be to taken on findings in favour of the liability to account of a party, and in the former it was said : " Now that question was the sole question in dispute at the hearing of the cause and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again on this decree so as to say that, though the result of the account may be against the defendant still he is not liable to pay anything." Shortly, it is the effect of the order as determining the disputed right of a party, not as formally concluding the proceedings, which must be regarded as decisive, and that distinction is observed with almost absolute consistency throughout the cases above referred to. For, although Fry, L.J., in *Salaman* v. *Warner* (2) referred to " the determination of the action," the references in the other judgments therein and in the other two cases are to "the matter in dispute" and " the rights of the parties."

Firm of Ramchand Manjimal v. *Firm of Goverdhandas Vishindas Ratanchand* (4) was decided under the present Code, and as the law is stated clearly there and in the other decisions of the Privy Council above referred to, it is unnecessary to deal at length with other cases decided in the Indian High Courts, on which respondent relies. It may, however, be observed that *Tirunarayana* v. *Gopalasami* (7), followed in *Vaddiparthi Mangayya* v. *Vaddiparthi Venkataramanamurthi* (8), was based on *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang* (9), and that the last mentioned decision was referred to in argument in *Rahimbhoy Habibbhoy* v. *Turner* (5) but apparently was not accepted as good law.

(1) (1878) 3 C. P. D. 67; 47 L. J. C. P. 3; 37 L. T. 372; 26 W R. 25.
(2) (1891) 1 Q. B. 734; 60 L. J.Q. B. 624; 39 W. R. 547.
(3) (1903) 1 K. B. 547; 72 L. J. K. B. 271; 51 W. R. 337; 67 J. P. 397; 19 T. L. R. 266; 1 L. G. R. 639.
(4) 56 Ind. Cas. 302; 47 C. 918 24 C. W. N. 721; 18 A L. J. 591; 22 Bom. L. R. 606; 39 M. L. J. 27; 12 L. W. 15; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M.L. T. 87; 47 I.A. 124; 14 S. L. R. 191.
(5) 15 B. 155; 18 I. A 6; 15 Ind. Jur. 35; 5 Sar. P C. J. 639; 8 Ind Dec. (N. S.) 104 (P. C).
(6) 23 A 152; 2 Bom. L. R. 978; 27 I. A. 209; 5 C. W. N. 52 (P. C.).
(7) 13 M. 349; 4 Ind Dec. (N. S.) 956.
(8) 48 Ind. Cas 132; (1918) M. W. N. 844.
(9) 8 B. 548; 4 Ind. Dec. (N. S) 741.

The test of the finality of an order being as stated above, we apply it to the proceedings before us.

The nature of those proceedings can be explained shortly. Plaintiff, now the respondent, sued for dissolution of partnerships and connected reliefs, including the taking of an account, and failed in the Court of first instance on two grounds, of which only the second, that his suit was barred by limitation is at present material. The finding on that point and our reversal of it respectively negatived and declared his right to relief; and the result as regards the right to an account between the parties, the taking of which the plaintiff's claim involves, is the same as that indicated in *Rahimbhoy Habibbhoy* v. *Turner* (5). Our direction to the lower Court to frame a preliminary decree and take further proceedings according to law was merely consequential on our decision and did not, we must hold, affect its character as a final order.

In these circumstances, we allow the petition with costs, and certify that, as regards value and nature, the case fulfils the requirements of section 110, Civil Procedure Code.

V.N.V.
W. C. A.

Petition allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1499 OF 1920.

August 3, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

HARA KUMAR DE—DEFENDANT—APPELLANT

versus

JOGENDRA KRISHNA RAY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

***Evidence Act** (I of 1872), s. 35—Evidence, admissibility of—Certificate of guardianship, nature of—Certificate, whether admissible to prove minority—Order for appointment of guardian of minor—Admissibility to prove age of minor.*

A certificate of guardianship is not a public record or register of any kind, but is a document issued to a particular person, giving to that person and only to him, a particular kind of authority, and cannot be regarded as evidence of minority under section 35 of the Evidence Act. [p. 337, col. 2.]

Satis Chunder Mukhopadhya v. *Mohendro Lal*, 17 C. 849; 8 Ind. Dec. (N. S.) 1110, *Mungni Ram Marwari* v. *Gursahai Nand*, 17 C. 347; 16 I. A. 195; 13 Ind Jur. 449; 5 Sar. P. C. J. 463; 8 Ind. Dec. (N. S.) 770, *Gunjra Kuar* v. *Ablakh Pande*, 18 A. 478; A. W. N. (1896) 158; 8 Ind. Dec. (N. S.) 1025, relied on.

An order made by a Court for the appointment of a guardian of a minor, which contains a recital that the latter was born on a particular date, is inadmissible in evidence to prove the date of birth of the minor. [p. 338, col. 2.]

Lekraj Kuar v. *Mahpal Singh*, 7 I. A. 63 at p. 65; 5 C. 744; 6 C. L. R. 593; 4 Sar. P. C. J. 03; 3 Suth. P. C. J. 704; Rafique & Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081 (P. C.) and *Emperor* v. *Panchu Das*, 58 Ind. Cas. 929; 47 C. 671; 31 C.L. J. 402; 24 C. W. N. 501; 21 Cr. L. J. 849 (F. B.), referred to.

Appeal against the decree of the Additional District Judge, Chittagong, dated the 22nd of March 1920, reversing the decree of the Officiating Subordinate Judge, Chittagong, dated the 17th of December 1918.

Babu *Dwarkanath Chakraburtty* (with him Babu *Paresh Chandra Mitra*), for the Appellant.—The only point in this appeal is the question of the admissibility in evidence of the recital of the date of birth of the defendant in the orders for the appointment and discharge of his guardian. The learned District Judge on the authority of the decision in *Satis Chunder Mukhopadhya* v. *Mohendro Lal* (1) has held that those orders were not admissible in evidence under section 35 of the Evidence Act. But the judgment of Sir Comer Petheram, C.J., in that case is in conflict with that of the Judicial Committee in *Mungniram Marwari* v. *Gursahai Nand* (2). Even if a certificate of guardianship is not admissible under section 35 of the Evidence Act, it may be admissible under some other provisions of the Act as a judgment of a Court of Justice or at least under section 32 (5) of the Evidence Act. Refers to *Achyutananda Das* v. *Jagannath Das* (3) and *Monindra Mohan Roy* v. *Ram Krishna* (4).

(1) 17 C. 849; 8 Ind. Dec. (N. S.) 1110.
(2) 17 C. 347; 16 I. A. 195; 13 Ind. Jur. 449; 5 Sar. P. C. J. 463; 8 Ind. Dec. (N. S.) 770.
(3) 27 Ind. Cas. 739; 21 C. L. J. 96; 20 C. W. N. 122.
(4) 28 Ind. Cas. 595; 21 C. L. J. 621.

Dr. *Dwarkanath Mitter* (with him Babu *Narayan Chandra Kar*), for the Respondents. —The decision of the Judicial Committee in *Mungniram Marwari* v. *Gursahai Nand* (2) does not militate against the view taken in *Satis Chunder Mukhopadhya* v. *Mohendro Lal* (1) which remains unchallenged by subsequent decisions. Taking the orders as judgments of a Court of Justice, the orders not being *inter partes*, their contents cannot be admissible in evidence. As to their admissibility under section 32 (5) of the Evidence Act, it has not been shown that the necessary conditions of that section have been satisfied. On the other hand, there is evidence to show that the applicant on whose application and affidavit the guardianship proceedings were founded, was alive during the pendency of the present suit in the Trial Court. Refers to *Haines* v. *Guthrie* (5).

Babu *Dwarkanath Chakraburtty* replied.

JUDGMENT.

Mookerjee, J.—This is an appeal by the defendant in a suit to recover the principal sum and interest thereon, due on a promissory-note executed by him in favour of the plaintiffs on the 11th June 1915. The defendant admitted the execution of the document, but contended that, as he was born on the 6th February 1895, and had a certificated guardian, the note was void because of his minority. The Trial Court gave effect to this contention and dismissed the suit. Upon appeal, the District Judge has reversed that decision and has decreed the suit. The District Judge has held that the oral evidence adduced on behalf of the defendant in proof of the date of his birth was unreliable, which is conclusive in second appeal; he has also held that the documentary evidence was inadmissible in law. The documentary evidence consisted of an order made by this Court on the 15th August 1910 for the appointment of a guardian of the person of the defendant, which contains a recital that the defendant was born on the 6th February 1895. The defendant also produced a subsequent order of this Court for discharge of the guardian, made on the assumption that he had attained his majority on the 6th February 1916. On the present appeal, the argument has been restricted to the question of the admissibility of the recital of the date of birth of the defendant in the orders for the appointment and discharge of his guardian. This question must plainly be determined with reference solely to the provisions of the Indian Evidence Act; see the observations of the Judicial Committee in *Lekeraj Kuar* v. *Mahpal Singh* (6); see also the decision of the Full Bench in *Emperor* v. *Panchu Das* (7).

The decision in *Satis Chandra Mukhopadhya* v. *Mohendra Lal* (1) shows that a certificate of guardianship is a document which is issued to a person, appointing him the guardian of another person, on the ground that that person is a minor. This certificate is neither a book nor a register nor a record kept by any officer in accordance with any law, but is a certificate, as it professes to be, of which there is only one, and which is not a public record or register of any kind, but is a document issued to a particular person, giving to that particular person and only to him, a particular kind of authority. On these grounds, Petheram, C. J., held that the certificate could not be regarded as evidence of minority under section 35 of the Indian Evidence Act. This was followed by Edge, C. J., in *Gunjra Kuar* v. *Ablakh Pande* (8) and the decision of the Judicial Committee in *Mungniram* v. *Gursahai Nand* (2) does not militate against this view.

This, however, does not conclude the question of admissibility, for, though not admissible under section 35, either of the documents may be admissible under some other provisions of the Indian Evidence Act. If it were treated as a judgment, it would clearly not be admissible as a judgment *in rem*, like a grant under the Probate and Administration Act; *Hemangini Debi* v. *Sarat Sundari Debya* (9). On the other hand, treated as

(5) (1884) 13 Q. B. D. 818; 53 L. J. Q. B. 421; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756.

(6) 7 I. A. 63 at p. 65; 5 C. 744; 6 C. L. R. 593; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081 (P. C.).

(7) 58 Ind. Cas. 929; 47 C. 671; 31 C. L. J. 402; 24 C. W. N. 501; 21 Cr. L. J. 849 (F. B.).

(8) 18 A. 478; A. W. N. (1896) 158; 8 Ind. Dec. (N. S.) 1025.

(9) 66 Ind. Cas. 882; 34 C. L. J. 457.

a judgment not *in rem* and not *inter partes*, it would be admissible not to prove its contents but only to prove that such a judgment was in fact pronounced; see *Basi Nath Pal* v. *Jagat Kisore Acharjee* (10), *Tripurana Sectha-pati Rao Dora* v. *Rokkam Venkanna Dora* (11), *Ram Parkash Das* v. *Anand Das* (12).

The only other provision which has been invoked by the appellant is that contained in section 32 (5) of the Indian Evidence Act, which renders admissible statements relating to existence of relationship, made before the question in dispute was raised, when the person making the statemen had special means of knowledge and is dead at the time of the suit, or cannot be found, or has become incapable of giving evidence, or cannot be procured without an unreasonable amount of delay or expense. In such circumstances, it has been held that a statement by the defendant's aunt in an application for guardianship, that he was born on a certain date, is admissible under section 32 (5); see *Monindra Mohan Roy* v. *Ram Krishna* (4), overruling *Ram Krishna* v. *Monind a Mohan Ray* (13), which had been doubted in *Achyutananda Das* v. *Jagannath Das* (3). This accords with the decisions in *Ram Chand a Dutt* v. *Jogeswar Narain Deo* (14), *Dhanmull* v. *Ram Chunder Ghose* (15) and *Oriental Government Security Life Assurance Company Limited* v. *Narasimha Chari* (16). On his principle, it has been ruled that a statement made by the father of a boy as to the date of his birth, which forms the foundation of a horoscope, is receivable in evidence under section 32 (5); *Annamalai Chetti* v. *Annamalai Chetti* (17), *Ramanathan Chetty* v. *Murugappa Chetty* (18); *Amardayal Singh* v. *Har Pershad Sahu* (19), *Patinhakuru* v. *Raman Varma* (20). This view receives support from the decision of the Judicial Committee in *Mahomed Syedol Ariff* v. *Yeoh Ooi Gark* (21). The defendant, however, is not entitled to the benefit of section 32 (5), because it transpires that the guardianship proceedings were founded on an application and affidavit made by one Panna Lal Seal, who was alive during the trial of the suit in the Primary Court and might have been, but was not called. The fact that he has since then died, apparently during the pendency of the appeal in this Court, clearly cannot improve the position of the defendant.

We may add that our attention was invited on behalf of the respondent to the decision in *Haines* v. *Guthrie* (5), which lays down an even stricter rule than what is contemplated by the Indian Evidence Act. There, in an action against *A* for goods sold, to which *A* pleaded infancy, an affidavit by *A's* father (deceased) stating the date of *A's* birth and made in a former action to which the plaintiff was not a party, was held inadmissible as evidence for *A* to prove his age, though it would be otherwise on matters of pedigree. This does not accord with the decision of the Judicial Committee in *Mahomed Syedol Ariff* v. *Yeoh Ooi Gark* (21). The decision in *Oriental Government Security Life Assurance Company, Limited* v. *Sarat Chandra Chatterji* (22), which was mentioned in the course of argument, only shows that declarations by relatives may be received to prove the age of the insured in an action against the Company, the contract allowing resort to non-admissible evidence.

We are of opinion that the District Judge has correctly held that the orders for the appointment and discharge of guardian could not be received in evidence to prove the date of birth of the defendant from the recitals contained therein. The decree made by the District Judge must consequently be affirmed and this appeal dismissed with costs.

W. C. A. *Appeal dismissed.*

(10) 35 Ind. Cas. 298; 23 C. L. J. 583; 20 C. W. N. 643.
(11) 66 Ind. Cas. 280; 42 M. L. J. 324; 15 L. W. 316; 30 M. L. T. 160; (1922) M. W. N. 147; 45 M. 332; (1922) A. I. R. (M.) 71
(12) 33 Ind. Cas. 583; 43 C. 707; 43 I A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 400; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 207 (P. C.).
(13) 27 Ind. Cas. 30; 20 C. L. J. 302.
(14) 20 C. 758; 10 Ind. Dec. (N. S.) 511.
(15) 24 C. 265; 1 C. W. N. 270; 12 Ind. Dec. (N. S.) 844.
(16) 25 M. 183; 11 M. L. J. 379.
(17) 52 Ind. Cas. 456; 10 L. W. 67.
(18) 33 Ind. Cas. 969; (1916) 1 M. W. N. 208; 3 L. W. 21.
(19) 58 Ind. Cas. 72; 5 P. L. J. 605; 1 P. L. T. 511.
(20) 24 Ind. Cas. 519; 28 M. L. J. 669.
(21) 39 Ind. Cas. 401; 43 I. A. 256; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 (P. C.).
(22) 20 B. 99; 10 Ind Dec. (N. S.) 624.

MOHAMMAD KARIM KHAN *v.* SADIQ HUSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL NO. 15 OF 1923.

January 19, 1923.

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

MOHAMMAD KARIM KHAN AND ANOTHER—APPLICANTS

versus

Mirza SADIQ HUSAIN AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 109, cls. (a) and (c), 105, 97—Order of remand, when final—Pre-emption suit—Donee from pre-emptor pending suit, allowed or disallowed to continue suit—Appeal to His Majesty in Council—Fit case for appeal.

An order of remand to be a final order, within the meaning of section 109, clause (*a*) of the Civil Procedure Code, must be such as finally disposes of the rights of the parties in regard to the subject-matter of the litigation. [p 340, col. 1.]

Isaacs & Sons v. *Salbstein*, (1916) 2 K. B. 139; 85 L. J. K. B. 1433; 114 L. T. 924; 60 S. J. 444; 32 T. L. R. 370, and *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishundas Ratanchand*, 56 Ind. Cas. 302; 47 I. A. 124; 24 C. W. N. 721; 18 A. L. J. 591; 22 Bom. L. R. 606; 39 M. L. J. 27; 12 L. W. 15; 2 U. P. L. R (P. C.) 94; (1920) M. W. N. 407, 28 M. L. T 87; 47 C. 918; 14 S L. R 191 (P. C), relied upon.

Rahimbhoy Habibbhoy v. *Turner*, 15 B. 155; 18 I. A. 6; 15 Ind. Jur. 35; 5 Sar. P. C J. 630, 8 Ind. Dec. (N. S) 104 (P C), *Sayyid Mazhar Hossein* v. *Bodha Bibi*, 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P C. J. 580; 8 Ind. Dec. (N. S.) 397 (P. C), *Nuri Mian* v. *Ganges Sugar Works Limited*, 32 Ind. Cas. 360; 38 A. 150; 14 A. L. J. 50, *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan*, 54 Ind. Cas. 504; 42 A. 174; 18 A. L. J. 83; 1 U. P. L. R. (A.) 108, *Mehr Chand* v. *Labbu Ram*, 60 Ind. Cas. 522; 2 L. 106, *Hyder Mehdi* v. *Badshah Khanam*, 40 Ind. Cas. 520; 21 O. C. 330; 6 O. L. J. 70, *Raghubar Dayal* v. *Champa Kunwar*, 33 Ind. Cas. 756; 19 O. C. 36, *Sri Krishna Das* v. *Benares Hindu University* 60 Ind. Cas. 208; 23 O., C. 324, referred to.

The determination of the right of a donee *pendente lite* to continue a suit for pre-emption brought by the donor, though involving an important subsidiary issue, cannot be said to finally determine the rights of the parties so as to bring the case within the purview of section 109, clause (*a*), Civil Procedure Code. Nor does it raise any question of public importance or general interest so as to fall under clause (*c*) of the section. [p. 340, col. 2; p 341, col. 1.]

Nuri Mian v. *Ganges Sugar Works Limited*, 32 Ind. Cas. 360; 38 A. 150; 14 A L. J. 50, *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan*, 54 Ind. Cas. 504; 42 A. 174; 18 A. L. J. 83; 1 U. P. L. R (A.) 108, *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji* 10 Ind. Cas. 439; 13 C L J. 507, *Srinibash Prosad Singh* v. *Kesho Prosad Singh*, 10 Ind. Cas 444; 13 C. L. J. 681, *Banarsi Prasad* v. *Kashi Krishna Narain*, 23 A. 227; 28 I. A. 11; 5 C. W. N. 193; 11 M. L. J. 56; 3 Bom. L. R. 154; 8 Sar. P. C. J. 447 (P. C.) and *Hirjibhai Navroji Ankleseria* v *Jamshedji* v. *Nassarwanji Ginvalla*, 21 Ind. Cas 783; 15 Bom. L. R. 1021 ,referred to.

Obiter.—Sections 97 and 105 of the Code of Civil Procedure do not regulate the right of appeal to His Majesty in Council; for, an order, which the Court declares to be final, may yet be open to an appeal to His Majesty in Council, *e. g.*, where the order negatives the right of a donee *pendente lite* to continue a suit for pre-emption brought by the donor. [p. 340, col 1.]

Tekait Krishna Prasad Singh v. *Moti Chand*, 19 Ind. Cas. 296; 40 C. 635; 17 C. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 Bom. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 149; 40 I. A. 140 (P. C.), referred to.

Application for leave to appeal to Privy Council.

Messrs. *Niamat Ullah* and *Mohammad Ayub*, for the Applicants.

Messrs. *Haider Hussain* and *M. Wasim*, for the Opposite Party.

ORDER.—This is an application for leave to appeal to His Majesty in Council arising out of a suit for pre-emption brought by Mirza Sadiq Hussain Khan in respect of a sale effected by defendants Nos. 6 and 7 in favour of defendants Nos. 1 to 4 on the 25th March 1919. The plaintiff claimed tobe entitled to pre-emption by reason of his being the owner of another *mahal* oft he village inwhich the property in dispute was situated.

During the pendency of the suit Mirza Sadiq Hussain Khan executed a deed of gift in respect of his entire interest n the said *mahal* in favour of his only son, Mirza Abid Hussain Khan, including in it a right to continue the suit for pre-emption aforesaid. Mirza Abid Hussain Khan subsequently applied to be added or substituted as a plaintiff; but the learned Subordinate Judge he d that the right to pre-emption was not transferab e and that the donee had no right to continue the suit. He further held that Mirza Sadiq Hussain Khan lost his right of pre-emption by transferring the property, the ownership of which had given him that right. On appeal it was held by this Court that the right of pre-emption was a right attached to the ownership of the property and that it passed by virtue of the gift to Mirza Abid Hussain Khan, who was permitted to continue the suit under O. XXII, r. 10 (1), of the Code of Civil Procedure. The suit was accordingly remanded to the Court below for disposal on the merits.

The question for consideration is whether the order of remand is a final order within the meaning of section 109, clause (*a*), of the Code of Civil Procedure. The order finally disposed of a subsidiary issue, which had arisen owing to a transfer effected by Mirza Sadiq Hussain Khan in favour of Mirza Abid Hussain Khan during the pendency of the suit. It is final so far as it disposes of the appeal; but it does not finally determine the rights of the parties in the litigation. The suit of Mirza Sadiq Hussain Khan or his donee may yet fail on any of the defences raised in the suit. The suit was dismissed by the Court below on a preliminary ground and the effect of the order of this Court is to direct that it should be determined on the merits. The issue decided by this Court is one of substitution or that of the right of a donee to continue a suit for pre-emption brought by the donor. Such an issue may be a cardinal issue in the suit, where there are no other material defences left to be determined. The rights of the parties here do not mainly depend on the determination of the right of the donee to continue the suit. They depend largely on the determination of the other issues raised in the defence and from the ultimate decree so passed an appeal may lie to the Privy Council in certain circumstances when the correctness of the order of remand can be challenged. Sections 97 and 105 of the Code of Civil Procedure do not regulate the right of appeal to His Majesty in Council, for, as Lord Moulton points out in *Tekait Krishna Prasad Singh* v. *Moti Chand* (1), an order, which the Code declares to be final, may yet be open to an appeal to His Majesty in Council, if the effect of the order is to negative the right of a donee to continue the suit. Such an order would have the effect of finally determining the rights of the parties; and an appeal therefrom would be maintainable on the ground that a substantial question of law was involved therein. As the effect of the order here was to recognise the right of the donee to continue the suit, the rights of the parties, in regard to the subject-matter of the litigation, are still in suspense and cannot be said to have been finally determined, though an important subsidiary issue which had arisen in consequence of a transfer effected by the original plaintiff during the pendency of the suit has been decided.

The learned Counsel for the applicants relies on the decisions of their Lordships of the Privy Council in *Rahimbhoy Habibbhoy* v. *Turner* (2) and *Saiyid Muzhar Hossein* v. *Bodha Bibi* (3). In the former case a cardinal issue, fixing the liability of the opposite party, had been decided, and the extent of the liability had alone remained to be determined. In the latter case the cardinal issue was one relating to the validity of a Will and the other defences were merely ancillary or subordinate.

In *Nuri Mian* v. *Ganges Sugar Works Limited* (4) and *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan* (5) orders of remand were not held to be final orders within the meaning of section 109 of the Code of Civil Procedure, and in *Mehr Chand* v. *Labbu Ram* (6) the same view was adopted. The decision in *Hyder Mehdi* v. *Badshah Khanam* (7) does not help the applicants, for there the substantial or main defence was one of limitation which had been finally determined.

In *Raghubar Dayal* v. *Champa Kunwar* (8) and *Sri Krishna Das* v. *Benaras Hindu University* (9) an order remanding a suit or proceeding, which had been dismissed on a preliminary ground without taking evidence, was held not to be a final order or decree within the meaning of section 109 of the Code of Civil Procedure. In *Isaacs & Sons* v. *Salbstein* (10) it was laid down that the nature of the order in each case would determine whether it was final

(1) 19 Ind. Cas. 296; 40 C. 635; 17 C. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 17 C. L. J. 573; 15 Bom. L. R. 515; 14 M. L. T. 37; 25 M. L. J. 140; 40 I. A. 140 (P. C.).

(2) 15 B. 155; 18 I. A. 6, 15 Ind. Jur. 35; 5 Sar. P. C. J. 639; 8 Ind. Dec (n. s.) 104 (P. C.).

(3) 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C. J. 580; 8 Ind. Dec. (n. s.) 397 (P. C.).

(4) 32 Ind. Cas. 360; 38 A. 150; 14 A. L. J. 50.

(5) 54 Ind. Cas. 504; 42 A. 174; 18 A. L. J. 83; 1 U. P. L. R. (A.) 168.

(6) 56 Ind. Cas. 522; 2 L. 106.

(7) 49 Ind. Cas. 320; 21 O. C. 336; 6 O. L. J. 70.

(8) 33 Ind. Cas. 756. 19 O. C. 36.

(9) 60 Ind. Cas. 208; 23 O. C. 324.

(10) (1918) 2 K. B. 139; 85 L. J. K. B. 1433; 114 L. T. 924; 60 S. J. 444; 32 T. L. R. 370.

or interlocutory. If the order finally disposed of the rights of the parties, it ought to be treated as a final order, but if it did not, itwas an interlocutory order, from which no appeal could be entertained In *Firm of Ramchand Manjimal* v. *Firm of Goverdhandas Vishindas Ratanchand* (11) a similar view was taken. The order in question does not finally determine the rights of the parties. It merely disposes of a subsidiary issue, the determination of which would require the continuation of the trial. If the suit ultimately fails on the merits, an appeal to the Privy Council may become wholly unnecessary. No leave to appeal can, therefore, be granted at this stage.

We do not also consider this to be fit case for appeal under clause (*c*) of section 109 of the Code of Civil Procedure. In *Muhammad Sajjad Ali Khan* v. *Muhammad Ishaq Khan* (5) the main question for consideration was whether a mortgage-deed was validly registered at a certain place by the inclusion of certain property, which did not really belong to the mortgagor. The determination of it depended on the question whether the mortgagee was aware of the fraud of the mortgagor, and the findings of the two Courts on that point were not the same. A mixed question of fact and law had thus arisen, the decision of which practically settled the fate of the litigation and the rights of the parties. In *Nuri Mian* v. *Ganges Sugar Works Limited* (4) a Full Bench of the Allahabad High Court was of opinion that special leave should be granted under clause (c) of section 109 only where the question for decision was one of general importance. In *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji* (12) and *Srinibash Prosad Singh* v. *Kesho Prosad Singh* (13) a Bench of the Calcutta High Court was of opinion that clause (*c*) of section 109 of the Code of Civil Procedure was intended to meet special cases, such, for example, as those in which the point in dispute was not measureable by money, though it might be of great public or private importance. As Lord Hobhouse said in *Banarsi Prasad* v. *Kashi Krishna Narain* (14), to determine whether a case is of great public or private importance, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without the special exercise of that discretion, evinced by the fitting certificate. It may be observed that the discretion, thus vested in the Court, has been always very sparingly used. A similar opinion was expressed by a Bench of the Bombay High Court in *Hirjibhai Navroji Anklesaria* v. *Jamshedji Nassarwanji Ginvalla* (15). At page 1033* of the report the learned Judges observed that what was contemplated in clause (c) of section 109 was a class of cases, in which there may be involved questions of public importance, or which may be important precedents, governing numerous other cases or in which, while the right in dispute is not exactly measureable in money, it is of great public or private importance. The case before us raises no question of public importance or general interest.

We dismiss the application accordingly with costs.

S. D. *Application dismissed.*

(11) 56 Ind. Cas. 302; 47 I. A. 124; 24 C. W. N. 721; 18 A. L. J. 591 22 Bom. L. R. 696; 39 M. L. J. 27; 12 L. W. 15; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M. L. T. 87; 47 C. 918; 14 S. L. R. 191 (P. C.).

(12) 10 Ind. Cas. 439; 13 C. L. J. 507.

(13) 10 Ind Cas. 444; 13 C. L. J. 681.

(14) 23 A. 227; 28 I A. 11; 5 C. W. N. 193; 11 M. L. J. 56; 3 Bom. L.R 154; 8 Sar. P.C. J. 447 (P. C.).

(15) 21 Ind. Cas. 783; 15 Bom. L. R 1021.

* Page of 25 Bom. L. R.—[*Ed.*]

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 225 OF 1921.

November 30, 1922.

Present :—Mr. Justice Das and Mr. Justice Adami.

Sri Thakur RADHA KRISHNA GOPAL LALJI AND OTHERS—APPELLANTS

versus

Babu LAKSHMI NARAYAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r.11—Guardian ad litem—*Notice to minor, necessity of—Guardian retiring during pendency of suit—Notice to minor of appointment of successor, whether necessary*—Karta, *appointment of, as guardian, effect of.*

RADHA KRISHNA GOPAL LALJI v. LAKSHMI NARAYAN.

Where a Court appoints a guardian *ad litem* for a minor it is not essential that notice of such appointment should be given to the minor. [p. 342, col. 2]

Where a guardian *ad litem* retires during the pendency of the suit, the Court is not bound to issue notice to the minor before making an order appointing a successor, as such a course is not contemplated by Order XXXII, r 11 of the Civil Procedure Code. [p. 342, col. 2]

Although a mother, the natural guardian, is the proper person to be appointed guardian *ad litem* of a minor, the fact that, on the nomination of the plaintiff, the eldest brother of the minor, who is also *karta* of the joint family, is appointed, would not render the decree passed in the suit a nullity. [p. 342, col. 2]

Appeal from the decision of the Subordinate Judge, First Court, Muzaffarpur, dated the 26th July 1921.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Appellants.

Messrs. *C. C. Das*, *Bhagwan Prasad* and *S. K. Mittra*, for the Respondent.

JUDGMENT.

Das, J.—This is an appeal on behalf of the decree-holders against an order of the learned Subordinate Judge of Muzaffarpur, dismissing the execution on the ground that the minor judgment-debtor was not properly represented in the action. The material facts are these.

The plaint was admitted on the 17th November 1913. On the 9th January 1914 the plaintiffs applied to the Court for the appointment of Ram Bahadur, the eldest brother of the minor, as the guardian *ad litem* for the minor defendant. It is not disputed that Ram Bahadur and the minor defendant formed a joint family and that Ram Bahadur was the managing member of the family. On the 4th of March of 1914 Ram Bahadur appeared in Court and expressed his disinclination to act as the guardian *ad litem* for the minor defendant. On the 30th April 1914 the Court appointed one Goodar Nath Pandey as the guardian *ad litem*. On the 20th May 1915 Goodar Nath Pandey being absent, the Court appointed one Nirbhay Singh as the guardian *ad litem* for the minor defendant. The suit was then compromised and a consent decree was passed in the suit.

The grounds upon which the learned Subordinate Judge has proceeded are these: First, that there is nothing to show that notice or summons was served on the minor after the appointment of Goodar Nath Pandey as the guardian *ad litem*; secondly, that the plaintiffs should have proposed the mother of the minor as the guardian *ad litem*; and, thirdly, that no notice was served on the minor informing him of the intention of the Court to discharge Goodar Nath Pandey as the guardian *ad litem*. On these grounds the learned Subordinate Judge came to the conclusion that the decree against the minor was void *ab initio* and that he could disregard the decree in the execution proceedings.

In my judgment the view taken by the learned Subordinate Judge is erroneous and cannot be supported. In the first place, there is no provision in the Civil Procedure Code which requires the Court to give any notice to a minor of the appointment of a guardian *ad litem* after such appointment.

Mr. Das contended before us that what the Court intended to find was, that the notice was not served on the minor in accordance with the provision of the 4th paragraph of O. XXXII, r. 3; but that is certainly not the finding of the learned Subordinate Judge and on the materials before him he could not have come to the conclusion that notice was not served in accordance with the provisions of the Code.

On the second point, I certainly think that the proper person to be appointed as guardian *ad litem* was the mother of the minor, that is to say, the natural guardian of the minor; but I am unable to say that the decree is a nullity because the plaintiff, instead of nominating the mother, nominated his brother who was undoubtedly the *karta* of the joint family and would represent the minor in all joint family transactions.

The third point raises a question of some difficulty, but I have come to the conclusion that, though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the Code which requires it to do so in a case contemplated by O. XXXII, r. 11. It will be noticed that paragraph 4 of O. XXXII, r. 3 applies only to a case contemplated by r. 3, that is to say, to a case where an application is made for the appointment of a guardian in the name or on behalf of

a minor or by the plaintiff. Rule 11 gives the Court power to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, and there is nothing in the Code which requires the Court to give notice to the minor before making the order under r. 11. The case of *Rajendra Prasad* v. *Prabodh Chandra Mitra* (1) is not an authority for the view that an order under r. 11, if made without notice to the minor, is a nullity. In that case the order of the learned Subordinate Judge appointing a person as guardian against the express wishes of the minor was challenged in the same proceedings and the Court had no difficulty in setting aside the order. But it is one thing to say that an order is without jurisdiction within the meaning of the term as used in section 115 of the Code, it is another thing to say that the order is void in the sense that the decree which is ultimately made may be disregarded by the Court executing the decree.

I would allow the appeal, set aside the order passed by the learned Subordinate Judge, and direct that the execution do proceed.

The appellants are entitled to the costs of this appeal.

Adami, J.—I agree.

W. C. A. *Appeal allowed.*

(1) 59 Ind. Cas. 936; 2 P. L. T. 116; 6 P. L. J. 282; (1921) Pat. 156.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL, NO. 444 OF 1921.

November 1, 1922.

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

KARUMURI RAMALAKSHMI *alias* PATTAMMA AND OTHERS—DEFENDANTS —APPELLANTS

versus

BODA NAGARATNAM AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

Hindu Law—Widow—Gift to next reversioner—Acceleration—Intention.

A transfer by a Hindu widow to her daughter or other next reversioner will ordinarily be regarded as an acceleration of the next reversioner's interest, but this will not be the case when there are material portions in the particular document by which the transfer is effected to support the existence of different intention on the part of the widow. [p. 344, col. 2.]

Bhupal Ram v. *Lachma Kuar*, 11 A. 253; A. W. N. (1889) 22; 6 Ind. Dec. (N S) 589; *Fup Ram* v. *Rewati* 6 Ind. Cas 541; 32 A. 582; 7 A. L. J. 645, referred to.

Appeal against a decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 62 of 1920, (Appeal Suit No. 121 of 1920 on the file of the District Court, Godaveri), preferred against a decree of the Principal District Munsif, Rajahmundry, in Original Suit No. 458 of 1918.

Messrs. *G. Lakshmanana* and *B. Satyanarayana*, for the Appellants.

Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—The foundation of the lower Appellate Court's judgment is, that Exhibit IV is a surrender of the interest of the first defendant. The appeal is argued on the footing that Exhibit IV operates merely as a gift to the first defendant's daughter, Subbamma, now deceased, of the first defendant's interest in the suit property under the Will, Exhibit V, purporting to have been executed by her husband, now deceased. It is necessary to add that Exhibit V has been found not to be genuine. Though there is no finding before us as to the first defendant's responsibility for its being put forward, the basis of our decision as to the character of Exhibit IV must be the intention of the executant, the first defendant.

That intention we have to collect from the wording of the document, and that wording fortunately is, in our opinion, clear. Exhibit IV is headed as a gift-deed, that description being repeated in its first paragraph. The second paragraph runs in this way : "My husband, late Korumudu Venkatapayya Garu, had executed a Will on 2nd May 1903 arranging among others that I should enjoy until my death the undermentioned immoveable property and the other moveable property belonging to my husband as his self-acquisition and that on my death you and your descendants should enjoy the same with powers of gift and sale. As I, too, am now 68

years old, as I have much affection towards you and as you and your husband have been protecting me amicably from the time of my husband's death till now, I have arranged that you should protect me in future until my death and I have this day given away to you as a gift the right and enjoyment possessed by me at present in the immoveable property worth Rs. 3,000 comprised in the said Will executed by my husband. Therefore, you yourself shall henceforth pay the entire taxes payable and enjoy the property from generation to generation with powers of gift and sale." The material fact on which we base our finding as to the first defendant's intention in this document is, that she proceeded throughout with reference to her husband's Will, first referring to it as the origin of her right to the property she was disposing and next referred to it as defining the estate, which she was disposing of. In these circumstances, our construction of Exhibit IV is that she was giving away what the Will purported to give her. Reference has been made to the Will as purporting to give her the estate she conveyed, not as really giving it to her in consequence of the lower Appellate Court's finding that the Will is not genuine, but that finding cannot affect the view we have to take of the first defendant's intention in Exhibit IV, we must reach a conclusion as to what she wished to give with reference to what she was assuming in the document as to the genuineness of the Will. Construction of the actual terms of the document as a justification for the lower Appellate Court's judgment failing, we have been asked to construe it in favour of the plaintiff-respondent with reference to what is alleged to be a rule of construction authorised by two decisions of the Allahabad High Court. That rule as proposed to us is, that gift by a widow to a daughter or, more generally a gift by a widow to another reversioner must be regarded, whatever its terms, as an acceleration of the other reversioner's interest. The exact question which the learned Judges were dealing in *Bhupal Ram* v. *Lachma Kuar* (1) is not clear. But we do not find that they intended to enunciate such a general rule as we are asked to adopt. In *Rup Ram* v. *Rewati* (2), *Bhupal Ram* v. *Lachma Kuar* (1) is, no doubt, followed, though apparently with some hesitation on the part of one of the learned Judges. But in fact we are unable to collect from either of these decisions that the Allahabad High Court has held anything which will be of any use to the plaintiff in the present case. The two decisions we have referred to, no doubt, lay down that a transfer by a widow to her daughter or other next reversioner will ordinarily be regarded as an acceleration of the next reversioner's interest. But the learned Judges do not say, and we do not think that they meant, that this will be the case when, as here, those are material portions of the particular document by which the transfer is effected to support the existence of a different intention. Taking this view, we cannot read Exhibit IV as executing acceleration of the plaintiff's interest or as anything except gift of what the widow believed to be her own interest in the suit property under the Will to her daughter Subbamma and Subbamma's heirs, in case Subbamma should die before the widow herself. The result is, that the second appeal must be allowed, the plaintiff's suit being dismissed with costs throughout.

V. N. V. N. H. *Appeal allowed.*

(1) 11 A. 253; A. W. N. (1889) 22; 6 Ind. Dec. (N. S.) 589.

(2) 6 Ind. Cas 541 : 32 A 582 : 7 A. L. J 645.

RAMYAD SINGH *v.* CHHEDIA BARHI.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 702, 746 AND 747 OF 1920.

June 13, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Kumar RAMYAD SINGH—PLAINTIFF—APPELLANT

versus

CHHEDIA BARHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (Beng. Act VI of 1908), s. 213 Execution of rent-decree—Auction sale of holding Exemption of portion of holding—Jurisdiction - Application to set aside sale not made—Suit to set aside sale, whether barred.

There is nothing in the Chota Nagpur Tenancy Act which authorises a Revenue Court to exempt from an auction sale, held in execution of a rent-decree, a portion of a tenant's holding, or to forbid an intending purchaser to bid for a portion of it

The fact that the sale of a holding in execution of a rent-decree is not sought to be set aside by means of an application under section 213 of the Chota Nagpur Tenancy Act, is no bar to the institution of a suit to set aside the same.

Appeals from a decision of the Deputy Collector, Hazaribagh.

Mr. *S. N. Rai*, for the Appellant.

JUDGMENT.

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

Kumar Ramyad Singh, the plaintiff, brought suits against three persons, Jhamna Dusadh, Chhedia Barhi and Lochan Koeri for arrears of rent. The suits were decreed and on applying for execution the defendants' holdings were put up for sale in the ordinary course. On the date fixed for the sales the plaintiff applied for permission to bid and permission was granted by the Deputy Collector with the reservation that the plaintiff should not be allowed to bid for the defendant's *ghars* and *gharbaris*. The plaintiff alleges that he had no knowledge of this reservation; he bid for and purchased the holdings, the sales were confirmed and it was not until after the confirmation of the sales that the plaintiff discovered that the *ghars* and *gharbaris* had been exempted. His contention is that in exempting these portions of the holdings the Deputy Collector acted without jurisdiction and he has consequently brought these suits to set aside the sales.

The suits were dismissed in the Court of first instance and the decisions having been upheld on appeal the plaintiff has again appealed to this Court. The defendants at the time of the trial alleged that the *ghars* and *gharbaris* were no portions of the holdings; this, however, was found against them by the Court of first instance, and apparently on appeal the question was not raised so that we must now take it that the *ghars* and *gharbaris* are parts of the holdings.

The only questions, therefore, which remain are whether the Deputy Collector had jurisdiction to exempt these portions of the holdings and whether for this reason the sales were without jurisdiction. The whole holdings were put up for sale and I can find nothing in the Chota Nagpur Tenancy Act which would authorise the Deputy Collector to exempt any portion of a holding or to forbid an intending purchaser to bid for a portion of it In these circumstances, it seems to me that the order of the Deputy Collector exempting these portions of the holdings from sale was without jurisdiction and, if this is so, clearly the sales themselves which purport to exclude these portions of the holdings which were put up for sale are also clearly without jurisdiction. Both the Courts below have referred to the fact that the plaintiffs might have made an application under section 213 to set aside the sales and they seem to think that because the plaintiff did not do this he is not entitled to succeed in these suits. I am unable to understand this view. It is true that the plaintiff could have made an application under section 213 but the fact that he did not do so certainly cannot bar the suits. In my view, the sales were without jurisdiction and should be set aside. I would accordingly decree these appeals.

Das, J.—I agree.

S. D. & N. H. *Appeals decreed.*

SADAQ REZA v. KHOSHMOHINI DASI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 565 OF 1920.

MAY 23, 1922.

Present :—Justice Sir Thomas Richardson, KT., and Mr. Justice Suhrawardy.

Syed SADAQ REZA, CHAIRMAN, MURSHIDABAD MUNICIPALITY —DEFENDANT—APPELLANT

versus

KHOSHMOHINI DASI AND OTHERS— PLAINTIFFS NOS 2, 3 AND 4— RESPONDENTS.

Fatal Accidents Act (XIII of 1855), s. 1—Bengal Municipal Act (III of 1884), s. 201—Negligence—Question of fact—Suit for damages for death caused by accident—Valuation of life lost.

In a suit under the Fatal Accidents Act for damages for death caused by an accident attributed to the negligence of the defendant, the death of one of the plaintiffs does not necessarily diminish the total amount to be distributed as loss among the survivors. [p. 349, col. 2.]

In such cases the question of negligence or no negligence is very largely a question of fact. [p. 349, col. 1.]

Where a person loses his life as the result of an accident, the value of his life does not depend on the number of his dependants but on his earning capacity. [p. 349, col. 2.]

Appeal against a decree of the District Judge, Murshidabad dated the 25th November 1919, affirming that of the Subordinate Judge of that District, dated the 18th September 1918.

Dr. *Sarat Chandra Basak* (with him Babu *Hemendra Kumar Das*), for the Appellants.—The defendant is the appellant. The appeal arises out of a suit for damages on account of the death of one Charu Krishna Dutt for the wrongful acts of the defendant Municipality. The original plaintiffs were the father, the mother, the widow and the minor daughter of the deceased. The suit was at first dismissed by both the Courts below on the ground that the suit was not maintainable, inasmuch as no notice was served on the Municipality under section 363 of the Bengal Municipal Act. On appeal to the High Court the case was remitted to the Trial Court to determine whether on the allegations in the plaint, the plaintiffs have a sufficient cause of action which, if established by proper evidence, would entitle them to recover damages from the Municipality for their breach of duty in failing to fence the road as mentioned in section 201 of the Bengal Municipal Act. The claim was made under the Fatal Accidents Act (XIII of 1855) and was for Rs. 1,020. During the trial on remand the father of the deceased died. The Courts below have decreed the suit and apportioned the entire sum claimed among the surviving plaintiffs. It is against that decision that the present appeal is directed. The facts shortly are these. There is an old drain by the side of the public road in the town of Murshidabad. The drain was being re-excavated by the Municipality. The drain having been completed there was only one stone slab placed on it as a bridge. On the night of the 16th July 1912 the deceased fell into the drain while trying to cross it and received injuries which were not of a serious nature but tetanus supervened and he died on 2nd August 1912. My first point is that it was incumbent on the plaintiff to serve a notice on the Municipality as provided by section 363 of the Bengal Municipal Act. The word "act" included omissions also. The General Clauses Act of 1899 (B. C.) did not introduce any change in the law. In this view the words "any thing done" in section 363 of the Bengal Municipal Act included an omission. Refers to Maxwell's Intrepretation of Statutes, p. 133 (6th Edition). Therefore, notice must be served, otherwise no suit would lie. Hence I submit the present suit is not maintainable, even though the plaintiffs based their case on the ground of an alleged breach of duty imposed upon the Municipality under section 201 of the Bengal Municipal Act. My next point is that the finding of the Courts below does not establish that the Municipality was guilty of such negligence as to make it liable for damages under the Fatal Accidents Act (XIII of 1855). My last submission is that there were originally four plaintiffs—the father, the mother, the widow and the minor daughter of the deceased. They claimed between them Rs. 1,020. The father died during the second trial. Therefore, the Courts below instead of decreeing the entire amount claimed, ought to have decreed a proper proportionate amount.

Dr. *Dwarkanath Mitra* (with him Babu *Sitaram Banerjee*), for the Respondents.—As regards the first point, the judgment

of the High Court on second appeal concludes it. On the first occasion the suit had been dismissed on the ground of notice, but Fletcher and Smither, JJ., on the second appeal held that at the time of the passing of the Bengal Municipal Act, the Bengal General Clauses Act did not provide that the word 'act' used in the Bengal Acts included certain omissions and it was only in 1899 that it was provided that the word 'act' used in the Bengal Acts passed after that date should include not only an act done but also an omission. I submit that decision concludes the point which can no longer be pressed now. As regards the second point, I submit it is a pure question of fact and the finding of the two Courts below are sufficiently conclusive. As regards the last point I submit Act XIII of 1855 authorises apportionment of damages among the parties for whose benefit the suit is brought or any of them in such shares as the Court shall direct. The Court of Appeal below has very aptly remarked that the value of a man's life does not depend on the number of dependants but on his earning capacity on which basis the damages have been assessed in the present case.,

Dr. *Basak*, replied in brief.

JUDGMENT.

Richardson, J.—This is an appeal from the judgment and decree of the District Judge of Murshidabad, dated the 25th November 1919, affirming the decree of the Subordinate Judge, dated the 18th September 1918. The plaintiffs in the suit were, originally, the father, the mother, the widow and the minor daughter of the deceased Chara Krishna Dutta whose death was caused by an accident attributed to the negligence of the Murshidabad Municipality.

The claim was under Act XIII of 1855 for a lump sum of Rs. 1,020 as damages on that account, the plaintiffs asserting that the deceased had maintained them. The suit having been dismissed, the High Court directed a re-trial. Pending the second trial the father of the deceased died. The Courts below have now, by concurrent decrees, apportioned the entire sum claimed among the three surviving plaintiffs. The appellant is the defendant, the Chairman of the Murshidabad Municipality.

It appears that in the town of Murshidabad there is an old open drain running by the side of a public road. It is not disputed that the drain is a public drain, vested in the Municipality which the Municipality were re-excavating or making deeper. For that purpose certain stone slabs were removed which had been placed across the drain to serve as a bridge by the owner of premises beyond the drain, one Gangadas Roy. The evidence is that the bridge consisted of several slabs side by side, each about 2 feet in width.

The work on this part of the drain having been completed, only one of the slabs was re-placed in position. Thereafter, on the night of the 16th July 1912, the deceased, going from the road with the intention of passing through Gangadas Roy's house or compound, fell into the drain and received certain injuries. The injuries were not in themselves of a serious character, but tetanus supervened and the deceased died on the 2nd August 1912.

The suit was instituted on the 8th January 1913.

In view of the argument addressed to us, it is convenient to set out the relevant provisions of Act XIII of 1855. Section 1 of that Act enacts in its first paragraph as follows:—"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect of the reof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime." The second paragraph of the section further enacts that "every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased." In the third

paragraph it is laid down that "in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

As the result of the second trial, the Courts below have found that the defendant Municipality was guilty of negligence or breach of duty by reason of the fact that the drain at the point where the deceased fell in was not fenced or lighted in accordance with the requirements of section 201 of the Bengal Municipal Act. Damages have been awarded, therefore, on the footing that on that ground the deceased, as an injured party, might, if he had survived, have maintained an action against the Municipality or its Chairman. Section 201 of the Municipal Act empowers the Commissioners of a Municipality to close a public road for repairs or for the purpose of constructing any sewer, drain, culvert or bridge or for any other public purpose. The section also provides that, "whenever owing to such repairs or constructions or from any other cause, any road or part of a road shall be in a state which is dangerous to passengers, the Commissioners shall cause sufficient barriers or fences to be erected for the security of life and property, and shall cause such barriers or fences to be sufficiently lighted from sunset to sunrise."

Dr. Basak, appearing on the Chairman's behalf, has contended, first, that the suit should have been dismissed under the provisions of sections 363 of the Bengal Municipal Act of 1884, secondly, that the facts found by the Courts below do not support the inference that the Municipality was guilty of such negligence as would make it liable to damages under Act XIII of 1855, and, thirdly, that the father having died pending the proceedings a deduction should have been made from the whole sum claimed of the amount representing his loss by reason of his son's death.

In my opinion, the first of these contentions fails in view of the terms of the judgment of the learned Judges of this Court, Fletcher and Smither, JJ., who remanded the suit for re-trial. At that stage the suit had been dismissed on the preliminary grounds that the notice required by section 363 of the Municipal Act had not been given and that the suit was out of time under that section. The section prescribes that no suit shall be brought against a Municipality "for anything done under this Act" until the expiration of one month next after notice in writing has been delivered or left at the Municipal Office. Unless such notice be proved, the Court is to find for the defendant and every such suit must be commenced within three months next after the accrual of the cause of action and not afterwards. The learned Judges laid stress on the words "anything done" under the Act. They pointed out that in 1884 there was no legislative definition such as that afterwards enacted in section 3 (2) of the Bengal General Clauses Act, 1899, under which "words which refer to acts done shall also extend to illegal omissions." They were of opinion that section 363 of the Municipal Act would have been applicable if the only cause of action disclosed in the plaint had been that the Municipality had improperly dug a hole in the road or the drain. They went on, however, to say that the plaintiffs also alleged a breach of duty by the Municipality in failing to perform their duty under section 201. The conclusion at which the learned Judges arrived was, that there was a case to be tried as to whether the plaintiffs, on the allegations in their plaint, have a sufficient cause of action which, if established by proper evidence, would entitle them to recover damages from the Municipality for their breach of duty.

It is true that in Maxwell on the Interpretation of Statutes (6th Edition, p. 133) it is stated that, "Statutes which require notice of action for anything 'done' under them are construed as including an omission of an act which ought to be done as well as the commission of a wrongful one." But it is unnecessary for us to consider how we might have construed the language of section 363 if the

point had been open. As between the parties to the present suit, the point is concluded by the previous judgment of this Court.

The issue indicated by the learned Judges has been tried and it has been found that the Municipality was guilty of breach of duty. If the learned Judges had not been of opinion that in such cases, the provisions of sections 03 had no application they would not have put the parties to the expense of a re-trial. In my opinion it is not now open to the defendant to rely on these provisions.

The second contention urged for the defendant is, that the facts found do not support the inference of negligence which the Courts below have drawn. The question of negligence or no negligence is in most cases, however, very largely a question of fact The Courts below have concurrently found that the road was in a state dangerous to passengers and that it was a breach of duty on the part of the Municipality not to take the precautions specified in section 201 of the Act. It was not disputed that the road and the drain alongside it must be taken together as an integral whole. Both were vested in the Municipality and people had to cross the drain to get to the houses on the other side. What appears to be suggested is that the drain has always been where it is and unlighted at night and that passengers must take the road as they find it with the drain. But that argument was not presented to the Courts below and it is not necessary to deal with it for this reason. On the material before them, it was open to the Courts to find that, whatever might be said about the previous condition of things at the spot where the deceased met with the accident, that condition had been so altered as to bring about undoubtedly a state of the road dangerous to passengers within the meaning of the Act. It is not necessary to say that we should have come to the same conclusion on the same materials. I do not suggest the contrary, but all that we need say is that there were materials before the Courts on which they might reasonably come to the conclusion to which they did come. It was not only that the drain had been made a foot or two deeper. The learned Subordinate Judge refers to evidence showing that loose earth heaped on the eastern edge of the drain slipped from beneath the feet of the deceased causing him to fall. The Subordinate Judge draws the inference that the road was on that account in a dangerous condition. It may be that the learned District Judge goes further, but if he speaks of the drain generally as a possible source of danger, he also adverts to the alteration of the previous state of things. The danger, he says, became all the greater "because in this particular instance certain stone slabs forming a passage across the drain had been removed and only one of them replaced in position." In my opinion, this second contention cannot be supported.

The last point taken is that it was not open to the Courts below to divide the whole sum of Rs. 1,020 claimed in the plaint between the surviving plaintiffs. Here, also, I think the appeal fails. If the provisions of the Act of 1855 had been strictly observed, the suit should, as it seems, have been brought by the widow of the deceased as his representative for her own benefit and for the benefit of the parents and the child of the deceased. If the suit had been so framed, the objection urged would hardly have suggested itself. It is not denied that the death of the deceased caused pecuniary loss to the plaintiffs. The death of one of the plaintiffs does not, or does not necessarily, diminish the total amount to be distributed as loss among the survivors. If the father had died before the accident, the deceased might have spent more on the other members of the family. The Act of 1855 expressly authorizes the division of the damages among the parties for whose benefit the suit is brought or "any of them in such shares as the Court by its judgment or decree shall direct." That would seem to give power to divide damages claimed and awarded between some only of the parties for whose benefit the claim is made. The damages here have been calculated on the basis of the earning of the deceased at the time of his death, and I agree with the District Judge that the value of his life does not depend on the number of his dependants but on his earning capacity. The loss to

the defendants is the estimated amount which they collectively have lost by reason of his death whether they be few or many.

In the result the appeal should, in my opinion, be dismissed with costs.

Suhrawardy, J.—I agree.

B. N. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 348 OF 1921.

November 27, 1922.

Present:—Mr. Justice Stuart.

Lala SHEO PRASAD—PLAINTIFF—APPELLANT

versus

BABU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 57 (d)—Tenant grove-holder—Ejectment.

A tenant grove-holder is very different from a tenant of a grove. His rights in the plot of the grove are not those of a tenant but of a grove-holder and as such he cannot be ejected from it under section 57 (*d*) or any other provision of the Agra Tenancy Act.

Rameshar Singh v. *Madho Lal*, 52 Ind. Cas. 191; 17 A. L. J. 971; 42 A. 36 and *Param Hansman Tewari* v. *Dasrathman Tewari*, 60 Ind. Cas. 770; 19 A. L. J. 292; 43 A. 445, distinguished.

Second appeal against the decree of ths District Judge, Bareilly, dated the 14th of December 1920.

Dr. *S. N. Sen* and Mr. *S. C. Das*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This was a suit for the ejectment through the Revenue Court of five persons who were tenants of an occupancy holding, on the ground that they had sublet a portion of their holding in contravention of the provisions of section 25 of the Tenancy Act. This suit thus lay under the provisions of section 57 (*d*). The Courts below have arrived at the following findings: They found that these five defendants were recorded as the tenants of over 50 plots of an area of 83 *bighas* 2 *biswas* and that all these plots with the exception of No. 817 were agricultural plots; but they found that No. 817 was a grove in which defendants Nos. 1 to 5 had the right of grove-holders. I cannot interfere with the finding that the defendants Nos. 1 to 5 had the right of grove-holders in No. 817, for that finding is a finding of fact. It appears to me to follow from that finding that No. 817 is not part of the occupancy holding. The conclusion at which I arrive is that No. 817 is a grove in which defendants Nos. 1 to 5 have grove-holder's rights. They are not tenants of the grove. They are tenants grove-holders, a very different thing. The remaining numbers form part of an occupancy holding.

This appeal has arisen in the following way:—

The Courts below while directing the ejectment of defendants Nos. 1 to 5 from all plots other than No. 817 have refused to eject them from No. 817. The plaintiff appeals against the refusal to eject from No. 817. As I have already stated, the finding is that the defendants are tenants grove-holders of No. 817 and from that finding it follows that No. 817, although recorded with the other numbers, is not a part of the occupancy holding. The plaintiff cannot, therefore, eject them from No. 817 under the provisions of section 57 (*d*) or any other provision in the Act. The case is different from the cases reported in *Rameshar Singh* v. *Madho Lal* (1), and *Param Hansman Tewari* v. *Dasrathman Tewari* (2). In the first case the person ejected was a tenant of a grove holding from year to year, and in the second case the land from which the person was ejected was found on the facts to be part of the holding. It was not grove land. I, therefore, dismiss this appeal with costs which include fees on the higher scale.

S. D. *Appeal dismissed.*

(1) 52 Ind. Cas. 191; 17 A. L. J. 971; 42 A. 36.
(2) 60 Ind. Cas. 770; 19 A. L. J. 292; 43 A. 445.

MAYARAM *v.* BHAIRON PRASAD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 415 OF 1920.
November 6, 1922.
Present :—Mr. Hallifax, A. J. C.
MAYARAM AND OTHERS—DEFENDANTS —APPELLANTS
versus
BHAIRON PRASAD—PLAINTIFF—RESPONDENT.

Hindu Law—Debt incurred by father as surety for payment of money lent—Liability of son

Where a Hindu father becomes surety for the payment of money lent, after his death his son is liable under the Hindu Law to pay the debt.
(Case-law referred to and considered.)

Appeal from the decree of the Additional District Judge, Raipur, in Civil Appeal No. 255 of 1919, dated the 28th June 1920.

Dr. *H. S. Gour*, for the Appellants.
Sir *B. K. Bose*, for the Respondent.

JUDGMENT.—The plaintiffs sued three persons on a bond executed by two of them in satisfaction of a decree outstanding against them and by the third, Mohan Kurmi, as a surety. In the First Court a decree was passed against the two principal debtors but the suit was dismissed as against Mohan Kurmi on the finding that he had not executed the bond. On the 20th of December 1919 the plaintiffs filed an appeal in which they made only Mohan a respondent. He, however, died on the 12th of January 1920, and his three sons were impleaded as respondents in his place. The learned Additional District Judge has somewhat carelessly ignored the death of Mohan and, finding that he did execute the bond, has passed a decree against him. In the First Court Mohan was the third defendant, and the decree of the lower Appellate Court, in modification of the Munsif's decree, declares that "defendant No. 3 is jointly liable with defendants Nos. 1 and 2 for the sum of Rs. 397-4-0 and costs Rs. 55-14-0 and that he should pay it to the plaintiffs accordingly." Mohan's three sons appeal against this decree on the ground that, under the Hindu Law, they are not liable to pay a debt contracted by their deceased father as a surety.

(2) The leading case on the subject appears to be *Tukarambhat* v. *Gangaram Mulchand Gugar* (1) where it was discussed at length by Ranade, J. The learned Judge mentions those texts which lay down generally what classes of the debts of his father a Hindu cannot be compelled to pay, in which are included "sums for which the father was a surety," and explains that it "is often found necessary, even in more regularly constituted Codes of law, but it is specially obligatory in the interpretation of ancient Hindu law books" to follow the rule that "an express particular text occurring in its proper place limits mere general statements of the principles made in other places." Mr. Justice Ranade then discusses the texts relating to this particular matter and arrives at what is clearly an inevitable conclusion, which can be stated in the following words with which he begins the discussion. "Brihaspati recognises four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons, but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death." This ruling was followed by the Allahabad High Court in the *Maharaja of Benares* v. *Ramkumar Misir* (2) and in Madras in *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar* (3) and *Thangathamma* v. *Arunachallam Chettiar* (4) and also coupled with the Allahabad case just mentioned, in Calcutta in *Rasik Lal Mandal* v. *Singheswar Roy* (5).

(3) The learned Counsel for the appellants has cited the Calcutta case of *Chakouri Mahton* v. *Ganga Proshad* (6) as holding a different view. The debt under consideration in that case was due by the defendant's deceased father under a decree obtained against him for damages on account of in-

(1) 23 B. 454; 12 Ind. Dec. (N. S.) 301.
(2) 26 A. 611; 1 A. L. J. 330; A. W. N. (1904) 142.
(3) 28 M. 377.
(4) 48 Ind. Cas. 76; 41 M. 1071; 35 M. L. J. 229; (1918) M. W. N. 673.
(5) 14 Ind. Cas. 147; 39 C. 843; 16 C. L. J. 107; 16 C. W. N. 1103.
(6) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

jury to the crops of the plaintiff by the obstruction of an irrigation channel, and it had to be decided whether such a debt was or was not *vyavaharika* and so payable by defendant, and in that connection the learned Judges examined the general lists of which Mr. Justice Ranade spoke in *Tukarambhat* v. *Ganga Ram Mulchand Gugar* (1). The discussion of the classes of debts payable by a Hindu son certainly goes outside the particular class of debts in question in the case, but the learned Judges expressly refrained from giving any decision in regard to suretyship debts. They said: "Reference was made at the bar to decisions upon the question of the liability of a son to satisfy a suretyship debt of his father, and mention was made particularly of the cases of *Tukarambhat* v. *Gangaram Mulchand Gugar* (1), *Narayan* v. *Venkatacharya* (7), *Maharaja of Benares* v. *Ramkumar Misir* (2), *Sitaramayya* v. *Venkatramanna* (8) and *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar* (3). It is not necessary, however, to discuss, for our present purpose, the question of the liability of a Mitakshara son for the suretyship debt of his father, because the determination of that question depends upon the interpretation of special texts, specially the text of Vishnu, which defines the different kinds of sureties, namely, for appearance for honesty, for debt and for delivery of the debtor's effects (Jagannath's Digest, Volume 1, page 246). But we may observe that the latest decision in this Court [*Hiralal Marwari* v. *Chandrabali Haldarin* (9)] may be difficult to reconcile with the cases in Bombay, Allahabad and Madras which we have already mentioned; for the reason already stated, however, it is not necessary to examine further this class of cases."

(4) There appears to me to be no difficulty, if I may say so with due respect, in reconciling *Hiralal Marwari* v. *Chandrabali Haldrain* (9) with the cases mentioned. Indeed, one of the cases from each of the three Courts is mentioned, and they are distinguished in a way which implies concurrence, not dissent. With reference to the *Maharaja of Benares* v. *Ramkumar Misir* (2), *Tukarambhat* v. *Gangaram Mulchand Gugar* (1) and *Sitaramayya* v. *Venkatramanna* (8) the learned Judges say: "The facts of these cases, upon which reliance has been placed for the plaintiff-appellant, are not similar to those of the case with which we are now concerned, because in none of those cases was there any question raised as to the effect of the personal remedy against the son being barred by the six years' rule of limitation."

(5) It was argued by the learned Counsel for the appellants that the obligation is not binding upon the sons of Mohan, because the money to be re-paid was not a loan, with reference to the third class of sureties mentioned by Brihaspati which is "for payment of money lent." The same argument was put forward in *Tukarambhat* v. *Gangaram Mulchand Gugar* (1) and *Rasik Lal Mandal* v. *Singheswar Roy* (5) and I can add nothing to the reasons stated in those cases for considering it of no avail, though it may be mentioned that there does appear to be some reason to suppose that the payment promised in this case was a payment of money lent, the creditor had obtained a decree for it, but that would not alter its character. The appeal is accordingly dismissed and the appellants must pay all the costs.

W. C. A

Appeal dismissed.

(7) 28 B. 408; 6 Bom. L. R. 434.
(8) 11 M. 373; 4 Ind. Dec. (N. S.) 260;
(9) 1 Ind. Cas. 153; 13 C. W. N. 91

CHANDRIKA RAM *v.* EMPEROR.

PATNA HIGH COURT.

DEATH REFERENCE, CASE NO. 3 OF 1922 AND CRIMINAL APPEAL NO. 16 OF 1922.

February 23, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Ross.

CHANDRIKA RAM KAHAR—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 32: Gestures by wounded person, relevancy of—Opinions of witnesses as to gestures, whether admissible in evidence.

Where a woman, with her throat partially cut and unable to speak, makes gestures in answer to questions put by a Sub-Inspector, Police, and indicates the person who has wounded her, the gestures are admissible in evidence under section 32 of the Evidence Act. The interpretation of the gestures is for the Court alone and the opinion of witnesses as to such gestures is not evidence [p. 357, col. 1]

Queen-Empress v. *Abdullah*, 7 A. 385; A. W. N. (1885) 78; 4 Ind Dec. (N S) 692 (F. B), followed.

Reference and Criminal appeal from a conviction and sentence passed by the Sessions Judge, Singhbhum, dated the 1st February 1922.

Mr. *Patel* (with him Mr. *Hyder Imam*), for the Appellant.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.

Coutts, J.—The appellant in this case, Chandrika Ram Kahar, has been convicted by the Sessions Judge of Manbhum-Sambalpur, under section 302 of the Indian Penal Code, for the murder of his wife, Budhua Kaharin, on the 9th October last and has been sentenced to death.

The case for the Crown is that Chandrika and his wife were not on good terms and that for this reason she lived almost entirely with her father Keshwar Ram. Before the date of her death she had been living with Keshwar for about six months, but on the evening of that day, at about 7 P. M., Chandrika came and said he wanted to take her to his house for the Dusserah festival. Keshwar lives in village Kasidih and Chandrika lives in Jugselai, a village about three miles south of Kasidih. Chandrika is said to have been accompanied by another man when he went to fetch his wife from her father's house but afterwards this man disappeared. When Chandrika came to fetch his wife Keshwar told her to go and they started off together. They did not go straight to Jugselai, however, but went to a *Ramlila* performance which was being held in a *shamiana* at Sakchi. There they stayed until about midnight when the performance ended and then went off together towards Jugselai. They had gone only about 200 yards when Chandrika seized his wife's arm apparently because she was starting to go in a wrong direction. She asked him why he was doing this and he said it was because she must go to his house. She replied that she would go but he must not hold her arm. They then went on, she going ahead and he following.

Next morning, at about 10 A. M., Sub-Inspector Sukhdeo Sahay, who was investigating a case in the neighbourhood, got certain information from one Ram Prasad in consequence of which he went with him and Mr. Rivett, Additional Superintendent of Public Safety at Jamshedpur, to a spot near the pathway which runs from Kasidih to Jugselai where they found the woman Budhua lying partly supported by a heap of stones with her throat cut and her clothes covered with blood. There was a pool of blood at a spot about 45 paces to the north. The woman was unable to speak but when asked who had wounded her she touched the *sindur* mark on her forehead which is placed on the forehead of married women by their husbands. The Sub-Inspector asked the woman if, by indicating the *sindur* mark, she meant that she had been murdered by her husband and she nodded her head in assent. Mr. Rivett was then asked by the Sub-Inspector to go on his motor bicycle to the Hospital and get medical help. He did so and Dr. Sen, who is the Deputy Chief Medical Officer, sent his assistant Dr. Roy in a car with necessary appliances. Dr. Roy took the woman to the Hospital where they arrived about 11 A. M., and there an operation was performed which took about 1½ hours. Meanwhile, a Muhammadan, who cannot be traced, had given information to Budhua's father Keshwar Ram and Keshwar went first to the Thana and then to the Hospital. The Sub-

Inspector was there but apparently did nothing until after the operation when there seems to have been an interview with Budhua after which the Sub-Inspector recorded a statement of Keshwar which has been treated as the First Information in the case. The Sub-Inspector then went to Jugselai which is about a mile from the place of occurrence and arrested the accused who was at the time sleeping in his house. After arresting Chandrika the Sub-Inspector took him to the Hospital. From there the Sub-Inspector went to the District Superintendent of Police and with him went to try and find a Magistrate. He failed to find either of the two Honorary Magistrates at their houses; so he returned to the Hospital. This was about 5-30 P. M. He then confronted Budhua with her husband Chandrika and asked her who had cut her throat, whereupon she pointed to Chandrika. She was asked if any one assisted Chandrika and she held up her fore-finger. This was taken to indicate that another man was assisting and when she was asked what the other man did she pressed back her head with both hands. Other questions were then asked and, amongst them, what she had been cut with. In reply to this she measured off about 9 inches on her arm and also held up two fingers together. Soon after this an Honorary Magistrate, Mr. Brokenshire, appeared, and after a consultation with Mr. Rivett they both went into the room where the woman was, taking with them Chandrika and a pick-pocket who had been arrested and who happened to be there. Questions similar to those asked by the Sub-Inspector were put to her and she is said to have made the same kind of gestures indicating Chandrika as having wounded her with a knife and as having been assisted by some other person. After some ten or twelve questions had been asked the examination was stopped by Dr Sen on account of the condition of the woman who was by that time very exhausted. Budhua died on the 11th at about 5 P.M., and the evidence of the Sub-Assistant Surgeon who conducted the *post mortem* examination shows that the larynx was completely divided through the thyroid cartilage and partly cut through the crico thyroid membrane, about 1·3rd inch of its diameter. The pharynx was cut about 2-3rd inch of its diameter beneath the thyroid cartilage and he deposes that she died from the effects of these injuries. There were other slight injuries which it is unnecessary to detail, as they have no bearing on the case. The wounds could not have been self-inflicted and the medical evidence shows conclusively that the woman Budhua has been murdered. The murder appears to have been of a peculiarly brutal character and there is no doubt that, if Chandrika were guilty, the only sentence which it would be possible to inflict would be the extreme penalty of the law. The question is whether the evidence is sufficient to establish Chandrika's guilt.

The learned Sessions Judge who has tried the case, which is a difficult one, with great care, has dealt with the different stages of the prosecution case separately, and for the sake of convenience I propose to deal with these stages in the order in which he has taken them.

First, there are what has been referred to as the unhappy relations which are said to have existed between Chandrika and his wife Budhua. There are three witnesses in regard to this stage of the case, Keshwar, the girl's father, and two neighbours, *Musammat* Dhanmatia and Bhikari Lal. Bhikari Lal relates a curious incident which he says he witnessed when Chandrika beat his wife and threatened her with a sword stick. The story is uncorroborated, though other persons are said to have witnessed the occurrence and this evidence has very rightly been rejected by the learned Sessions Judge. There remains the evidence of Keshwar and *Musammat* Dhanmatia. Dhanmatia says she knows nothing about the relations which existed between Chandrika and Budhua. The learned Sessions Judge however, seems to think that her evidence supports the view of unhappy relations because she deposes that Budhua did not live constantly at the accused's house but often came to her father's house and was often fetched away by the accused's father. This, however, is hardly a correct summary of her evidence on this point. What she says is :

"I have been living there for four years and Keshwar was living there before me. I

have seen Budhua in his house for six months. Before that she was not there. I had never seen the accused at Keshwar's house before."

And again :—

"During the four years that Keshwar lived there Budhua used to come and go. Often the accused s father used to take her off to the accused's house."

This indicates nothing more than a very ordinary state of affairs ; and certainly does not support the view of unhappy relations.

I now come to Keshwar's evidence. Before the Sessions Judge he says that the accused ,—

"married my daughter Budhua, nine years ago. She lived with him for four years off and on but was always coming back to my house on the plea of ill-treatment. She came last to my house in Kasidih in *Chait* and lived with me for six months."

And again ,—

" during the six months she went away once for a week to the accused and complained about him on her return "

Before the Committing Magistrate, however, what he said was ,—

"On last *Chait* my daughter came to my house after the death of my wife and children . . . . . My daughter told me when she was younger that her husband ill-treated her , ... , . . . She has not told me this since she came to live with me last *Chait.*"

This clearly indicates that, although when they were first married there may have been some ill-treatment of Budhua by Chandrika, there is no reason to suppose that in recent years they have been on bad terms and I am unable to accept the version which Keshwar has given in the Sessions Court and which is obviously an improvement introduced to suit the prosecution case. It is true that Keshwar in his statement to the Police, which has been treated as the First Information in the case, said that his daughter did not want to live with her husband as he used to ill-treat her. But this statement, as will presently appear, is not really the First Information at all and consequently not evidence. When the evidence regarding this stage of the case is examined then it is clear that no case of unhappy relations between Chandrika and Budhua is made out ; and, if anything, the evidence is to the contrary, for both Keshwar and Dhanmatia say that, when her husband came on the evening of the 9th, Budhua went away with him without any remonstrance. Dhanmatia further says that there was no quarrel or dispute at all and it seemed to her to be a case of an ordinary departure of the husband taking the wife. It is true that two witnesses, who say they saw Chandrika and Budhua at the *Ramlila*, said that when they left the *Ramlila* Chandrika seized Budhua's arm. But why he did so is by no means clear from their evidence and even they depose that she said that she would go along with him if he let her hand go. This hardly indicates unwillingness to go with him ; moreover, it is significant that before the Committing Magistrate neither of these witnesses say anything about the seizing of Budhua's hand by Chandrika and I am very much inclined to think that this part of the evidence is embroidery. The evidence then, in my opinion, does not disclose any unhappy relationship between Chandrika and his wife and with this the motive for the crime disappears.

I next come to the taking away of Budhua by her husband on the evening of the 9th. The evidence on this point consists of the statements of Keshwar and Dhanmatia. Both these witnesses say that Chandrika was accompanied by another man who, however, appears to have disappeared before Chandrika left with Budhua. This evidence, and in particular the evidence of Dhanmatia, which is entirely disinterested, has been believed by the learned Sessions Judge. No reason why it should be disbelieved has been shown to us and I accept it as establishing that Chandrika went to Keshwar's house on the evening of the 9th and left with Budhua.

The next stage of the case is the *Ramlila* party and the subsequent scene between the husband and wife. The witnesses to this are Ramdas Kahar, carter, and Sukhdeo Kahar, a mechanic at Tata's Iron Works. They say that they saw Chandrika and his wife at the performance, that they stayed till the end.

Ramdas and Sukhdeo were behind them as they went along the road after the performance and they saw the incident of the seizing of Budhua's hand. For the reasons I have already given, I disbelieve the story of the seizing of Budhua's hand and I am inclined to distrust the rest of their evidence. They do not give any reason for specially noticing Chandrika and Budhua at the *Ramlila* party. Ramdas says that there were separate places for men and women at the performance, whereas Sukhdeo says there were not and they have certainly added to their story in the Sessions Court. This they have done clearly in order to assist the prosecution case of unhappy relations between Chandrika and Budhua and it would be, in my opinion, very unsafe to accept their evidence which looks to me suspiciously as if it had been introduced in order to show that Chandrika was with Budhua up till midnight, because the prosecution case is that Chandrika cut Budhua's throat at about 1 A. M.

I now come to the most important part of the case, namely, the direct evidence connecting Chandrika with the crime. The evidence is that alleged to have been furnished by Budhua herself. The First Information we have that Budhua implicated her husband is a passage in the commitment order to the following effect:—

"The Sub-Inspector proceeded towards the place where he met one Ram Prasad (P. W. No. 15) who told him that he had seen the woman, and that she was alive—also that on being questioned, she had pointed to the vermilion stain (*sindur*) on her forehead. Ram Prasad was of opinion that the woman meant to indicate that her husband had cut her throat."

Now, if this is so, Ram Prasad's statement to the Sub-Inspector was clearly the First Information in the case, for he also deposed that the woman had been recognized; yet, not only was his statement not recorded as a First Information by the Sub-Inspector but he was not examined in the Sessions Court and he was not even tendered as a witness. The learned Government Advocate suggests that he was probably not examined or tendered because his statement before the Committing Magistrate was not in accordance with the statement which he had made to the Sub-Inspector and was an untrue statement made to bring his evidence into line with the prosecution case on this point. To satisfy ourselves on this point the learned Government Advocate has asked us to look into the Police diary and we have done so. It appears that Ram Prasad's statement was not recorded by the Sub-Inspector, but the Sub-Inspector made a note to the effect that he got information from Ram Prasad Bania that he had seen a girl with her throat cut lying near the *nullah* of the new cooling tank:—

"The girl was saying that her husband had cut her throat."

Now, it seems to me that this statement does not necessarily conflict with the statement made before the Committing Magistrate, but whether it does or not Ram Prasad was apparently the first person to see the woman Budhua and he was the first person to give information to the Police. This being so, the Sub-Inspector should have recorded his statement as the First Information and the Crown should certainly have either examined or tendered him in the Sessions Court. The failure of the Sub-Inspector to record Ram Prasad's statement as the First Information entails the discarding of the so-called First Information, and the non-production of Ram Prasad in the Sessions Court has had the more serious consequence of depriving the accused of the right to cross-examine a witness who either heard the woman speak or whose interpretation of gestures made by the woman is clearly the origin of the prosecution case that she was wounded by her husband. Whether he was a false witness or a witness of truth he was a material witness examined by the Committing Magistrate and it was clearly the duty of the Public Prosecutor either to examine or to tender him. There can, I think, be no doubt that the real reason he was withheld was because the Public Prosecutor was afraid of the cross-examination which might arise out of the note made by the Sub-Inspector in his diary. His action was clearly unjustified and cannot but throw a certain amount of suspicion on the prosecution case.

I now come to the direct evidence, namely, the gestures made by Budhua in answer to questions ; and, in the first place, I may remark that the learned Counsel for the appellant has not contended that these gestures are not evidence. They are clearly evidence under section 32 of the Evidence Act and if authority for the proposition were required I need only refer to the Full Bench decision of the Allahabad High Court in the case of *Queen-Empress* v. *Abdullah* (1). The interpretation of the gestures, however, is for the Court alone and the opinion of the witnesses as to the meaning of such gestures is not evidence.

The first gestures made by Budhua to indicate her husband as having wounded her were, so far as the evidence on the record goes, made to the Sub-Inspector when he first saw the woman about 10 A.M. He says that when he first saw he he asked her who had wounded her and she lifted her right hand to the *sindur* mark on her forehead. Influenced clearly by what Ram Prasad had told him he asked if she meant her husband and she nodded her head as if assenting. The next evidence as to the gestures is the evidence of Keshwar. Before the Sessions Judge he deposes to asking exactly the same questions and getting the same gestures in response. This was at the Hospital at about 1 A.M., and it is after this that the Sub-Inspector went and arrested the accused. I have no hesitation in saying that this evidence of Keshwar is false, because in his statement to the Committing Magistrate he said that when he asked her who had cut her throat,

"she gesticulated by passing her hand to and fro near her throat."

This is almost certainly the true description of what happened and the story told in the Sessions Court is a subsequent improvement. So far as the evidence of the Sub Inspector is concerned, it seems curious if in fact Budhua's gestures did indicate that the wounds had been caused by her husband, that he did not go or send to arrest Chandrika at once, and it appears to me that, perhaps unconsciously, he was influenced in interpreting some vague movements of the woman's hand by what had been told him by Ram Prasad. It is impossible, therefore, in my opinion, to place reliance on this witness.

I now come to the gestures made to the Sub-Inspector and Mr. Brokenshire on the evening of the 10th. The Sub-Inspector having already twice questioned the woman —once in the morning and again with Keshwar—it is somewhat difficult to understand why he questioned her again. He does not explain this but it may have been, because he had then arrested Chandrika and had him at the Hospital. In his evidence he suggests that when he questioned Budhua, a person who was accused in another case was present as well as Chandrika. He does not say so definitely and I am unable to accept the suggestion that this was so because in his record of what took place he notes,

"one of the accused, Chandrika Kahar, has been caught at Jugselai and produced before Budhua Kaharin."

Moreover, Dr. Roy who was present at the time makes no mention of any one except Chandrika. What the Sub-Inspector's evidence then amounts to is this: producing Chandrika before Budhua he asked her who had cut her throat and she pointed to Chandrika. He then asked her if any one had assisted Chandrika and she lifted her fore-finger; this was taken to indicate that there was another man and asked what the other man did she pressed back her head with both hands. Asked with what she had been wounded she indicated about 9 inches on her arm and also held up two fingers together.

Very shortly afterwards she was questioned by Mr. Brokenshire in the presence of Chandrika and a man, an accused in another case who happened to be there. The questions he should ask were already indicated to him by Mr. Rivett who had been present in the morning when Ram Prasad spoke to the Sub-Inspector and who also had been present at the time when the Sub-Inspector questioned the woman in the evening. The questions were put by Mr. Brokenshire through Mr. Rivett and, according to the evidence of these two gentlemen, the gestures made by her were almost the same as those which had been made to the Sub-Inspector. Now, when

(1) 7 A. 385: A. W. N. (1885) 78; 4 Ind. Dec. (N. S.) 692 (F. B.).

Mr. Brokenshire was questioning the woman through Mr. Rivett, Dr. Sen was present and when the Sub-Inspector was questioning her, Dr. Roy was present and on two important points in connection with the gestures made they contradict Mr. Brokenshire, Mr. Rivett and the Sub-Inspector. They say that when the woman was asked with what she had been wounded she held her hands apart. Dr. Sen further says that when she was asked who had held her down she pointed to the other man who was in the room along with Chandrika. This statement of Dr. Sen, if we believe it, is very important because there is no suggestion that the other man who was in the room was the other accused in the case and it indicates that the woman was merely making vague movements without understanding what was being asked or what she was doing and that those movements were interpreted by the Sub-Inspector, Mr. Rivett and Mr. Brokenshire to fit in with the preconceived idea which they all undoubtedly had. I do not mean to suggest that any of these witnesses has intentionally given false evidence, but there is a very grave danger that they may have interpreted vague gestures in accordance with their preconceived idea. The woman was obviously in a very weak state and evidently hardly knew what she was doing. Keshwar says she was salaaming everyone that came in. This salaaming may very well have been interpreted as touching the *sindur* mark and Mr. Rivett says that,

" the woman sometimes answered at once and sometimes turned her head to the wall and made no answer until it had been repeated. She did not seem to understand that a question was directed to her until she was touched. "

The questioning of the woman finally had to be stopped by the Doctor on account of her exhausted condition. In these circumstances, it would, in my opinion, be in the highest degree unsafe to rely on gestures made to witnesses who, as I have already said, had a strong preconceived idea that it was Chandrika who had wounded the woman. The learned Sessions Judge has not accepted the evidence of the Doctors where they contradict the Sub-Inspector, Mr. Rivett and Mr. Brokenshire; but they are very emphatic in their contradiction, and I think it is just as probable that they are right as that the other witnesses are right.

There are two other reasons why I think it would be dangerous to accept the evidence as to the gestures which has been given by Mr. Brokenshire and Mr. Rivett. One is, that the record of the interview was made after it was over. This introduces a possible element of mistake increased by the preconceived idea, because the witnesses have deposed after referring to this record. The other is, that Mr Brokenshire's knowledge of the vernacular is clearly not great; I do not know what Mr. Rivett's qualifications in this regard may be, but it is not at all impossible that the questions as put by these gentlemen might not be understood. For all these reasons, it would, in my opinion, be very unsafe to rely on the direct evidence which is supposed to have been given by the woman Budhua.

The only evidence, then, which connects the accused with the crime is that at about 7 P. M., in the evening he went to Keshwar's house and his wife left with him ostensibly to go to his house at Jugselai. This undoubtedly is a very suspicious circumstance and the accused, if he is in fact innocent, would have been well advised to explain his movements after that time. Accused persons, however, are very often badly advised in this country and the learned Government Advocate has admitted that this in itself is not a circumstance on which a conviction could be based. Moreover, there are circumstances in the case which are certainly favourable to the accused. The instrument with which the crime was committed has not been found nor have any blood-stained clothes belonging to the accused been found, although it is almost certain that the clothes of the person who wounded the woman must have been stained with blood. The accused's conduct, too, after the occurrence seems more consonant with innocence than with guilt, for when the Sub-Inspector went to arrest him he found him asleep in his house.

Further, the prosecution case does not by any means eliminate the possibility of the crime having been committed by some one

other than the accused. The woman's father deposes that when she left him she was wearing more ornaments than were found on her person when she was first seen by the Sub-Inspector and Rs. 4 out of Rs. 5 which her father had given her when she left the house had disppeared. It is not suggested that either the ornaments or the money were taken by the accused so that some one must have robbed her and it is not impossible that the robber was the person who wounded her. Further, the prosecution case clearly indicates another person besides the accused being implicated, for a second man is said to have gone to Keshwar's house with the accused when he went to fetch his wife and unless we accept the gestures of the woman in pushing her head back as indicating the part taken by the second person, which we cannot do for the reasons I have given, this second man might very well be the person who committed the murder.

In the result, then, I am not satisfied that the case against the accused has been established and I would set aside the conviction and sentence and acqui' him.

Ross, J.—I agree.

N K.

Accused acquitted.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 617 OF 1922.

December 11, 1922.

Present:—Mr. Justice Piggott.

NANOO—APPELLANT

versus

EMPEROR, THROUGH THE MUNICIPAL BOARD, AGRA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 556—Case initiated by Municipal Commissioner—Trial by Bench of Honorary Magistrates—Municipal Commissioner member of Bench—Trial, legality of.

A Municipal Commissioner invited the attention of the Executive Officer of the Committee to the infringement of a Municipal Bye-law by the accused. The Executive Officer called the attention of the Health Officer, who instituted a prosecution against the accused. The case was tried and the accused convicted by a Bench of Honorary Magistrates of which that Municipal Commissioner was a member:

Held, that the conviction could not be quashed on the ground that the Municipal Commissioner was personally interested in the success of the prosecution within the meaning of section 556 of the Criminal Procedure Code, or was a party to the prosecution in the sense that he had caused it to be instituted.

Criminal reference by the District Magistrate, Agra.

JUDGMENT.—The District Magistrate of Agra has referred for the orders of this Court the records of eight cases in which accused persons belonging to the sweeper caste residing within the jurisdiction of the Municipality of Agra have been convicted under section 299 of the United Provinces Municipalities Act, No. II of 1916, for keeping pigs within the limits of the Municipality without a license and contrary to the provisions of local bye-laws lawfully promu'gated for that purpose. The main point taken by the District Magistrate in his Referring Order is, that the prosecution had been instituted under such circumstances that one of the Honorary Magistrates sitting on the Bench which tried the case, was personally interested in the success of the prosecution within the m aning of section 556, Criminal Procedure Code, or was a party to the prosecution, in the sense that he had caused it to be instituted. I think the exp'anation of the Magistrate concerned on this point is satisfactory. In his capacity as a Municipal Commissioner he had invited the attention of the Executive Officer to the manner in which the bye-law on the subject of the keeping of swine within Municipal limits was apparently being disregarded. The Executive Officer called the attention of the Health Officer to the matter, and the Health Officer instituted the prosecutions, after satisfying himself that there were good *prime facie* grounds for believing that the bye-law was being broken and that the interests of the public health required its enforcement. I am not prepared, therefore, to quash the convictions on the grounds suggested by the District Magistrate. I agree with him, however, that the sentences of fine imposed in these cases are on the face of them excessive and out of proportion to the means of the persons convicted. The purpose for which these prosecutions were

instituted could, I think, be served without imposing such severe penalties upon ignorant persons. They will understand that persistence in disobeying the bye-law after prosecution and fine, would deservedly receive far more severe punishment. My order is that in each of the cases now before me the sentence be reduced by dividing by ten the amount of fine imposed by the Trial Court. That is to say, where a fine of Rs. 20 has been imposed I reduce it to Rs. 2, where Rs. 40 to Rs. 4, where Rs. 25 to Rs. 2-8 and so on.

S. D. *Sentence reduced.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 109 OF 1921.

January 10, 1922.

Present:—Mr. Pipon, J. C.

KHWAJA HASSAN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437, proceedings under—Accused, whether entitled to notice—Member of Frontier Constabulary, whether Police Officer—Admission made to such officer, relevancy of—Evidence Act (I of 1872), ss. 25 26, application of—Penal Code (Act XLV of 1860), s. 399—Preparation for dacoity—Preparation, whether must be by five or more accused—Evidence of previous conduct of accused, admissibility of—Evidence Act (I of 1872), s. 15.

Although section 437 of the Criminal Procedure Code does not specifically mention that notice must be issued to the accused to show cause why a fresh inquiry should not be ordered, yet such notice is proper. The mere omission to issue such notice, however, would not vitiate a trial following upon an order under section 437, unless the accused can be shown to have been prejudiced by the fact of not having been given an opportunity of being heard in the proceedings under that section. [p. 361, col. 2.]

A member of the Frontier Constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police Officer, an and admission made to him, and not in the presence of a Magistrate, by an accused person cannot be proved against the latter. [p. 362, col. 2.]

Where in a trial upon a charge under section 399 of the Penal Code the accused plead that their presence at a particular spot, armed and in company was accidental and innocent it is open to the prosecution to rebut the plea, and section 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon the acts of the accused which in themselves might or might not be preparation for dacoity, and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible for the purpose. [p. 363, col 2.]

Gangaram v. *Imperator*, 62 Ind. Cas. 545; 22 Bom. L. R. 1274; 22 Cr. L.J. 529, distinguished.

In order to establish an offence under section 399 of the Penal Code, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise, it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law. [p. 364. col. 1.]

Appeal from an order of the Additional District Magistrate, Bannu, dated the 29th August 1921.

Mr. *Beli Ram*, for the Appellants.

The Public Prosecutor, for the Respondent.

JUDGMENT.—The appellants, Khwaja Hassan, Shahid, Malgai and Shah Jehan, have been convicted by Khan Sahib Muhammad Dilawar Khan, Additional District Magistrate, Bannu, under section 399, Indian Penal Code, of making preparation for committing dacoity and have been sentenced each to five years' rigorous imprisonment.

The facts as shown by the prosecution are as follows :—

On the 11th of May 1921 Mauladad, Subedar of the Frontier Constabulary, proceeded along the Kohat-Bannu road with a party of 13 men of the Frontier Constabulary. The party was, it is clear, searching for raiders. When at some distance from a bridge known as the "Kirra" bridge, Subedar Mauladad saw through his field glasses a party of men whom he suspected of composing a gang making preparation to commit highway robbery. His suspicions were intensified by seeing a motor car coming from the Bannu direction turn round and return on coming in view of the men. He saw, he says, five men altogether. He despatched some sepoys in advance and followed with the main body. The suspected men divided into two parties. Khwaja Hassan, accused,

and another man (not captured) going in one direction and the remaining three accused in another. Khwaja Hassan was arrested in possession of a rifle, which was found to be duly licensed. The other accused when arrested had no weapons, but shortly afterwards an unlicensed rifle, which Malgai accused admitted to be his, was found in a cave covered by a "*chaddr*".

The accused are Wazirs, resident of Dabak, a village close to the spot. The place where accused were arrested is remarkable for a number of caves locally known as "Kirris," and evidence is produced to show that it is a notorious haunt of robbers and dacoits. The Sub-Inspector of Police has deposed to three or four cases having occurred, in which the tracks of the presumed offenders led to Dabak. A more important piece of evidence was that of some Khattaks who had been kidnapped on the road at the same bridge about a month before the present case and taken first to Dabak and then across the border. One of these identified Shahid, accused, as among his captors. Another said that he had heard one of the same gang addressed as "Khwaja Hassan."

The accused pleaded in defence that they had been to a neighbouring village to collect a debt, were returning innocently home to their village, were making no preparation to commit dacoity or any other offence, and that the Frontier Constabulary had got up the case against them because they refused to give the Subedar and his men a feast in the village.

The accused were originally tried in the Court of Muhammad Akbar Khan, District Judge and Additional District Magistrate, and were discharged. In that Court the Sub-Inspector of Police was not examined, and the kidnapped Khattaks were not produced in evidence. The District Magistrate called for the record and ordered further inquiry under section 437, Criminal Procedure Code. The accused were then tried and convicted by the present Trial Court.

I will deal, first, with various questions of law raised by the appellant's Counsel, the decision of which has an importance outside the present case.

It is urged that the order of the District Magistrate under section 437, Criminal Procedure Code, is irregular, inasmuch as no notice was issued to the accused to show cause why fresh inquiry should not be ordered. Section 437 does not specifically mention that notice must be issued but it has always been held that notice is proper. In fact some High Courts have gone so far as to rule that omission to issue notice is fatal to the validity of the order. The High Court of Madras, however, modified this view to the extent of holding that the omission does not in itself render an order invalid but that, unless there was special reason for not following the general rule prescribing notice, the order would be set aside. It is clear that the District Magistrate erred in not issuing notice, and his attention is drawn to the impropriety of the omission. At the same time I cannot agree that this Court is obliged to invalidate the second trial merely by reason of this omission. The accused could have applied for revision of the District Magistrate's order, but did not do so. Their second trial, the legality of which they did not at the time challenge, has been concluded, and what I am now asked to do is not only to set aside the District Magistrate's order under section 437 but to invalidate the whole proceedings of the trial resulting from it. I should only be prepared to invalidate that trial, if the accused can be shown to have been prejudiced by the fact of not having been given an opportunity of being heard in the proceedings under section 437.

It is argued for the appellants that the second Court was naturally influenced by the implication that the District Magistrate favoured conviction. That, of course, is inherent in any order directing fresh inquiry. It is inevitable that the superior authority in directing fresh inquiry after discharge should imply dissatisfaction with the order of discharge. In the present case what weighed with the District Magistrate was the incompleteness of the evidence taken, and the District Magistrate's view that full evidence must be heard before a final decision was arrived at was clearly justified. The appellants have not before me disclosed any plea which, if put before the District Magistrate when he was considering the question of ordering fresh inquiry, would have induced him to vary his decision. The whole evidence, both old and new, was taken in the fresh trial, and accused had full opportunity of rebutting it. I cannot hold that

they have been prejudiced by reason of any irregularity in the section 437 proceedings, and I hold that the present trial resulting from them is not invalid.

The next point to be considered is the plea that the admission of Malgai, accused, made to Subedar Mauladad of the Frontier Constabulary that he was the owner of the rifle, is inadmissible in evidence under section 25 of the Evidence Act, as having been made to a Police Officer, and under section 26 of the same as made when in custody of a Police Officer and not in presence of a Magistrate. The question is a very simple one. Is an Officer of the Frontier Constabulary a Police Officer within the meaning of sections 25 and 26, Evidence Act? It appears to me to be set at rest by Mr. Bunbury's judgment in the case *Khairbaz* v. *King-Emperor*, published as No. 30 (1905), North-West Frontier Province Judicial Record. In that case Mr. Bunbury held that a Commandant, Border Military Police, was a Police Officer for the purposes of the above sections. He was guided by the Calcutta High Court's decision that the term "Police Officer" in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. He noted that the general duties of Border Military Police Officers, as defined in section 13 of Act IV of 1904, were similar to the duties of Police Officers as defined in section 23 of Act V of 1861. The Border Military Police constituted under Act IV of 1904 has been abolished, and has been replaced by the Frontier Constabulary constituted under Act XIII of 1915. Section 15 of Act XIII of 1915 defining the duties of members of the Constabulary merely reproduces the provisions of section 13 of the Border Military Police Act.

Under section 16 of Act XIII of 1915 the powers of Police Officers can be conferred upon members of the Frontier Constabulary. It has been argued by the learned Public Prosecutor that, as no notification under that section has been issued by the Local Government conferring powers, members of the Frontier Constabulary are not at present "Police Officers," for the purposes of sections 25 and 26 of the Evidence Act. I cannot, however, admit this contention. The position of the Border Military Police was the same. Similar powers could be, but had not actually been, conferred. Mr. Bunbury refers to the fact that the Local Government had *power* to confer them in support of his finding that the Border Military Police must be treated as "Police Officers" in respect of confessions made to them or in their custody. It is clear that the reason for the disability of Police Officers in respect of confessions is that they have, (*a*) a professional interest in the effect of a confession, and (*b*) special opportunities for putting pressure upon the person confessing. Both these conditions must necessarily apply to the Frontier Constabulary. An Officer of the Frontier Constabulary who has arrested a suspected person must inevitably be professionally interested in whether or not his action is justified, and the custody of a person by the Frontier Constabulary is, while it lasts, indistinguishable from Police custody. I hold, therefore, that, for the purposes of sections 25 and 26 of the Evidence Act, a member of the Frontier Constabulary is a "Police Officer," and that in the present case the admission of Malgai as to his ownership of the rifle cannot be proved in evidence against him, inasmuch as it was made to a Police Officer, and while he was in custody of a Police Officer, and not in the presence of a Magistrate.

This finding, however, does not affect the ultimate decision of the case. It has been proved independently that the rifle was found in a spot and under circumstances which shew it to have belonged to one of the gang. Shahid is not under trial for an offence under the Arms Act, and the question whether he or another member of the gang owned or had been carrying the rifle is immaterial.

A more difficult question is raised with regard to the evidence of Shahid having been previously concerned in a case of kidnapping. Mr. Beli Ram has argued for the appellants that such evidence is inadmissible under section 54 of the Evidence Act as being evidence of bad character. For the Crown it is argued that in the present case the evidence is admissible under sections 8 and 15 of the same. The question is of vital importance in the present case, inasmuch as the evidence, if admissible, is, in my opinion, credible and if it is not admissible, the prosecution would, I consider, fail to

establish satisfactorily that the accused were making preparation to commit dacoity.

The appellant's Counsel relies principally on the ruling of the Bombay High Court in the case *Gangaram* v. *Imperator* (1). In that case certain persons were charged with murder, and set up the defence that certain other persons were guilty. The prosecution produced evidence to show that on two previous occasions the accused had committed murder and had succeeded in getting other persons convicted. It was held that this evidence was not admissible either under section 8 or section 15 of the Evidence Act and that it was inadmissible under section 54 as evidence of previous bad character. That case, however, was widely different from the present one. It related to the offence of murder. A murder had admittedly occurred, and the question was which of two sets of persons had committed it. As regards section 8 the learned Judges pointed out that the truth regarding the previous murder did not suggest a motive or preparation for the murder then before the Court. They held that section 15 did not apply, as there was no question in issue as to whether the death of the murdered person was accidental or intentional. But in the present case, what the prosecution are endeavouring to prove is not that accused committed a dacoity but that they were making preparation to commit dacoity. Mere "preparation" for the commission of an offence is not ordinarily itself an offence. It is only in the case of dacoity (and of waging war against the King or against an Allied Country) that mere preparation is punishable. It is an earlier stage than attempt, and the evidence required to prove it differs necessarily from that required to prove other offences or attempts to commit them. Under the conditions obtaining in the Bannu District, it is clear that practically all acts which would constitute preparation for dacoity might be either criminal or innocent according to the intention of the actors as evidenced by the circumstances. Wazirs ordinarily go armed and there is nothing abnormal in their being collected in a body. If evidence is to be excluded that persons composing a gang are already known to be raiders or dacoits, it is difficult to see how preparation can be proved at all. It appears to me that section 15 of the Evidence Act exactly covers a case of this kind. Illustration (*a*) to that section is indicative. A person is accused of burning down his house to obtain insurance money, and evidence is admissible to show that his houses were constantly being burnt down and insurance money obtained. His plea naturally is that the fire was accidental. The prosecution produces evidence of cases which have previously occurred to show that this plea puts too great a strain on any person's credulity. In the present case the accused's plea is that their presence at that particular spot, armed and in company, was accidental and innocent. It is, to my mind, clearly open to the prosecution to rebut this theory, and to produce evidence that in the same locality raids had taken place in which one of the gang had been concerned. In the case of actual dacoity, the prosecution is bound to prove the accused's commission of all acts which constitute the offence. Evidence that the accused previously committed dacoity is excluded from consideration by a Court of law, although the fact that he was a habitual dacoit would weigh with any one who was considering the case in a non-judicial manner. If Shahid were accused of dacoity, evidence that he had previously committed a cognate offence would be inadmissible. But in the case of mere preparation the Court has to estimate the significance of certain established facts and to weigh the probabilities for and against the alternative theory that they were accidental and innocent. It is clear to my mind that section 15 admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be preparation for dacoity, and that evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible for this purpose.

I need not here consider the applicability of section 8 of the Evidence Act I doubt if it applies, for the commission of a previous raid or dacoity was not in itself necessarily either a motive or a preparation for the present incident.

(1) 62 Ind. Cas. 545; 22 Bom. L. R. 1274; 22 Cr. L. J. 529.

KHWAJA HASSAN *v.* EMPEROR.

I have mentioned above that there is evidence not only to show that one of the gang was previously concerned in a case of kidnapping but also to show that the previous case occurred at the same spot and that other cases also occurred there. It has been argued for the appellants that evidence cannot even be admitted that previous offences had occurred in the same locality. This argument cannot be seriously entertained. Evidence that the spot was suitable for dacoity is too obviously admissible to require discussion. It is not conclusive but it is clearly relevant.

I now turn to a question of fact. It is argued for the appellants that there is no evidence to show that more than 4 men were seen by the Frontier Constabulary and that in consequence it is not proved that dacoity was the offence contemplated. This point is important. At the same time it may be remarked that to establish an offence under section 399, Indian Penal Code, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise it would not be dacoity but merely robbery and mere preparation for committing robbery, unless it ends in an actual attempt is not punishable by law. There is in the present case distinct evidence to show that although only four men were arrested, there were originally more than 4 men in company with the accused. Subedar Maulad in Court stated that he had actually seen five men. In his first report to the Police he did not say that he had seen five men but that the footprints of another person were seen there. It is also clear that in the previous case of kidnapping alluded to although four men may have been the actual culprits, other inhabitants of the village of Dabak must have been concerned as well as residents of Independent Territory. Considering the evidence as a whole I see no reason to disbelieve that the raid, for which the accused are said to have been preparing, would have been committed by more than four persons and would have been technically a dacoity.

The remaining question for decision is whether the circumstances, under which the accused were captured justify the presumption that they were preparing for a raid. There are a number of circumstances each of which taken singly would be insufficient to prove their guilt, but the cumulative effect of which appears to me convincing. It is clear that the accused endeavoured to evade the Frontier Constabulary when they were seen. Although Khwaja Hassan appears to have played the part of a person who had nothing to fear, it was quite natural that one of the gang should have done this and that he was the best person to adopt this role as his rifle was a duly licensed one. Although it is urged that the accused were proceeding towards their village in a direction leading away from the road, the fact (which I see no reason to disbelieve) that the motor car turned back immediately on coming into view of them shows that they were at that time in a position threatening the safety of passers-by. Again there are the facts alluded to above that at least one of the gang was previously concerned in a cognate case in exactly the same locality, and that there had been numerous other cases committed in that locality by raiders or dacoits in which every thing pointed to a gang from the village of Dabak having been concerned but which were not brought home to the actual perpetrators. The caves adjacent to the spot were particularly suitable for the operations of raiders and the accused took advantage of them by attempting to conceal in them one of the weapons in possession of the gang and this weapon was an illegal one.

Taking all these circumstances into account, I concur with the finding of the Trial Court that the accused were guilty of making preparation to comit dacoity, and I uphold the conviction. The sentences passed on members of a gang which was a serious danger to public security are not in my opinion excessive. I, therefore, uphold the convictions and the sentences in the case of all the accused and dismiss this appeal.

W. C. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 501 OF 1922.
August 10, 1922.

Present.—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

AKSHOY KUMAR BHATTACHARJEE AND OTHERS—1ST PARTY—PETITIONERS
versus
BROJESWAR GHATAK AND OTHERS —2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Presumption of possession arising from title, when can be applied—Evidence as to possession equally unreliable on both sides—Principle, whether applicable—Attachment of subject-matter of dispute.

Where in a proceeding under section 145 of the Code of Criminal Procedure a Magistrate finds on each side evidence, which in itself is reliable and he finds that the evidence on the one side and the evidence on the other side is equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he has found to be in that side. The principle, however, does not apply to a case when the Magistrate has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. In such a case the Magistrate should attach the subject-matter in dispute by putting in force the provisions of section 146 of the Code. [p. 366, cols. 1 & 2]

Revision against an order of the Deputy Magistrate, Khulna, dated the 31st May 1922.

Babu *Manmatha Nath Mookerjee* (with him Babu *Saraj Kumar Chatterjee*), for the Petitioners.

Babu *Dasarathi Sanyal* (with him Babu *Mon Mohan Bose*), for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This is a Rule calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside on the second and fifth grounds mentioned in the petition.

The second ground is, "for that with regard to the portion lying to the east of Thia-Khal the Magistrate's finding being that there was no satisfactory evidence of possession on either side, the order in respect of the said portion is without jurisdiction"

The fifth ground is "for that the order is without jurisdiction as relating to 112 *bighas* of land when the entire area, according to the learned Magistrate himself, is not less than 250 *bighas* and no attempt has been made to define the smaller area."

The proceedings were under section 145 of the Criminal Procedure Code and the learned Magistrate declared that the second party was in possession of the disputed land and that the disputed land was bounded on the north by Kangal Mandal's Bheri, on the east by Guatalor Khal or Guatala Kata Khal, on the south by Simanar Kata Khan and on the west by Thia Khalir Kata Khal.

The disputed land has been described in the judgment as being divided into two parts, one being called the western portion, which lies between the Thia Khalir Kata Khal on the west and Thia Khal original on the east; the north and south boundaries are those which I have already mentioned. The other was called the eastern portion; lying between Thia Khal original on the west and the Guatalor Khal on the east, the northern and southern boundaries being those which I have already mentioned.

The learned Magistrate came to the conclusion on the evidence that the second party was undoubtedly in possession of the western portion; and, in my judgment, there is no reason for interfering with the learned Magistrate's order as regards that portion, which I have described and which is called the western portion.

As regards the eastern portion the Magistrate in his judgment said this :—

"Though neither Sava Ram nor the first party could adduce satisfactory evidence of possession in respect of the eastern area, I should also find possession of it with Sava Ram and his co-sharers with whom I have found the title to this land to lie by relying on the recognised principle enunciated in various rulings of the Calcutta High Court which is very much applicable to a case like the present one;" and, accordingly, as I have already stated, the Magistrate declared the second party to be in possession not only of the western portion but also of the eastern portion of the disputed land.

It has been argued that, having regard to the finding of the learned Magistrate that neither party had adduced satisfactory evidence of possession in respect of the eastern portion, the Magistrate was not entitled to take into consideration the presumption

as to possession which might arise from the title which he found to be in the second party. The principle which may be applied to this case is : that where a Magistrate finds on each side evidence, which in itself is reliable and he finds that the evidence on the one side and the evidence on the other side is equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he has found to be in that side. In my judgment, however, the principle does not apply to a case where the Magistrate has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. The question is, in which category does this case lie; I have been placed in somewhat of a difficulty by the fact that the explanation of the Magistrate, which he has forwarded to this Court, does not seem to me to be consistent with the judgment which he had given. I have already read what the Magistrate said in his judgment, and, but for his explanation, I should have come to the conclusion that he meant to find that there was no satisfactory evidence on either side with regard to the question of possession, and if that be the proper construction to put upon his judgment, then, in my judgment, he was not entitled to rely upon any presumption as to possession from the title which he had found in the second party.

In his explanation, however, the Magistrate has said : " Both parties adduced evidence of their respective possession over the portion lying to the east of the Thia Khal, but I found it evenly balanced on both sides, so I referred incidentally to the question of title and found possession with the party with whom I found the title to this land, in addition to the evidence of possession adduced by them. "

In my opinion, if his explanation had been embodied in his judgment then this Court should not have interfered with the order which the Magistrate made. But, in my opinion, that explanation is not consistent with the Magistrate's judgment. I have carefully considered the judgment of the learned Magistrate, and I am bound to put the natural meaning upon the words used by the learned Magistrate in his judgment and I have come to the conclusion that, at the time when he delivered his judgment, he meant to find that there was no satisfactory evidence on either side with regard to the question of possession ; consequently, in my judgment, he was not entitled to declare that the second party was in possession of the eastern portion In my judgment, with regard to the eastern portion the proper course for the Magistrate to adopt would have been to apply the provisions of section 146 of the Criminal Procedure Code.

The result is, in my judgment, that this Rule should be made absolute only so far as the eastern portion is concerned. We do not intend to interfere with the Magistrate's order as regards the western portion. As regards the eastern portion we remit this matter to the Magistrate and direct that the Magistrate do put in force the provisions of section 146 of the Criminal Procedure Code.

Chotzner, J.—I agree.

B. N. *Rule made absolute.*

CALCUTTA HIGH COURT.

CRIMINAL GOVERNMENT APPEAL No. 2 OF 1921.

July 12, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS—APPELLANTS

versus

SHYAM SARDAR BHUMIJ AND OTHERS—RESPONDENTS.

Jury trial Misdirection—Unanimous verdict—Failure of justice.

To justify the reversal of an unanimous verdict of a Jury on the ground that the Judge in his charge misdirected the Jury, it must be shown that the verdict has occasioned a failure of justice; that the verdict was due to the misdirection, and that, apart from this, the Jury would not have come to the same conclusion. [p. 368, col. 1.]

Appeal against an order of the Sessions Judge, Bankura, dated the 21st December 1920.

Mr. *Orr* and Babu *Monindra Kumar Bose*, for the Appellants.

Babu *Phanindra Nath Das*, for Respondents Nos. 1 to 5 and 8.

JUDGMENT.—This is an appeal on behalf of the Local Government against the acquittal of eleven persons, of whom all were charged with having conspired to commit dacoity, and all but one were charged with having committed a dacoity. The trial took place before the Sessions Judge of Bankura and a Jury. The Jury returned a unanimous verdict of acquittal with which the learned Judge agreed. We are asked to reverse this verdict and order a re-trial on the ground that there has been serious misdirection by the learned Sessions Judge in his charge to the Jury. We accept the contention on behalf of the Crown that the learned Judge was not as impartial as he should have been in those portions of the charge in which he discussed allegations made on behalf of the defence against the investigating Police Officers. He did not point out to the Jury, as he should have done, that the witnesses who accused the Police were, on their own showing, untruthful, as they were contradicting their statements made on oath before the Committing Magistrate, or that they were contradicted by other witnesses for the prosecution whose evidence deserved some consideration. As regards the more serious charge made against the Police, that of ill-treating two women there was positive misdirection. During the search of the house of the accused Guiram his wife fainted. She was not examined as a witness but her son Goshta was allowed to depose that she said next day that she fainted because the Police used force to her. This was hearsay and there is no legal evidence that Guiram's wife was ill-treated while there is evidence to the contrary. But in his charge to the Jury (paragraph 20) the learned Sessions Judge refers to this episode as if there were evidence to support the case for the defence on this point. Then, as regards the woman Nidhu Dasi, daughter of the accused Nadiar Chand, she resiled from the evidence she had given before the Committing Magistrate, saying that she gave false evidence because she was ill-treated by the Daroga. There is, however, no evidence to support the suggestion that she was detached from her relations and kept fasting in a strange place for a night. The serious defect in the charge, when it refers to the conduct of the Police, is, that no distinction has been made between the suggestions put in cross-examination that are supported by evidence and those that are not, and also that the attention of the Jury has not been drawn to the direct evidence rebutting these suggestions.

But, though there was this misdirection this would not justify the reversal of the verdict of the Jury unless this misdirection has in fact occasioned a failure of justice. We have, therefore, examined the evidence and our conclusion after doing so is, that we ought not to order a re-trial. The case for the prosecution depends on the direct evidence of an accomplice and other evidence corroborating his story. The confession of the accomplice was more probably due to a hope of escaping by turning King's evidence than Police oppression, but even then the accomplice's story that he confessed through repentance is false. There are some improbable details in his story, for instance, he does not explain how the dacoits happened to meet on the night of the dacoity, though the arrangement had been to meet the previous night. His evidence is such that it would require very strong corroboration before it could be acted on,

in fact the corroborative evidence would have to be almost sufficient for a conviction apart from the approver's evidence. This we do not find on the record. The most important evidence is as to the finding of certain property at the houses of various accused. But the effect of this evidence is seriously weakened by the unsatisfactory evidence of the identifying witnesses. They appear to have been ready to identify any article shown to them whether it was capable of identification or not. It is argued that there was misdirection in this respect, as the Jury were told that Abinash did not, at the first test identification, identify all the articles that he identified the second day. Though the written report of the Magistrate who held the second test identification shows that Abinash did not identify any article on the second day which he had not identified the first day, Abinash himself deposed that he and his brother Joy Ram identified some of the articles the first day and all on the second day. Whether this statement is true or false it cannot be said that Abinash's identification is free from doubt. There is also evidence of association, but this, even if believed, is not alone sufficient corroboration to support a conviction. One of the accused made a confession which he subsequently retracted. Though the learned Judge summed up for an acquittal he did not omit to tell the Jury that they were Judges of the facts and should form their own opinion. We are not prepared to hold that the Jury's verdict was due to the misdirection in the charge and that, apart from this, then, they would not have come to the same conclusion. We accordingly dismiss this appeal. The bail bonds of the accused are discharged.

W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 581 OF 1922.

December 20, 1922.

Present :—Mr. Justice Walsh.

SRI KRISHNA SONAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 556—Sessions Judge allowing prosecution of accused as Insolvency Judge—Competency to hear appeal from conviction—Knowledge of case.

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where, as an Insolvency Judge, he allowed the prosecution to proceed. But a Judge may object to hearing such a case if he remembers being acquainted with it before.

Criminal revision from an order of the Sessions Judge, Ghazipur, dated the 30th October 1922.

Mr. *E. A. Howard*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In my opinion a Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where, as an Insolvency Judge, on the application of a creditor, he allowed the prosecution to proceed. A Judge may reasonably object to hearing such a case, if he remembers being acquainted with it before. There is nothing in this application for revision. It is dismissed. The applicant must surrender to his bail and serve out the rest of his sentence.

S. D. *Application dismissed.*

MUHAMMAD SHAKUR *v.* ABDUL GHANI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 273 OF 1921.

November 2, 1922.

Present :—Mr. Justice Stuart.

Sheikh MUHAMMAD SHAKUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh ABDUL GHANI AND ANOTHER —DEFENDANTS—RESPONDENTS.

Construction of document—Question of law—Question of fact—Decision as to possession based on revenue entries—Appeal, second—Finding of facts, whether can be attacked where reasoning is weak.

The term '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, while the effect of the words is a question of law. [p. 309, col. 2]

Chatenay v. *Brazilian Submarine Telegraph Co. Ltd.*, (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739 39 W. R. 65, relied upon.

If a Court, which reads entries in revenue papers, simply decides to what extent those entries indicate a party's possession of certain plots and does not interpret them to indicate any legal point, its decision interpreting the revenue papers is a decision of fact and not of law. [p. 369, col. 2.]

A finding of fact, where there is sufficient evidence to support it, cannot be attacked in second appeal on the ground that the reasoning for it is weak or inconclusive. [p. 369, col. 2.]

Chatenay v. *Brazilian Submarine Telegraph Co., Ltd*, (1891) 1 Q. B. 79 at p 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65 and *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*, 17 I. A. 122 at P. 127; 18 C. 23; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. C.), applied.

Second appeal from a decree of the District Judge, Ghazipur, dated the 18th November 1920.

Mr. *Hameedullah*, for the Appellants.

Mr. *S. P. Sinha*, for Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The learned Counsel for the appellants has taken me very carefully through he whole facts of the case, but he has not been able to satisfy me that the appeal can succeed in face of the findings of fact. He ok exception, in the first place, to what he suggest d was an improper admission of evidence by the lowe Appellate Cour . The learned District Judge wrote : " One thing was wanting in the lower Court whi h, to some extent, is responsible for the lower Court's judgment, *i. e.*, *khasra* showing corresponding plots. As it was a matter of Revenue Records I have accepted it now and accept the conten ion that the *sir* plots in question rea y appertained to the old *khewat* No. 16. "

The learned Counsel would argue from these words that the learned District Judge had admitted improperly in evidence, in appeal, documents which had been rejected by the Trial Cour . He has not, however, been able to point out to me that the learned District Judge admit ed any d cument in evidence which the Trial Court had rejected, and in so far as the admissibility of the *khasras* go, they would all be admissible in themselves as certified copies of public documents. With regard to the conclusion drawn by the learned District Judge from the revenue papers it is necessary to distinguish carefully between, to what extent his conclusions are conclusions of fact and to what extent they are conclusions of law. The distinction as to how far a decision upon the contents of a document is a question of fact and how far it is a question of law, has never perhaps be n mo e happily expressed than by Lindley, L. J. in *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.* (1):— "The expression 'construction', as applied to a document, at all event s as used by English lawyers, includes two things: Fi st, the meaning of the words; and, secondly, their legal effect, or the eff ct which is to be given to them. The meaning of the words I take to be a que tion of fact in all cases, whe her we are dealing with a poem or a legal document. The effect of the words is a question of aw. "

Wha has the learned District Judge done here ? He has read entries n many revenue papers and he has imp y decided to what extent th e entri s indicate the plaintiffs' pos session of certain plots. He has in no way interpre ed these entries to indicate any legal point, so his decision in erpreting these documents is a decision of act and not of law. The learned Counsel has assai ed the reasoning of the learn d District udge but he cannot possibly attack a finding of fact on the ground that the reasoning is on his argument weak or inconclusive. It is only necessary to refer

(1) (1891) 1 Q B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.

to the well-known decision of their Lordships of the Privy Council in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2) :—" It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding ". Here there was no error or defect in the procedure. The evidence was before the lower Appellate Court and the lower Appellate Court had sufficient evidence to support its finding. For the above reasons I dismiss this appeal with costs which will include fees on the higher scale.

S. D. *Appeal dismissed.*

(2) 17 I. A. 122 at p. 127; 18 C. 23; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 10 (P. C).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1011 OF 1921.
November 9, 1922.
Present:—Mr. Justice Ryves.
Babu NOBIN CHANDRA BOSE AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BANDI—DEFENDANT—RESPONDENT.

Landlord and tenant—Permanent tenure—Presumption.

Where the origin and terms of a tenancy are unknown but it is found that (1) it was created more than 30 years ago; (2) the land was let for building purposes and that the lessee had constructed on it *pacca* houses, and that (3) the tenancy was transferred from time to time without any objection by the landlord, a Court is perfectly justified in holding that the land was originally let for building purposes on a permanent tenancy. [p 371, col. 1.]

Caspersz v. *Kader Nath Sarbadhikari*, 28 C. 738; 5 C. W. N. 858 and *Afzal-un-nisa* v. *Abdul Karim*, 50 Ind. Cas. 749; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. R. (P. C.) 47; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R 891; 65 P. L. R. 1919; 46 I. A. 131 (P.C.), relied upon.

Second appeal from a decree of the Subordinate Judge, Cawnpore, dated the 16th March 1922.

Mr. *S. C. Das*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to eject the defendant from a house on the allegation that the defendant is a tenant-at-will only and that as he refuses to pay enhanced rent the plaintiff is entitled to eject him.

The defendant claims that the land in suit was let to his predecessors 60 or more years ago to build upon, on the understanding that the lease would be a permanent one.

Both the lower Courts have dismissed the suit. It has been found that there was an enclosure (*ahata*) in Cawnpore which belonged to the predecessor of the plaintiff. This enclosure was let out to tenants for building purposes on small rent. This fact is practically admitted in the second paragraph of the plaint.

It appears in evidence that there are now some 114 tenants who have got houses in this enclosure. The plaintiff naively in his plaint explains why he brought the suit. He says that, on the one hand, he has to pay additional taxes to the Municipality and, on the other hand, rents have gone up all over Cawnpore, and he does not see why he should not share in the rise. The Courts below have dismissed the suit holding that the land was let out to the defendant or his predecessors to build upon, on a permanent lease. In second appeal two main grounds have been pressed: the first and the 10th. The first ground is that inasmuch as evidence has been produced on behalf of the defendant to show that the terms of the lease were put into writing, the document alone was admissible and no other evidence was admissible to prove the terms of the lease, and the 10th ground is that a permanent tenancy could be created only by a registered document, and as none such is forthcoming in this case, there is no legal

evidence to prove that the lease is a permanent lease.

The Court below has found (1) that the origin of the tenancy and its terms are unknown but it is certain that the tenancies were created more than thirty years ago and possibly fifty or sixty years ago. (2) It is found that the land was let for building purposes and the lessees constructed houses on the parcels of land in dispute at considerable expense. Exception is taken to this that the houses were built at "considerable expense." I do not think it matters much as to what was exactly the amount spent in building these houses. It is proved they are *pucca* buildings. (3) It is also found that the tenancies in dispute were transferred from time to time and that the plaintiff acquiesced in these transactions. (4) Lastly, it has been found that all other cases brought by the landlord against other tenants in this "*ahata*" on the allegation that they were tenancies-at-will, have been dismissed on the finding that the tenancies were permanent. We may leave out the last finding as, perhaps, being inadmissible, It seems to me that on the other findings the Court was perfectly justified in holding as a fact that the land was originally let for building purposes on a permanent tenancy. The facts of this case are very like those in *Caspersz* v. *Kader Nath Sarbadhikari* (1), and as that case was expressly approved of by their Lordships of the Privy Council in *Afzal-un-nisa* v. *Abdul Karim* (2) it seems to me that the appeal must fail. I accordingly dismiss it.

S. D. *Appeal dismissed.*

(1) 28 C. 738; 5 C. W. N. 858.
(2) 50 Ind. Cas. 749; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; (U. P. L. R. (P. C.) 47; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919; 46 I. A. 131, (P. C.).

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL No. 27 OF 1921.

June 30, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice B. B. Ghose.

BEPIN KRISHNA ROY AND OTHERS—PETITIONERS

versus

PRIYABRATA BOSE AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Privy Council appeal—Application for leave—Value of subject-matter on appeal—Suit for rectification of mortgage-decree Substantial question of law.

The plaintiff who had obtained a mortgage-decree in respect of a property instituted a suit for rectification of the decree on the allegation that there had been a mistake in the description of the property in the mortgage-deed and the decree, which should have included a 2-annas 4-*gandas* share of the mortgagor in a certain land which had been purchased by defendant No. 8 after the date of the mortgage with full knowledge of the mortgage and of the mistake which had occurred. The Trial Court decreed the suit and the High Court on appeal by defendant No. 8 confirmed that decree. In an application by defendant No. 8 for leave to appeal to the Judicial Committee of the Privy Council it was contended that though the value of the subject-matter of the suit was more than Rs. 10,000, the value of the subject-matter in dispute on appeal to His Majesty in Council was the market-value of the 2-annas and 4-*gandas* share claimed by the applicant, which, being less than Rs. 10,000, no leave could be granted under the provisions of section 110 of the Code of Civil Prodedure:

Held, (1) that as the plaintiff's claim against defendant No. 8 was not distinct from the mortgage transaction and as there was no claim by title paramount set up by the applicant, the value of the subject-matter in dispute on appeal to His Majesty in Council was not the value of the applicant's share of 2-annas 4-*gandas* but the value of the suit which was more than Rs. 10,000; [p. 373, col. 2.]

(2) that the question whether the plaintiff was entitled, as against defendant No. 8, to have the mortgage-deed and the decree rectified by the subsequent suit was a substantial question of law. [p. 372, col. 1; p. 374, col. 2]

Radha Kunwar v. *Reoti Singh*, 35 Ind Cas. 939; 38 A. 488; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L.W. 450; 43 I.A. 264(P. C.), distinguished.

Application for leave to appeal to the Privy Council.

Dr. *Dwarkanath Mitter* (with him Babu *Debendra Nath Mondal*), for the Petitioner.—My application satisfies both the conditions of section 110 of the Code of Civil Pro-

cedure. The question of law involved in the appeal will be whether the plaintiff is entitled to have his mortgage-decree rectified by a subsequent suit so as to affect the interest of my client. Then the value of the subject-matter in dispute on appeal to His Majesty in Council is the value of the subject-matter of the suit which is admittedly over Rs. 10,000. The mere fact that the value of the share purchased by me is less than that sum would not affect the position. For the allegation in the plaint is that I purchased the equity of redemption in the property which is sought to be included in the mortgage-decree. Every bit of the mortgaged property is liable for the whole of the mortgage-debt. Consequently, if according to the allegation in the plaint I were to exercise my right of redemption, I would have to pay the whole of the mortgage-debt. Under these circumstances a certificate of fitness for appeal to the Judicial Committee ought to be granted.

Babu *Ram Chandra Mazumdar* (with him Babu *Rupendra Kumar Mitter* and *Mon Mohan Bose*), for the Opposite Party.—It is not necessary for me to dispute the position that the appeal involves a substantial question of law. My contention is that leave ought to be refused on the ground that the value of the appeal to the Judicial Committee is less than Rs. 10,000. The value of the suit cannot be the value of the appeal, for in the appeal the appellant is only claiming a 2-annas and 4-*gandas* share in *Touzi* No. 93A. The market value of that share is the value of the appeal to the Judicial Committee. See *Radha Kunwar* v. *Reoti Singh* (1).

Dr. *Dwarkanath Mitter* was not called upon to reply.

JUDGMENT.

Sanderson, C. J.—This is an application by defendant No. 8 for a certificate that this is a fit case for appeal to the Judicial Committee of the Privy Council.

The original suit was a mortgage suit in respect of a certain property which was described as *Touzi* No. 93, and the applicant, as I understand, was not a party to it. When the decree had been obtained and indeed, as I understand, when the property had been brought to sale, it was alleged by the mortgagee that there had been a mistake in the description of the property, and, consequently, in the mortgage-decree the property had been wrongly described as *Touzi* No. 93. The mortgagor had, we are informed, a share in *Touzi* No. 93 and a 2-annas 4-*gandas* share in *Touzi* No. 93A. The result was that the present suit was instituted and the defendant No. 8 was made a party, it being alleged by the plaintiff that, after the date of the mortgage, the defendant No. 8 had purchased the mortgagee's share in *Touzi* No. 93A with full knowledge of the mortgage and with full knowledge of the mistake which had occurred.

The plaintiffs, however, in paragraph 9 of the plaint, after alleging that the *kobala* of defendant No. 8 was a collusive and fraudulent document, alleged that, in order to "give an opportunity to redeem in the case, should the Court find his purchase to be real, they had impleaded him as a defendant in this suit."

The learned Subordinate Judge came to the conclusion that the property had been wrongly described and directed that the description should be rectified. Then there was an appeal by defendant No. 8 to this Court and this Court held that the judgment of the lower Court was correct and dismissed the appeal. Consequently, the defendant No. 8 has applied for leave to appeal to the Judicial Committee of the Privy Council. Inasmuch as the judgment of this Court affirmed the decision of the learned Subordinate Judge, it is necessary for the applicant to show two things, firstly, that there is a substantial question of law involved; and, secondly, that the amount or value of the subject-matter in dispute in the suit and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is Rupees ten thousand or upwards.

In my judgment, there is a substantial question of law involved and that point

(1) 35 Ind Cas. 939; 38 A. 488; 14 A L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J 71; 18 Bom. L. R. 850; 24 C. L. J. 303; 5 L. W. 456; 43 I. A. 264 (P. C.).

has not been really disputed by the learned Vakil for the respondent and, therefore, it is not necessary to enter into detail as to what appears to be a substantial question of law. It is sufficient for me to point out one respect, in which there appears to be a substantial question of law. It is whether the plaintiffs as against defendant No. 8 were entitled to have the mortgage-deed and the decree rectified having regard to the circumstances of the case.

The matter which has been hotly contested on this application is, whether the subject-matter in dispute in the appeal to His Majesty in Council is of the value of Rs. 10,000 or upwards. There was a reference to the lower Court for an enquiry into the valuation of 2-annas 4-*gandas* share of the property, *Touzi* No. 93A, free from encumbrances as on the 27th February 1914 and 14th June 1921 and the learned Subordinate Judge has reported that the value of the 2-annas and 4-*gandas* of *Touzi* No. 93A did not exceed Rs. 7,425 on the 27th February 1914 and Rs. 8,910 on the 14th June 1921. Consequently, if the matter depended upon that report, the petitioner would not have succeeded in fullfilling the second condition which is necessary before leave can be granted. The learned Vakil for the petitioner has based his argument upon another ground and it is this. He drew our attention to the plaint. I have already referred to the passage in paragraph 9 and the reliefs asked for therein. In short, his argument was, that defendant No. 8 was, for all intents and purposes, in the same position as the mortgagor and it is conceded, or rather it is not seriously disputed, that if this application had been made by the mortgagor the value would have been sufficient to comply with the provisions of section 110 of the Code of Civil Procedure, because the amount claimed at the date of the suit was Rs. 9,988 to which must be added the subsequent interest. This, if calculated to the present time, it was urged, would bring the amount or value of the subject-matter in dispute considerably over Rs. 10,000. On the other hand, it is argued by the learned Vakil for the respondents that the amount or value of the subject-matter in dispute ought to be decided with reference to the market-value of the 2-annas 4-*gandas* share in *Touzi* No. 93A, and he relied upon the case of *Radha Kunwar* v. *Thakur Reoti Singh* (1), which was decided by the Judicial Committee of the Privy Council.

It seems to me that there is a distinction between the case which we have now to deal with and the reported case. In the reported case the appellant was claiming as her property 4-*biswas* share which the mortgagees stated were included in their mortgage and the Lord Chancellor in delivering the judgment pointed out, "the present appellant, who claimed through a person named Hukum Singh, said that she was entitled to 4-*biswas* of the property. That dispute was entirely independent of the mortgage transaction of 1884." Later on, the Lord Chancellor pointed out that, "The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could, under no circumstances, have been made responsible for the amount of the mortgage, nor could its extent, in any way whatever, have in the least degree varied her rights."

It seems to me impossible to say in this case that the plaintiff's claim against defendant No. 8 was quite distinct from the mortgage transaction, having regard to the way in which the plaintiffs have framed the suit, and having regard to the reliefs which they themselves asked for in the plaint. For these reasons, the present case seems to me to be different from the case decided by the Judicial Committee of the Privy Council. I am of opinion that it has been made out in this case that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is Rupees ten thousand or upwards, and, inasmuch as there is a substantial question of law, a certificate will be granted.

Ghose, J.—I am of the same opinion. The plaintiff asked for enforcement of his mortgage and valued his claim at Rs. 9,998 odd which, with the subsequent interest, would come up to more than Rs. 10,000. It is not

contested by the respondent that that would make the amount of the subject-matter of the suit over Rs. 10,000. The decree of the High Court is also for an amount exceeding Rs. 10,000. It is, however, contended on behalf of the respondent that the value of the subject-matter of the appeal by defendant No. 8 would not come to Rs. 10,000, as the value of the property mortgaged is less than Rs. 10,000, and he relies upon the case of *Radha Kunwar* v. *Reoti Singh* (1) in support of his contention that, in such a case as this, the value of the property is to be taken into account in the matter of granting leave to appeal in England.

In the reported case the appellant in England claimed by title paramount in a suit that was brought by the mortgagee. In that case the appellant in England ought not to have been joined as a party defendant. As was pointed out by the Lord Chancellor that, as the defendant claimed by title paramount, it was really a combined suit brought by the mortgagee against the mortgagor for enforcement of his mortgage and for a declaration of title of the mortgagor against a third person and that third person appealed against the decree of the High Court with regard to his right to the portion of the property he claimed. Consequently, the value of his appeal was not the amount of the mortgage-money but simply the market-value of the property which he claimed in his own right against the mortgagor and mortgagee. He could not, under any circumstances, be held liable for the mortgage-money nor could he have claimed any right to redeem the mortgage. Here the case is quite different. The plaintiff made the defendant No. 8 a party on the ground that he was a purchaser of the equity of redemption, though he said the purchase was not a real and *bona fide* transaction. As purchaser of the equity of redemption he was a necessary party and the defence that this defendant took was one which was open to the mortgagor. This defendant did not claim the property as against the mortgagor, but what he said was, that the mortgagor did not pledge this property under the mortgage but it was some other property, and his own particular defence was to the effect that, as he had purchased this property *bona fide* and without notice of the alleged mistake in the mortgage-decree, the property in his hands was not liable for the mortgage-debt. That is not claiming by a paramount title and, although the value of the mortgaged property was less than Rs. 10,000, if the defendant redeems this property, which he is entitled to do, he would have to pay more than Rs. 10,000 to the mortgagee.

It seems to me, therefore, that the amount or value of the subject-matter of the suit as well as the final decree is over Rs. 10,000.

As the judgment is one of affirmance, the appeal must involve some substantial question of law. As regards that point it was not seriously contended by the respondent that the appeal did not involve some substantial question of law and, in my judgment, the question whether the previous decree can be rectified by a subsequent suit in the circumstances of this case, is a substantial question of law.

B. N. *Certificate granted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 816 OF 1921.

October 26, 1922.

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

JANTAPURAM SUBBIAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GUNDALAPUDI *alias* MITTAMUDI VENKATARAMAYYA—PLAINTIFF—RESPONDENT.

Co-owners—Improvements by one co-owner in possession—Other co-owners, compensation by.

One tenant-in-common who makes improvements on the property of the co-tenancy without necessity or without the concurrence of the other co-owners, is ordinarily not entitled to compensation for doing so. [p 375, col. 2.]

Upendra Nath Banerjee v. *Umesh Chandra Banerjee*, 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375, *Swan* v. *Swan*, (1820) 8 Price 518; 22 R. R. 770; 146 E. R. 1218, *Jones, In re, Harrington* v. *Forrester*, (1893) 2 Ch. 461; 62 L. J. Ch. 996; 3 R. 498; 69 L. T. 45, relied on.

JANTAPURAM SUBBIAH *v.* GUNDALAPUDI.

Leigh v. *Dickeson*, (1885) 15 Q. B D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddapah, in Appeal Suit No. 16 of 1920 (Appeal Suit No. 163 of 1918 of the District Court), preferred against the decree of the Court of the District Munsif, Prodattur, in Original Suit No. 21 of 1917.

Mr. *T. R. Arunachala Iyer*, for the Appellants.

Mr. *K. Ramanna*, for the Respondent.

JUDGMENT.—Some arguments have been addressed to us on behalf of the defendants-appellants with reference to the calculations on which the lower Court's judgment is based. We have not, however, been shown how any question of law is raised in connection with their correctness and we, therefore, decline to interfere with the conclusions on which those calculations resulted.

The remaining ground, on which the appeal is argued, is against the lower Court's refusal to make any provision in its decree for an award to the defendant on account of the improvements they allege they have made on the suit property. The suit property is part of a larger area in common ownership of the plaintiff and defendants. The plaintiff let his unascertained share to the defendants, and the present suit is brought for the eviction of the defendants from the share, the form of the decree being, of course, a decree for partition by metes and bounds of the plaintiff's share and delivery to him of possession thereof. It cannot, therefore, at present be said that the improvements are on the portion of which the plaintiff will be entitled to delivery. But, in any case, we cannot see how one tenant-in-common, who makes improvements on the property of the co-tenancy, can ordinarily be entitled to compensation for doing so. The defendants' argument has been on the dictum of Mookerji, J., in *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (1) that, "if one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take this fact into consideration upon a partition and in some way will make an allowance to him therefor, in addition to his rateable share of the property." The learned Judge has proceeded to explain the nature and the grounds of this equity, but we prefer to decide whether any such principle as that relied on by him is really recognised by authority. Certainly, it is not recognised in the unqualified form in which he stated it in the cases referred to in his judgment. In *Swan* v. *Swan* (2) the Court ordered a referee for an account to be taken of what had been expended by a co-tenant necessarily or with the concurrence of the other co tenant; and these qualifications were fully recognised in *Jones, In re, Harrington* v. *Forrester* (3). No doubt, the reference in that case to the observations of Cotton, J., in *Leigh* v. *Dickeson* (4) is, at first sight, in favour of the existence of a general right in one co tenant to compensation for improvements made by him against another. But in the judgments of Brett L. R., and of the other learned Judges in *Leigh* v. *Dickeson* (4), the right was only sustained as subject to proof of the necessity for repairs or improvements or of the co-tenant's concurrence, express or implied, in their execution. The portion of the judgment of Cotton, L. J., to which reference has been made, appears, on a perusal of his judgment as a whole, to be concerned solely with procedure, that is, with the existence of a remedy in equity by a partition suit, which the Common Law could not afford. In the present case the defendants have never in their written statement or elsewhere alleged the plaintiff's concurrence, expressed or implied, in what they did and no issue on the point was framed or even asked for. In these circumstances, this objection to the lower Appellate Court's decree must fail.

The second appeal is, therefore, dismissed with costs, including costs of Civil Miscellaneous Petition No. 2483 of 1921.

V. N. V. *Appeal dismissed.*

(1) 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375

(2) (1820) 8 Price 518; 22 R. R. 770; 146 E. R. 1281.

(3) (1893) 2 Ch. 461; 62 L. J. Ch. 996; 3 R. 498; 69 L. T 45.

(4) (1885) 15 Q B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538.

SAKAT MUL *v.* KATORI.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 33 OF 1922.

December 13, 1922.

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

SAKAT MUL AND OTHERS—APPELLANTS

versus

Musammat KATORI, MINOR, THROUGH DAULAT RAM—RESPONDENT.

Succession Certificate Act (VII of 1889)—Certificate, grant of—Question of debts having already been discharged, consideration of—Joint debt—Certificate authorising collection of share of debt, whether valid.

A person having a *prima facie* claim to represent the estate of a deceased person is entitled to obtain a Succession Certificate for the recovery of debts due to the deceased; and the question as to whether those debts have already been discharged is one which cannot be gone into in proceedings under the Succession Certificate Act. [p. 376, col. 2; p. 377, col. 1.]

A Succession Certificate cannot be granted authorising a person to collect a share of a debt. A Succession Certificate must be in favour of a single person, who would thereunder become authorised to collect the entire debt, subject to a liability to account for a share in the same to any person lawfully entitled to claim such share. [p. 877, cols. 1 & 2.]

First appeal from an order of the District Judge, Aligarh, dated the 19th November 1921.

Mr. *Durga Prasad*, for the Appellants.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This is an appeal in a Succession Certificate matter. The circumstances are a good deal more complicated than any one reading the judgment of the Court below would suppose, and, in the interests of the parties themselves, it is as well that we should set them out in some little detail. One Kalyan Das died in the month of March 1920. He left behind him a Will under which he appointed three of his nephews, the sons of two previously deceased brothers, to be executors of his estate, with large powers in the matter of realization of outstanding debts. This Will was propounded by the executors in the month of March 1921, and Probate of the same has been granted by the District Court. Kalyan Das had a daughter named *Musammat* Teji, who predeceased him. This daughter had a son named Makhan Lal, and one question about which the parties to this appeal are at issue, but which we do not propose to determine, is, whether Makhan Lal was or was not adopted by Kalyan Das. The said Makhan Lal died on the 16th of October 1914, leaving a widow, *Musammat* Chandrawati, who also died before Kalyan Das, the date of her death being the 5th of November 1918. The marriage of Makhan Lal and Chandrawati had issue, one daughter, *Musammat* Katori, who is the respondent to this appeal. *Musammat* Katori is still a minor, and there was a dispute about the guardianship of her person and property between Kalyan Das, already mentioned, and Daulat Ram, the maternal grandfather of *Musammat* Katori. This dispute was decided in favour of Daulat Ram, and the proceedings now before us have been conducted by Daulat Ram on behalf of *Musammat* Katori. The application out of which this appeal arises was one presented on behalf of *Musammat* Katori for a Succession Certificate for the collection of three specified debts. Two of these debts were said to be due to Makhan Lal on bonds executed in his favour. The third debt was specified as due upon a bond executed in favour of Kalyan Das and Makhan Lal, in which Makhan Lal was interested to the extent of a half share, and the application was for a certificate empowering *Musammat* Katori to collect the said half share. The application was opposed by the three executors under the Will of Kalyan Das. As regards the two debts specified as standing in the name of Makhan Lal, the objectors asserted, firstly, that the money had really been advanced by Kalyan Das, although he had chosen to make the advance in the name of Makhan Lal. Secondly, they alleged that Kalyan Das had already realised these debts in his own lifetime, so that it was futile to grant a Succession Certificate in respect of the same. These objections were not valid objections to the granting of the Certificate in question in respect of these particular debts. *Musammat* Katori had a *prima facie* claim to represent the estate of Makhan Lal, more particularly in view of the fact that she denied the alleged adoption of Makhan Lal by Kalyan Das. As regards these two debts which were, on the face of them, due to Makhan Lal

alone, all she asked for was a Certificate authorising her to take steps for the recovery of the same. The question whether the debtors, on being sued for these debts, can or cannot prove that they have paid the same to Kalyan Das, and that Kalyan Das was lawfully entitled to realise them, so that payment to him operates as a discharge of their liability, is one which obviously could not be gone into in proceedings under the Succession Certificate Act. It must be left to be determined if and when *Musammat* Katori, through her guardian, takes effective steps for the realisation of the debts. On the materials before him, the learned District Judge was right in holding that *Musammat* Katori should be given authority under the Succession Certificate Act to take steps for the realisation of these debts, if she was advised that she had a good claim to the same. The question regarding the third debt stands on a wholly different footing. It was due from one Munni Lal, and it was due on a hypothecation bond which, on the face of it, was in favour of Kalyan Das and Makhan Lal jointly. Now Kalyan Das in his lifetime sued upon this bond, claiming to be entitled to realize the whole debt after the death of Makhan Lal. In order to obtain a binding decision on this point he impleaded *Musammat* Chandrawati, who then represented the estate of Makhan Lal, as a *pro forma* defendant. Kalyan Das obtained a decree in this suit and the executors under his Will have already been taking steps to execute that decree under the authority conferred upon them by the Will. The debt in question has, therefore, ceased at present to be a debt on a hypothecation bond, but has become a judgment-debt in favour of Kalyan Das as decree-holder. The learned District Judge has committed a double mistake. In the first place, he has acted contrary to the numerous decisions of this Court in granting *Musammat* Katori a Succession Certificate authorising her to collect half of this debt. Even if it were not a decree-debt in favour of Kalyan Das alone, the Succession Certificate in respect of the same was bound to be one in favour of a single person, who would thereunder become authorised to collect the entire debt, subject to a liability to account for a share in the same to any person lawfully entitled to claim such share. In the second place, the learned District Judge was not entitled, under the circumstances, to ignore the order granting Probate of the Will of Kalyan Das in favour of the present appellants. The debt having become a judgment-debt in favour of Kalyan Das, the granting of the Probate of that gentleman's Will *ipso facto* authorised the executors under that Will to proceed with the execution of the decree, subject to proper orders being obtained from the Execution Court. The question whether, after the executors have realised this money, any claim can lie against them on the part of *Musammat* Katori as a claim for money had and received on her behalf, is one which cannot arise in the present proceedings, and the determination of which would depend upon many circumstances, amongst others the truth or otherwise of the allegation that Makhan Lal was adopted by Kalyan Das, and the effect of the decree in Kalyan Das' favour as binding the estate of Makhan Lal, in view of the fact that the widow had been impleaded as one of the defendants in the suit. With these considerations we have at present nothing to do. We are satisfied that the order of the Court below, including this judgment-debt from Munni Lal, or rather a share in the said debt, in the Certificate granted in favour of *Musammat* Katori, is wrong and cannot be sustained. We, therefore, allow the appeal to this extent, that the Succession Certificate granted by the Court below will be amended by striking out all reference to the debt due from Munni Lal. We are of opinion that this appeal has substantially succeeded and that the respondent is to blame for having made any attempt, under the circumstances stated, to include this debt amongst those in respect of which a Succession Certificate was asked for. We, therefore, order that the respondent do pay the costs of this appeal, including fees on the higher scale.

Appeal allowed.

N. H.

SURADHANI DUTTA *v.* SITOO SHEIKH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 775 OF 1920.

May 17, 1922.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

SURADHANI DUTTA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SITOO SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2, O.XXIII—Objection not raised in previous suit, if can be set up as defence in subsequent suit—Execution Court—Decree, modification of, by consent of parties—Adjustment.

An objection which could have been raised in a suit by the plaintiff under section 47 of the Code of Civil Procedure, can be made the ground of defence in a subsequent suit. [p. 380, col. 1]

Bhiram Ali v. *Gopi Kanth*, 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N. S.) 904, *Nil Kamal* v. *Jahnabi Chowdhurani*, 26 C. 946; 13 Ind. Dec. (N. S.) 1205, *Durga Charan Agradani* v. *Karamat Khan*, 7 C. W. N. 607, *Chandramoni Saha* v. *Halijennessa Bibi*, 4 Ind. Cas. 168; 9 C. L. J 464, relied on.

An Executing Court is not competent to enlarge, extend or modify a decree even by consent of parties subsequent to the decree unless it is in adjustment of the decree. [p. 380, col. 2.]

Kanhya Lall Pundit v. *Court of Wards* [*Rajah Puddo Lal Bhunj.*] 16 W. R. 275; 14 B.L.R. 291 *n.* referred to.

The only adjustment of a decree of which an Execution Court can take cognizance is the adjustment contemplated by O. XXI, r. 2 of the Civil Procedure Code. [p. 380, col. 1.]

O. XXIII of the Civil Procedure Code, which deals with adjustment of suits, is not applicable to execution proceedings. [p 380, col 2.]

Appeal against a decree of the Officiating Additional Subordinate Judge, Faridpur, dated the 15th August 1919, modifying that of the Munsif, First Court at Goalundo, dated the 23rd December 1918.

Babu *Nirmal Chandra Chatterjee* (for Babu *Rupendra Kumar Mitter*), for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for recovery of possession. The facts are shortly these:—Plaintiffs brought a suit for recovery of possession of lands against the defendants and also certain other persons for 4 *pakis* of land. The suit was decreed. But in execution of the decree a Commissioner was appointed to deliver possession. Then there was some dispute as to the measurement and a compromise was arrived at and the decree was executed and possession delivered according to it. Subsequently, the defendants dispossessed the plaintiffs from that land. Hence the present suit. First Court decreed the suit in full. On appeal the learned Judge held that in the previous suit the claim was for 4 *pakis* of which 3 *pakis* were only decreed. Therefore, the Commissioner's award for 3½ *pakis* according to the compromise was in excess of the decree and hence he decreed only as to 3 *pakis*. I submit under section 47 of the Code of Civil Procedure no separate suit would lie. The defence was a matter which could have been dealt with in the execution proceedings. So in the present suit that matter could not be registered. Refers to *Biru Mahata* v. *Shyama Churn Khawas* (1), *Jogendro Narain Koonwar* v. *Puree Surno Moyee* (2), *Hassan Raja Chaudry* v. *Kailas Chandra Singha* (3). The defence raised in the suit was barred by the principle of *res judicata*. Issues as to standard of measurement were decided by the Executing Court or by the Commissioner appointed by the Court. That issue could not be re-opened. Refers to *Ram Kirpal* v. *Rup Kuari* (4). The compromise should be treated as an agreement between the parties who signed on delivery of possession. They cannot resile from it. The defendants are entitled to no costs inasmuch as they were the aggressors.

Babu *Phanindra Lal Moitra*, for the Respondent. It is settled law that an objection which could have been raised in a suit by the plaintiff under section 47 can be made a ground of defence in a subsequent suit. Refers to *Bhiram Ali* v. *Gopi Kanth* (5), *Nil Kamal* v. *Jahnabi Chowdhurani* (6), *Durga Charan Agradani* v. *Karamat Khan* (7), *Chandramoni Saha* v. *Halijennessa Bibi* (8). Section 47 has no application, inasmuch as the present suit is based on a different cause of action. In the previous suit they claimed 4 *pakis* but got a decree for 3 *pakis*. The

(1) 22 C. 483 at p. 484; 11 Ind. Dec. (N. S.) 323.
(2) 14 W. R. 39; 12 B. L. R. 201*n*.
(3) 8 C. W. N. 49 at p. 50.
(4) 6 A. 269 at p. 273; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).
(5) 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N S.) 904.
(6) 26 C. 946; 13 Ind. Des. (N. S.) 1205.
(7) 7 C. W. N. 607.
(8) 4 Ind. Cas. 168; 9 C. L. J. 464.

SURADHANI DUTTA *v.* SITOO SHEIKH.

Commissioner raised some difficulties as to the standard of measurement. He proceeded upon a new standard according to which possession was given and plaintiffs got 3½ *pakis* according to Nalkasha measurement. The action of the Commissioner was certainly *ultra vires*, he having gone beyond the law. Refers to *Kankya Lall Pundit* v. *Court of Wards* [*Rajah Puddo Lal Bhunj*] (9). Therefore, the plaintiff can have no title to the ½ *paki* in excess of the previous decree. Then as to the compromise one of the present defendants was no party to it. It cannot be, therefore, treated in law as an agreement. O. XXIII, r. 4 of the Code of Civil Procedure does not apply to execution proceedings. Refers to O. XXI, r. 2, Civil Procedure Code. We do not have the record showing that the adjustment was certified. Therefore, the Court could not take any cognizance of the compromise.

Babu *Nirmal Chandra Chatterjee* replied in brief.

JUDGMENT.

Suhrawardy, J.—This appeal arises out of a suit for recovery of possession of certain parcels of land on the allegation that the plaintiffs got a decree in respect of them in 1908 but from which the defendants subsequently dispossessed them. The facts are that in 1908 the plaintiffs brought a suit against the defendants and other persons for recovery of 4 *pakis* of land measured according to the standard called Nalkarsha rod. In that litigation they finally got a decree for 3 *pakis* of land according to that measurement, namely, Nalkarsha measurement. They put that decree in execution when a Commissioner was appointed by the Executing Court to deliver possession to the plaintiffs. The Commissioner felt some difficulty in regard to the measurement to be applied and the plaintiffs set up a Patlai rod of 14 cubits 1 inch, while the defendants set up the Nalkarsha of 13 cubits. The Commissioner made a compromise with the consent of the parties by which the length of the rod was fixed somewhere between these two figures and, according to that measurement, he delivered possession to the plaintiffs of 3 *pakis* of the land which, according to Nalkarsha measurement, came to 3½ *pakis*. Subsequently, the defendants dispossessed the plaintiffs from the whole of 3½ *pakis*. The plaintiffs got a decree for 3 *pakis* according to Nalkarsha measurement, and the only point in issue is with regard to the plaintiff's right to recover the ½ *bigha* remaining.

The Trial Court gave a decree to the plaintiffs holding that the defendants are bound by the result of the previous litigation. In appeal the learned Subordinate Judge has reversed that decree holding that the plaintiffs in the previous suit brought a claim for 4 *pakis* of Nalkarsha land while they got a decree for 3 *pakis* of Nalkarsha land, and therefore, so much of the order of the Executing Court as purported to put the plaintiffs in possession of 3½ *pakis* was not right and could not be enforced. In this view of the matter he held that the plaintiffs are entitled to 3 *pakis* and dismissed the suit for the remaining ½ *paki*.

On appeal several objections were taken to the decision of the Court of Appeal below. It is urged that under section 47, Civil Procedure Code, the defendants are not entitled to object to the plaintiffs' right to recover the whole 3½ *pakis*. I may here mention that one of the defendants, namely, defendant No. 3, was not a party to the agreement before the Commissioner in the previous execution proceeding as to the length of the rod used in measuring the land decreed to the plaintiffs in that suit. With regard to this contention it is enough to say that the present suit is not a continuation of the previous litigation but is based upon a subsequent cause of action, namely, dispossession by the defendants long after 1908. The plaintiffs, therefore, must succeed on the strength of his title. The learned Court of Appeal below was perfectly right to the statement of facts that the plaintiffs had brought a suit for 4 *pakis* and got a decree for 3 *pakis* and they were not under the provisions of the law entitled to the remaining ½ *paki*. This contention of the plaintiffs has been met by the learned Judge by observing that section 47, Civil Procedure Code, bars the suit but it does not prevent the defendant from setting up a defence based upon an objection which could have been taken under section 47, and in support of this view reliance is placed on the case of *Nil Kamal* v. *Jahnali Chowdhurani* (6), which follows

(9) 16 W. R. 275; 14 B. L. R. 291 n.

the case of *Bhiram Ali* v. *Gopi Kanth* (5). These cases are again followed in the cases of *Durga Charan Agradani* v. *Karamat Khan* (7) and *Chandramoni Saha* v. *Halijennessa Bibi* (8). It, therefore, seems to be settled that, so far as this Court is concerned, an objection which could have been raised in a suit by the plaintiff under section 47, can be made the ground of defence in a subsequent suit. The result, therefore, in my judgment, is that, in the first place, section 47 has no application, because the present suit is based upon a different cause of action and, secondly, it is competent to the defendants to set up the defence, as in this case, without violating the provisions of section 47, Civil Procedure Code.

The next ground of attack is that it ought to have been held that the defendants are barred by the principles of *res judicata* from raising this question and disputing the plaintiffs' title to the ½ *paki*. So far as one of the defendants is concerned, namely, defendant No. 3, this objection has no force because he was not a party to any compromise between the other defendants and the plaintiffs in the previous litigation. Then the elements constituting *res judicata* do not seem to be present in this case. It is conceded that section 11, Civil Procedure Code, does not apply, but, according to the recent decision of the Judicial Committee, the principle which underlies section 11 is applicable to these proceedings. Admitting that to be so it does not appear that the question of the length of the rod was a point in issue in the previous case before a Court of justice or that there was adjudication on that point. The Commissioner, it appears, unnecessarily raised difficulties in this matter by suggesting that he could not decide what rod was to be used to measure the land, though the decree was for 3 *pakis* of land according to Nalkarsha measurement. There was no dispute that this Nalkarsha rod was of 13 cubits. Both parties set forward certain measurements and they came to an arrangement by which the length of the rod was taken as of more than the Nalkarsha rod and the plaintiffs got more than they were entitled to. In this state of facts, I think the principle of *res judicata* is not applicable.

The next attempt is to make these defendants bound by the previous compromise. It is argued in answer that the Executing Court is not competent to enlarge, extend or modify the decree even by consent of parties subsequent to the decree unless it is in adjustment of the decree. In my opinion this view of the law ought to prevail. It seems reasonable that the Court which takes upon itself to execute the decree is authorized by law only to execute the decree as it stands irrespective of any other circumstance, as for example, the agreement between the parties to modify the decrees. Take for instance, a decree is passed for the sum of Rs. 5,000 in favour of the plaintiff; it is absurd to assume that the Court in execution would be justified to execute a decree for Rs. 10,000 because the parties agree between themselves that the judgment-debtor should pay Rs. 10,000 to the decree-holder. It seems to me that any such compromise may afford a cause of action for a separate suit, but it cannot invest the Executing Court with jurisdiction to execute the decree which he was not called upon to do. In connection with this contention the case of *Kanhya Lall Pundit* v. *Court of Wards* [*Rajah Puddo Lal Bhunj*] (9) would seem to be in point. It may also be observed that O. XXIII, which deals with adjustment of suits, is not applicable to execution proceedings. The only adjustment of decree of which the Execution Court can take cognizance is the adjustment contemplated by O XXI, r. 2. In this view of the matter, we do not think that there is much force in this contention. As I have observed, one of the defendants was not a party to the arrangement in the previous suit by which the plaintiffs got more than they were entitled to, and in the present case it is difficult to divide the interests of the several defendants.

One other point has been raised, namely, that the order of the Court of Appeal below that the parties should bear their own costs throughout is bad on principle. I am of opinion that, considering the course the litigation has taken, it was in the right exercise of the discretion of the Court of Appeal below that this order was passed. I do not see any reason to interfere with it.

As all the objections taken by the appellants fail this appeal must be dismissed with costs.

Walmsley, J:—I agree.

B. N. & N. H. *Appeal dismissed.*

SURADHANI DUTTA *v.* SITOO SHEIKH,

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 193 OF 1921.

November 6, 1922.

Present:—Mr. Justice Stuart.

RAM GAJADHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SURTANI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 56—Sub-tenant, status of—Ejectment—Jurisdiction of Civil and Revenue Courts—Pleadings—Second appeal—Point of law.

The person to whom for his lifetime an occupancy tenant sub-lets a portion of his holding for a fixed rent is a tenant within the meaning of section 56 of the Agra Tenancy Act, and can only be ejected in accordance with the provisions of that Act and not by a Civil Court. [p. 381, cols. 2,]

A High Court is justified, as an exceptional case, in permitting a point of law which goes to the root of the merits of the whole case, to be taken in second appeal. [p. 382, col. 1.]

Second appeal against a decree of the District Judge, Allahabad, dated the 21st December 1920.

Mr. *Haribans Sahai*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The facts of the suit out of which the present appeal arises are as follows:—The plaintiffs are Brahmans. They apparently have an occupancy holding. The defendant appears to be a widow of their family to whom had been assigned 14 *biswas* of land (about half an acre) out of the occupancy holding on payment of a trifle as rent for her maintanence during her life. As far as I can gather, beyond this tiny plot she has no means of support. It appears to be the case that after having given this widowed woman this plot for her maintenance the plaintiffs have endeavoured on more than one occasion to oust her from it. They instituted a suit for her ejectment in the Rent Court. The Rent Court found that she could not be ejected under section 58 of the Tenancy Act on the grounds that she did not hold as a tenant from year to year and that she did not hold under a lease the term of which had expired or was about to expire, or that she had refused to accept a lease. They then endavoured to eject her through the Civil Court. In the Civil Court a compromise was arrived at by which she was to continue in possession for the whole of her life provided she paid Rs. 2-4-0 a year. The woman appears to have been in arrears on more than one occasions. Suits were brought against her and then she paid. On the last occasion in 1920 the plaintiffs sued for her ejectment on the ground that she owed one year's rent. She replied that she had paid the rent but that she was ready to pay it again sooner than he ejected. When it came to the point the Court refused to believe that she had paid the rent and ordered her ejectment. In appeal the learned District Judge applied the provisions of section 114 of the Transfer of Property Act. He omitted, however, to direct that the woman should pay interest on the sum tendered, probably overlooking that stipulation in the section in view of the ludicurously small amount that the interest would have been. She should technically have been ordered to pay Rs. 5 per cent. on Rs. 2-4-0 for a period of about one year, something under two annas. He has accordingly upon her paying the rent into Court permitted her to remain in possession and against this the plaintiffs appeal demanding her ejectment. The ground of appeal taken is that section 114 has no application in view of the provisions of section 117. This contention appears to be a good one, but I have to point out that the suit appears to be bad *ab initio*. I may take it that the compromise in the Civil Court created a somewhat peculiar sub-tenancy. An occupancy-tenant under this compromise agreed to sub-let a portion of his holding for a fixed rent during the lifetime of the sub-tenant. The defendant is a tenant within the meaning of section 56 of the Tenancy Act and she can only be ejected in accordance with the provisions of the Tenancy Act and not by a Civil Court. I do not say that the Revenue Court was wrong in refusing to eject her under section 58. I think the Revenue Court was right. How then can she be ejected? Only, as far as I can see, if section 57 has application, that is to say, if a decree for arrears of rent is outstanding against her, if she commits any act or omission detrimental to the land in the holding or inconsistent with the purpose for which it was let, or on the ground that she has broken a condition not inconsistent

with the provisions of the Tenancy Act, and on breach of which she is, by special contract with the plaintiffs, liable to be ejected, or that she has sub-let or otherwise transferred the whole or any portion of the 14 *biswas* in contravention of the provisions of this Act. But clearly no cause of action has yet arisen under section 57 and, if it had, the Civil Court could not have ejected the defendant. The appellants' Counsel objects that any sub-lease for over five years is null and void. It is certainly voidable at the option of the Zemindar, but the Zemindar has, as far as I can see, made no objection. This point was, it is true, not taken by the defendant in the Trial Court or in the First Court of Appeal and it is ordinarily a sound rule of law not to permit a point to be taken in a second appeal which has not been taken before, but in view of the fact that both the Courts below have assumed a jurisdiction which, as far as I can see, they do not possess, and the fact that the defendant is a poverty-stricken woman who apparently is likely to starve if deprived of her small maintenance I consider myself justified, as an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root of the merits of the whole case. Finding that the Civil Courts had no jurisdiction in the matter I find that the suit was rightly dismissed and dismiss this appeal with costs.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 684 OF 1921.
November 29, 1922.
Present:—Mr. Justice Ryves.
JANKI RAM AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MISRI LAL—DEFENDANT—RESPONDENT.

Mortgage (usufructuary) of sir land—Separate covenant to pay interest if possession not given—Possession never given—Redemption—Interest covenanted for, whether payable.

Where a usufructuary mortgage of *sir* land is executed with a further separate covenant that if possession is not given to the mortgagee the principal mortgage-money shall be re-paid with interest at a fixed rate, and possession is not given in fact, the mortgagor cannot be allowed to redeem the mortgage without paying the interest which he had covenanted to pay in case of his failure to give possession. [p. 383, cols. 1 & 2.]

Mir Dad Khan v. *Ramzan Khan*, 44 Ind. Cas. 988; 16 A. L. J. 326; 40 A. 449 and *Moti Chand* v. *Ikram Ullah Khan*, 39 Ind. Cas. 454; 39 A. 173; 5 L. W. 388; 15 A. L. J. 150; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L.R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.), distinguished.

Second appeal against a decree of the District Judge, Budaun, dated the 3rd February 1921.

Mr. *Baleshwari Prasad*, for Mr. *D. C. Banerji*, for the Appellants.

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

JUDGMENT.—The facts out of which this appeal arises are as follows:—The plaintiffs executed on the 3rd of July 1912 a usufructuary mortgage of some of their *sir* land in favour of the defendant for Rs. 100. On the same date they executed an agreement to the effect that if they did not give possession to the defendant or if the defendant having obtained possession, lost it they would re-pay the principal mortgage-money, *plus* interest at the rate of 2 per cent. per mensem from the date of mortgage. As a matter of fact the plaintiffs remained in possession throughout and still are in possession. It appears that when the defendant applied for mutation of names he was resisted by the plaintiffs and mutation was not effected. After that the defendant seems to have done nothing. He did not apply under section 36 of the Land Revenue Act to have the rent assessed, assuming that he could have done so.

The plaintiffs brought this suit to redeem the mortgage on payment of Rs. 100 only. The suit was filed on the 30th of June 1920, that is to say, they had had the use of defendant's money for about 8 years and had paid no rent or interest to the defendant. The defendant claimed that they were not entitled to redeem unless they paid interest according to the agreement already mentioned.

The Trial Court decreed the plaintiffs' claim, holding that the defendant was not entitled to physical possession of the mort-

gaged property as it was the plaintiffs' *sir* and that the defendant could only have got the rent assessed, and as he never applied to have the rent assessed, the fault was his.

On appeal the learned District Judge held that the respondents, that is to say, the plaintiffs, were bound by their contract to pay interest and as they had failed admittedly to put the appellant in possession of the mortgaged land and had committed a breach of their contract, he modified the decree of the Court below by ordering redemption on the payment of Rs. 100, *plus* interest at the rate of 2 per cent. per mensem from the date of mortgage to the date of payment.

The plaintiffs come here in appeal and argue that this case is really on all fours with the case reported in *Mir Dad Khan* v. *Ramzan Khan* (1), which is based on a recent decision of their Lordships of the Privy Council in *Moti Chand* v. *Ikram Ullah Khan* (2). The facts of that case and this are very similar but there is this great difference between the two cases. In that case the transferee was suing to enforce an illegal covenant in the contract: here the plaintiffs sue to redeem and wish to avoid a term of their contract which the defendant could not have enforced in law but which they could have themselves carried out if they had been so minded. As pointed out in the judgment of Mr. Justice Piggott in the case of *Mir Dad Khan* v. *Ramzan Khan* (1), "An ex-proprietary tenant (which the plaintiffs became on execution of this usufructuary mortgage) with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts." In the same case Mr. Justice Walsh adopts Dr. Agarwala's comment on the subject in the words, "It comes to this that though a proprietor can, in fact, give up his ex-proprietary rights when they accrue, by not availing himself of them, he cannot bind himself by an express stipulation to that effect in a deed of transfer of the property or the like".

It seems to me it would be highly inequitable to hold that the plaintiffs, having agreed to give up possession, although they knew probably that that agreement could not be enforced by the mortgagee, should be allowed to redeem the mortgage without paying the interest which they had covenanted to pay in case they did not give possession. They have had the use of the defendant's money for 8 years and paid him nothing.

In my opinion the decision of the Court below is right. I accordingly dismiss the appeal with costs.

Appeal dismissed.

S. D.

(1) 44 Ind. Cas. 988; 16 A. L. J. 329; 40 A. 449.

(2) 39 Ind. Cas. 454; 39 A. 173; 5 L. W. 388; 15 A. L. J. 150; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N 616; 19 Bom. L. R. 433; 26 C L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.).

PATNA HIGH COURT.

CIVIL REVISION NO. 213 OF 1922.

November 22, 1922.

Present:—Justice Sir John Bucknill, KT.

Musammat AJODHYA KUWAR—DEFENDANT—PETITIONER

versus

DURGA PRASAD—PLAINTIFF—OPPOSITE PARTY.

Ex parte *decree—Appeal—Decree confirmed—Application to set aside* ex parte *decree—Trial Court, jurisdiction of.*

Where an appeal against an *ex parte* decree has been dealt with and decided on the merits by the Appellate Court, the Court which made the *ex parte* decree has no jurisdiction to entertain an application to set that decree aside.

(Case-law referred to and considered).

Revision from a decision of the Subordinate Judge, Patna, dated the 11th March 1922.

Messrs. *K. P. Jayaswal* and *B. C. Sinha*, for the Petitioner.

Mr. Rai *Guru Saran Prasad*, for the Opposite Party.

JUDGMENT.—This was an application in civil revisional jurisdiction made by

one *Musammat* Ajodhya Kuwar, widow of the late Munshi Negi Prasad, asking that an order, dated the 11th March 1922, passed by the Subordinate Judge of the Second Court of Patna, should be set aside or otherwise dealt with. The circumstances which have given rise to this application are in themselves very simple, but raise an interesting, though well defined, point of law which has been ably placed before me by the learned Counsel for the petitioner. In order to understand exactly how the question which has been argued before me arises, it is necessary, shortly, to refer to the facts in this case and to the somewhat lengthy course which the litigation has already passed through.

A certain Durga Prasad, who is the respondent to this application, brought an action against the petitioner and other defendants claiming that certain land belonged to him as his *bakasht* as the result of a partition. The present petitioner, who was a defendant, as I have said, in that suit was a *pardah-nashin* lady. The plaint was admitted in May of 1919 and there were frequent applications for time, not, I may point out, entirely made by the petitioner or the other defendants. However, on the 8th September 1919, the plaintiff was, according to the Munsif's order-sheet, ready for trial, although the defendants still prayed for time to adduce evidence. The 1st of November was fixed for the trial, and on that date the defendant was not ready and prayed for time for calling for certain papers from the Collectorate and the District record-room. The Munsif, after shortly discussing the delays which had already taken place, came to the conclusion that this petition for time made on behalf of the defendant was frivolous and he accordingly rejected it. The Munsif then proceeded with the case, and I am sorry to see that those who represented the defendant, stating that they had no instructions other than to apply for adjournment, withdrew from the suit.

Although this conduct has very little to do with the point in this case, I think it is not out of place to indicate that to take up such an attitude, which often greatly embarrasses one who desires to try and to retreat from the position in which this behaviour puts him, is a mistake. It is far better, if in any way possible to do, for those representing a litigant in such circumstances to continue the conduct of the case as far as may be possible and then to intimate clearly the reasons for which it is found that the case can be at that stage carried no further by him. If his petition for adjournment under such circumstances is then rejected, it may well become a matter for serious consideration as to whether the rejection of such an application was appropriate or the reverse.

To return now to the course which this litigation has pursued, the Munsif's order in the suit, made on the 1st of November 1919, was, that "the suit be decreed *ex parte* with costs and Rs. 253 mesne profits, and future mesne profits to be ascertained hereafter in Execution Department. The plaintiff's title to the suit be declared and he do recover possession of the same on ousting the defendant." Now, apparently, on the 29th of November, the defendant filed an application for review before the Munsif of this order and, on or about the same date, an appeal was also entered against this decision. On the 5th of January 1920 the Munsif notes in his order-sheet that an intimation had been received from the Appellate Court calling for the record and he accordingly ordered the record to be sent to the higher Court and stayed the proceedings for setting aside the *ex parte* decree which had been put forward before him, and of which he had then fixed, provisionally, the hearing for the 17th of January. The matter seems to have come before the Subordinate Judge of Patna a good many months later, for it is found that by a judgment, dated the 18th January 1921, that Judge disposed of the appeal. He went into the merits of the case and came to the conclusion that, on the merits, the Munsif was right and he affirmed the Munsif's decision. He states, however, at the conclusion of his decision, that he observes that an application for re-hearing under O. IX, r. 13 of the Civil Procedure Code was still pending before the Munsif. He adds that, although in the appeal before him no case had been made out for remitting the suit for a fresh trial upon the merits, and that, therefore, he found him-

self unable to accede to the appellant's request for a remand, yet he thought that the learned Munsif might re-consider this matter if he (Munsif) thought that it was a fit case for setting aside the *ex parte* decree which he had made. On the 14th July, the record having been received back by the Munsif, he, guided presumaably by what had fallen from the Subordinate Judge, decided to consider whether or not he ought to set aside his *ex parte* order made on the 1st of November 1919, and, accordingly, he fixed a date for the hearing of the application. After some delay the matter came up for his decision on the 6th September and the learned Munsif then dealt with the case somewhat exhaustively. He points out in a careful judgment that the application before him had been opposed on two grounds; firstly, on legal gounds and, secondly, on merits. Dealing with the former ground of opposition he came to the conclusion, on the authority of the case of *Mathura Prasad* v. *Ramcharan Lal* (1), that the order of the Court of Appeal was final and that the applicant before him having appealed from his *ex parte* order and the Appellate Court having considered the case on its merits and dismissed the appeal, the case for re-instatement had gone out of his (the Munsif's) hands and that he had no further seizin of it. He, therefore, came to the decision that on this legal ground the application must be rejected, but in addition to thus deciding the matter on this ground of objection he also considered the merits of the case, and, after having given a lengthy summary of what had taken place before him and the causes which had given rise to the substantial delay between the date when the plaint was entered and the hearing of the suit, he was of the view that he saw absolutely no ground for restoration of the matter. The defendant appealed from this decision to the Subordinate Judge and, on the 11th of March of this year, that Judge decided against the appellant. The Subordinate Judge did not think that it was worth while to go into the question of the merits because he was satisfied that the legal ground upon which the Munsif had dismissed the appellant's application were sound and should be affirmed. He held, therefore, that the Munsif was right in refusing to restore the suit.

It may, perhaps, in passing, be desirable to mention that it was apparently suggested to the defendant that a second appeal should have been presented from the judgment of the Subordinate Judge of the 18th January 1921. The time, however, for filing such an appeal had expired; but an application to this Court was made in June of this year asking that, under the circumstances, the time should be extended so as to allow the entry of the appeal. The application, however, was rejected on the 31st July by Mr. Justice Das and Mr. Justice Adami, on the ground that, under the provisions of the Limitation Act, the circumstance under which extension of time was sought had no application in a case of this nature.

As a last resort the defendant has now brought this matter before this Court, asking that it should exercise its revisional jurisdiction.

I need not, I think, refer, for it is, strictly speaking, hardly material so to do, more than casually to the allegations of hardship which have been suggested in this application, it is sufficient to state that it is now said that, principally owing to the fact that the applicant is a *pardanashin* lady and on that account unacquainted with legal or business affairs, certain important documents of title, which would have assisted her most materially in connection with her contention, which she would have desired to adduce in defending herself in the original suit had been mislaid and had not been discovered in time for their presentation before the Munsif in 1919. I can only say, in comment upon this statement, that it does not, so far as I can see, appear clearly from any of the records which have been placed before my notice that the exact nature of these documents was explicitly characterised.

The only point which has been pressed before me is that, in this matter, it was incumbent upon the Subordinate Judge to have considered the decision of the Munsif

(1) 28 Ind. Cas. 261; 37 A. 208; 13 A. L. J. 283.

so far as it related to the reasons why he had originally decided to hear the case *ex parte* and to reject the application originally made for further time and to refuse to set aside the application for reinstatement on questions relating to the facts of the case, and that the Subordinate Judge should not have dealt solely with the question of law and affirmed the decision of the Munsif on the legal ground alone, because, so it is argued, both the Munsif and the Subordinate Judge were wrong in thinking that the Munsif was debarred by what had taken place from reinstating the case before him. This contention formed the subject-matter of spirited argument, and there seems little doubt that, unless one looks very carefully into the present position of the law as referred to in the recent decisions, there has been some discrepancy of opinion. Put very broadly, the position may thus be stated: the Munsif may perhaps be entitled to consider an application made to him to review his decision even where an appeal has been lodged, but where such an appeal has been actually decided the Munsif has no power to entertain such an application. The line of cases to which reference has been made in this case to me may, for practical purposes, be regarded as commencing with that of *Ramanadhan Chetti* v. *Narayanan Chetty* (2). In that case in 1904 it was held that it must, on principle, be considered that, after the due filing of an appeal and during its pendency, the power of the inferior Court in any way to deal with the litigation is completely in abeyance other than in connection with the carrying out of its decree. This case was followed by that of *Sankara Bhatta* v. *Subraya Bhatta* (3), heard in 1907 and reported in I. L. R. 30 Madras 535, where it was held that, after an appeal had been filed against the decree of a lower Court, the power to set aside the original decree on an application under section 108 of the Civil Procedure Code (now O. IX, r. 12) becomes vested in the Appellate Court. In the other direction, however, was cited the case of *Zendoolal Nandlal* v. *Kishorilal Mehtabrai* (4) where it was held that, when an *ex parte* decree had been satisfied, there was still nothing to disentitle a defendant from applying successfully to a Court to set it aside under section 108 of the Civil Procedure Code. Far more important, however, than this case, was that of *Chenna Reddi* v. *Pedda Obi Reddi* (5). In that case it was held in 1909 that where an application for review had been presented by a party to a suit and an appeal had afterwards been preferred, the Court to which the application for review is made was not thereby deprived of jurisdiction to entertain the application. The case of *Ramanadhan Chetti* v. *Narayanan Chetty* (2), to which I have already made reference, was overruled; whilst that of *Sankara Bhatta* v. *Subraya Bhatta* (3) was there distinguished. Now, in the course of their Loreships' judgment, which was that of a Full Bench consisting of Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran Nair, their Lordships referred to the intention of the framers of the Civil Procedure Code. Their Lordships say: "This reference raises the question whether, when an application for review of judgment has been made prior to the filing of an appeal, and, an appeal is filed subsequently, the Court is precluded from proceeding to hear the application for review. Section 623, Civil Procedure Code, provides for making an application for review before an appeal has been filed, and sections 624 and 630 provide that the Court is either to reject the application or to grant it and re-hear the case. The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by Statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary

(2) 27 M. 602.
(3) 30 M. 535; 17 M. L. J. 436.
(4) 23 B. 716; 1 Bom. L. R. 213; 12 Ind. Dec. (N. s.) 479.
(5) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 135; 19 M. L. J. 388.

implication. There are no express words and the question, therefore, is, is there any necessary implication?" Their Lordships continue to consider why they regard implication as being absent, and, after expressing their disapproval of the decision in the case of *Ramanadhan Chetti* v. *Narayanan Chetty* (2), they go on to add: "Now, after an appeal has been filed, the Appellate Court is seized of the case and should no doubt be applied to rather than the Court of first instance. But it is a very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of first instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction. Such a notion would never, I think, have occurred to the framers of the Code." Their Lordships then go on to consider what the attitude of mind in which the English lawyers who were drawing up this Code must have been and they then make use of an expression (referring to the position under English law) upon which the learned Counsel for the applicant before me has very rightly laid great stress. Their Lordships say:—"They were English lawyers engaged in conferring upon Indian Courts, subject, no doubt, to modifications and restrictions, jurisdiction to grant relief by way of review of judgment similar to that which had been exercised by Courts of Equity in England and by the Supreme Courts in the exercise of their equitable jurisdiction. It is only necessary to refer to what is said in Mitford's Pleadings in Chancery, 5th Edition, page 101, on Bills of Review, or to the observations of Cozens-Hardy, L. J., in *Bright* v. *Sellar* (6) to see that section 623 contains an adaptation of the practice as to Bills of Review in Equity. Not only is there no warrant for the notion that the filing of an appeal deprived the Court of jurisdiction to proceed further with a Bill of Review *but it* was even held that a Bill of Review might *be filed after the affirmance of the decree by the Appellate Court*, (Mitford, page 105), If the framers of the Code had intended to introduce any such rule, I think they would have said expressly not only that an application for review should not ordinarily be made after the filing of an appeal, but also that the filing of an appeal should determine the jurisdiction to dispose of applications made before the filing of the appeal. On the whole, it seems to me impossible to hold that there is any necessary implication that the filing of an appeal operates as a stay of proceedings on an application for review, especially as section 623 itself provides for making certain applications for review even after the filing of an appeal."

Now, it does certainly appear, at first sight, that these remarks constitute some foundation for the contention which has been urged upon me by the learned Counsel for the applicant here. There are, however, later cases, the trend of all of which appears to point in a somewhat different direction. The first of these is to be found in the decision in the case of *Brij Narain* v. *Tejbal Bikram Bahadur* (7), a case decided in the Privy Council in 1910 and reported in I. L. R. XXXII Allahabad 295. It is not necessary to refer in detail to the facts in that case, save to indicate that there was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court and that, previous to the order of amendments, that decree had been affirmed on appeal by the High Court. The High Court of Allahabad has observed that the Subordinate Judge had no jurisdiction under such circumstances to amend his order, and their Lordships of the Privy Council (in commenting upon a peculiar anomaly which was observable between the position of two separate decree-holders, one of whom had succeeded in obtaining an amendment of his order originally made by the Subordinate Judge and the other of whom had not) remarked: "Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think

(6) (1904) 1 K. B. 6; 72 L. J. K. B. 921; 89 L. T. 431; 52 W. R. 148; 20 T. L. R. 12.

(7) 6 Ind. Cas. 669; 32 A. 295; 14 C. W. N. 667; 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; (1910) M. W. N. 392; 37 I. A. 70 (P. C.).

the High Court have themselves said enough to make it clear that, if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of one of joint decree-holders, so also the alteration in the case of another of joint decree-holders was equally ineffectual." The observations to which their Lordships referred as having been made by the High Court of Allahabad were to the following effect:—"A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of. In the other application the Bench made an order rejecting it, holding that, under all the circumstances o the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is, that there are now two joint decree-holders, as to *one* of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the *other* this provision does not exist. The provision of the decree, therefore, seems to be apparently inconsistent, as out of two joint decree-holders one can execute the decree *plus* future interest, whilst the other cannot." It would certainly seem, from their Lordships' observations in that case, that their Lordships did not necessarily associate themselves with the position which had been taken up by the High Court of Allahabad in their view that the decree of the inferior Court had been made without jurisdiction in altering that decree after it had been affirmed on appeal. This case was followed by that of *Kumud Nath Roy Chaudhry* v. *Jatindra Nath Chaudhry* (8) and decided in 1911. In that case, which was heard by Mr. Justice Mookerjee and Mr. Justice Teunon, it was declared that an original Court can entertain an application to set aside an *ex parte* decree, although an appeal by the contesting defendant is pending in the Appellate Court. This decision may not, as I have just quoted it, appear to carry the matter in any way further, but there are words used in the judgment of the Court to which my attention has been drawn by the learned Vakil for the respondent before me, and which certainly seem to assist in a proper consideration of the point which is now before me for my decision. Their Lordships say at page 400*: 'In so far as the second point is concerned, it has been argued by the learned Vakil for the respondent that the Subordinate Judge had no jurisdiction to entertain the application to set aside the *ex parte* decree, because the contesting defendants had preferred an appeal to this Court against the decree . . . In our opinion, the objection by the respondent must be overruled." Then their Lordships, after referring to cases which were quoted before them and to which I have here already for the most part made some reference, go on to remark: "It has been broadly contended, however, by the learned Vakil for the respondent, upon the authority of expressions to be found in the judgments in *Dhanai Sardar* v. *Tarak Nath Chowdhuri* (9), *Ramanadhan Chetti* v. *Narayanan Chetty* (2) and *Sankara Bhatta* v. *Subraya Bhatta* (3), that the immediate effect of the presentation of an appeal to a Superior Court against the decree of a Subordinate Court, is to destroy the jurisdiction of the latter Court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well-founded on principle, and it is, as a matter of fact, opposed to the decision of the House of Lords in *Mellish* v. *Richardson* (10), in which it was ruled, that where the Court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken. This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the original Court to deal in any manner with the judgment under appeal;" and then their Lordships use words here of considerable importance. They add: "The position is obviously *different after the adjudi-*

(8) 9 Ind. Cas 189; 38 C. 394; 13 C. L. J. 221; 15 C. W. N. 399.

(9) 5 Ind. Cas. 525; 12 C. L. J. 53.

(10) (1832) 36 R. R. 111; 1 Cl. & F. 224; 6 E. R. 900; 6 Bligh (N. S) 70; 9 Bing. 125. 2 Moore & Scott 191.

* Page of 38 C.—[*Ed.*].

cation of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal. *Brij Narain* v. *Tejbal Bikram Bahadur* (7). " The matter does not, however, altogether remain there. In the case of *Mathura Prasad* v. *Ramcharan Lal* (1), decided in 1915, and reported in I. L. R. XXXVI Allahabad, 208, the question here seems to have been considered by Mr. Justice Chamier and Mr. Justice Piggott. Their Lordships there held that when *once the High Court had confirmed a decree on appeal it was not open to the Court which passed the decree to entertain an application to set the decree aside and it made no difference that the application to set the decree aside was filed before the appeal was disposed of.* Their Lordships in that case had cited before them practically all the cases to which I have here referred, and in their judgment they remarked: " This case was decided by the Court of first instance on the 20th of September 1911. On the 30th of November 1911 the present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the Court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on the 24th of February 1913, and after the record had been returned to the Court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdiction to alter or set aside the decree passed by him, inasmuch as it had been confirmed by and become, as he says, merged in, the decree passed by this Court. We have been referred to several decisions bearing on the question whether a Court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a lower Court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior Court, *but all the authorities seem to be agreed* that when a decree has been passed by the Superior Court the lower Court cannot alter or amend its decree." Now, when their Lordships make use of the expression " all the authorities " they are evidently referring to the cases which were quoted before them by the respondents to the appeal which they were hearing. Those cases as set out in the report are: *Brij Narain* v. *Tejbal Bikram Bahadur* (7), *Sankara Bhatta* v. *Subraya Bhatta* (3), *Dhanai Sardar* v. *Tarah Nath Chowdhuri* (9) and *Kumud Nath Roy Chaudhry* v. *Jatindra Nath Chaudhry* (8) to which have just referred.

I have now completed the review of this legal point which has been placed before me. I think that there can be no doubt that, on a proper survey of the result of the decisions to which I have been referred and to which I have referred, the contention put forward by the learned Counsel for the applicant here must fail. I am of the opinion that the Munsif and the Subordinate Judge were both right in the legal decision to which they came, namely, that, after the original appeal to the Subordinate Judge from the Munsif's *ex parte* order had been dealt with by the Subordinate Judge and decided by him on the merits, as well as on the question of the Munsif's decision refusing the application of the defendant for further time, it was not open to the Munsif to entertain the application which had been made to him to set aside his *ex parte* decree. I think that, further, the Subordinate Judge was in no way incorrect in view of the opinion which he had formed as to the correctness of the Munsif's attitude in refusing to entertain the application to re-open his order, in dismissing the appeal which was made to him solely on the ground that the Munsif was right in considering that the decision of the appeal in the original suit had debarred him from exercising further jurisdiction over the matter.

This application to me must, therefore,

fail with costs, and I must decline to interfere. Hearing fee three gold *mohurs*.

W. C. A. *Application failed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 417 OF 1921.

November 15, 1922.

Present:—Mr. Justice Stuart.

SITA RAM—PLAINTIFF—APPELLANT

versus

REWA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Sale-deed—Recitals—Evidence—Hindu Law—Alienation by daughter to pay off mother's debts—Reversioners, whether bound.

The mere recital in a deed of sale is evidence.

Nanda Lal Dhur Biswas v. *Jagat Kishore Acharjya Chowdhuri*, 36 Ind. Cas. 420; 14 A. L. J. 1103; 20 M. L. T. 535; 31 M. L. J. 563; (1916) 2 M. W.N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186, 10 Bur. L. T. 117; 43 I. A. 249 (P. C.). followed.

An alienation by a daughter to pay off her mother's debts cannot operate against the interests of reversioners.

Second appeal against a decree of the Additional Subordinate Judge of Budaun, dated the 31st January 1921.

Mr. *Saila Nath Mukerji*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—There are two main points argued in this appeal. The first is that the mere recital in the deed of sale is not evidence. I think it is evidence in view of the decision in *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1). But on the next point the appeal must succeed. It is this :—The alienation was by a daughter to pay off her mother's debts. This is not a reason for an alienation which can operate against the interests of the reversioners. The learned Counsel for the respondents would uphold the decree on the point that the suit was barred by *res judicata*, a point which the lower Appellate Court has decided against them. I agree with the lower Appellate Court that the suit is not barred by *res judicata* for the obvious reason that the original suit was by a vendee against one of the daughters for partition, to which the other daughter was made party. The reversioners are in no way bound by decisions against the daughters. I, therefore decree this appeal, restore the judgment of the learned Munsif and set aside the judgment of the lower Appellate Court. The defendants will pay their own costs and those of the plaintiffs in all Courts. These costs will include in this Court-fees on the higher scale.

Appeal decreed.

S. D.

(1) 36 Ind. Cas. 420; 14 A. L. J 1103; 20 M. L. T.535; 31 M.L. J.563; (1916) 2 M. W.N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 24 C. L J. 487; 1 P.L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L T. 177; 43 I. A. 249 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL NO. 89 OF 1917.

July 28, 1920.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

Rao Sahib T. NAMBERUMAL CHETTIAR, BY HIS AGENT C. RAGHAVALOO NAIDU—PLAINTIFF—APPELLANT

versus

A. T. RAGHAVA CHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59, —Evidence Act (I of 1872), s. 68—Mortgage-bond —Attesting witnesses—Proof, mode of.

The provision in section 68 of the Evidence Act which requires that one at least of the attesting witnesses to a mortgage-bond should be called, if there is any alive, does not in any way affect the requirements of section 59 of the Transfer of Property Act that a mortgage-bond, in order to be valid, must be executed in the presence of two attesting witnesses. If one attestor only is called it is competent for him or for any other witness to prove that the execution was in the presence of two attestors, and it is not necessary to call two attestors. When all the attesting witnesses are dead, the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses. [p. 391, col. 2; p. 392, col. 1.]

NAMBERUMAL CHETTIAR *v.* RAGHAVA CHARIAR.

Shamu Patter v. *Abdul Kadir Rowthan*, 16 Ind. Cas. 250; 35 M. 607; 16 C W. N 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.) and *Uttam Singh* v. *Hukam Singh*, 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167. relied on.

Ram Dei v. *Munna Lal*, 38 Ind. Cas. 175; 39 A. 109; 14 A. L. J. 1041, and *Shib Dayal* v. *Sheo Ghulam*, 38 Ind. Cas. 694; 39 A. 241; 15 A. L. J. 164, distinguished.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Original Suit No. 41 of 1916.

This appeal coming on for hearing on the 25th and 26th of March, 1918, the Court (Abdur Rahim and Seshagiri Aiyar, JJ.,) delivered the following

JUDGMENT.

Abdur Rahim, J.—I think there ought to be a further enquiry into the question whether the document, Exhibit A1, was duly executed as required by law. It is a deed of mortgage executed to the plaintiff by the 1st defendant, and it also includes a sub-mortgage of properties belonging to defendants Nos. 3 and 6. There are 5 attesting witnesses altogether. One of them was examined and his evidence was that he was present at the time of the execution of the deed. It was sought to be elicited from him in cross-examination that the other attesting witnesses were not present at the time of execution. The learned Pleader for the appellant says that his client was taken by surprise and had not sufficient opportunity to examine the other attesting witnesses. It appears that at the earlier stages of the hearing they had been summoned and were actually present. On the day the case was posted for further hearing, the Pleader who had conducted the case of the plaintiff all along was unable to be present and another Pleader appeared before the Trial Judge. It rather seems that that gentleman did not quite realise the necessity for proving that the mortgagor executed the document in the presence of at least two attesting witnesses. He asked for an adjournment, but the Subordinate Judge refused to grant an adjournment and proceeded with the case. That is so at least according to the affidavit filed by the appellant. The Pleader for the defendants applied for an express issue to be raised whether there was any proof of the due execution of Exhibit A1. This was after the evidence was closed. The Subordinate Judge considered such an issue unnecessary and reserved judgment. Judgment was not delivered until some days afterwards, and the Subordinate Judge found that the document was not proved to have been executed in the manner required by section 59 of the Transfer of Property Act, that is to say, *i.e*, in the presence of at least two attesting witnesses. It may be that that conclusion was right upon the evidence as it stood. But I think that a further opportunity should be given to the plaintiff to examine his other attesting witnesses to prove the fact, if it be so, that they or at least two of the attesting witnesses were present at the time of the execution of the document. The first issue which has been pointed to us as raising the question, did not in fact raise the question at all. It raised the question " whether the suit mortgage-bond was true, *bona fide*, supported by consideration and binding on defendants Nos. 2 and 6." Then no objection as to the proper execution of the document was taken in the written statement either. The issue upon a question of this sort ought to have been whether the mortgage-bond was executed as required by the law.

As regards the law, there can be no doubt that section 59, Transfer of Property Act, as interpreted by the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (1), requires that a mortgage-bond in order to be valid must be executed in the presence of two attesting witnesses. Section 68 of the Evidence Act further requires that one at least of the attesting witnesses to a mortgage-bond should be called, if there is any alive. But that does not in any way affect the requirements of section 59 of the Transfer of Property Act. Section 68 of the Evidence Act lays down that in order to prove a mortgage-bond, one of the attestors must be called. It would be competent for that attestor or for any other witness to prove that the execution was in the presence of two attestors and it is not necessary to call two attestors. There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence which would show that the document was executed in the pre-

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A 218 (P. C.).

sence of two attesting witnesses. That is the effect of the ruling in *Uttam Singh* v. *Hukam Singh* (2). Reliance was placed by Mr. Venkatasubba Row on the ruling in *Ram Dei* v. *Munna Lal* (3), and *Shib Dayal* v. *Sheo Ghulam* (4); and he contends that these decisions lay down that if one attesting witness is called and he proves that he saw the executant execute the document, then it need not be shown that the execution was made in the presence of two attesting witnesses I am not sure that this was what was intended to be laid down, for such a proposition would be directly in the teeth of section 59 of the Transfer of Property Act. And I may mention that it does not appear from the reports that the learned Judges bestowed sufficient attention to the judgment of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (1).

I think, therefore, that there should be a further enquiry into the question whether Exhibit 'A1 was properly executed in accordance with the requirements of the law, and it will be open to the parties to adduce fresh evidence on the point. The other questions will be dealt with on receipt of the finding.

The finding will be submitted within two weeks after the re-opening of this Court, and 10 days will be allowed for objections. Defendants Nos. 2 and 6 are under the circumstances entitled to costs of this hearing, whatever may be the ultimate result. The appeal is not pressed against the 3rd defendant. It is, therefore, dismissed with costs so far as this defendant-respondent is concerned.

Seshagiri Aiyar, J.—I agree. I wish to say a word about the contention raised by Mr. Venkatasubba Row that on proof by one attesting witness of the execution of the mortgage-bond there is a presumption that it is a valid one. In my opinion, this is mixing up two distinct questions, one relating to the validity of the document which is controlled by section 59 of the Transfer of Property Act, and the other relating to proof of the document which is governed by section 68, Evidence Act. Section 68 is an onerous provision. Under section 67, a document can be proved by any witness. Under section 68, it is necessary that a particular class of witnesses should be called in order to prove a document which is required by law to be attested. Therefore, this provision does not do away with the necessity of showing that the document is valid. A document may be proved as required by section 68 and put on record Nonetheless in order that a decree may be founded on it, it must be shown to be valid; and for this purpose we must go to section 59 of the Transfer of Property Act. That section lays down that unless a mortgage is attested by two witnesses, there cannot be a proper mortgage. Mere proof by a single witness that it has been executed, cannot enable a party to get a decree on the mortgage, unless it is also shown that at its execution the document was attested by two witnesses. The decision in *Ram Dei* v. *Munna Lal* (3) and another decision of the same Court in *Uttam Singh* v. *Hukam Singh* (2), if I may say so with respect, do not seem to have recognised that before a person could obtain a decree upon a mortgage it must be proved to be valid. The learned Judges were dealing only with the mode of proof and not with the validity of the document. As pointed out by my learned brother, the decision in *Shamu Patter* v. *Abdul Kadir Rowthan* (1) leaves no room for doubt that in order that a decree may be founded upon a mortgage-deed, it should be proved to have been executed by a person and also attested by two witnesses. These requirements are wanting at present on the evidence let in.

I wish to say nothing more about the way in which the case has been conducted in the lower Court. It seems to me that this is a fit case for giving the party an indulgence on the condition imposed by my learned brother.

In pursuance of the order contained in the above judgment, the Temporary Subordinate Judge of Chingleput submitted a finding that the mortgage was properly executed in accordance with the requirements of law as laid down by their Lordships.

This appeal came on for final hearing, after the return of the finding of the lower Court upon the issue referred by this Court for trial.

(2) 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167.
(3) 38 Ind. Cas. 1/5; 39 A. 109; 14 A. L. J. 1041.
(4) 38 Ind. Cas. 634; 39 A 241; 15 A. L. J. 164.

Mr. *P. Venkatramana Rao*, for the Appellant.

Mr. *T. P. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—This litigation has taken a somewhat unfortunate course, but we feel bound to give effect to the clear legal principles which, in our judgment, apply to the case. The plaintiff obtained leave to institute a suit against the first defendant on a mortgage by the first defendant of certain properties, one of which was alleged to be within the original jurisdiction of this Court. Here, I may say in passing that it appears to us to make no difference whatever as to the jurisdiction of this Court whether or not the mortgagor had a good title to the property situated within the jurisdiction of this Court, What he did was, he mortgaged his interest, such as it was, in immoveable property situated within the jurisdiction of this Court. and that. in our opinion, was quite sufficient to give this Court jurisdiction to give leave. However, that is really not a question which arises here. The plaintiff obtained an *ex parte* decree against the first defendant and having apparently heard that the first defendant was not a full owner but a mortgagee of some of the items of the properties included in the mortgage, he apparently obtained from Mr. Justice Bakewell an order to insert in the decree a direction for an enquiry as to what was the interest of the mortgagor in the said mortgaged properties. In our opinion such an enquiry could only be for the purpose of settling the sale proclamation and in no way affected the right of the plaintiff decree-holder to proceed to the execution of his decree. If he had brought the properties to sale after that enquiry and either purchased them himself or any one else had purchased them, then that auction-purchaser could have proceeded to enforce his rights against the mortgagors of the first defendant as to those items by bringing a suit for sale when they would have had to exercise their right of redemption or to allow the suit properties to be sold, and in that way, the rights of the parties would have been fully worked out. What the plaintiff was advised to do was to obtain a stay of execution of the Original Side Decree and to file a fresh suit in the District Court of Chingleput against the mortgagors of these items and, also, as regards some other items to join aliences subsequent to himself, with regard to whom he alleged that he did not know of their existence when he brought his suit in this Court. Here again it was unnecessary to bring another suit because, if the first decree had been executed, as the subsequent alienees were not parties to the suit they might, if so minded, have sued to redeem those items from the auction-purchaser on suitable terms. If they did not choose to do so, the purchaser would remain undisturbed. There was, therefore, no necessity for the plaintiff to bring this second suit and there is no ground in law for his doing so. If the second suit had been brought after an order absolute of the sale was obtained against the 1st defendant in the first suit, then it is perfectly clear that the original cause of action would have been merged in the decree and that no subsequent suit could be brought against him; and, even supposing that, as alleged for the appellant, the second suit was instituted before the making of the order absolute in the first suit, still in our opinion, the provisions of section 11, Civil Procedure Code, are sufficient to prevent the plaintiff from instituting a suit about an issue which had been tried and decided in a previous suit in this Court. The present suit, in our opinion, both as against the 1st defendant and as against the subsequent alienees against whom the auction-purchaser in the first suit will be entitled to enforce his remedies in execution of the decree in that suit, is entirely misconceived.

On this ground, the suit fails and the appeal must be dismissed with the costs of defendants Nos. 2 and 6 one set.

V. N. V.

W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 987 OF 1921.

December 20, 1922.

Present:—Mr. Justice Gokul Prasad.

AMAR DEO PANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GAYA PANDE—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887),

AMAR DEO PANDE *v.* GAYA PANDE.

Sch. II, Art. 42—Two persons mortgaging property belonging to one of them—"Joint mortgagors" —Personal liability.

Where two persons join in mortgaging the property belonging to one of them, they are "joint mortgagors' within the meaning of Art. 42, Schedule II, to the Provincial Small Cause Courts Act.

A mortgage carries with it a personal liability. *Musaheb Zaman Khan* v. *Inayat Ullah* 14 A. 513; A.W.N. (1892) 80; 7 Ind. Dec. (N.S.) 698, followed.

Second appeal against the decree of the District Judge, Ghazipore, dated the 14th April 1921.

Mr. *A. Sanyal*, for the Appellants.

Mr. *Baleshwari Pershad*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs for recovery of a certain sum of money which they had paid for the defendants. The facts are briefly as follows:—Two persons, Tulshi and Gaya Prasad, executed a deed of mortgage in favour of one Ram Saran Singh on the 4th of July 1903. Under the terms of this mortgage each of the executants was liable to pay a definite amount out of the total consideration of Rs. 295. On the 17th of August 1907 the mortgagee got a preliminary decree for sale against both the mortgagors. This decree was made final on the 9th of October 1909 against both the judgment-debtors. The property was put up for sale and Tulshi having died his sons, the present plaintiffs, paid up the amount of the decree and thus saved their own property and the person of the defendants from further liability. They have now sued for recovery of the amount payable by the defendants. The claim was decreed by the Court of first instance but has been dismissed by the lower Appellate Court. The plaintiffs come here in second appeal. A preliminary objection has been taken by the defendant-respondent that no second appeal lies, as the suit was of the nature cognizable by the Court of Small Causes and valued at less than Rs. 500. On behalf of the appellants reference is made to Art. 42 of the Second Schedule of the Provincial Small Cause Courts Act, which runs as follows:—"A suit by one of several joint mortgagors of immoveable property for contribution in respect of money paid by him for the redemption of the mortgaged property." At the first sight this seems to exclude the case from the cognizance of a Court of Small Causes, but it is urged on behalf of the respondent that, as a matter of fact, there are no co-mortgagors here. Instead of executing two mortgages or two documents the two executants joined in executing this mortgage although the property of one of those only was hypothecated, As the property of one of the executants only was hypothecated it is contended that the two were not joint mortgagors, and, therefore, Art. 42 would be inapplicable. Nevertheless both of the executants joined in executing this document and I think they can be brought within the words " joint mortgagors" as used in Art. 42. It is contended that as one of the executants had no interest in the mortgaged property and did not purport to transfer any interest therein, there was no mortgage on his behalf. As I have already said, it is quite true that the property of one of the executants only was mortgaged but the two executants were liable personally also for re-payment of the money. Under these circumstances the mere fact that the property of one of those persons only was mortgaged makes no difference, as both of them remained joint mortgagors. I, therefore, disallow the preliminary objection.

Coming now to the merits of the appeal I am of opinion that this appeal must prevail. The learned Judge of the lower Appellate Court has proceeded on an incorrect assumption of law, namely, that in India a mortgage does not carry with it a personal liability. I do not know where the learned Judge has got hold of this proposition of law. So far as this Court is concerned it is concluded by an authority of a Division Bench. See the case of *Musaheb Zaman Khan* v. *Inayat Ullah* (1). So that the whole fabric of the learned District Judge's judgment falls to the ground. It is not denied that a certain amount of money was payable by Gaya Prasad, defendant, and another sum was payable by the plaintiff's father Tulshi. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court to be restored to its original number and to be tried according to law. Costs here and hitherto will abide the event.

S. D. *Appeal allowed.*

(1) 14 A. 513; A. W. N. (1892) 80; 7 Ind. Dec. (N. S.) 698.

BHOLA PANDEY *v.* RAM BILAS PANDEY.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 531 OF 1920.

January 31, 1922.

Present:—Justice Sir Jwala Prasad, KT.

BHOLA PANDEY AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM BILAS PANDEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897) —Holders of plots of zarait *land paying neither revenue nor rent—Partition—Rent determined and embodied in Record of Rights—Liability of holders of plots to pay rent—Presumption.*

The purchasers of separate plots of certain *zarait* land neither paid any revenue to Government nor any rent to the proprietor within the ambit of whose Zemindari the plots fall. On proprietor's application under the Estates Partition Act, it was determined that the holders of the plots were liable to pay the same rent as was payable for the lands of similar nature in the vicinity; and as the result of this determination their status was shown in the *batwara* Record of Rights as that of tenure-holders :

Held, that unless the presumption raised by the Record of Rights in favour of the proprietor was rebutted the holders of plots were liable to pay a fair and equitable rent as embodied in the Record of Rights. [p 399, col. 2.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *K. Sahai, S. Dayal* and *Brij Kishore Prosad,* for the Appellants.

Mr. *Parmeshwar Dyal,* for the Respondents.

JUDGMENT.—The defendants are the appellants. They are aggrieved by the decision of the District Judge of Shahabad, dated the 19th March 1920, who in agreement with the decision of the Munsif, dated the 28th April 1919, has decreed the plaintiffs' Suit No. 9 of 1918 for arrears of rent.

The area concerned in the suit is a holding of 5 *bighas* 2 *kathas* 14 *dhurs* in a village Sabbalpur (Touzi No. 818). The holding bears *Khata* No. 1641 in the last Survey Record of Rights and *Khasra* Nos. 2421, 1494 and 1454. The rent claimed is with respect to the year 1324 *Fasli* at the rate of Rs. 4 per *bigha.* The defendants-appellants contend that the plaintiffs are not entitled to recover rent at a rate exceeding 14 annas 6 pies per *bigha.* The only question, therefore, before us is what is the rate of rent for the holding in question. The point raised in the present case is extremely difficult and has no authority or precedent to guide us in the determination thereof.

In order to appreciate the point raised in the case it is necessary to give briefly the history of the land in question. The estate Sabbalpur to which the land in question appertains belonged at one time to Bhai Haran and Ajit Singh each owning 8-annas share in it. Bhai Haran mortgaged his Zemindari rights to certain persons keeping his possession over 141 *bighas* odd of *zarait* land. Subsequently, the mortgagees came to purchase the mortgage interest of Bhai Haran and 141 *bighas* of *zarait* land also by transfer came to be held by different persons. The defendant's father came to hold 4 *bighas* 15 *kathas* of the *zarait* land which is the subject-matter of dispute in the present case. The Government revenue of the entire estate used to be paid by the transferees of the Zemindari interest, inasmuch as they got their names registered in Register D of Collectorate. The holders of the *zarait* land aforesaid did not pay in Government revenue and their names were not registered in Register D, inasmuch as they did not hold any aliquot part of the estate but only small parcels of land in *bighas* and *kathas,* there being no provision in the Land Registration Act for the registration of parcels of land.

The defendants hold the land in question by virtue of a sale-deed (Exhibit C) dated the 17th November 1878 in favour of their ancestors with respect to 12 *bighas* of land of which the disputed 4 *bighas* odd is a part.

The result was that the holders of the *zarait* land including the defendants never paid revenue to Government or rent to the proprietors whose names were registered in the Collectorate. The entire revenue used to be paid by the recorded proprietors. On behalf of the recorded proprietors, therefore, a suit was brought in the year 1898 to recover from the holder of the *zarait* land including the defendants proportionate revenue with respect to the land held by them by way of contribution ; that litigation ended with the judgment of the High Court of Calcutta, dated the

22nd April 1904, confirming those of the Munsif and the District Judge of Shahabad. The reason for refusing the recorded proprietors a decree for contribution was stated by the High Court to be that there was "nothing whatever to show that the assessment of Government revenue was made on any basis or that at the time of the Permanent Settlement there was any such calculation by which the revenue for which the *zarait* land was liable was held to bear to the total revenue assessed the same proportion as the area of these lands nor to the total area of lands then under calculation". Their Lordships of the Calcutta High Court further held that the calculation on such a basis "is entirely contrary to the principles under which the revenue was assessed on estates at the Permanent Settlement". The High Court dismissed the appeal "leaving it to the appellants to take steps as they may be advised in the Revenue Courts in order to have the revenue assessed on their share in the estate or on the *zarait* land held by the defendants".

Following up the suggestion of the High Court, some of the recorded proprietors, who were plaintiffs in that litigation, instituted proceedings before the Collector for a partition of the estate. Objections of various character were made by different persons objecting to the partition of the estate. We are, however, not concerned with all of them, except those which relate to the objections to the partition of the estate on the ground that the original proprietors had alienated their *zarait* land without specifying the Government revenue payable by them. That objection was disposed of by the Deputy Collector on the 17th of January 1915 (Exhibit K) and by the Commissioner on the 17th June 1916 (Exhibit 7). The objection was treated as one under section 14 of the Estates Partition Act (Act V of 1897) and was overruled and the partition of the estate continued. The Commissioner does not refer to this point at all, but the following observation of the Deputy Collector appears to relate to the *zarait* lands in question. Says the Deputy Collector—"What is the present condition of the 141 *bighas* and 13 *kathas* of *zarait* lands alluded to above. Nearly 40 *bighas* 11 *khatas* and 12 *dhurs* have already been consolidated with the tenancy lands with attested rents and the remaining 101 *bighas* and 1 *khata* and 8 *dhurs* are held by no less than 43 men. The next question is what should be the status of these men. Are they to be treated as *putni* proprietors, or tenure-holders or tenants? Apparently they do not appear to have paid any rent or revenue since the transfer of those lands but when they were served with notices by this Court at the instance of Babu Mahanand Sahay calling on them to state if they had any objection to contribute the proportionate revenue in the shape of rent through the existing proprietors of Bhai Haran Singh's *patti*, they generally expressed their willingness to pay rent up to the extent of the proportionate revenue. The fact that the holders of over 40 *bighas* of such lands have already allowed themselves to be treated as tenants in the recent Record of Rights is also a significant one. When Babu Mahanand Sahay and others sued them for the recovery of the revenue paid for them by them and the case went up on appeal before Mr. Justice Brett and Mr. Justice Woodroffe they stated that they had no objection to pay rent up to the extent of the proportionate revenue. Thus it is quite clear that the holders of the 101 *bighas* and odd *kathas* of the *zarait* lands have no objection to pay *lagan* to the proprietors up to the extent of the proportionate revenue, which has been ascertained at Rs. 92-1-9 of 101 *bighas* 1 *katha* and 8 *dhurs*, the calculation being made at the total assets due from them, *viz.*, Rs. 423-2-6. Some of these lands have been settled by the *farzidars* with the tenants, the rents paid by whom have already been alluded to in the recent Record of Rights, and in these cases the alluded rents have been taken on the assets of those lands; in the case of lands which are still in the *khas* possession of the *farzidars* the rate of assessment has been fixed at Rs. 4 per *bigha* on an average, regard being had to the rents paid for similar lands with similar advantages in their vicinity. The details of 101 *bighas* 1 *katha* 8 *dhurs* are given below. Total assets Rs. 395-2-6; area 101 *bighas* 1 *katha* 8 *dhurs*. The proportionate revenue per *bigha* works out to 14 annas 6 pies at which the *farzidars* shall have to pay the proprietors of Bhai Haran Singh's *patti*

for the lands held by them. . . . . To me it seems that the status of the present *erazidars* is just like that of *mokarraridars* when they will pay a small rent equivalent to the proportionate revenue on the lands held by them, as at the time of the creation of the *mokarrari* leases a handsome *salami* is taken by the landlords. In the present case also a sum of Rs. 10,000 was paid by Janki Prasad Singh at the very outset. Thus it will appear that these *erazidars* are not independent of the proprietors and their lands form part of the Touzi, the entire revenue on which has been hitherto paid by the registered proprietors without intermission. Thus again for the safety of the Government revenue and its punctual realisation it would be most unwise to treat such a large number of men each holding one or two *bighas* of lands as *putni* proprietors, specially when they had hitherto betrayed by their action and without utter reluctance to be brought under the category. In the circumstances stated the proprietors of the *patti*, Bhai Haran Singh and Lachmi Narain Singh, cannot further for the purposes of the partition be considered as out of possession of 101 *bighas* 1 *katha* and 8 *dhurs* of the *zarait* lands when they have kept their proprietary title alive by paying the entire revenue all along."

The plaintiffs also who were defendants in the litigation referred to above, which was finally concluded by the judgment of the High Court, in paragraph 3 of their written statement (Exhibit E) gave an idea of what the proportionate revenue should be, namely, 9 annas 8 *dams* Government revenue and 2 annas 4 *dams* road-cess (Total 11 annas 12 *dams*).

In the year 1901, on behalf of the plaintiffs a Road-Cess Return (Exhibit E) was filed showing the rate of rent of the *zarait* land, held by them as well as by the defendants, to be Re. 1 per *bigha*. The Survey Record of Rights, which was published on 9th of August 1912 (Exhibit I, J and 14) shows that the defendants were recorded as tenure-holders and the land in suit was shown as *bakasht erazidars*. No rent was mentioned in the column provided for it. The *batwara raibandi* and the *khasra* showed that the lands in suit were assessed at the rate of Rs. 4 per *bigha* and that they were allotted to the *patti* of the plaintiffs. The plaintiffs thus became, after the partition in which delivery of possession was effected in 1917, the 16 annas proprietors of the estate in which the lands in suit are situate. The present suit was instituted soon after the *batwara dakhaldehani* for the arears of rent for the year 1324 *Fasli*. The claim of the plaintiff is, therefore, based entirely upon the *batwara khasra* and the *khatian*.

The defendants' case is that they were proprietors in this estate to the extent of the *zarait* lands held by them and they are not liable to pay to the plaintiffs anything beyond the proportionate revenue, and their case is based upon the remarks of the Deputy Collector in his order of the 15th of January, 1915, in which he said that the proportionate revenue per *bigha* of the *zarait* lands would be 14 annas 6 pies. The defendants have accepted their status to be that of tenants, and have abandoned the position of proprietors which they originally claimed. They may be proprietors within the definition of the term in section 3, clause (*v*) of the Estates Partition Act, as being owners of the land in dispute, whether or not they were recorded proprietors of the estate. The word "recorded-proprietor" had a peculiar meaning in the Partition Act as being a person whose name is registered on the Collectorate's General Register of the revenue paying lands as proprietor of an estate or of any share or interest therein (clause (*vi*) of section 3). The defendants were certainly not the recorded proprietors and as such they were not entitled to claim partition of their estate in the estate to the extent of the *zarait* lands held by them (*vide* section 5). They were also not entitled to have a separate estate allotted to them on partition at the instance of the other recorded proprietors (*vide* section 5). "An estate" means all lands which are borne on the Revenue Roll of a Collector as liable for the payment of one and the same demand of land-revenue. The lands held by them were certainly responsible for the payment of Government revenue, inasmuch as they were included in the estate, and when an estate is declared to be partitioned all the lands appertaining thereto have to be taken into account and must be allotted to the

recorded proprietors of the estate. The proceedings start with a survey of all the lands and a preparation of the Record of Rights under Chapter VI of the Act. Under section 45 the Deputy Collector is bound to make a survey and prepare a record of existing rents and other assets of all lands included in the estate. Similarly, under section 46, clause (*d*), the assets of the land in question had to be determined and stated. Under section 47 the Record of Rights prepared is published, and that record shows not only the existing rents but also the other assets of the estate. The Record of Rights prepared under the Chapter is then locally published under section 48 of the Act, and a copy thereof is given to each landlord and tenant of the entries relating to the estate, tenure or holding. These provisions are similar to those contained in the Bengal Tenancy Act, Chapter X which relates to the preparation and publication of the Record of Rights between the landlord and the tenant. The difference between the two records, the one prepared under the Estates Partition Act and the other under the Bengal Tenancy Act, is this that, while the latter records the status of the landlord and tenant, the former records the status of a proprietor and other persons who need not necessarily be landlords or tenants. In the Bengal Tenancy Act Records the rent stated by the landlord and that stated by the tenant and as attested by the Survey and Settlement Officer is recorded. In the Record of Rights prepared under Chapter VI of the Estates Partition Act, in addition to the above, the assets of all other lands are recorded. There was no relationship of landlord and tenant between the plaintiffs and the defendants before the partition of the estate. In the partition proceedings the defendants could not be allotted a separate estate representing the interest owned by them in the estate, inasmuch as they did not hold any share of the estate but only some parcels of lands. The lands held by them, as observed above, had necessarily to be taken into account and those lands were allotted to the share of the recorded proprietors. The assets of those lands had to be determined in order to effect the partition of the different interests held by the several recorded proprietors. The word "assets" has been defined in section 3 clause (xv) to be "in the case of land held by cultivating *raiyats* the rent payable by them," and "in the case of land which is occupied by a proprietor the rent which might reasonably be expected to be payable by cultivating *raiyats* if the land were occupied by them". The lands in the present case were held by the defendants as proprietors and the assets mentioned in the partition Record of Rights is the rent which might reasonably be accepted to be payable by the occupancy *raiyats*; in other words, Rs. 4 per *bigha* mentioned as assessment of the land in question by the *batwara* records is one which the holders would have, therefore, to pay to the proprietors for the use and occupation of the land. The Record of Rights prepared under Chapter VI of the Estates Partition Act raises a presumption in favour of its accuracy, in the same way as the Record of Rights prepared under the Bengal Tenancy Act, and every presumption as to its having been carried out according to the rules and of its having been duly published will arise remains in its favour. From the fact that the publication of the Record of Rights has not been questioned in the present case and as held by the Courts below, the defendants must be presumed to have knowledge of the partition proceedings. The Record of Rights raises a strong presumption that the rent payable by them to the recorded proprietor with respect to the land in question must be that entered in the *batwara* papers. The Survey Record of Rights, which was finally published in the year 1912, also defined the status of the defendants as that of tenure-holders and not of proprietors. Whatever the position of the holders of the *zarait* lands might have been originally when the *zarait* lands and the Zemindary rights with respect to the lands held by the tenants were separately treated by the original proprietor of the estate, Bhai Haran Singh, it is clear that during the survey and the partition proceedings, that is, during 1912 to 1916, the defendants gave up their status, if any, of holding the lands as proprietors and accepted the position of tenure-holders or tenants, in other words, they accepted their liability to pay rent to the recorded proprietors of the estate. Had they been recognised as pro-

prietors of the estate they would have been made liable to pay revenue to Government and the only proceeding in which their status as proprietors could be recognized was the partition proceeding which prepared the *khewats*, that is, the interest held by the proprietors; the Record of Rights, that is, the interest held by the intermediate holders of lands, namely, the tenure-holders and tenants and others. The Estates Partition Act has not recognized them, and in fact could not recognize the defendants as proprietors of the estate. This liability to pay rent is also not disputed before me. It has not been disputed in the Courts below also.

The only question raised by the defendants is that they should pay rent calculated at the rate of the proportionate revenue payable with respect to the lands in suit. The Deputy Collector, no doubt, at one place observed on the 15th of January 1915 that the proportionate revenue of the *zarait* lands would be 14 annas 6 pies. This, no doubt, the defendants admitted and they were willing to pay and are still willing to pay. The plaintiffs, on the other hand, say that the responsibility to pay directly revenue to the Government is now borne by them and for the default of even a pice in the payment of revenue made by them, the entire interest of the estate held by them would be jeopardized and sold up by the Collector The revenue sale will not in any case affect the interest of the defendants, but they will continue to hold the lands in suit as intermediate holders, namely, tenure-holders or tenants. Therefore, the plaintiffs contend that the risk that they have now undertaken, or which has been imposed upon them by the partition proceedings, by being directly liable to the Government for the payment of revenue, must be compensated by allowing them the rate of rent of the lands from the defendants in the same way as that payable by the tenants of similar lands in similar circumstances. It may be, on the other hand, contended by the defendants that the assets determined by the Collector in the partition proceedings and the Record of Rights prepared by him are for the purpose of the partition cannot be a binding and conclusive document determining the relationship between the plaintiffs and the defendants, or for the matter of that between the proprietors and the tenants. There is a good deal of force in this contention. It is true that the *batwara* Record of Rights is not conclusive. It raises a presumption and a rebuttable presumption. The plaintiffs, therefore, had got in their favour the presumption of the entries in the *batwara* papers as to the rate of rent payable by the defendants to them. They have also the presumption of the Survey Record of Rights of their liability to pay rent. It is open to the defendants to rebut that presumption. They must pay a fair and equitable rent for the use and occupation of the lands under the plaintiffs who are the recorded proprietors and are liable to pay revenue to the Government. What must be that fair and equitable rent? The Civil Court will not have the same advantages as the Revenue Court had in the partition proceedings to determine the fair and equitable rent of the lands in consideration of the rent payable by the lands in the vicinity and with similar advantages. The Deputy Collector in his order of the 15th of January 1915 has also referred to the rate of Rs. 4 as payable by the tenants. The Survey Record of Rights has also determined the rate of Rs. 4 with respect to 40 *bighas* of the lands out of 141 *bighas* of *zarait* lands. The rate of rent of the other lands in similar circumstances has also been found by the *batwara* to be Rs. 4 a *bigha*. Therefore, the rate now claimed by the plaintiffs based upon the entries in the *batwara* proceedings cannot be said to be inequitable and must be presumed to be fair. The defendants, no doubt, could succeed if they were in a position to show that they are not liable to pay under any express provision of law any rent in excess of the proportionate revenue upon these lands; but they have failed to do so. Nowhere in the Partition Act has it been stated that the original proprietor of certain parcels of land should pay rent to the recorded-proprietor, in whose *takhta* his lands fall, proportionate to the revenue. If they were to pay rent proportionate to the revenue they will acquire the same status as a proprietor; but under the partition their position is now to be derogated to that of a tenant. In the case of

land which has fallen to the *patti* of one proprietor, and is allowed to remain in occupation of another proprietor, Chapter IX, sections 64 to 66 declare that the rent payable by the latter to the former would be on the basis of the assets recorded by the Deputy Collector. On that principle also the defendants in the present case should pay to the plaintiffs rent in accordance with the Survey Record of Rights. As to the value of the Records of Rights prepared under the Estates Partition Act, *vide*, *Razuddin Hussain* v. *Taharat Hussain* (1), *Bahuria Janakdulari Kuar* v. *Bindeswari Gir* (2), *Nandkishore Singh* v. *Mathura Sahu* (3), *Gulab Chand* v. *Salek Hussain* (4), *Debi Lal Sah* v. *Ram Bibeki Singh* (5), *Jagdeo Narain Singh* v. *Bulaki Gope* (6). The principle may also be deduced from the decision in the case of *Nawab Begum* v. *Rustum Khan* (7).

Therefore, it appears to me that there is no error in law in the decision of the Courts below. I have already said that the case is of first impression. I am also alive to the principle that the rate of rent payable by a tenant depends upon the contract, expressed or implied, between the landlord and the tenant. In the present case, there is no such contract. A contract may be implied by a course of conduct evidencing the payment of a particular rate of rent. This is not a case of this kind. No rent was previously paid by the defendants to the plaintiffs. The rate of rent payable by a tenant to the landlord may also be determined in a suit and the decree passed in the suit may be the foundation determining the contract between the parties to pay rent at the rate embodied in the decree. This also is not the case here. The position claimed by the defendants was that of a proprietor of certain *zarait* lands. This, of course, is a case where by the operation of law the defendants occupy the land within the ambit of the Zemindari of the plaintiffs and they are liable to pay rent for the use and occupation of the same. The rent has been determined in the proceedings under the Estates Partition Act to be that payable by the lands of similar nature in the vicinity. The defendants must, therefore, pay the fair and equitable rent as embodied in the Record of Rights. On these principles I have been able to overcome the difficulty which I felt in the beginning in the case, and I confirm the decrees passed by the Courts below with costs.

Mr. Parmeshwar Dyal points out with respect to *Khata* No. 752, in Suit No. 9, that there has been a mistake in the preparation of the decree in the Court below, inasmuch as that decree is not in accordance with the judgment. The judgment mentions Rs. 1-8 for the entire holding whereas in the decree the rent has been calculated at the rate of Rs. 1-8 per *bighi*. The mistake, if any, should be corrected by the Court below and the decree must be brought in accordance with the judgment.

S. D. *Decree confirmed.*

(1) 13 Ind. Cas. 498; 16 C. L. J. 19.
(2) 57 Ind. Cas. 328; 1 P. L. T. 374; 5 P. L. J. 456; (1920) Pat. 355.
(3) 65 Ind. Cas. 586; 3 P. L. T. 13; (1922) A. I. R. (Pat) 193.
(4) 36 Ind. Cas. 513; 5 P. L. W. 6.
(5) 63 Ind. Cas. 194.
(6) 63 Ind. Cas. 226; 2 P. L. T. 343.
(7) 2 Agra H. C. R. 149.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 439 OF 1921.
November 16, 1922.
Present:—Mr. Justice Stuart.
MUHAMMAD ALTAF ALI KHAN—DEFENDANT—APPELLANT
versus
Rani PHOOL KUNWARI—PLAINTIFF—RESPONDENT.

Landlord and tenant—Lease of agricultural land—Possession of whole leased area not given to lessee—Lessee's remedy—Reduction of rent—Suit for damages—Jurisdiction of Civil and Revenue Courts.

A lessee of agricultural land, if not given possession of a portion of the leased area, cannot obtain a deduction of his rent from a Rent Court, though it is open to him to institute a suit in the Civil Court for damages for breach of contract by the lessor. [p. 401, col. 1.]

Second appeal against the decree of the Additional Judge of Moradabad, dated the 17th December 1920.

AMBADAS *v.* LAXMAN.

Mr. *N. C. Vaish* for Mr. *G. Agarwala*, for the Appellant.

Mr. *Baleshwari Prasad* for the Hon'ble Mr. *S. Raza Ali*, for the Respondent.

JUDGMENT.—The facts of the suit out of which this appeal arises are these:—The defendant-appellant took a *theka* from the plaintiff-respondent of 451 *bighas* (the greater part of which was agricultural land) on an annual rent of Rs. 500. Admittedly, he paid only Rs. 415 in one of the years under dispute and only Rs. 445 in the remaining year under dispute. When sued in the Rent Court for the balance he set up the plea that the plaintiff had improperly deprived him of the use of two *bighas* and 3 *biswas* out of the 451 *bighas* leased to him and had given the use thereof to a certain Sadullah for the purpose of making bricks thereon, and had taken rent from Sadullah. The lower Appellate Court has refused to admit this plea. I agree with the learned District Judge on the point. It is open to the defendant to institute a suit in the Civil Court for damages for breach of contract in respect of his allegation, but there is no possible method by which he can obtain a deduction from his lease-money from the Rent Court in respect of the matter alleged. The Rent Court can certainly not award him damages. It is not a question of a set-off, because a set-off must be an ascertained sum. The plea taken that Sadullah must be considered as having paid the rent to the plaintiff in respect of the land used by him for the manufacturing of bricks as part payment of the defendant's rent is not supported by any facts and there are no facts to justify the conclusion of the Trial Court that the plaintiff reduced the demand for rent The words used by the Trial Court on the point show that there was no substance in the suggestion. The Assistant Collector says "that the plaintiff tacitly agreed to deduct the said amount from annual *theka* money of defendant". There is no evidence to support that statement. I dismiss this appeal with costs.

Appeal dismissed.

S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 109 OF 1922.

October 18, 1922.

Present:—Mr. Prideaux, A. J. C.

AMBADAS—DECREE-HOLDER—APPLICANT

versus

LAXMAN—JUDGMENT-DEBTOR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 148, applicability of—Time fixed by decree—Extension.

Section 148 of the Civil Procedure Code does not apply to a case where time is fixed by a decree; where, therefore, a decree in a pre-emption suit fixes the time for payment of the pre-emption money a Court has no power to extend that time. [p. 402, col. 1.]

Suranjan Singh v. *Rambahal Lal*, 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950, *Dharmaraja Iyer* v. *Sreenivasa Mudaliar*, 31 Ind. Cas. 240; 39 M 870; 2 L. W. 1074; 29 M. L. J. 708; 18 M L. T. 486, *Bibi Sharofan* v. *Mahomed Habibuddin*, 10 Ind Cas. 148; 15 C. W. N. 685; 13 C. L. J. 535 *Sajjadi Begam* v. *Dilawar Husain*, 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625, referred to.

Abu Muhammad Mian v. *Mukut Pertap Narain*, 34 Ind. Cas. 88; 1 P. L. J. 92; 2 P. L. W. 400, disapproved.

Appeal against the order of the Munsif, No. 3, Akola, in Civil Suit No. 236 of 1921, dated the 29th April 1922.

Mr. *K. K. Gandhe*, for the Applicant.

Mr. *D. T. Mangalmurti*, for the Non-Applicant.

JUDGMENT.—The present applicant, Ambadas, sued the non-applicant for pre-emption in regard to field survey No. 12 of Mouza Umri, obtaining a decree on 9th March 1922. The decree was in the usual form for a pre-emption decree and directed that Rs. 1,215 were to be paid by the plaintiff into Court within a month from the date of the decree and on such payment being made the defendant was to deliver possession of the field to the plaintiff; but in default of payment the plaintiff's suit was to stand dismissed.

On 7th April 1922 the plaintiff put in an application under section 148 of the Civil Procedure Code asking that time for the payment of the pre-emption money be extended. The Judge admitted the application and sent for the record, and on the 29th April, without notice to the other side, rejected the same. Thereupon plaintiff at once put in an application asking to be allowed to deposit the amount; the Court rejected this application.

It is here argued that the lower Court

erred in the exercise of its jurisdiction in not allowing the applicant to deposit the amount on 29th April 1922, the date of its order refusing extension of time, in view of the fact that the applicant applied on 7th April 1922, that is, two days prior to the date fixed by the decree, for the payment of the purchase-money. The only case quoted by the applicant's Counsel to show that section 148 of the Civil Prodecure Code applies to a decree for pre-emption is *Abu Muhammad Mian* v. *Mukut Pertap Narain* (1).

Against this case there is a series of rulings holding that section 148 of the Code of Civil Procedure would not apply to a decree of this nature. I need only mention *Suranjan Singh* v. *Rambahal Lal* (2) which deals with a pre-emption decree. In *Dharmaraja Iyer* v. *Sreenivasa Mudaliar* (3) it was held that section 148 of the Civil Procedure Code does not enable a Court to extend time for doing acts allowed by a decree; and in an earlier case *Bibi Sharofan* v. *Mahomed Habibuddin* (4) it was laid down that the High Court has no power to extend the time allowed to the judgment-debtor by O. XXI, r. 92, sub-r. (2) to deposit the decretal amount with a view to setting aside the sale, either under section 5 of the Limitation Act or under section 148, Civil Procedure Code. In another case to the same effect, *Sajjadi Begam* v. *Dilawar Husain* (5), it was held that, except in the case of mortgage-decrees, where a Court by its decree orders a party to make a payment, or take certain action within a specified time and provides that certain detrimental consequences shall follow in the event of non-compliance with its order, the Court itself has no jurisdiction to extend the time limited by the decree, save on an application for review under section 114, read with O. XLVII, r. 1, of the Code of Civil Procedure. The only case of this Court I can find dealing with section 148 is *Komalsingh* v. *Jagannath Muratsingh* (6), where it was held that section 148, Civil Procedure Code, does not empower an Executing Court to extend the time fixed for payment of the decretal amount. It empowers the Court to extend time only when a period is fixed for the doing of any act prescribed or allowed by the Code itself. It does not apply to a case where time is fixed by a decree. It was further held that time fixed by a decree cannot be extended under section 151, Civil Procedure Code, as that section is not meant to empower the Executing Court to alter the decree or in any way affect its finality.

The weight of authority is clearly against the present applicant. Knowing that he had to deposit the amount by a certain date he waited until two days of that date and then applied for extension of time. That the Court was unable to dispose of his application until after the date fixed for the payment of money into Court does not, in my opinion, help him. The Court itself had no power to extend the time and the plaintiff-applicant having prosecuted the suit to a successful conclusion should have seen that he did not forfeit the benefit of his decree by his own negligence.

The result is, that this application for revision fails and is dismissed with costs. I fix Rs. 10 as Pleader's fee.

W. C. A. *Application dismissed.*

(1) 34 Ind Cas 88; 1 P. L. J. 92; 2 P. L. W. 400.
(2) 21 Ind Cas 585; 35 A 582; 11 A. L. J 950.
(3) 31 Ind Cas 240; 39 M. 876; 2 L. W. 1074; 29 M. L. J. 708; 18 M. L. T. 486.
(4) 10 Ind Cas 148; 15 C. W. N. 685; 13 C. L. J. 535.
(5) 47 Ind Cas 4; 40 A. 579; 16 A. L. J. 625.
(6) 49 Ind. Cas. 840, 15 N. L. R. 39.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 371 OF 1921.
January 3, 1923.
Present:—Mr. Justice Ryves and Mr. Justice Gokal Prasad.
RAM SAHAI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BINOD BEHARI GHOSE—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 47—Possession taken forcibly by unsuccessful party—Declaratory suit—Limitation—Criminal Procedure Code (Act V of 1898), s. 145—Order passed against head of joint Hindu family, whether binding on family.

Where proceedings under section 145, Criminal Procedure Code, end in an order maintaining the possession of a person in certain property, his opponent can sue for recovery of possession of the property in dispute within 3 years from the date of the order, under Art. 47, Schedule I to the Limitation Act; and it is not open to him to enlarge that period of limitation by taking the law into his own hands and forcibly ejecting the person in possession and then bringing a suit, not for recovery of possession of the property but for a de-

claration that he is the owner in possession of the property in dispute. [p. 403, col. 2; p. 404, col. 1.]

An order under section 145, Criminal Procedure Code, passed against the head of a joint Hindu family, is binding on the whole family, whether it was passed against him in his personal capacity or as the managing member of the family. [p. 403, col 2.]

Second appeal from a decree of the District Judge, Allahabad, dated the 2nd March 1921.

Messrs. *Damodar Das, Iqbal Ahmad* and *Kamuda Prasad*, for the Appellants.

Messrs. *I. B. Banerji* and *Maheshwari Prasad*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are as follows:— Ajudhia Prasad, the father of Ram Sahai and grandfather of Baijnath Prasad, plaintiffs in this suit, took a permanent lease of a compound in the city of Allahabad on the 7th of September 1912 from Sita Ram Ghose and his two brothers. Binode Behari Ghose, the defendant-respondent here, claimed a share in the compound and it appears that proceedings were taken against him at the instance of Ajudhia Prasad under section 145 of the Code of Criminal Procedure. Those proceedings ended in an order by the Magistrate maintaining the possession of Binode Behari Ghose in one room in the compound and maintaining the possession of Ajudhia Prasad in the rest of the compound. This order was passed on the 9th of March 1914. Subsequently, Ajudhia Prasad died without having instituted any suit in the Civil Court to contest the Magistrate's order. Afterwards in 1919 the plaintiffs-appellants forcibly ejected Binode Behari Ghose from the room he was occupying. Binode Behari Ghosh took criminal proceedings against the plaintiffs under section 448 of the Indian Penal Code, with the result that the plaintiffs were convicted and fined, and under section 522 of the Criminal Procedure Code, Binode Behari Ghosh was put back into possession of the room. This order was dated the 8th of September 1919. Thereafter on the 9th of March 1920 the plaintiffs brought this suit for a declaration that they were the owners in possession of the room in dispute and that the defendant had no right therein, and, secondly, for a perpetual injunction to be issued to the defendant to restrain him from interfering with the plaintiffs' possession. Both Courts have dismissed the suit on the ground that under Art. 47 of the Second Schedule to the Indian Limitation Act the suit was barred by time. The plaintiffs come here in appeal; and as the questions involved are somewhat difficult the case has been referred to a Bench of two Judges for disposal. Three main grounds are taken against the decision of the Courts below. First, it is argued that Art. 47 does not apply, because this suit is not a suit on the face of it to recover the property but is a suit for a declaration pure and simple. Next, it is argued that Art. 47 cannot apply at all to the facts of this case, because the order under section 145 of the Code of Criminal Procedure did not refer to the room now in dispute. There was a third plea raised, namely, that in any case the order under section 145 was made against Ajudhia Prasad alone and that the plaintiffs were, therefore, not bound by that order because they were not claiming through him but in their own right as surviving members of a joint Hindu family of which Ajudhia Prasad was a member. On the second point it seems to us that the Court below has found, rightly or wrongly, that the order under section 145 referred to the room now in suit. It seems to us that that is a finding of fact. The lower Court has considered the evidence and come to a finding thereon and it is not open to us to interfere with that finding. On the third point it seems to us that the plaintiffs are in a dilemma. There is no doubt that Ajudhia Prasad took the lease. He either took it in his personal capacity or he took it as the head and managing member of a joint Hindu family. If he took it in his personal capacity there can be no doubt that the plaintiffs must claim through him as his next heirs, and, therefore, Art. 47, if it applies at all, would apply to them. If, on the other hand Ajudhia Prasad took the lease as the managing member of the family for the family, it seems to us that he must have taken proceedings under section 145 as the managing member of the family on behalf of the family, and, if so, he and the whole family were bound by the order under section 145. There remains the first ground which is not free from difficulty. Art. 47 lays down that a suit by any person bound by an order respecting the possession of immoveable property made under the Code of Criminal

Procedure of 1898 to recover the property comprised in such order must bring a suit within three years of the date of the final order in the Criminal Court. The final order in the Criminal Court was passed, as we have said, on the 9th of March 1914. Any suit, therefore, to recover possession of property comprised in such order could only have been brought up to the 9th of March 1917. No such suit was brought. It seems to us, therefore, that the learned Judge of the Court below is right in holding that the suit was barred. It does not seem to us that the plaintiffs by taking the law into their own hands and forcibly ejecting the defendant so as to enable them to bring a suit in the form of a suit for a declaration merely can enlarge the period of limitation prescribed by law within which only they were entitled to recover possession. We, therefore, are of opinion that the decisions of the Courts below were right. We accordingly dismiss this appeal with costs.

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 348-B OF 1921.

November 15, 1922.

Present—Mr. Prideaux, A. J. C.

NARSAYYA—PLAINTIFF—APPELLANT

versus

LAXMINARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11, applicability of—Order refusing to investigate claim to attached property—Suit to establish title—Limitation.

The period of limitation prescribed by Art. 11 of Schedule I to the Limitation Act, is applicable to a suit to establish a right to property attached in execution of a decree brought after disallowance, without investigation, of an objection to such attachment.

Ponnusami Pillai v. *Samu Ammal*, 38 Ind. Cas. 937; 31 M. L. J. 247, *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma*, 48 Ind. Cas. 270; 41 M 985; 21 M.L.T. 197; (1918) M.W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.), *Nogendra Lal Chowdhury* v. *Fani Bhusan Das*, 44 Ind. Cas. 265; 45 C. 785; 23 C. W. N 375, *Gulab* v. *Mutsuddi Lal*, 50 Ind. Cas. 748; 41 A. 623; 17 A L. J. 674; 1 U. P. L. R. (A.) 41, *Gopal Singh* v. *Ganpat*, 35 Ind. Cas. 321; 66 P. R. 1916; 117 P. W. R. 1916; 130 P. L. R. 1916, referred to.

Nanhu v. *Malloo*, 44 Ind. Cas. 528, distinguished.

Appeal from a decree of the First Additional District Judge, Akola, in Civil Appeal No. 30 of 1921, dated the 7th July 1921.

Mr. *V. N. Bapat*, for the Appellant.

Messrs. *K. K. Gandhe* and *A. V. Khare*, for the Respondents.

JUDGMENT.—In Civ. Suit No. 1389 of 1918, on the file of the Small Cause Court, Akola, the first defendant attached houses situated in the town of Akola purporting to belong to his judgment-debtors. The plaintiff preferred an objection to the attachment contending that he owned a third share in the houses and that his share was not liable to attachment and sale. That objection was summarily rejected on 23rd November 1918 on the ground that it was filed too late having been unnecessarily delayed. The present case was filed on the 2nd of July 1920 by the plaintiff in which he seeks a declaration that his one-third share in the houses was not liable to attachment and sale in the execution of the decree against defendants Nos. 2 and 3. It was pleaded in defence, *inter alia*, that the suit was barred by limitation not having been brought within one year of 23rd November 1918, the date on which plaintiff's objection was dismissed. That plea has prevailed in both Courts who hold that Art. 11 of the Limitation Act applies and the suit, not having been brought within the one year provided by that Article, must fail.

It is here contended that, as there was no investigation or inquiry into plaintiff's objection in the Executing Court, Art. 11 does not apply and it is admitted that if the Article does apply the suit is beyond time. Before the change in the language of Art. 11 made by the Act of 1908, a change that followed the change made in section 283 of the Code of Civil Procedure, 1882, now represented by r. 63 of O. XXI of the Civil Procedure Code, 1908, it was doubtful whether Art. 11 applied when the order rejecting a claim was made without investigation. I myself held in *Nanhu* v. *Malloo* (1) (Second Appeal No. 463 of 1916, dated 31st December 1917) that the Article does not apply to the suit to set aside an order on an objection dismissed without recording any evidence. But the trend of recent cases makes it clear that the change in the language of Art. 11 by the Act of 1908, the language being more comprehensive, does not restrict the Article

(1) 44 Ind. Cas. 528.

to those cases only in which an investigation has taken place and that an order refusing to investigate a claim to attached property on the ground of delay in filing it is an order passed against the claimant within O. XXI, r. 63, Civil Procedure Code, and Art. 11 of the Limitation Act, IX of 1908. The Madras, Calcutta, Allahabad and Patna High Courts hold this view. I need only refer to *Ponnusami Pillai* v. *Samu Ammal* (2), *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (3), *Nogendra Lal Chowdhury* v. *Fani Bhusan Das* (4), *Gulab* v. *Mutasaddi Lal*(5) and *Gopal Singh* v. *Ganpat Rai* (6).

It seems to me that the present suit clearly falls under Art. 11 of the Limitation Act and, having been filed more than a year from the date disallowing the appellant's objection, is time-barred. I confirm the decisions of the Courts below and dismiss this appeal with costs.

Appeal dismissed.

W. C. A.

(2) 38 Ind. Cas. 937; 31 M. L. J. 247.
(3) 48 Ind Cas. 270; 41 M. 985; 24 M. L. T. 107; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.).
(4) 44 Ind. Cas. 265; 45 C. 785; 23 C. W. N. 375.
(5) 50 Ind. Cas. 748; 41 A. 623; 17 A. L. J. 674; 1 U. P. L. R. (A.) 41.
(6) 35 Ind. Cas. 321; 66 P. R. 1916; 117 P. W. R. 1916; 130 P. L. R. 1916.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 691 OF 1921.
December 19, 1922.

Present:—Mr. Justice Ryves and
Mr. Justice Gokul Prasad.

Rai Bahadur Babu BAHADUR SINGH—DEFENDANT—APPELLANT
versus
Lala RAM BAHADUR—PLAINTIFF AND SRI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Settlement by father adopted and acted upon by sons—Sons, whether can go behind settlement as reversioners—Estoppel.

On the death of a separated Hindu, who left surviving him two daughters, a dispute arose between his two first cousins and daughters as to the succession of his property. The parties settled this dispute by a private settlement under which the property of the deceased was divided by mutual consent into four equal shares and each of the four claimants got possession of one separate share. One of the cousins sold his share and on the death of the other his sons adopted the settlement and continued in possession of the share which had come to their father. After 14 years, on the death of one of the two daughters, they claimed the property of the deceased daughter as reversioners:

Held, that, though they were not parties to the settlement, under which their father had acquired a share in the estate of his deceased cousin, yet, they were estopped from going behind that settlement and claiming one-fourth share as reversioners. [p. 407, col. 2.]

Kanhai Lal v. *Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914, 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L.R. 1048; 45 I. A. 118 (P. C.) and *Harder* v. *Bhagwan Singh*, 50 Ind. Cas. 812; 24 C. W. N. 105 (P. C.), relied on.

Second appeal from a decree of the District Judge, Pilibhit, dated the 1st April 1921.

Dr. *S. N. Sen*, for the Appellant.

Messrs. *S. N. Mukerji* and *Kamuda Prasad*, for the Respondents.

JUDGMENT.

Ryves, J.—This appeal raises a very difficult question of law and I have arrived at my decision with some hesitation.

The facts are as follows:—

One Salig Ram died in 1905, leaving him surviving two daughters only, *Musammats* Krishna Kuar and Ilaichi Kuar. It is stated that he had separated in 1891 from Raghunath and Bal Gobind, his first cousins, who were brothers and that Raghunath separated from Bal Gobind in 1895. On the death of Salig Ram in 1905 disputes arose as to the succession of his property. What exactly those disputes were is not established by any evidence on the record but this much is certain that on the 22nd of September 1905, about a month after the death of Salig Ram, an agreement in writing was entered into between Bal Gobind, Raghunath and the two daughters of Salig Ram as to the division of the property left by Salig Ram. That document was executed by all four and is in the following terms :—

"The aforesaid property left by Salig Ram has devolved upon us, the executants, in equal shares by right of inheritance. Besides us there is no other claimant of the property of the said deceased. Now, we all the four parties have, with our mutual con-

sent, divided the property left by the said deceased in equal shares..... All the four parties shall remain in separate possession and shall be the exclusive owners thereof. Each party may have his own share separately partitioned and one party will have no objection as against the other."

This agreement was given effect to and mutation of names was made accordingly, that is to say, *Musammat* Ilaichi Kuar, *Musammat* Krishna Kuar, Raghunath and Bal Gobind each took possession of a separate one-fourth share and dealt with it as their own exclusive property. Thus we find that Raghunath Prasad sold his share and he is no party to this litigation, nor are his transferees; and on the death of Bal Gobind in 1906 his three sons, Sri Ram, Babu Bahadur Singh and Ram Charan, defendants Nos. 1-3 obtained mutation of names in respect of the fourth share which Bal Gobind had acquired under the agreement and have been in possession of it ever since. This position of affairs lasted until the 7th of February 1920 when *Musammat* Krishna Kuar died without issue. Thereupon a dispute arose in the mutation department between the plaintiff Lala Ram Bahadur, the husband of *Musammat* Krishna Kuar deceased, her sister Ilaichi Kuar and the three sons of Bal Gobind, namely, Sri Ram, Babu Bahadur Singh and Ram Charan for the entry of their names respectively in the place of that of *Musammat* Krishna Kuar with respect to her 1-4th share. The Revenue Court directed the entry of each set of claimants over 1-3rd of the property left by *Musammat* Krishna Kuar, that is to say, it decided that Ram Bahadur was entitled to 1-3rd, *Musammat* Ilaichi Kuar to 1-3rd and the three sons of Bal Gobind to 1-3rd. This suit was brought by Lala Ram Bahadur to recover 2-3rd share which was entered in the name of *Musammat* Ilaichi Kuar and defendants Nos. 1-3. He based his claim on the allegation that under the compromise of the 22nd of September 1905 his wife became absolute owner of ¼th of the property left by her father Salig Ram and that it became her *stridhan* and on her death without issue he succeeded to it; he was the next heir and as such entitled to the property. *Musammat* Ilaichi Kuar did not contest the suit but defendants Nos. 1-3 raised several defences. Their written statement is not very easy to understand They say:—

(1) Under the deed of partition dated the 22nd September 1905 the property acquired by *Musammats* Krishna Kuar and Ilaichi Kuar as daughters of Salig Ram cannot constitute their *stridhan*, nor is the same their self-acquired property. Under the Hindu Law they were the owners of the entire property left by Salig Ram. They took a little less than their share under the Hindu Law and gave something to the brothers of their father.

(2) *Musammat* Krishna Kuar died without leaving any issue. According to the Hindu Law her property devolved upon her sister *Musammat* Ilaichi Kuar. The plaintiff is not the heir to the property in dispute under the Hindu Law. His claim should be dismissed.

(4) No Hindu is competent to establish succession contrary to the provisions contained in the Hindu Law and Legislative enactments, and, according to the document dated the 22nd September 1905 plaintiff's succession under Hindu Law has not been established.

(5) The document, dated the 22nd September 1905, is based upon a clear misconception of the principles of the Hindu Law. In reality there was no dispute. Neither Bal Gobind nor Raghunath Prasad had any right at that time. The plaintiff has misinterpreted the aforesaid document. It has no effect against the succession under the Hindu Law.

The Trial Court dismissed the suit. On appeal, however, the lower Appellate Court decreed it, holding that the compromise of the 22nd of September 1905 was a settlement of a family dispute and as such was binding upon the parties. Babu Bahadur Singh alone has appealed, and two main grounds have been strenuously urged on his behalf. Firstly, that the agreement of the 22nd of September 1905 cannot be regarded as a settlement of a family dispute such as has been upheld on many occasions by the Privy Council, and, secondly, that the defendants, being no parties to the compromise, are entitled to set up their claim as reversioners and that they do not claim as such through their father Bal Gobind but independently

On the first point, having regard to the evidence on the record it may be that this agreement was not a settlement of a family dispute recognised as such by the Privy Council. It is manifest on the face of it, that the settlement arrived at in 1905 and given effect to was one wholly unjustified by Hindu Law. If Salig Ram was separate from his cousins then his two daughters were undoubtedly his heirs and were entitled to succeed to his property. If Salig Ram was joint with his two cousins then they would be entitled to succeed by survivorship and his daughters would be entitled to maintenance only. The position would be further complicated if Raghunath and Bal Gobind were separate from each other, but whatever was the actual state of facts the two daughters and Raghunath and Bal Gobind could not possibly be entitled to proprietary rights in a one-fourth share. However in the view I take it is unnecessary to decide this question and I rely for the view I have taken on two recent decisions of the Privy Council which are reported in *Kunhai Lal* v. *Brij Lal* (1) and *Hardei* v. *Bhagwan Singh* (2).

It seems to me that, although defendants Nos. 1-3 (including the appellant) were no parties to the partition of 1905, nevertheless since 1906 on the death of Bal Gobind, their father, who was a party to it, they have been in possession of the share which Bal Gobind acquired under that partition and to which he would not have been otherwise entitled. Ever since, that is for over 14 years, they have taken the place of their father and have enjoyed possession of the property in succession to him, and I, therefore, hold that they are now estopped. It must be noted that as Ilaichi Kuar is still alive, even according to their own written statement, they have no present valid claim under Hindu Law to the one-fourth share of Salig Ram's property and if Raghunath, who is also alive, was also separate from Gobind, may never have a legal claim. In *Kunhai Lal* v. *Brij Lal* (1) a similar argument was raised, but it was held that as under the compromise Kanhai Lal had obtained a substantial benefit which he had hitherto enjoyed he was bound by it and could not now claim as a reversioner though he was no party to the compromise in that case. Similarly, in the case of *Hardei* v. *Bhagwan Singh* (2) their Lordships of the Privy Council held " whether this arrangement is binding on the grandsons cannot be determined in this suit, and on that question their Lordships express no opinion. But the plaintiff at all events is bound by her own agreement; and in view of this fact, and of the favour shown by the Courts to family arrangements and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement." It is quite clear that one of the grounds, if not the main ground, for their decision was that the plaintiff being a party to the agreement could not be allowed to repudiate it. Here, although the defendants were no parties to the agreement, their father was, and on his death they adopted it and obtained possession of the property which had come to their father under the agreement and were in possession of it for over 14 years and even now they do not repudiate it. They wish not only to hold what they got under that agreement but at the same time to go behind that agreement and claim as reversioners (*vide* their written statement). In my opinion they are estopped from so doing. I would dismiss the appeal with costs.

Gokul Prasad, J.—I agree.

S. D. *Appeal dismissed.*

(1) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 451 A. 118 (P. C.).

(2) 50 Ind. Cas. 812; 24 C. W. N. 105 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 61 OF 1920.

November 2, 1922.

Present:—Mr. Ju tice Rafique and Mr. Justice Lindsay.

RUP SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

BHULLAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption Partition, perfect—Hissadar *in village—Pre-emption of sale in different* maha!.

After a perfect partition, a person who is merely a *hissadar* in the village, has no right to pre-empt the sale of a share sold in a *mahal* in which he himself is not a co-sharer.

After a perfect partition in a village there is no community of interest between the co-sharers of one *mahal* and the co-sharers of another *mahal*, and none of them can, in any sense of the word, be regarded as a co-sharer of the property of the others.

Dalganjan Singh v. *Kalka Singh*, 22 A. 1; A. W. N. (1899) 111; 9 Ind Dec. (N. S.) 1035 (F. B.), followed.

First appeal from a decree of the Subordinate Judge, Mainpuri.

Mr. *G. W. Dillon*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The only question for determination in this appeal is whether or not the Court below was right in holding that the plaintiffs-appellants had no right of pre-emption.

It appears that the property, which forms the subject-matter of the suit, is situated in a certain village in which undoubtedly the plaintiffs are co sharers. It is apparent, however, that, sometime ago, a perfect partition was carried out in this village, the result of which was the erection of a number of *mahals*, and it is an admitted fact that, under the present constitution of the village, the property in dispute lies in a *mahal* in which the plaintiffs have no rights according to what was decided when the partition took place.

The plaintiffs in the Court below relied upon the *wajib-ul-arz* which was prepared for the period from 1278 to 1307 Fasli. In this *wajib-ul-arz* it was, no doubt, provided that, in the last resort, persons, who were co-sharers in the village, were to have a right of pre-emption.

We have already stated that, since this document was prepared at the time of the settlement already referred to, a perfect partition of the village has taken place.

The learned Judge of the Court below has referred to a large number of rulings beginning with a Full Bench decision of this Court reported in *Dalganjan Singh* v. *Kalka Singh* (1). In that case the law laid down is that a person, who is merely a *hissadar*, has no right to pre-empt the sale of a share sold in a *mahal* in which he himself is not a co-sharer.

The learned Subordinate Judge refers to other cases of this Court subsequent to the date of decision of the Full Bench case in which a different view was taken. Later on, however, it seems that the trend of decisions took another turn and reverted in the direction of the view which was taken by the Full Bench in *Dalganjan Singh* v. *Kalka Singh* (1). It seems to us that, having regard to these recent decisions which are apparently the decisions of a Special Bench which was created in this Court to deal with pre-emption cases so as to procure uniformity of decision, we must hold that the view taken by the learned Subordinate Judge is correct. The *ratio decidendi* of these cases is as described by the learned Subordinate Judge in his judgment, namely, that after a perfect partition there is no community of interest between the co-sharers of one *mahal* and the co-sharers of another *mahal* and none of them can, in any sense of the word, be regarded as a co-sharer of the property of the others.

We think this is a right decision and ought to be upheld. We accordingly dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

(1) 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.).

KRISHNA BAI *v.* DEBISINGH.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 469 OF 1921.

October 30, 1922.

Present:—Mr. Hallifax, A. J. C.

Musammat KRISHNA BAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBISINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Gratuitous transfer—Intention to defeat creditors—Right of strangers to avoid transfer—Transferee offering payment of debt to creditor—Transfer, avoidance of—Gift not accompanied by delivery of possession—Question of validity, whether can be raised by strangers—C. P. Tenancy Act (XI of 1898), s. 46, applicability of—Transfer to remote heirs—Civil Procedure Code (Act V of 1908), s. 42, O. XXI, r. 16—Decree-holder, death of—Right of heirs to apply for execution—Decree for ejectment—Revenue Officer, whether can execute it in favour of heirs of deceased decree-holder.

A transfer which is gratuitous and made for the sole purpose of defeating the creditors of the transferor is not void but only voidable and that too at the instance of the creditor who has actually been defeated or delayed by it. [p. 409, col. 2.]

A creditor cannot be said to have been defeated or delayed if the transferee actually offers to pay the debt due to him, and he cannot, therefore, avoid the transfer under section 53 of the Transfer of Property Act. [p. 409, col. 2.]

A question about the validity of a gift not being accompanied by the delivery of possession of the property gifted can arise only between the donor and the donee and cannot be raised by a third party. [p. 409, col. 2.]

Kishan Rao v. *Rukhma*, 11 C. P. L. R. 11 and *Kalidas Mullick* v. *Kanhaya Lal Pundit*, 11 C. 121; 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N.S.) 839 (P.C.), referred to.

Section 46 of the C. P. Tenancy Act, 1898, does not contemplate a transfer only to the nearest existing heir at the time it is made. [p. 409, col. 2.]

Under r. 16 of O. XXI, of the Civil Procedure Code the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree and under section 42 of the Code to the Court to which it may have been transferred for execution and the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these thing can only be done in a Civil Court. A Revenue Officer to whom a decree for ejectment is transferred for execution cannot execute it in favour of any one but the person named in it. If he executes it in favour of the heir of the deceased decree-holder the ejectment is entirely illegal and invalid. [p. 410, col. 2.]

Appeal from the decree of the Additional District Judge, Nagpur, dated the 16th June 1921, in Civil Appeal No. 61 of 1921.

Mr. *D.T. Mangalmoorti*, for the Appellant.

Mr. *M.D. Khandekar*, for the Respondents.

JUDGMENT.—There are three points in respect of which the gift of the occupancy holding by the tenant Shioram Singh to his daughter and her two sons has been found to be invalid. They are that the gift was not accompanied by delivery of possession being between Hindus, that it was not to Shioram Singh's nearest heir and that it was made for the purpose of defeating and delaying Shioram Singh's creditors. The finding in the lower Appellate Court on this last point apparently has reference to section 53 of the Transfer of Property Act, but it is still more apparent that it was given without any actual reference to the text of that section. Even a gratuitous transfer made for the sole purpose of defeating the creditors of the transferor is not void; it is only voidable and that only at the instance of a creditor who has actually been defeated or delayed by it. In this case the transferees actually offered to pay the debt due to the defendants, so that they were in no way defeated or delayed by the transfer and cannot avoid it.

2. As to delivery of possession being required under the Hindu Law to validate a gift, that is a question that can arise only between the donor and the donee and cannot be raised by a third party, as was held by Ismay, J. C., in *Kishan Rao* v. *Rukhma* (1) following the ruling of the Privy Council in *Kalidas Mullick* v. *Kanhaya Lal Pundit* (2). In regard to the view that section 46 of the Tenancy Act, 1898, contemplates a transfer only to the nearest existing heir at the time it is made, if the words of that section and section 47 did not make it clear that this is not so, it seems to me, the matter would be set beyond doubt, at least for all practical, purposes, by sub-section (2) of the latter section. Even if a gift of his holding to his daughter by an occupancy tenant who has a son is invalid and the landlord sets it aside, the daughter can immediately re-enter, and the result is exactly the same as if the gift were valid, except that there have been two sets of proceedings and one change of possession more than was necessary.

(1) 11 C. P. L. R. 11.

(2) 11 C. 121; 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839 (P. C.).

3. But it is perfectly clear that the ejectment of the tenant Shioram Singh was invalid, because it was at the instance of the present defendants, the heirs of the original decree-holder, who was also called Shioram Singh. The Court of the Additional Munsif passed an order of ejectment and sent it to the Tahsildar for execution. On 11th February 1918, before the Tahsildar had issued a warrant in execution of this order, the decree-holder Shioram Singh died. The parties had been warned to appear before him on 28th February 1918 and on that day the first of the present defendants, who are the heirs of the decree-holder, appeared with a Pleader and applied that their names should be substituted for that of Shioram Singh. The representative of the present plaintiffs, Ganesh Singh the husband of Krishna Bai and father of her two sons, had previously intervened in the proceedings and had offered to pay off the decree alleging transfer of the tenancy under the deed of gift. The decree-holder was then given an adjournment to enable him to think out some reason for refusing what was in effect, and even possibly in words though that is not recorded, an offer of payment of the arrears by the tenant himself. It was in this interval that the decree-holder died, and at the hearing on 28th February 1918 when his nephews applied to be put in his place Ganesh Singh sent a telegram to the Tahsildar stating that he had missed his train and asking for a short adjournment. This was refused, and the names of the defendants were substituted for that of the deceased decree-holder and a warrant for the delivery of possession to them was immediately issued. This was executed on 6th March 1918.

4. This matter is discussed in paragraph 5 of the judgment of the lower Appellate Court. The decision is entirely vitiated by a very complete failure to get hold of the facts. This is illustrated in the following passage from the judgment: "It is also pleaded that as the tenant died during the pendency of the proceedings, the issue of the warrant of possession is illegal unless his heirs were brought on record. It will be seen that the tenant was given notice as required by law. He did not appear. Hence warrant was ordered to issue. And possession was subsequently given. Thus no notice was necessary to the heirs. Moreover, his heirs did come forward and they thus got the notice as a fact. But they failed to take any action later on. They could have applied as heirs of the tenant, and paid the amount. I thus find that the proceedings are in no way a nullity." It was the *Malguzar* Shioram Singh who died in 1918. The tenant Shioram Singh did not die till November 1919, eight months after the present suit was instituted. And it was naturally the heirs of the *Malguzar* who came forward in the proceedings before the Tahsildar, not those of the tenant, who was alive.

5. The proceedings of the Tahsildar are, however, completely vitiated and the taking of possession by the present defendants under his warrant does become a nullity, by reason of his having no power to issue that warrant after the death of the decree-holder Shioram Singh. Under r. 16 of O. XXI the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree, and under section 42 they can do so equally to any Court to which that decree has been transferred for execution. It would seem also hat the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can be done only in a Civil Court. The Tahsildar as a Revenue Officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When he is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to anybody else whom he considers to be the heir of that person than a *Mazkuri* would have in the same circumstances.

The ejectment of the tenant Shioram Singh was entirely illegal and invalid, so that the plaintiffs are entitled to possession of the holding whether they actually had possession during the lifetime of Shioram Singh or not. The decree of the lower Appellate Court will be set aside and a decree will issue ordering that the defendants do deliver possession to the plaintiffs of the occupancy holding of three fields mentioned in the plaint. The defendants will pay all the costs in all three Courts.

G. R. D. *Decree set aside.*

ABDUL GHAFUR *v.* NURUDDIN AHMAD.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 191 OF 1922.

November 10, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Banerji.

ABDUL GHAFUR AND OTHERS—DEFENDANTS—APPELLANTS

ver us

NURUDDIN AHMAD—PLAINTIFF—RESPONDENT.

Jurisdiction—False allegations in plaint—Abuse of process of Court—Jurisdiction, general rule as to test of—Plaint designedly drafted falsely to give jurisdiction—Procedure.

If a plaintiff makes allegations which he knows to be false and untrue, and makes them with the object of thereby inducing a Court to entertain the suit, and thereby assume to invest itself with jurisdiction, that is an abuse of the process of the Court, and is a fraud upon the Court which cannot be permitted. [p. 411, col. 2]

As a general rule, the proper test of jurisdiction is the statements made in the plaint and the nature of the claim before the Court, but where a plaint is designedly drafted with known false allegations, inserted with the object of obtaining a hearing in a Court which in truth has no jurisdiction, the plaintiff is not entitled to a hearing on the merits, the proper course in such a case is for the Court to direct the plaint to be returned for presentation in the proper Court. [p. 412, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Farrukhabad at Fatehgarh.

Dr. *Surendro Nath Sen* and Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—This appeal raises an interesting and important point on the question of jurisdiction. One Ahmad Said had married a lady, Roquaiat-un-nisa, whose dower was said to have been fixed at Rs. 60,000. She had a brother named Nur Uddin Ahmad, and the lady having died on the 29th of August 1907 and the husband having died on the 10th of December 1919, Nur Uddin Ahmad brought a claim against the persons in possession of the estate of the deceased husband for one-half of the dower-debt, namely, Rs. 30,000. The marriage took place at Kakori in the Lucknow District; the parties lived at Kakori; and the wife died at Kakori. On the 3rd of August 1920 the present suit was filed in the Court of the Subordinate Judge of Farrukhabad, and, on an examination of the plaint, the defendants noticed that the addresses of Abdul Ghafur and Abdul Samad were, as they contended, intentionally false in order to found jurisdiction in the Court of the Subordinate Judge at Farrukhabad; and they further alleged that the plaintiffs had incorporated in the plaint a deliberately false allegation which they knew had no foundation in fact or in law and this was done for the sole purpose of giving to the Court a jurisdiction, which otherwise it would not possess. The importance about the point of jurisdiction, according to the defendants, is that if the suit had been instituted in the proper Court, in the Lucknow District, the defendants could have taken advantage of the provisions of the Oudh Laws Act, XVIII of 1876; and whilst admitting the lady's dower originally to have been fixed at Rs. 60,000, they might have secured a substantial reduction of the claim. In a suit instituted in the Court at Farrukhabad, the Judge would have no option, if he were of opinion that the claim of the dower was correctly stated by the plaintiff and the case duly proved, but to decree such claim in full. He would have no power to reduce the amount of the dower. Therefore, it is important to remember that from first to last the defendants were insisting in the Court of the Subordinate Judge of Farrukhabad that the Court had no jurisdiction to try the matter and that the Court had been inveigled into trying the matter by deliberately false allegations. Mr. O'Conor, of course, agrees that if a plaintiff makes allegations which he knows to be false and untrue, and makes them with the object of thereby inducing a Court to entertain the suit, and thereby assume to invest itself with jurisdiction, that such a thing is an abuse of the process of the Court, is a fraud upon the Court and could not be permitted. Therefore, the question we have got to decide is, what is the complexion of the plaint. Is it a pure mistake that the names and addresses of Abdul Ghafur and Abdul Samad were incorrectly stated, or is the learned Subordinate Judge right when he said in his judgment that there was no doubt left in his mind after plaintiff's examination that he had purposely given the wrong residence of the defendants Nos. 1 and 2 to bring the suit within the cognizance of his Court? That was a finding of fact extremely adverse to the honesty of the plaintiff, and the Judge came to that conclusion after the plaintiff had been examined about the matter, and no

one who reads the record, and who remembers that on the 15th of July 1920 when the plaintiff applied for a Succession Certificate at Lucknow he gave the correct addresses of the parties, can fail to notice that the plaintiffs, on the 3rd of August 1920, put on record addresses known by them to be false. There is no doubt that the Judge came to the conclusion that the allegation, with which we are going to deal in a few minutes, was false and untrue, and put upon the record with the designed object of giving the Court jurisdiction. Paragraph 3 of the plaint sets out that on the 9th of December 1911, the husband, Ahmad Said, made a Will making the dower-debt chargeable against the entire property mentioned and specified in the relief and made over the same to his wife, Roquaiat, after making it and completing it. The prayer asked for a declaration that the dower-debt claimed is a lien and charge on the property mentioned in the plaint. Three items of this property are within the jurisdiction of the Farrukhabad Court. The fourth is within the jurisof the Court at Hardoi; that Court is in Oudh and the provisions of the Oudh Laws Act, already mentioned, have force in that Court, and the plaintiff could, proceeding in the Hardoi Court, also have got a charge on the property. The learned Subordinate Judge looked into the text of the Will and he came to the conclusion, a conclusion with which we agree, that there was no charge created by that document, and indeed it cannot reasonably be argued that there was, and he, in his judgment, said with reference to the Oudh Laws Act, XVIII of 1876, "it is very likely, on this account, that the plaintiff's advisers have thought it advisable to bring this suit in thi Court and have very cleverly framed the suit as one for declaration and enforcement of a charge on the property in suit." It does not anywhe e seem to have occurred to the learned Subordinate Judge that it was his duty to see that the Court was not imposed upon, and, in our view when he was on the question of jurisdiction, he misled himself by regarding this as a *bona fide* case in which the proper test of jurisdiction is the statements which are made in the plaint and the nature of the claim before him. That is, no doubt, the general rule, but when the plaintiff was boldly setting up allegations that they themselves knew to be false, for an indirect purpose in abuse of the process of the Court, it was the duty of the Judge to consider it from that point of view. We think that, although he did come to that conclusion, the logical effect of that finding never seems to have occurred to him; and he ought not to have proceeded with the hearing of the case upon the merits but ought to have decided as a matter of fact that the plaint was designedly drafted with known false allegations, inserted with the object of obtaining a hearing in a Court which in truth had no jurisdiction, and that he, having come to that conclusion, should have returned the plaint.

We, therefore, allow this appeal, set aside the decree of the lower Court and direct the plaint to be returned to the plaintiffs for presentation in the proper Court. The appellants will have their costs of this appeal in this Court and in the Court below.

W. C. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 19 OF 1922.

November 14, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Ryves.

KAMAL KHAN—PLAINTIFF—APPELLANT

versus

NIZAMUDDIN—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 87—Pro-note—Alteration of name originally written—Material alteration.

As a matter of law, the alteration of the name originally written in a promissory-note, is a material alteration within the meaning of section 87 of the Negotiable Instruments Act.

PHULA *v.* KUSAMSINGH.

Second appeal from a decree of the District Judge, Gorakhpur.

Messrs. *Jang Bahadur Lal* and *Shiva Prasad Sinha*, for the Appellant.

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

JUDGMENT.—This appeal arises out of a suit brought by Kamal Khan on a pro-note executed by Nizamuddin and Khairati. The pro-note is dated the 11th January 1918 for a sum of Rs. 240 and carried interest at a rate amounting to something like Rs. 150 per cent. per annum.

The defence to the suit was that the pro-note was not executed in favour of the plaintiff, Kamal Khan, but in the name of one Alam Khan and that the pro-note has been altered by changing 'Alam Khan' into 'Kamal Khan'. The First Court decreed the suit, but, on appeal, the learned District Judge found as a fact that the pro-note was originally written in favour of 'Alam Khan' and that name has been altered into 'Kamal Khan' and he held that this was a material alteration within the meaning of section 87 of the Negotiable Instruments Act such as would render the promissory-note void. We must accept the finding of fact, namely, that originally the name 'Alam Khan' was written on the pro-note and that it has been changed into 'Kamal Khan' and we hold that, as a matter of law, such alteration is a material alteration within the meaning of section 87 of the Negotiable Instruments Act. The result is that the appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 170 OF 1921.

November 4, 1922.

Present:—M. Kotwal, A. J. C.

Muammat PHULA AND ANOTHER—DEFENDANT—APPELLANTS

versus

KUSAMSINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitration—Hindu family—Separation—Reference to arbitration—Imposition of conditions affecting tenure or devolution of shares allotted, legality of.

In the case of a reference to arbitration for division of property, it is not only open to the arbitrators to allot a definite share of the estate to each of the referring parties but it is also open to them to make the allotment subject to conditions which affect its tenure or devolution. [p. 414, col. 2]

A dispute between three brothers was referred by their common consent to arbitration, the reference containing the following passage, "you will make a division of the moveable and immoveable property having considered what is proper and having made a just settlement. That division we accept in every respect." The arbitrators gave each brother one-third of the property but declared that an issueless brother would have only a life-interest in the share allotted to him, that a male issue subsequently born would have the right to succeed to his father's share but not so a female issue, and that after death of the brother his widow would have a right of maintenance only and would not be entitled to succeed; the brothers or nephews becoming the heirs:

Held, (1) that the arbitrators were authorized under the reference to annex the condition in dispute to the division made by them; [p. 414, col. 2; p. 415, col. 1.]

(2) that as under the Hindu Law the brothers could have validly come to such an agreement as the above, there was nothing to prevent them from doing the same thing through arbitrators. [p. 415, col. 1.]

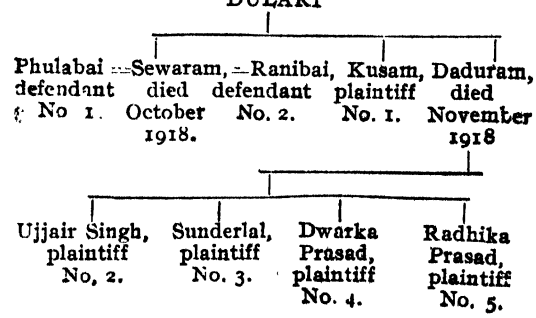
Jafri Begam v. *Syed Ali Raza*, 23 A. 383; 5 C. W. N. 585; 28 I. A. 111; 8 Sar. P. C. J. 27 (P. C.), *Muthuraman Chetiiar* v. *Ponnuswamy Udayar*, 29 Ind. Cas. 549; 29 M. L. J. 214 (1915) M. W. N. 405; 2 L. W. 533; 18 M. L. T. 124. *Rup Singh* v. *Bhabhuti Singh*, 58 Ind. Cas. 632; 42 A. 30 at p 36; 17 A. L. J. 916, referred to.

Appeal from the decree of the District Judge, Jubbulpore, dated the 10th December 1920, in Civil Appeal No. 34 of 1920.

Mr. *M. Gupta*, for the Appellant.

Sir *B. K. Bose*, Messrs. *V. Bose* and *P. N. Rudra* for the Respondents.

JUDGMENT.—The following genealogical tree shows the relationship of the parties to this suit other than defendant No. 3:



Defendant No. 3 is said to be purchaser of the crops of the land in dispute between the parties. Ranibai had dropped out of this suit having re-married after its institution. After Dulari's death his three sons

desiring to separate made a reference to arbitrators which is translated as follows:

"Making over to you this day the joint moveable and immoveable property of us brothers situate at *Mauza* Kaithora, we execute this deed of agreement with the condition that the division of the moveable and immoveble property that you may make after proper consideration and due settlement shall in every respect be acceptable to us."

The arbitrators gave their award on the 22nd July 1917. They divided the property into three shares as nearly equal in value as possible and allotted one to each of the three brothers. They further provided as follows:—

"There is this condition that the property which the issueless brothers have received is to be theirs for life. If an issue is born subsequently that issue will have the right. But a female issue has no right. After (their) death, the persons entitled to the property will not be (their) wives, but brothers or nephews, being sons of brothers. The wives will be entitled to maintenance."

Sewaram died in October 1918 without male issue and his widows came into possession of his property. The plaintiffs claim his share of the property on the strength of the condition in the award set forth above.

The defence is that the condition was *ultra vires* of the arbitrators. The Trial Court held that the arbitrators could not without an express authority on the point in the reference impose such a condition, but that as the award was acted upon by the parties and definitely acquiesced in by Sewaram the condition was binding on Sewaram's widows. The lower Appellate Court has held that though subsequent acquiescence by the parties would not validate an award otherwise invalid, yet it is a valuable piece of evidence showing that the parties themselves put as wide an interpretation on the reference as the arbitrators did. It, therefore, considered itself justified in holding that the arbitrators did not travel beyond the terms of the reference and held that the award was binding on Sewaram and his widow. Phulabai and defendant No. 3 appeal.

It is not disputed that the brothers themselves might lawfully have made the division subject to the condition in dispute.

The question for decision is: Does the reference as it is authorise the arbitrators to annex the condition in dispute to the division made by them. The question, in my opinion, must be answered in the affirmative. A literal translation of the passage in the reference with which we are more particularly concerned is, "you will make a division of the moveable and immoveble property having considered what is proper and having made a just settlement. That division we accept in every respect." In making a division, in my opinion, not only was it open to the arbitrators to allot a definite share of the estate to each of the referring parties but it was also open to them to make the allotment subject to conditions which affect its tenure or devolution. The insertion of the condition was not the introduction into the award of a matter not referred by the parties but was merely an attachment of a condition or quality to a division which was authorised. In my opinion, therefore, the absence of any express mention of the condition in the reference did not exclude the power to make the division subject to the condition in dispute. Reliance is placed by the appellants on *Jafri Begam* v. *Syed Ali Raza* (1), and it is argued that assumin that the matter of the condition regarding devolution was covered by the reference, ye the award was not legal as it effected the interest of persons not parties to the award, namely, the widows of the parties. That ruling seems to have no application in this case. It was there laid down that the arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Muhammadan Law in the absence of a special custom prevailing in the family. Here the arbitrators do not alter the course of legal devolution in a mode at variance with the ordinary principles of Hindu Law, for it has been admitted by the appellant that according to Hindu Law, the co-parceners could have validly agreed amongst themselves to exclude the widows from succession as the arbitrators have done: *vide* also *Muthuraman Chettiar* v. *Ponnuswamy Uayar* (2). What the co-parceners

(1) 23 A. 383; 5 C. W. N. 585; 28 I. A. 111; 8 Sar. P. C. J. 27 (P. C.).
(2) 29 Ind. Cas. 549; 29 M. L. J. 214; (1915) M. W. N. 405; 2 L. W. 533; 18 M. L. T. 124.

could have done themselves by agreement they could get done through arbitrators: *Rup Singh* v. *Bhabhuti Singh* (3).

The next point urged is that the lower Courts erred in passing a decree in respect of the crops against defendant No. 3. The plaint in this case was filed on the 15th April 1919, and on the same day a Receiver was appointed and directed to gather the crops and sell them. The case against defendant No. 3 is stated in paragraphs 7 and 8 of the plaint as follows:—

"The *birra* and *ulsi* crops sown in last winter on the *sir* and *khudkasht* fields of the said 8-annas *patti* have been gathered and are lying on the threshing floor in *Mauza* Imli and defendants Nos. 1 and 2 are also in possession of Sewaram's cattle as well as *ganj*. The defendant No. 3 and defendant No. 4 is claiming a portion of the crops alleging that the same has been so let to him by defendants Nos. 1 and 2. The said sale, if true, is invalid against the plaintiffs and none of the defendants have any right to retain the crops to which plaintiffs are entitled."

In paragraph 12 the plaintiffs claim possession of the crops or their value Rs.1,800. Defendant No. 3 in his written statement filed on the 20th June 1919 denied the claim and stated that he had no concern with the purchase of the crops and that he had unnecessarily been made a party to the suit. In their reply dated the 17th July 1919, the plaintiffs stated that defendant No. 3 had cut the crops and resisted the Receiver's taking possession of them relying on a sale-deed executed by Ranibai in favour of his father-in-law, Khawza Baksh, who was subsequently added as defendant No. 4. In her written statement dated the 19th September 1919 Phulabai stated that Ranibai had removed the crops. Ranibai in her written statement filed on the 16th October 1919 stated that she was entitled to the whole crop but that, defendant No. 3 had cut and removed it under colour of a sale-deed, which he had fraudulently got executed by her in the "*farzi name*" of his father-in-law to save it from the hands of the Receiver appointed in the case. On the 29th November 1919, the plaintiffs' Pleader orally stated that defendant No. 3 had "cut the crops and appropriated the proceeds". Issue No. 4 (*c*) which arises out of these pleadings is as follows:—

"With what defendants are the following properties left by Sewaram, and of what values they are:"

(*c*) grain?

Are plaintiffs entitled to the whole or part of the same?

The Trial Court held that defendant No. 3 had obstructed the process-server who had gone to deliver possession to the Receiver and had taken possession of the crops and removed them under colour of a sale from defendant No. 2. It found that the value of the crops was Rs. 1,800 and decreed that amount against defendant No. 3. This finding and decree have been upheld by the lower Appellate Court.

It is argued on defendant No. 3's behalf that as soon as he stated that he had no concern with the crops he should have been discharged and that the fact of his having cut and removed the crops after the institution of the suit was a tort against the Receiver in respect of which the Receiver might have filed a separate suit against him, but that the plaintiffs had no cause of action. I cannot agree with the contention that defendant No. 3 should have been discharged as soon as he pleaded that he had no concern with the crops. If he was claiming the crops and was in possession his mere disclaimer of title would not help him. The lower Appellate Court seems to find that defendant No. 3 was in possession. From his conduct after the institution of the suit there can be no other conclusion than that he was in possession before the institution of the suit. The fact that the plaint does not in so many words state that defendant was in possession is not of importance, for the implication from it is that he was. I think a sufficient case was set up in the plaint against defendant No. 3.

Even assuming that the cause of action arose after the institution of the suit, defendant No. 3, who was represented by a Pleader on the date when the issue between him and the plaintiffs was framed, went to trial upon it. In the lower Appellate Court too he did not urge the present objection and it is now too late to urge it. The plaintiffs had prayed for a decree for possession of the

(3) 58 Ind. Cas. 632; 42 A. 30 at p. 36; 17 A. L. J. 916.

crops and the mere fact that a Receiver was appointed could not affect their right to a decree.

The appeal fails and is dismissed with costs.

G. R. D. & N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 98 OF 1922.

November 13, 1922.

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

BHAGWAN DAS—APPLICANT APPELLANT

versus

MANGALIA—OPPOSITE PARTY—RESPONDENTS.

Guardian—Successive applications for removal on same facts, not entertainable—Mother appointed guardian—Residence of second husband of mother in same house with minor, whether ground for removal.

The duly appointed guardian of the person of a minor ought not to be called upon to resist successive applications for his or her removal upon the same set of facts.

Where a mother is appointed the guardian of the person of her minor son, and she re-marries, the fact that her second husband resides in the house which she continues to occupy as guardian of her minor son, is not a sufficient cause for her removal from such guardianship.

First appeal from an order of the Additional Judge, Cawnpore.

Mr. *Hari Kishen Kaul*, for Mr. *Kailas Nath Katju*, for the Appellant.

Dr. *Surendro Nath Sen*, for the Respondent.

JUDGMENT.—In the year 1915 *Musammat* Mangalia was appointed guardian of the person and property of her minor son, Ganga Prasad. In the year 1920 Bhagwan Das, father-in-law of the minor, applied for the removal of *Musammat* Mangalia from the guardianship both of the person and of the property, making a number of allegations against her. On this application, it so happened that two successive orders were passed by officers holding the District Judgeship of Cawnpore, and one of these orders came before this Court in appeal in the year 1921. As to the effect of these orders, we entertain no doubt. *Musammat* Mangalia was removed from the guardianship of the property of the minor and Bhagwan Das was appointed in her place. The Court refused to remove her from the guardianship of the person of the minor. On the 16th of February 1922 Bhagwan Das presented to the District Judge the application out of which this appeal arises. It is curiously drafted and seems to ignore the result of the previous litigation. There is also a passage in it which leaves one in doubt whether Bhagwan Das himself desired to resign the office of guardianship of the property of the minor to which he had been appointed. The application, however, has not been so interpreted by the District Judge, and we have not been asked to re-consider the view which he took of it in respect of this matter. The point., however, is this, that Bhagwan Das seeks to treat the question of the guardianship of the person of the minor as still open, and asks the Court to go into the question of the relative claims of himself and of *Musammat* Mangalia, as if there were at present no guardian of the person of the minor in existence. The District Judge has rightly held that the effect of the orders previously passed was to confirm *Musammat* Mangalia in the position of guardian of the person of the minor. The question, therefore, is whether, in this fresh application of the 16th of February 1922, Bhagwan Das has shown cause for her removal from the guardianship of the person. In the main, this application puts forward the same facts which were considered by the District Judge of Cawnpore in the year 1921. There is one fresh allegation, as to the residence of *Musammat* Mangalia's second husband in the house, which *Musammat* Mangalia continues to occupy as guardian of her minor son. This would not in itself be a cause for her removal. It has been contended before us that orders in a guardianship matter cannot have the effect in law of *res judicata*. It is not a question, however, of the operation of section 11, Civil Procedure Code. The question is whether the duly appointed guardian of the person of a minor is to be called upon to resist successive applica-

tions for his or her removal, based upon the same set of facts each time. In our opinion, the District Judge was right in dismissing the application of Bhagwan Das on the ground on which he has substantially proceeded, namely, that *Mussammat* Mangalia was the lawfully appointed guardian of the person of the minor and that no fresh cause was now being shown for her removal from that office, over and above the facts which had been put forward and duly considered by the District Judge in the year 1921. On these grounds we dismiss this appeal with costs.

Appeal dismissed.

W. C. A.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 98 OF 1922.

November 2, 1922.

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

RAMANAND SHUKUL—DECREE-HOLDER—APPELLANT

versus

CHHOTEY LAL—JUDGMENT-DEBTOR—RESPONDENT.

Hindu Law—Debt incurred by father—Sons, liability of.

A decree-holder is entitled to proceed against any ancestral property in the hands of the son of his deceased judgment-debtor which, under the Hindu Law, is liable for the payment of the debts, unless and until the son can prove either that there was in fact no debt at all, or that the debt was tainted with immorality. [p 418, col. 1.]

First appeal from an order of the Subordinate Judge, Basti.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.

Piggott, J.—This is a decree-holder's appeal arising out of the following circumstances:—On the 5th of June 1917, Ramanand Shukul obtained a simple money-decree against Nageshar Pande. On the 30th of May 1920 within the prescribed period of limitation, Nageshar having died on some unspecified date during this interval, the decree-holder attached the ancestral family property in the hands of Chhotey Lal, son of Nageshar, and sought to bring it to sale in satisfaction of his decree. Chhotey Lal filed an objection saying that he knew nothing about the decree in question, that he was certain that his father had never executed any document in favour of Ramanand Shukul, that he was not bound by the terms of the decree obtained against his father only, and that Ramanand had recently been worsted in another litigation in which he had tried to make the objector, Chhotey Lal, liable upon a document alleged to have been executed by his father Nageshar. There was also a suggestion that the application for execution was beyond time, which was obviously not pressed, and could not have been, in view of the dates we have already given. The main plea was that the decree-holder was not entitled to obtain execution against the property attached in the hands of Chhotey Lal, unless he first proved his case over again, that is to say, established by evidence that a debt was in fact due from Nageshar on the date on which the decree was obtained. The Execution Court, referring to the provisions of section 53 of the Code of Civil Procedure, held that the decree-holder was clearly entitled to proceed with the execution and passed orders accordingly. There was an appeal which was disposed of by the Subordinate Judge of Basti. The Appellate Court has referred to two decisions of this Court, both of which related to a state of facts essentially different. In both cases there was a litigation against the father resulting in a decree, and proceedings in execution were taken against property in which the sons had a joint interest along with the father, while the father was still alive. In such a state of facts, no question arises regarding the interpretation or effect of section 53 above referred to. The decision of the learned Subordinate Judge is a very good example of the danger of decid-

ing questions of law upon brief statements of principle to be found in the head-notes of reported cases, without taking the trouble to ascertain the state of facts upon which the decision relied upon as an authority was pronounced. In the present case there was a decree against Nageshar, and Chhotey Lal was the legal representative of Nageshar within the meaning of those words as defined in section 2 clause (11) of the Code of Civil Procedure. Under sections 50 and 53 of the same Code, the decree-holder, Ramanand, was entitled to proceed against any property, in the hands of Chhotey Lal which was liable under Hindu Law for the payment of the debt. Now, the existence of an unsatisfied decree on the date of Nageshar's death was evidence of the existence of a debt which it was the pious duty of Chhotey Lal to satisfy. The ancestral property in the hands of Chhotey Lal was liable, under Hindu Law, for the payment of this debt, unless and until Chhotey Lal could prove, either that there was in fact no debt at all, or that the debt was tainted with immorality. The lower Appellate Court was clearly wrong. The only question about which there can be any serious argument is whether the Trial Court, in any way, treated the objector with undue harshness, or shut him out from any reasonable opportunity of producing evidence. It seems to us that Chhotey Lal at no time offered to produce evidence before the Trial Court. He wanted a decision that the Execution Court could not proceed without the decree-holder's proving the debt all over again, as if he were now suing for the first time. That point was rightly decided against him and the First Court's order directing execution to proceed necessarily followed. It has never been alleged by Chhotey Lal that there was a debt for which he was not liable, because it had been borrowed for what the Hindu Law regards as immoral purposes. Consequently, he cannot ask the Court to offer him an opportunity of proving a fact which he never alleged. On the question of the existence of the debt, we repeat that we do not see that he offered any evidence. We accordingly allow this appeal, set aside the order of the lower Appellate Court and restore that of the Court of first instance, with costs throughout.

Walsh, J.—I entirely agree. I am quite satisfied by the form of the original application that the applicants had no case and that they merely wrapped up a vague collection of allegations raising points of law in the hope of creating delay and difficulty. Onus of proof is of no importance when both parties produce evidence. In this case the decree-holder had his decree. The sons could have given any evidence of their own or of any other witness which they possessed, to show that the debt was not one for which the property was liable under Hindu Law. Judges in the Court below would find it a simple and effective method when a question of onus of proof is raised, to ask the Pleader or Vakil, who raises it, whether he is going to call any evidence. If he says, yes, he should order him to call his evidence and see that the evidence is closed, before any such question is discussed. When the evidence is closed the question, if not by that time entirely irrelevant, can be decided, and even if there is an appeal, it is unnecessary to remand the case, because all the evidence has already been taken. If, on the other hand, the learned Counsel says that he is not going to call any evidence, the question of law is ripe for decision. In this case, if the sons decided to call no evidence, they were bound to fail. I am satisfied that they had no evidence to call. I agree in the order proposed.

Appeal allowed.

W. C. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 29-B OF 1922.
November 14 1922.
Present:—Mr. Prideaux, A. J C.
BANSILAL AGARWALA—APPLICANT
versus
RANGLAL AGARWALA AND ANOTHER—NON-APPLICANTS.

Provincial Insolvency Act (V of 1920), s. 53—Fraudulent transfer, annulment of—Receiver not appointed.

BANSILAL *v.* RANGLAL.

Proceedings to annul a transfer, under section 53 of the Provincial Insolvency Act, should be taken in the name of the Receiver, but where no Receiver is appointed the Insolvency Court can itself move on the matter being brought to its notice by any of the creditors.

A person impeaching a transaction under section 53 of the Act has only to prove that it took place within two years of the insolvency of the transferor, and when this has been done the *onus* is shifted on to the transferee to establish the *bona fides* of the transaction which he seeks to maintain.

Revision of the orde of the District Judge, Akola, dated the 24th December 1921, in Miscellaneous Civi Appeal No. 11 of 1921, aris ng out o. Insolvency Ca e No. 25 of 1920, dated the 30th July 1921.

Mes rs. *Gangadha Si aram* and *A. C. Roy*, .or the Applicant.

Mr. *M. R. Bobde*, for Non-Applicant No. 1.

ORDER.—One Ranglal was adjudged an insolvent on 8th October 1920, the order of insolvency go ng back to 9th August 1920, the date of his applicat.on to be declared an insolvent. No Receiver was appointed in the case. On 25th September 1919, that .s, within two years o the .nsolvency, Ranglal had so d a port on of a field to his two brothers and a share in a house to his brother Bansilal. On the appl.cation at the instance of Ranglal's cred tors these alienations have been held void as against the Insolvency Court. That deci ion has been uphe d in appeal. Hence the present appl.cation for revision.

The first ground in this application runs:—"That the Trial Court had no jurisdiction to entertain and decide the application for annulment of the transfers at the instance of the creditors when the Receiver was not a party to the same." There seems to me no force in this ground. The law is this: a transfer of this nature is voidable against the Receiver; so he is the proper person to impeach the fraudulent transfer by the insolvent and proceedings to annul a transfer under section 53 of the Provincial Insolvency Act should be taken in the name of the Receiver But if the Receiver refuses to interfere then a creditor can proceed with the matter with the leave of the Court. Until, however, the Receiver has refused or declined to act no one else can do so: *Hemraj Champa Lall* v. *Ramkishen Ram* (1): But if no Receiver is appointed the matter is otherwise. In that case the Insolvency Court can itself move on the matter being brought to its notice by any of the creditors and that is what has occurred in the present case. There is no illegality in this.

As regards the other grounds in this application for revision, it is argued that the brothers were in possession of the property; but it is admitted that they did not p oduce their account-books to show that the money had passed nor did they produce the *peripatraks*, or rent receipts, to show possession or payment of land revenue. The person impeaching a transaction of this nature has only to p ove that it took place within two years of the insolvency of the transferor and when this has been done the *onus* is shifted on to the transferee to establish the *bona fides* of the transaction which he seeks to maintain. In this case two Courts have concurrently found that the present applicants have failed to establish such *bona fides*. The question is one of fact depending on the amount of belief to be accorded to the testimony of witnesses. There is ample evidence to support the findings come to. For these reasons this application fails and is dismissed with costs. The applicants will pay non-applicant's costs. I fix Pleader's fee at Rs. 15.

S. D. *Application dismissed.*

(1) 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 303.

DARSHAN LAL *v.* SHIBJI MAHARAJ BIRAJMAN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 128 OF 1922.

November 15, 1922.

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

DARSHAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHIBJI MAHARAJ BIRAJMAN—PLAINTIFF—RESPONDENT.

Juristic person—Idol - Idol, whether infant Next friend, suit by, when competent—Civil Procedure Code (Act V of 1908), s. 22, applicability of.

Section 92 of the Civil Procedure Code has no application to suits by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income. [p. 420, col. 2, p. 421, col. 1.]

An idol who is being defrauded by his lawful guardian or trustee cannot be treated by a Court of Law on the footing of an infant, and any person claiming a benevolent interest in the fortunes of the said idol, cannot be permitted to maintain a suit in the name and as the next friend of the injured idol. The person maintaining the suit must make out that he has a right to act on behalf of the idol. [p 421, col. 1.]

First appeal from an order of the District Judge, Budaun.

Dr. *S. M. Sulaiman*, for the Appellants.

Messrs. *Harnandan Prasad* and *Baleshwari Prasad*, for the Respondent.

JUDGMENT.—This is an appeal against an order of remand, and the pleadings of the parties require to be carefully studied if the particular point about which the Courts below have differed is to be rightly appreciated. On the face of it, the suit is one brought by the idol, Shibji Maharaj, installed in a certain temple, suing as a juristic person, through Swami Lachhmi Nand, described as officiating priest and manager of the affairs of the temple. The persons impleaded as defendants are alleged to be wrongfully appropriating the income of the property which should be devoted to the plaintiff. It is an accident of the particular suit that one of the defendants, *Musammat* Pawa, is the survivor of two ladies who executed a certain deed of endowment in favour of the plaintiff idol. This deed has been read to us. We understand it to mean that the temple was in existence and the plaintiff idol installed therein before the execution of this deed. In any case, therefore, the trust-deed about which the parties are disputing must be distinguished from all those deeds by which a temple is directed to be built, or an idol to be installed therein. On the face of it, the deed is a gift in favour of the plaintiff idol, subject to this qualification that the executants are to remain trustees and managers on behalf of the idol *qua* the trust property and are made responsible for seeing that the income of the property is devoted to the interests of the temple. Now, the plaintiff alleges that, after the death of one of the two executants, the survivor, *Musammat* Pawa, has been induced to execute another deed in derogation of the rights which accrued to the idol under the original deed of endowment. He impleads various other defendants, on the allegation that they are concerned in the trespass committed upon the rights of the plaintiff idol under cover of the second deed executed by *Musammat* Pawa. The Court of first instance framed two issues only. One of these was: Is the suit cognizable by this Court? The second was: Is the suit barred by section 92 of the Code of Civil Procedure? So far as we can gather, the latter was the only question to which the Trial Court directed its mind, for there is nothing in the frame of the suit to suggest that it is one outside the cognizance of the Trial Court, unless it be barred by the second clause of section 92, Civil Procedure Code. The First Court found that it was so barred and dismissed the suit altogether. The lower Appellate Court has reversed this finding and remanded the suit for further trial upon the merits. Subject to one remark, which we shall have to make, we think the order of the lower Appellate Court was clearly right. On the wording of the trust-deed, and independently of any evidence as to what worship is actually conducted and what charities, if any, dispensed at the temple of Shibji Maharaj in question, we should hesitate to hold that the deed of endowment, which has been read to us was one creating a trust for public purposes, whether of a charitable or of a religious nature. This, however, is a point on which further light might perhaps be thrown by evidence hereafter to be produced.

Apart altogether from this question the suit, as filed, is simply one by an idol in his juristic capacity against persons who are interfering unlawfully with his property or

with his income. Such a suit has nothing to do with section 92, Civil Procedure Code. There was, however, a question raised in the pleadings about which no specific issue was framed, but which is discussed, in an incidental manner, in the judgment of the lower Appellate Court. The defendants did undoubtedly challenge the competence of Swami Lachhmi Nand to act as the guardian or legal representative of the plaintiff idol for the purposes of this suit. All we wish to say is that there must be an issue on this point and it must be determined. The plaintiff claims, as we understand, to be entitled to represent the idol because he is the priest of the temple, independently altogether of the endowment made in favour of the idol by the original trust-deed on which the claim is based. He says also that he looks after the management of the temple, by which we presume him to mean that he conducts the worship there and dispenses such charities, if any, as are customary at this particular shrine. If this is what the plaintiff means, then this allegation does set up *prima facie* a case entitling Swami Lachhmi Nand to bring this suit as the next friend of the idol. The fact that he is not the manager or trustee, under the particular deed of endowment which he desires to set up for the benefit of the aforesaid idol, would not prevent him from having a right to act on behalf of the idol in this litigation, if he occupied a position of manager or trustee *qua* the performance of those ceremonies of worship or charities for the benefit of which the trust monies were directed to be applied. It will, however, be for the Trial Court to fix an issue on this point and to determine it after evidence has been taken. There is, in the judgment of the lower Appellate Court, a suggestion that an idol, who is being defrauded by his lawful guardian or trustee, might be treated by a Court of Law on the footing of an infant, and that any person claiming a benevolent interest in the fortunes of the said idol, would be permitted to maintain a suit in the name and as the next friend of the injured idol. We think it sufficient to say that we should not be prepared to affirm this as a correct proposition of law. It will be for Swami Lachhmi Nand to make out that he has a right to act on behalf of the plaintiff idol ; otherwise the suit will fail on the mere ground that the plaintiff, considered as a juristic personality is not legally before the Court. Subject to these remarks, we dismiss this appeal. As we think that the defendants should have submitted to the order of remand on the ground on which it has proceeded, we leave them to bear the costs of this Court.

W. C. A *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 182-B OF 1921.

October 4, 1922.

Present :—Mr. Kotwal, A. J. C.

KISANLAL—PLAINTIFF—APPELLANT

versus

ABDULLA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882) —Principles, whether applicable where Act not in force—Forfeture, relief against—Consent mortgage-decree—Period fixed, extension of, by Court.

The principles embodied in the Transfer of Property Act are applicable, as principles of equity, justice and good conscience in places where the Act is not in force. [p. 422, cols. 1 & 2.]

A Court is empowered to extend the period fixed for payment in a mortgage-decree by consent, the condition being that the property was to be foreclosed on default of payment as settled. [p. 423, col. 2.]

Wentworth v. *Bullen*, (1829) 9 B. & C. 840 at p. 850; 9 L. J. (O S.) K. B. 33; 109 E. R. 383; 33 R. R 355, *Krishnabai* v. *Hari Govind*, 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370 (F. B.), *Balambhat* v. *Vinayak*, 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154, *Surendra Nath Banerjee* v. *Secretary of State for India in Council*, 57 Ind. Cas. 643; 24 C. W. N. 545, *Lachiram* v *Jana Yesu*, 27 Ind. Cas. 830; 10 Bom L. R. 668, *Bheema Venkataramana* v. *Bommini Garappa*, 28 Ind. Cas. 970; 28 M. L. J. 488; 2 L. W. 537, *Supdu Dhodu* v. *Madhavrao Jivram*, 57 Ind. Cas. 534; 44 B. 544; 22 Bom. L. R. 780, referred to.

Appeal from the decree of the District Judge, Amraoti, dated the 17th February 1921, in Civil Appeal No. 243 of 1920.

Dr. *H. S. Gour* and Mr. *A. V. Khare*, for the Appellant.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Respondents.

JUDGMENT.—On the 20th June 1902 the following preliminary decree for foreclosure in a mortgage-suit was passed against Abdulla, defendant No. 2, and his brothers, Karamat and Habshi, by the Court of the Civil Judge, Amraoti :—

" The Court passes a decree in accordance with compromise put in by parties. That in full satisfaction of the claim defendants

shall pay plaintiff Rs. 3,300 by 22 annual instalments each of Rs. 150 to be paid every year. The first instalment being payable on the 1st April 1903 and so on. In default of payment of any one instalment defendants shall pay interest on that amount at 8 annas per cent. and on default of three instalments the whole amount shall be paid at once. On failure to do which the mortgaged property be foreclosed and be put into plaintiff's possession."

Abdulla and Habshi were, at this time, minors under the guardianship of Karamat. The instalments were paid in accordance with the decree till 1915. The instalment of 1916 was paid late but accepted by the decree-holder. The instalments for 1917, 1918 and 1919 were not paid. On the 5th April 1919 the plaintiff filed an application for making the decree absolute. The 28th June 1919 was fixed for hearing this application. On the 8th May 1919 Abdulla paid into Court Rs. 517-8-0. This sum represented the three instalments in arrears and interest thereon. On the 28th June 1919 the judgment-debtors remained absent and an *ex parte* order making the decree final was passed. On the application of one of the judgment-debtors this decree was set aside on the 14th August 1920. On the 17th August 1920 the entire amount due on the decree was deposited in Court by the judgment-debtors. On the 1st September 1920 Abdulla filed an application for extension of time on various grounds. The First Court rejected the application and passed an order making the decree final. The lower Appellate Court has set aside the order, extended the time and directed the decree-holder to take the money deposited in Court. The decree-holder appeals.

It is contended on his behalf that the provisions of the Transfer of Property Act could not be applied in this case as (1) that Act did not apply to Berar when the decree was passed, and (2) as the decree was a compromise decree and not one under that Act. Although the Transfer of Property Act did not apply to Berar in 1902, yet the principles embodied in that Act would be applicable as principles of equity, justice and good conscience. If the decree had been a decree passed by the Court and not based on a compromise, it would have been open to th Court to extend time notwithstanding that the Transfer of Property Act did not apply.

The question, therefore, remains as to what is the effect of the circumstance that the decree is a consent decree. It is argued that, as the parties had fixed the time by agreement and the decree merely embodied a contract between them, the Court was bound to treat it as a contract and had no power to alter its terms and extend the time. The decree does embody a contract, but, as observed in *Wentworth* v. *Bullen* (1), "the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge." *Krishnabai* v. *Hari Govind* (2) was a case where the plaintiff was seeking to enforce by original suit a right to forfeiture contained in a consent decree whereby the status of landlord and tenant was established between the plaintiff and the defendant. It was held that the Court, in the exercise of its equitable jurisdiction, was not precluded from granting such relief against the forfeiture as it might have granted had the status arisen from contract or custom. In *Balambhat* v. *Vinayak* (3) the principle of this ruling was held to apply alike to a suit to enforce a decree and to proceedings in execution.

In *Surendra Nath Banerjee* v. *Secretary of State for India in Council* (4) the suit was compromised on terms under which the defendant recognized the right of the plaintiff to the land in suit and agreed to hold the land as a separate holding under the plaintiff and undertook to execute, within two months, an agreement in favour of the plaintiff in a certain form, in default whereof the plaintiff would take *khas* possession of the land in suit in execution of the decree to be passed on the basis of the compromise. A decree was passed in accordance with the terms of the compromise. The defendant not having executed the

(1) (1829) 9 B. & C. 840 at p. 850; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313; 33 R. R. 353.
(2) 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370 (F. B).
(3) 10 Ind. Cas. 746; 35 B. 239; 13 Bom L. R. 154.
(4) 57 Ind. Cas. 643; 24 C. W. N. 545.

agreement within the time stipulated the plaintiff applied for execution and prayed for recovery of possession. It was held that it was open to the Execution Court to consider what the rights of the parties equitable or otherwise were which followed from the contract embodied in the decree.

The cases cited above were concerned with relations between landlord and tenants and the right of forfeiture incidental to those relations.

In *Lachiram* v. *Jana Yesu* (5) the plaintiff had sued for ejectment. A compromise decree was passed which provided for the payment of a certain sum by certain instalments. It also provided that, in default of payment of two instalments, the plaintiff was to recover possession of the lands in suit. Default in payment having occurred, the plaintiff applied to recover possession. The defendant then paid up the balance due on the decree. The lower Courts, relying on the equitable principle stated in *Krishnabai* v. *Hari Govind* (2) and *Balambhat* v. *Vinayak* (3), declined to put the plaintiff in possession of the property. The High Court held that the decisions in those cases were inapplicable where the relations of landlord and tenant were not created by the decree and that, as a decree made by consent can only be varied by consent, the plaintiff was entitled to enforce the term of the decree as to possession. In *Bheema Venkataramana* v. *Bommini Gurappa* (6), however, a provision in a compromise decree that possession was to be given to the plaintiff if the defendant failed, within a certain time, to withdraw from Court certain promissory-notes and return them cancelled to the plaintiff was relieved against as penal. This suit was for the recovery of lands sold to the plaintiff by the defendant. In *Supdu Dhodu* v. *Madhavrao Jivram* (7), according to Macleod, C. J., the compromise decree amounted to a decree for redemption and, according to Heaton, J., it was in some ways an agreement to purchase property on the part of one person and an agreement to sell on the part of another and in some ways like a mortgage where the provision is that the mortgage-debt shall be paid on a particular date, and that on a later date the mortgaged property should be restored to the mortgagor. Macleod, C. J., referred to *Lachiram* v. *Jana Yesu* (5) but held that the Court cannot lay down a general principle that in no case can the terms of a consent decree be varied and that in each case the terms of the consent decree must be considered. The following passage from the judgment of Heaton, J., is pertinent in connection with the present case :—

" When once it is conceded that we have here, though it takes the form of a decree, what is substantially a contract, then I think the principle, on which the decision in *Krishnabai* v. *Hari Govind* (2) was founded, applies. Then whether we apply the rule as to the time being of the essence of the contract, or the general principle that where you have relations of mortgagor and mortgagee, although the time may be fixed for the payment of the mortgage-debt by the contract, the mortgagor would still be entitled to pay the mortgage-debt until the relation of mortgagor and mortgagee had ceased to exist, the result is the same."

The contract embodied in the decree in the present case is really a mortgage with a condition of foreclosure. Whether the decree is a foreclosure decree, or is treated as a contract the lower Court had the power to grant relief by way of extension. Under the circumstances of the case, the lower Appellate Court appears to me to have exercised its discretion rightly in granting the extension.

The appeal fails and is dismissed with costs.

Appeal dismissed.

N. H.

(5) 27 Ind. Cas. 830 ; 16 Bom. L. R. 668.
(6) 28 Ind. Cas. 970 ; 28 M. L. J. 488 ; 2 L. W. 537.
(7) 57 Ind. Cas. 534 ; 44 B. 544 ; 22 Bom. L. R. 780.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1171 OF 1921.
December 21, 1922.
Present:—Mr. Justice Rafique and Mr. Justice Piggott.
Babu JHINAK SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Babu AMBIKA PRASAD AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Appeal—Death of joint plaintiff before hearing of appeal, effect of—Decree passed in ignorance of fact of death, validity of.

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity.

Imam-ud-din v. *Sadarat Rai*, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228 and *Balaram Pal* v. *Kanysha Majhi*, 53 Ind. Cas. 548, followed.

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 9th of April 1921.

Dr. *K. N. Katju* and Mr. *N. Upadhya*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by three persons, namely, Ambika Prasad, Ram Charatar Singh and Hobedar Singh on the 21st of June 1920 in the Court of the Munsif of Bansgaon for the recovery of possession of property conveyed by one Damri to the defendants-appellants on the 20th of May 1919 by a registered sale-deed on the ground of pre-emption. The claim was denied by the vendees and the learned Munsif dismissed the claim. Of the three plaintiffs, Ambika Prasad alone preferred the appeal and said that he was preferring it both on his own behalf and on behalf of his co-plaintiffs, Ram Charatar Singh and Hobedar Singh. Before the appeal came to be heard Hobedar Singh died. The fact of the death of Hobedar Singh was not brought to the notice of the learned District Judge nor an application made to bring the legal representatives of Hobedar Singh on the record prior to the hearing of the appeal. The appeal was heard as if Hobedar Singh was alive and a decree was passed on the 9th of April 1921 in favour of Ambika Prasad, Ram Charatar Singh and Hobedar Singh by the learned District Judge on the payment of three-fourths of the sale consideration within a specified period for the recovery of three-fourths of the property in dispute. The vendees have preferred the present appeal before us and contend *inter alia* that the decree of the learned District Judge is a void decree under the law inasmuch as it was passed after the death of Hobedar Singh. This contention, we think, must prevail. It is supported by two authorities, namely, *Imam-ud-din* v. *Sadarat Rai* (1) and *Balaram Pal* v. *Kanysha Majhi* (2). We, therefore, allow the appeal, set aside the decree of the learned District Judge and dismiss the claim of the plaintiff-respondent, Ambika Prasad, with costs including fees in this Court on the higher scale, if any.

Appeal allowed.

S. D.

(1) 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228.
(2) 53 Ind. Cas. 548.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 99 OF 1922.
November 16, 1922.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.
HARDEO PRASAD—PLAINTIFF—APPLICANT
versus
DAMODAR PRASAD—DEFENDANT—NON-APPLICANT.

Jurisdiction—Suit by two plaintiffs—Dismissal—Appeal by one joining other as respondent—Appeal, acceptance of—Court, jurisdiction of, to show respondent as appellant.

A Court has no jurisdiction to direct that a person who was never an appellant before it should be shown in the decree as an appellant. [p. 425, col. 2.]

Two persons, *H.* and *D.* brought a suit for profits which was dismissed. *H.* alone appealed joining *D.* as respondent. The appeal was accepted

HARDEO PRASAD *v.* DAMODAR PRASAD.

and the Appellate Court came to the conclusion that a decree in favour of both *H.* and *D.* should be passed. By mistake, however, the decree was drawn up in the name of *H.* alone. *D.* applied for correction of the decree. Upon this the Appellate Court passed an order directing the name of *D.* to be entered in the decree as an appellant. On revision:

Held, that the order was without jurisdiction and could not be sustained.

Civil Revision from an order of the District Judge, Bulandshahr.

Mr. *Girdhari Lal Agarwala*, for the Applicant.

JUDGMENT.—Two brothers, Hardeo Prasad and Damodar Prasad, brought a suit for profits. They appeared as joint plaintiffs and jointly claimed the profits due on the entire share of which they were the joint owners. The First Court dismissed the suit. For some reason, with which we are not now concerned, Damodar Prasad preferred to submit to this decree. Hardeo Prasad appealed against the whole decree and impleaded Damodar Prasad as a respondent, on the ground that he had declined to join in the appeal. The District Judge reversed the finding of the Trial Court on the merits. The conclusion arrived at in the judgment obviously is that the suit of Hardeo Prasad and Damodar Prasad ought to have been decreed, and the operative portion of the judgment directs that the decree of the Trial Court be set aside and, in lieu thereof, the claim be decreed. We think there can be no doubt the District Judge intended to give a decree to Hardeo Prasad and Damodar Prasad for the amount in question. By some error in the office, when the decree was drawn up, it was so drafted as to appear on the face of it a decree in favour of Hardeo Prasad alone, and, by a further oversight, the name of Damodar Prasad did not appear at all in the array of parties as shown in the decree. On this Damodar Prasad applied to the District Judge, asking that what was obviously a clerical error or accidental omission in the decree should be set right. The District Judge intended the decree to be in conformity with his judgment. Technically, we think the order passed by him was wrong and that it is questionable whether it really gives effect to the operative portion of the judgment. It is, moreover, unjust to Hardeo Prasad who was clearly entitled alone to recover the costs of the appeal, seeing that he alone had fought the matter. The order of the District Judge is that the name of Damodar Prasad be entered in the decree as an appellant. Now, apart from what has been stated above, it is obviously wrong for any Court to direct that a person who was never an appellant before it should be shown in the decree as an appellant. We think we must hold that it is outside the jurisdiction of any Court to pass an order thus misdescribing in the decree one of the parties to the same. We, therefore, take up this matter in revision and set aside the order complained of. There has been some little argument before us as to the order which we ought to substitute for it. We could, of course, pass an order the only effect of which would be to require the District Judge to look further into the matter. We think, however, that it would be better for us to dispose of this small difficulty by passing the order which the District Judge obviously ought to have passed upon the application of Damodar Prasad. That order will direct that a decree be drawn up so as to decree the money found to be due, and shown in the decree as it at present stands, together with the costs of the Court of first instance, in favour of the appellant, Hardeo Prasad, and the respondent, Damodar Prasad, as against the other respondent who was the defendant in the original suit. It will further direct that the costs of the appeal be paid by the aforesaid defendant-respondent to the appellant, Hardeo Prasad, alone. Under the circumstances, we think we must allow the applicant, Hardeo Prasad, his costs of this application, and we order accordingly.

N. H.

Application allowed.

ANAND RAM BRAHMAN *v.* RAMGULAM SAHU.

PATNA HIGH COURT.

STAMP REFERENCE IN FIRST CIVIL APPEAL NO. OF 1922.

October 31, 1922.

Present:—Justice Sir Jwala Prasad, KT.

ANAND RAM BRAHMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMGULAM SAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal, or plaint, presentation of, during vacation, validity of—Appeal, presentation of, to Assistant Registrar, whether proper—Bihar and Orissa Court-Fees (Amendment) Act (II of 1922)—Restrospective effect.

There is nothing to prevent the presentation of a plaint or memorendum of appeal during a vacation or even on a Sunday provided it is presented to a proper officer and that officer receives it. [p. 430, col. 1.]

Ununto Ram Chatterjee v. *Protab Chunder Shiromonee*, 16 W. R. 230, *Gobind Coomar Chowdhry* v. *Huro Gopal Nag*, 3 B. L. R. App 72; 11 W. R. 537 and *Ram Das Chakarbati* v. *Official Liquidator of the Cotton Ginning Company, Limited*, 9 A. 366; A. W N. (1887) 34; 5 Ind. Dec. (N S.) 679, referred to.

The Assistant Registrar of the High Court of Judicature at Patna is not the officer expressly appointed by the rules of the Court to receive a memorandum of appeal Therefore, a memorandum of appeal presented to him during the vacation should be deemed to have been presented on the re-opening of the Court when the Registrar actually receives it and stamped according to the law as to Court-fees in force on the day when the Registrar receives it and not when it was presented. [p. 430, col. 2; p. 431, col. 1.]

The Bihar and Orissa Court-Fees (Amendment) Act (II of 1922) does not have retrospective effect so as to impose a liability upon an appellant to pay Court-fee, on copies of judgment and decree filed with a memorandum of appeal which he was not liable to pay on the date such copies were obtained. [p. 431, col. 1.]

FACTS.—The High Court of Patna was closed for the long vacation on the 4th of August 1922 and re-opened on the 22nd of October 1922. During the long vacation of the High Court, Bihar and Orissa Court-Fees (Amendment) Act, II of 1922, was passed and was brought into force from the 24th of August 1922. Prior to the enforcement of the Act, various appeals including one in report were filed before the Assistant Registrar of the High Court during the long vacations, the Registrar being absent from Patna during those days. On the re-opening of the High Court, the Registrar formally received the memoranda of appeals and admitted them on the Register of the Court. The appeals were stamped with Court-fees in accordance with Act VII of 1870 and not in accordance with Bihar and Orissa Court-Fees (Amendment) Act, II of 1922. Mr. Nageshur Prasad, Stamp Reporter of the Patna High Court, thereupon made the following report to the Taxing Officer—

"The suit out of which this appeal arises was instituted in 1921 for certain declarations and a perpetual injunction. It having been dismissed by the lower Court the plaintiffs have preferred this first appeal from its decree. The suit was valued at Rs. 36,783-8-3 and as it is governed by section 7, clause (*iv*) (*c*) of the Court-Fees Act (VII of 1870), a proposition which cannot be disputed, a Court fee of Rs. 1,055 calculated *ad valorem* on Rs. 36,783-8-3 according to Art. 1, Shedule I, of that Act was paid on the plaint. The appeal is similarly valued and stamped. The plaint is sufficiently stamped but the memo. of appeal appears to me to be insufficiently stamped.

"The question for determination, therefore, is whether the memo. of appeal is insufficiently stamped and. if so, by how much. The decision of this question hinges upon another question of considerable importance, namely: "When was the appeal validly presented?" The decision of the latter question will decide the question of Court-fee raised not only in this appeal filed before the Assistant Registrar in the last long vacation but in good many other appeals filed during the same vacation before that officer or the Deputy Registrar.

"The High Court was closed for the last long vacation from the 4th of August to the 22nd of October 1922 and re-opened on the 23rd of October. The office of the High Court was open, though not working with full strength, throughout the vacation, as in previous years for administrative and urgent purposes. There is no order, rule or law compelling a litigant or conferring a statutory right upon him to file a civil appeal during a vacation. This is so on account of the sufficient protection given by section 4 of the Limitation Act, 1908, against limitation expiring on a day when the Court is closed. But as the office is open for

the said purposes Vakils desiring and choosing to file appeals during any long vacation in the office are permitted at their request to file them in the office, not as a matter of right, but as a matter of favour to suit their convenience on the distinct understanding that the appeals filed during a long vacation will be kept in the office by way of deposit and will be treated as having been filed on the day that the Court re-opens. Accordingly, this appeal and many others were filed either before the Deputy or the Assistant Registrar during the last long vacation. They were kept in the Vernacular Department by way of deposit and presented before the Registrar on 23rd October 1922, when the Court re-opened. This appeal which will be in time up to 7th November 1922 but was filed before the Assistant Registrar on 18th August 1922, during the vacation, was presented to the Registrar on 23rd October 1922 when the Court re-opened, and the first entry, signed by the Registrar, in the order-sheet, therefore, is "23rd October 1922. Filed. Put up for orders." Therefore, in my humble opinion, this appeal was validly presented on 23rd October 1922. This view is supported by the High Court's letter No. 3908 V. D., dated 11th September 1919, which is a reply from the then Registrar to a letter received in the long vacation of 1919 from Mr. Shoroshi Charan Mittra as Vice-President of the Vakils' Association, Patna High Court, to the Registrar of the High Court complaining that since a certain date in the vacation of that year the Vakils had not been able to file non-urgent civil appeals and that that was causing great inconvenience to litigants and Vakils. The said High Court letter runs as follows:—

'To

The Vice-President,
Vakils' Association,
Patna High Court.

Sir,

With reference to your letter No. *nil*, dated the 29th August 1919, regarding the receipt of appeals during the vacation, I am directed to say that no appeal can be claimed to be filed in office as of right on any day except on a Court day, but appeals will be, as in previous years, received during the vacation and kept to be formally dealt with when the Court re-opens. They will be treated as having been filed on the re-opening date.'

"The above High Court letter is a conclusive authority for my submission that the appeal was validly presented on 23rd October 1922. But it may be contended that, according to the rules of presentation of appeals, as contained in the Code of Civil Procedure, 1908, and the Rules of the Patna High Court, 1916, the presentation of the appeal to the Assistant Registrar on 18th August 1922 and other appeals presented to him or the Deputy Registrar on that date or any other date during the last vacation is valid, and that, therefore, they were validly presented before them on the dates on which they were presented during the vacation. My idea is that those rules, except rule 4, Chapter II of the Patna High Court Rules, are applicable only when the High Court is open and not when it is closed. However, assuming that they are applicable when the Court is closed for the long vacation on the ground that the Hon'ble Mr. Justice Adami, the Vacation Judge, held Court during the vacation, I proceed to examine those rules in order to see if the appeal presented to the Assistant Registrar on 18th August 1922 was a valid presentation.

"O. XLI, r. 1 (1) of the Code enacts: "Every appeal *shall* be preferred in the form of a memorandum signed by the appellant or his Pleader and *presented to the Court or to such officer as it appoints in this behalf.* The memorandum shall be accompanied by a copy of the decree appealed from . . ." The italicising is mine. The above italicised provisions are imperative, so that it is obligatory upon an appellant to present his appeal to the Court or such officer as it appoints in this behalf, and if he does not so present it the presentation is invalid just as the presentation of an appeal without a copy of the decree appealed from is invalid, as held by this Court in *Chaturbhuj Sahay* v. *Muhammad Habib* (1).

(1) 54 Ind. Cas. 36; 2 U. P. L. R. (Pat.) 6.

"The proper officer appointed by the Court to receive an appeal from the decree or order of a Subordinate Civil Court is the Registrar according to clause (*iii*), rule 13, Chapter II of the Patna High Court Rules. Therefore, the present appeal, which is an appeal from the decree of a Subordinate Civil Court, must have been presented either to the Court or to the Registrar. It was not presented to the Court, the Vacation Judge, the Hon'ble Mr. Justice Adami, as an urgent matter under rule 4, Chapter II of the Patna High Court Rules. But a presentation to his Lordship was possible only if in his Lordship's opinion the filing of the appeal before his Lordship was an urgent matter. Probably the appellants did not think that it was urgent, and, therefore, they did not venture to present it to his Lordship. However, the fact remains that the appeal was not presented to his Lordship on 18th August 1922. On the other hand, it was filed before the Assistant Registrar. But it could not have been filed before him under law, because the Court did not by an order, so far as I know, appoint him or the Deputy Registrar as the officer to receive appeals during the last vacation under O. XLI, r. 1 (i) of the Code in temporary supersession of rule 13 (*iii*) of the Patna High Court Rules. It may further be contended that the presentation of the appeal to the Assistant Registrar (or the Deputy Registrar) was valid under rule 26 or 27, Chapter VII of the Patna High Court Rules. There are several conditions which must be fulfilled before these two rules can be applied. I lay stress on only one of them, namely, limitation. According to both the rules, any memorandum of appeal or application which might be barred by time may be presented to the Deputy Registrar or the Assistant Registrar under certain circumstances. But the present appeal was not going to be time-barred on 18th August 1922. The time for presenting it is, as already stated, up to 7th November 1922. Even if the period of limitation prescribed for the appeal had been expiring on 18th August 1922, nay, even if it had already expired on any previous date during the vacation the appeal would have been in time up to 23rd October 1922, the day that the Court re-opened, by virtue of the provisions of section 4 of the Limitation Act. Therefore, rules 26 and 27 aforesaid have no application to this appeal or any other appeal filed before the Deputy Registrar or the Assistant Registrar during the vacation. It may further be contended that the presentation to the Assistant or the Deputy Registrar is valid because the Registrar might have delegated his function of receiving appeals under rule 13 (*iii*), Chapter II of the Patna High Court Rules to those officers under rule 14 of the same Chapter on the ground that such a function is neither of a judicial nor *quasi*-judicial character. With regard to this, my first respectful submission is that it is a matter of considerable doubt whether the Registrar can delegate his powers of receiving a memo. of appeal to the Deputy or the Assistant Registrar, because, (1) under r. 16 of Chapter II of the Patna High Court Rules, in the absence of the Registrar or whenever the Chief Justice so directs, his powers and duties under r. 13 (*ii*) of the same Chapter, *i.e.*, of receiving appeals, etc., shall be performed by a Judge or Judges and not by the Deputy or the Assistant Registrar, which shows that the function of receiving appeals is of a *quasi*-judicial character; and as an example of this I may note that when the Registrar was absent on leave from 31st May to 9th June last memoranda of appeals used to be received by Judges and not by the Deputy or the Assistant Registrar; and (2) O. XLI, r. 1 (1) of the Code does not provide that the officer appointed by the Court to receive an appeal (*e.g.*, the Registrar) can delegate his powers of receiving it to any other officer. My next respectful submission is that, apart from the question whether the function of receiving a memo. of appeal is of a *quasi*-judicial character or not or whether the Registrar can delegate that function or not, the Registrar did not, as a matter of fact, so far as I know, delegate his powers of receiving a memo. of appeal to the Deputy or the Assistant Registrar so as to entitle them to receive that document *during the last vacation*. Therefore, rule 14 of Chapter II of the Patna High Court Rules cannot be relied on. Therefore, presentation of the appeal to

the Assistant Registrar (or the Deputy Registrar) during the last vacation was no presentation or an invalid one and it became valid only when it was presented to the Registrar on 23rd October 1922.

"For the reasons given above my answer to the question : 'When was the appeal validly presented ?' is, that it was validly presented on 23rd October 1922.

"On the 23rd of October 1922, when the appeal was validly presented, as shown above, the Bihar and Orissa Court-Fees (Amendment) Act (II of 1922), which came into operation on 24th August 1922, was in force. Therefore, the memo. of appeal and other documents filed with it are governed by the Court Fees Act (VII of 1870) as amended by the said Act II of 1922. According to the former Act as amended by the latter the Court-fee on Rs. 36,783-8-3, the value of the appeal, is Rs. 1,567-8-0. The Court-fee paid is Rs. 1,055 according to the former Act. Therefore, the memo. of appeal is insufficiently stamped by Rs. 512-8-0. This is my answer to the first question whether the memo. of appeal is insufficiently stamped and, if so, by how much.

"There are three other documents accompanying the memo. of appeal which, according to the said Act II of 1922, are also insufficiently stamped. One of them is the *vakalatnama*. It is insufficiently stamped by Re. 1. The other two are copies of the judgment and the decree. They are insufficiently stamped by annas 4 and 8, respectively.

"In the result the appellants having to pay the following deficit Court-fees :—

	Rs.	a.	p.
On the memo. of appeal ..	512	8	0
,, Vakalatnama ..	1	0	0
,, copy of judgment ..	0	4	0
,, ,, decree ...	0	8	0
Total ..	514	4	0"

The matter came on for hearing before Mr. Macpherson, Taxing Officer of the High Court, who submitted the case to the Taxing Judge with the following observations :—

ORDER.—"This is a Court-fee matter.

"The question at issue has been discussed at length by the Stamp Reporter, and I cannot usefully add anything to what he has said. But as the question is not only of general importance since a large number of cases depend upon it, but also urgent as these cases numbering, I am informed, about 150, cannot be admitted until the decision is arrived at, I refer the case at once for the final decision of the Taxing Judge under the provisions of section 5 of the Indian Court-Fees Act, 1870. The question for decision is, whether a memorandum of appeal or other documents filed in the High Court from the 4th August to the 23rd August 1922 inclusive is to be taken, for the purposes of the Court-Fees Act, 1870, as amended by the Bihar and Orissa Court-Fees (Amendment) Act, 1922, as having been filed on the 23rd October, 1922. The fourth day of August 1922 was the first day after the Court closed for the long vacation. The twenty third day of August was the day before the Bihar and Orissa Court-Fees (Amendment) Act, 1922 came into operation, and the twenty-third of October was the day on which the High Court opened after the long vacation.

"This will be taken as a test case as it is typical. The learned Vakils have agreed to appoint one or more of their number to argue the matter in a representative capacity, and I am asking the Government Advocate or in his absence the Government Pleader to represent the Revenue."

Messrs. *S. C. Mitter, S. N. Palit, Jadubans Sahay* and *Hareshwar Prasad Sinha*, for the Appellants.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.—This is a Court-fee matter and has been referred to me as a Taxing Judge. The first question for determination is, whether the memorandum of appeal is sufficiently stamped.

The memorandum of appeal was filed before the Assistant Registrar of the High Court on the 18th of August 1922 when the old Court-Fees Act was in force. Accord-

ing to that Act, the memorandum of appeal bore Court-fee of sufficient value. The new Bihar and Orissa Court-Fees Act (Amendment) (Act II of 1922) came into force on the 24th day of August 1922, according to which the Court-fee should have been much larger than has been paid by the appellant. The Court was closed for the long vacation from the 4th of August to the 22nd of October 1922, though the offices were open and the Registrar was on duty. Under O. XLI, r. 1, the memorandum of appeal must be "presented to the Court or to such officer as it appoints in this behalf." This Court has appointed the Registrar to receive memorandum of appeal(Chapter II, rule 13, clause 3, Patna High Court Rules). There are ample authorities to show that a memorandum of appeal presented during the vacation to the proper officer appointed in that behalf will be a valid presentation, although it is open to an appellant to present a memorandum of appeal on the first day of the opening of the Court under the Law of Limitation if the time fixed for the filing of the same expires during a vacation. This is for the benefit of litigants. But there is nothing to prevent the presentation of a plaint or a memorandum of appeal during a vacation or even on a Sunday, provided it is presented to a proper officer and that officer receives it: *vide Ununto Ram Chatterjee* v. *Protab Chunder Shiromonee* (2), *Gobind Coomar Chowdhry* v. *Huro Gopal Nag* (3) and *Ram Das Chakarbati* v. *Official Liquidator of the Cotton Ginning Company, Limited* (4). Therefore, if the Assistant Registrar in this case was the officer properly constituted to receive the memorandum of appeal, in my opinion the appeal was then properly presented and filed on the 18th of August 1922 and the Court-fee payable was that prescribed by the Act which was then in force, namely, the old Court-Fees Act.

The chief question, therefore, for determination is, whether the Assistant Registrar was the officer authorized to receive the memorandum of appeal in question. He has not been expressly so appointed by the Rules of our Court. The Registrar, though on duty, was not in Patna those days. It has been urged that he had delegated his powers to the Assistant Registrar under rule 14 of Chapter II of our Rules. There is nothing to show that the powers were delegated by the Registrar under that rule, even if the Registrar had the power to do so and that the receiving of the memorandum of appeal was not a judicial or *quasi*-judicial matter.

It is then said that the Assistant Registrar must be deemed by implication to have the powers of the Registrar delegated to him. This contention is based upon what is said to have been the practice prior to 1919 when the Deputy and the Assistant Registrars used to receive appeals during vacation. We do not know whether they did it under any delegation of powers made by the Registrar or only as a mere matter of practice. I do not think that the delegation, if any, prior to 1919 will be of any avail for the year 1922. In order to apply rule 14 it must be clearly shown that there was a delegation by the Registrar of his powers to the Deputy or the Assistant Registrar before he left for Ranchi during the last vacation. Therefore, rule 14 does not help the appellants in the present case.

Under rule 16, in the absence of the Registrar, his powers under rule 13, clauses (1) to (13) must be exercised by a Judge or Judges: in other words, the power of the Registrar to receive an appeal under clause (3) of rule 13 could only during the vacation and in the absence of the Registrar be exercised by a Judge of this Court. The memorandum of appeal should, therefore, have been, in the absence of the Registrar, presented to Mr. Justice Adami, who was the Vacation Judge. Whether the receiving of a memorandum of appeal is a judicial act or not, rule 16 expressly says that it shall be only within the competence of a Judge or Judges of this Court, in the absence of the Registrar, to receive a memorandum of appeal, and in the face of this express provision I do not think that the Deputy or the Assistant Registrar could receive the memorandum of appeal in question. They could only perform such of

(2) 16 W. R. 230.
(3) 3 B. L. R. App. 72; 11 W. R. 537.
(4) 9 A. 366; A. W. N. (1887) 34; 5 Ind. Dec. (N. S.) 679.

the duties of the Registrar as were enjoined upon him under clauses (14) to (23) of the said rule. Therefore, although, in my opinion, the appeal could be presented on the 18th of August 1922 to the Registrar or a Judge of this Court, it was not properly presented to the Court or to the officer appointed by the Court under O. XLI, r. 1 of the Code of Civil Procedure. Therefore, the memorandum of appeal should be deemed to have been presented on the 23rd of October 1922 when the Court re-opened and the Registrar actually received the document and noted on the order-sheet as having been filed on that date. The new Bihar and Orissa Court Fees Act which had already come into force before the 23rd of the October 1922, will apply to the present case, and hence the memorandum of appeal is insufficiently stamped to the extent and the value indicated by the Stamp Reporter.

The *vakalatnama* is also insufficiently stamped, as is reported by the said officer.

The copies of the judgments and the decrees, to my mind, are properly stamped and bear sufficient Court-fees, inasmuch as they were obtained before the present Act came into force; and, therefore, the fact that they were filed after the present Court-Fees Act came into force would not make those documents invalid and unreceivable under the new Court-Fees Act.

This is also supported by the General Clauses Act, section 6, clause (*c*). The present Act cannot have the retrospective effect to impose a liability upon the appellants to pay Court-fee which they were not liable to pay on the date when the copies were obtained by them.

I understand that there are a number of cases of this nature. They will all be governed by this judgment.

N. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 102 OF 1922.

November 17, 1922.

Present:—Justice Sir P. C. Banerji, KT.,

BANGALI MAL,—PLAINTIFF—PETITIONER

versus

FIRM GANGA RAM-ASHARFI LAL,—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 20—Sale of goods - Loan of money- Presumption as to place of payment—Cause of action—Jurisdiction.

Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or re-payment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender as the case may be.

Civil revision against an order of the Judge, Small Cause Court at Agra.

Mr. *S. C. Das*, for the Applicant.

Mr. *S. B. Johari*, for the Opposite Party.

JUDGMENT.—The only question in this case is whether the Court of Small Causes at Agra had jurisdiction to entertain the suit. That Court has held that it had no jurisdiction and has returned the plaint for presentation to the Court at Budaun. The plaintiff's firm is at Agra. A contract was made at Budaun with the defendant's firm for sale to that firm of certain goods which were to be delivered at Budaun. The goods were despatched from Agra and delivery was taken at Budaun. As the price was not paid, the plaintiff's firm brought the present suit at Agra for recovery of the price. The plaintiff's agent gave evidence and he said that it was agreed that the price would be sent to Agra. One of the defendants was examined and he said that one of the proprietors of the plaintiff's firm had said that he would take the price when he came to Budaun. No evidence was given by either party in support of this statement. Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or repayment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender, as the case may be. In the absence of evidence to prove that it was specifically agreed that payment was to be made at Budaun the presumption would be that payment was to be made at Agra. Therefore, the Agra Court had jurisdiction to entertain the suit, it not having been proved that payment was agreed to be made at

Budaun. The learned Judge of the Small Cause Court at Agra was, therefore, not justified in returning the plaint. I allow the application, set aside the order of the Court below and direct that the plaint be received back and the case tried on the merits. I make no order as to costs. I would advise the parties to come to terms instead of fighting the matter any further.

S. D. *Application allowed.*

ALLAHABAD HIGH COURT.

CIVIL CASE NO. 712 OF 1921.
(CONNECTED WITH SECOND CIVIL APPEALS NOS. 713 TO 716 OF 1921).
December 7, 1922.
Present:—Mr. Justice Stuart.
Khan Bahadur MOHAMMAD ASGHAR ALI KHAN—PLAINTIFF—APPELLANT
versus
RAMMON—DEFENDANT—RESPONDENT.

N. W. P. Land Revenue Act (XIX of 1873), s. 66—U. P. Land Revenue Act (III of 1901), s. 86—Customary due—"Cess"—Custom—Proof—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Suit to claim "cess" as customary due—Nature of suit—"Cess", "siwai", "jamabandi", meaning of.

A fixed number of cow-dung cakes and a bundle of chaff, claimed annually by a *zemindar* from his tenant as a customary due, not connected with land, is a "cess" within the meaning of the second part of section 66 of the old Land Revenue Act (XIX of 1873), and section 86 of the U. P. Land Revenue Act (III of 1901). [p. 434, col. 1.]

A "cess" levied in accordance with village custom is only recoverable if recorded by the Settlement Officer and generally and specially sanctioned by the Local Government; and the person claiming it must prove that in the particular case these conditions are fulfilled. [p. 434, col. 2.]

Lala v. *Hira Singh*, 2 A. 49; 1 Ind. Dec. (N. S.) 576, relied upon.

Sis Ram v. *Asghar Ali*, 16 Ind. Cas. 422; 35 A 19; 10 A. L. J. 416, *Rangi Lal* v. *Jassa*, 35 Ind Cas 208; 38 A 286; 14 A. L. J 393, *Sheoambar Ahir* v. *Collector, Azamgarh*, 14 Ind. Cas. 138; 34 A. 358; 9 A. L. J. 431, referred to.

If the custom of levying such a "cess" or a customary due is recorded by a Settlement Officer, it should be recorded in the *Wajib-ul-arz* or the *Dasturdehi*, and not in the *Jamabandi*. However, if it is recorded in the *Jamabandi* it cannot be considered as a record of a custom by the Settlement Officer; nor can the Local Government be taken to have sanctioned it merely because the Settlement was confirmed by it. [p. 434, col. 2; p. 435, col. 2.]

The evidence that for 20 or 30 years the *zemindar* has been receiving dues paid by his tenants is insufficient to establish a custom even in a Province where a custom need not necessarily be immemorial. [p. 436, cols. 1 & 2.]

Gokul Dichit v. *Maharaj Dichit*, 2 A. L. J. 790; A. W. N. (1905) 266, referred to.

A suit for recovery of a "cess" as a customary due, and not as originating from a contract, is covered by clause 13 of the Second Schedule to Act IX of 1887 and, therefore, is not a Small Cause suit. [p. 434, col. 1.]

The words "cess", "*siwai*", and "*jamabandi*" explained. [p. 435, col. 1.]

Second appeal from the decision of the Additional Judge at Bareilly, dated the 29th January 1921.

JUDGMENT.—Second Appeals Nos. 712 713, 714, 715 and 716 of 1921 all raise the same points. They have been argued together and can be decided in the same judgment. The plaintiff who is the appellant in all these appeals is a Muhammadan gentleman of Bareilly who is the *zemindar* of the village of Nathua Rampura. H asserts, as against certain tenants in the village, his right by immemorial custom to certain dues. The dues in question according to his allegations were payable in kind and varied in the case of the different tenants.

In Appeal No. 712 he claims that Rammon Brahmin was under an obligation to supply him annually with 100 cow-dung cakes of the value of 4 annas and a bundle of chaff of the value of Re. 1.

In Appeal No. 713 he claims that Jhunna Lal Brahmin was under an obligation to supply him annually with 200 cow-dung cakes of the value of Re. 1 and two bundles of chaff of the value of Rs. 2.

In Appeal No. 714 he claims that Raghunandan and Ram Sahai Brahmins were under an obligation to supply him annually with 100 cow-dung cakes of the value of 8 annas and a bundle of chaff of the value of Re. 1.

In Appeal No. 715 he claims that Pyare Lal Brahmin is under an obligation to supply him annually with 100 cow-dung cakes of the value of 4 annas and a bundle of chaff worth Re. 1.

In Appeal No. 716 he claims that Kadha Brahmin was under an obligation to supply him annually with 100 cow-dung cakes of

the value of 8 annas and a bundle of chaff of the value of Re. 1.

I state these facts to show that the customary dues claimed were not claims per capita, and I am unable to understand why the demands varied amongst themselves. There is no suggestion that they were in any way based upon the area of the tenant's holding or the amount of rent paid by him. It would almost appear that the demands were fixed arbitrarily. But in every case the claim is based on custom. There is no suggestion that it is based on contract. The plaints are very similar. They are to the effect that each defendant used to supply these cow-dung cakes and chaff over and above his rent; that the obligation was verified and admitted at the time of the settlement also, and that the said payment has all along been made according to custom. In the 3rd paragraph it is again stated that the right to claim these articles is valid and recorded on the basis of custom. It suggests that the dues were given to compensate the *zemindar* for his generosity in permitting his tenants to carry out their necessary agricultural vocations in the village upon land in the inhabited area without payment of rent. It is necessary to emphasise at the beginning of this judgment that the claim is based on custom and on nothing else. There is no suggestion that any individual defendant ever contracted to give these dues. The plaints continue that inasmuch as the defendant in each case has refused to carry out his obligations the plaintiff should be awarded a money relief in respect of the obligations evaded during the previous three years. The Trial Court arrived in all cases at the conclusion that a custom was proved and granted the plaintiff relief accordingly. The lower Appellate Court found that the suits were not maintainable and dismissed them accordingly. It did not arrive at a clear finding upon the question of custom. The plaintiff appeals here. The amount of money relief sought in each appeal is very small but the question of principle is of importance and it is necessary to go at some length into the various points which have to be decided in order to determine these appeals. The first question which arises is, are these suits maintainable? The last Settlement of this village took place in the year 1897, while the Land Revenue Act, XIX of 1873, was in force, and before the present Land Revenue Act, Local Act III of 1901, came into force. Under the sections relating to the Record of Rights the question of the recording of cesses is treated. Under section 66 the Settlement Officer was ordered to record all the cesses payable by tenants on account of the occupation of land assessed to revenue and taken into account in such assessment, or which, in the case of land not assessed to revenue, would have been taken into such account had the land been assessed, or in lieu of which proprietary rights had been assigned under section 56 (*b*) and to consolidate the cesses with the amount payable by the tenants.

The meaning of this provision is quite clear. There was to be no future separate record of such cesses. They were to be included in the rent and to form part of the rent, and, in those circumstances, they would be recovered with the rent by suit in a Revenue Court. The remainder of section 66 deals with other cesses, that is to say, with cesses unconnected with the occupation of land, and here a very stringent rule is laid down, that unless any such cess is recorded by the Settlement Officer *and is generally or specially sanctioned by the Local Government* it shall not be enforced in any Civil or Revenue Court. The place of record is not stated but as the section is in the portion of the Act referring to the preparation of the Record of Rights (which includes the *Wajib-ul-arz* and the *Dasturdehi*) it is clear that the record if made by the Settlement Officer should be made in the *Wajib-ul-arz* or the *Dasturdehi*. But the mere entry in the *Wajib-ul-arz* or the *Dasturdehi* by the Settlement Officer would not be sufficient to legalise the cess, unless, in addition, the cess was generally or specially sanctioned by the Local Government. This is clear from the wording of the section and the principle has, in addition, been laid down in an old decision of this Court in *Lala* v. *Hira Singh* (1). The section continues that out of the income obtained from cesses not connected with the occupation of land the Local Government may direct expenditure to be made on public objects, such as the conservancy of a village or its watch and ward.

The word "cess" as used in this section and as again used in Local Act III of 1901

(1) 2 A. 49; 1 Ind. Dec. (N. S.) 576.

is not an altogether suitable word to express the meaning of these provisions, for it clearly includes two distinct demands. The first is a demand by the *zemindar* for provision of certain articles or the doing of certain services, for his own personal benefit. When the word is used in this sense it is better to refer to the demand as a demand for dues and in these cases the dues demanded are customary dues. The word "cess" is also used secondarily to denote demands for contributions in cash or kind to be devoted to the benefit of the village as a whole, and when used in that sense the word would almost mean a rate. In Dr. Agarwalla's Commentary on the present Land Revenue Act, 5th Edition, there is a very valuable discussion as to how the two classes of cesses originated. This discussion commences at page 147. For the decision of these appeals I need only refer to the broad division given in section 66. The first class of cesses are now recorded under section 56 of the new Act; and the second class of cesses are now recorded under section 86 of the new Act. It would appear that the lower Appellate Court has treated the claims in these suits as claims falling under the first part of section 66 of the old Act and section 56 of the present Act. On this view he was clearly right to dismiss the suits, for if these cesses were of that class they could only be considered if consolidated with the rent and not otherwise. But in appeal it has been pressed before me that the plaintiff is really claiming cesses of the nature of customary dues such as fall under the second part of section 66 of the old Act and section 86 of the new Act. I am ready to consider the cases from that standpoint. A preliminary objection was taken by the respondents that no second appeals lay, as the suits were suits of a Small Cause Court nature for a relief of less than Rs. 500. I do not consider that that objection will prevail, as clause 13 of the Second Schedule to Act IX of 1887 appears to cover the case. This is taking the view that the dues claimed are customary dues. Of course if the dues had been claimed as originating from a contract the objection would have prevailed.

In spite of the allegation in the plaints that these customary dues were payable in addition to the rent I agree with the learned Counsel for the appellant that they are clearly claimed as " cesses" within the meaning of the second part of section 66 of the old Act, and he is therefore, obliged to establish that they were recorded by the Settlement Officer and generally or specially sanctioned by the Local Government. If he cannot establish these points the suits must fail, even if he can prove a customary right, as the provisions of section 66 of the old Act and section 86 of the new Act lay down that no such cesses can be enforced in any Civil or Revenue Court even if levied in accordance with village custom, unless they have been recorded by the Settlement Officer and generally or specially sanctioned by the Local Government. The decision in *Lala* v. *Hira Singh* (1) is clear on that point. And although it has been decided in *Sisram* v. *Asghar Ali* (2) and *Rangi Lal* v. *Jassa* (3) that, where there was a contract to pay such cesses and the right to collect was not based upon a custom, such cesses could be enforced, and in *Sheoambar Ahir* v. *Collector of Azamgarh* (4) that a suit for a declaration by a tenant that he was not liable to pay cesses, even although his liability was recorded in the *Wajib-ul-arz*, was cognizable by a Civil Court, there has never been any subsequent decision which has modified or overruled the decision in *Lala* v. *Hira Singh* (1). The decision in question lays down clearly and distinctly that a cess levied in accordance with village custom can only be recoverable if recorded by the Settlement Officer and generally or specially sanctioned by the Local Government.

The learned Counsel for the appellant has argued, however, that these conditions are fulfilled in the case of these particular claims, and he has referred me to an extract from the *Jamabandi* of the Settlement of 1897, which he asserts is a record of the custom in question. Now, it is to be noted that, as I read both the old Act and the new Act, if such a custom is recorded by the Settlement Officer it should be recorded in the *Dasturdehi*, which is the recognized record of customs. It is difficult to understand how the record of a custom could find place in the *Jamabandi* and the extract before me is an extract from the *Jamabandi*. The

(2) 16 Ind. Cas. 422; 35 A. 19; 10 A. L. J. 416.
(3) 35 Ind. Cas. 208; 38 A. 286; 14 A. L. J. 393.
(4) 14 Ind. Cas. 138; 34 A. 358; 9 A. L. J. 431.

Jamabandi is a revenue paper which shows the current arrears, demands and collections from every tenant and sub-tenant from the village as well as demands and collections on account of *siwai*. The word *siwai* may be fairly translated as income from miscellaneous sources. An income from customary dues of manure and *bhoosa* would undoubtedly be *siwai* income. But the *Jamabandi* would, in no sense, record the right to obtain such income and even less would it be a record of a custom from which such right was derived. It would merely contain the account that so much had been collected in a particular year under a particular head. It would, at the most, afford proof that such income had been collected, but it could not by any possibility be considered to be the paper in which a Settlement Officer would record the existence of a customary cess in such manner as to bind the inhabitants of the village. And when this entry is examined, it is clear that the Settlement Officer thereby recorded as a fact that certain amounts had been collected under certain heads. He in no way recorded that the Zemindar had a customary right to make the collections. The entry is somewhat peculiar. In the *Jamabandi*, the amount of demands, collections and arrears should be entered against the name of each individual tenant. The paper might almost be considered as a ledger in respect of each tenant's liabilities and payments. But we find that no entry is recorded against the name of any tenant, and that it clearly means that, in that particular year, 1897, the *zemindar* had stated his annual collections from miscellaneous sources from all the tenants in the village in the figures which I now give. The heading is " Items of *siwai*" and then follow the following items :—

	Rs.	a.	p.
For collections in respect of one quarter of bamboos ..	7	8	0
Realisations in respect of *bhoosa*	3	0	0
" " " Cow-dung ..	1	0	0
" " " Hides	2	0	0
Grazing Fees ..	1	0	0
Nazarana ..	8	0	0

It is to be noted that upon the basis of this record the *zemindar* is proceeding now to claim, when he had realised Re. 1 in respect of cow-dung from all the tenants in the village; 4 annas from one tenant; Re. 1 from the second; 8 annas from the third; 4 annas from the fourth; and 8 annas from the fifth, that is to say, 8 annas more than the paper, on which he relies, puts what he had collected from the whole village. It is also to be remembered that there are many tenants in this village and that the *zemindar* is only proceeding against five.

A similar calculation can be worked out in respect of the *bhoosa*. But it is abundantly clear that, whatever evidential value the entry in the *Jamabandi* might have, it in no way can be considered as a record of a custom by the Settlement Officer. And there is not the slightest evidence that there was any general or special sanction by the Local Government. The learned Counsel for the appellants argues that, as the Settlement was confirmed by the Local Government, the Local Government must be considered to have sanctioned every entry in the Settlement papers. The point is really of no importance, as on my finding there was nothing to sanction, but if the Local Government had adopted the course which is suggested, it would have been going against its own rules which had been clearly laid down as long ago as 1876 and which on the facts before me have never been altered. These will be found in the Circulars of the Board of Revenue of the 1890 Edition (the Circular in question, though not cancelled, has not been reprinted)—Circular (X) dated the 27th of April 1876—which lays down direct instructions as to the recording of the cesses under the latter part of section 66, Land Revenue Act, and the words used are as follows :—" As to cesses under clause 2, the Lieutenant-Governor is not disposed to give any general or special sanction at present. When expensive establishments are necessary under clause 3 the Board can make special application for sanction of the cesses which it may be desirable to maintain basing it on the ground of the necessity of providing for the establishment but not on the expediency of maintaining any special class or classes of cess." The meaning of this order is very clear. The Act stated that it was open to the Settlement Officer to record the existence of a village custom permitting demands in respect of customary dues which were not payable directly on account of the occupation of land, but

that, before those demands could become enforceable, it was necessary that they should be generally or specially sanctioned by the Local Government. And the concluding portion of the Circular says very clearly that in 1876 the Local Government laid down as a principle that it did not propose to recognize such cesses or to permit their enforcement, except in very special cases, when it was necessary for the benefit of the village to permit such cesses to be collected in the interests of conservancy, public safety or the like. There are, of course, many instances when the customary right to collect such cesses is recorded and sanctioned. A common case would be the case of weighing dues from which are met the conservancy charges of a market. But this Circular shows clearly that Governement only intended to permit such cesses to be legalised as an exception, and, in these circumstances, the confirmation of a Settlement by the Local Government could not, in any way, be held to take the place of the sanction required by the Act. For the above reasons the appeals would fail. But I am ready to take a further point which I have been pressed to consider by the learned Counsel for the appellants. He argues that if he can prove a custom which would justify the collection of these cesses these appeals should succeed. I do not agree with him that these appeals should succeed even if he could prove such a custom. But it is desirable perhaps to decide the point as to whether any such custom exists. As I have already stated, the lower Court did not decide in so many words as to whether such a custom existed or not. I do not propose to send the case back for a finding of fact upon this point. I have sufficient materials before me to decide it and I propose to decide it under the provisions of section 103, Code of Civil Procedure. The whole of the evidence to establish the custom is the enrty in the *Jamabandi*, to which I have referred, which cannot prove anything more than that sums aggregating Rs. 22-8-0 were collected as *siwai* in the year 1897. (One of the sums, Rs. 8, being on account of *nazrana* and another sum of Re. 1 being on account of grazing dues) the evidence of the *patwari* and a certain number of witnesses. The latter evidence goes no further than to show that the *zemindar* has in the past 20 or 30 years been receiving dues which were paid by certain tenants. But this evidence is absolutely insufficient to establish any thing of the nature of a custom. I am fully aware that it is not necessary in this Province to establish that a custom has been immemorial and I have considered the principles laid down in *Gokul Dichit* v. *Maharaj Dichit* (5) and in previous cases. But after hearing and going through all the above decisions I am satisfied that, applying the most liberal interpretation as to what is necessary to establish the existence of a custom in this Province, the evidence falls ludicrously short of the evidence that would be required to establish such a custom. I am not even certain that the witnesses are honest. It unfortunately is very easy for pressure to be put upon tenants to come forward and depose to the existence of a custom in favour of the *zemindar*. I do not say that that has been done here, but I am not satisfied with the quality of the evidence. And even if I were satisfied with the quality, which I am not, there is not sufficient evidence to establish a custom. This concludes the matter. I dismiss the appeals in question with costs.

S. D. *Appeals dismissed.*

(5) 2 A. L. J. 790; A. W. N. (1905) 266.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 327 OF 1921.

November 20, 1922.

Present:—Mr. Hallifax, A. J. C.

MAHARASHTRAYA JNAN KOSH MANDAL, LTD.—PLAINTIFF—APPELLANT

versus

BIJJULAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. III, r 4—Vakalatnama—*Omission of Pleader's name*—*Acceptance*—*Presentation*—*Requirements of valid* vakalatnama—*Plaint returned for presentation to proper Court*—Vakalatnama, *whether to be returned*—*Duty of Court*—*Prevention of injustice*—*Evidence Act (I of 1872), ss 93, 96*—*Ambiguity*—*Latent and patent*—*Oral evidence, admissibility of.*

The presentation of a plaint is not bad in law owing to the omission of the Pleader's name in the *vakalatnama* when it is otherwise clear that the *vakalatnama* was offered to and accepted by the Pleader making the presentation. Where a party deliv s a duly accepted *vakalatnama* to a Pleader without putting his name in the body thereof he impliedly authorises the Pleader to fill in the detail and if the Pleader simultaneously accepts the *vakalatnama* and signs his name in token of acceptance the provisions of O. III, r. 4, of the Civil

Procedure Code are sufficiently complied with. [p 438, col. 2.]

Raman Lalji v. *Gokul Nathji*, 39 Ind. Cas. 462; 39 A. 313; 15 A. L. J. 309, *Jairam* v. *Motilal*, 58 Ind. Cas. 961; 17 N. L. R. 22, *Chhayunnessa Bibi* v. *Basirar Rahman*, 5 Ind. Cas. 532; 39 C. 399; 11 C. L. J. 285, referred to

Dhanoolal v. *Baji*, 37 Ind. Cas. 103: 12 N. L. R. 189, distinguished.

Mohammad Ali Khan v. *Jasram*, 23 Ind Cas. 464; 36 A 46; 11 A. L. J. 1015 and *Pokhpal Singh* v. *Dambar Singh*, 6 A L. J. 11 *Note*, not followed.

If a plaint is returned for presentation to the proper Court the original *vakalatnama* enures for the purpose of the suit in the Court in which the plaint is subsequently filed under r. 4 (2) of O. III. of the Civil Procedure Code even if it contains no express provision to that effect. [p. 440, col. 2.]

Shah Mukhun Lal v. *Sreekishen Singh*, 8 W. R. 92, *Rajah Sutto Churn Ghossal Bahadoor* v. *Suroop Chunder Doss*, 12 W. R. 465, *Raghunath Singh* v. *Raghubir Sahai*, 15 A. 55; A. W. N. (1892) 222; 7 Ind. Dec (N S.) 751, *Sadashiv Ganpatrao* v. *Vithaldas Nanchand*, 29 B 108; 10 Ind. Dec. (N. S.) 91, *Debilal* v *Krishnaji*, 67 Ind. Cas. 296; (1922) A. I. R. (N.) 125, referred to.

Although O. III, r. 4 of the Civil Procedure Code, provides that the authorization of a Pleader must be in writing this does not mean that such authorization must be in a particular form, or that it must show the Pleader's name in the main body of the document. So long as the authority is in writing and it states that the party authorizes the Pleader to act for him and is signed by the party and the Pleader, there is no relaxation of the provisions of the rule in accepting it. Courts are bound to be astute to prevent the defeat of a just claim, and it is their chief duty to prevent injustice and abuse of their process. [p. 439, col. 2; p. 440, col. 1.]

A patent ambiguity in a document cannot be explained under section 93 of the Evidence Act by oral evidence, but a latent ambiguity can be cleared up by extrinsic evidence under section 96 of the same Act. [p. 439, col. 1.]

Appeal against the decree of the Additional District Judge, Nagpur, dated the 21st March 1922, in Civil Appeal No. 143 of 1920.

Mr. *A. V. Wazalwar*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—The plaintiff-appellant in this case is a Limited Liability Company represented by its Secretary. The defendant failed to pay three calls on shares he held in the Company which fell due on the 6th of January 1917 and two later dates, and this suit was brought for the enforcement of payment of the three amounts so due. The suit was first filed on the 6th of January 1920 in the Court of Small Causes of Nagpur, the plaint being presented by Mr. Wazalwar, a Pleader, who was armed with a proper *vakalatnama*. It was correctly held that the suit was not triable by that Court and the plaint was returned on the 20th February 1920 for presentation to the proper Court, and it was presented on the same day by Mr. Wazalwar to the Court of the Munsif. When a plaint is returned under r. 7 of O. X of the Civil Procedure Code it is, I understand, the invariable practice in the Civil Courts of these Provinces not to return the *vakalatnama* under which it was originally filed. This, as I shall show later, is wrong, but the practice was, of course, followed in this case, and Mr. Wazalwar had to obtain a second *vakalatnama* before he could present the plaint in the Court of the Munsif. In this second *vakalatnama*, which is a printed form, no name was entered in the blank space left in the body of the document after the word "Mr." for the name of the Pleader, but it was signed by the Secretary of the plaintiff Company and also by the Pleader under the printed word "Accepted." All other details were also entered in the appropriate places and the one omission passed unnoticed at the time.

(2) The defendant appeared and contested the claim on pleas mainly based on misunderstood and distorted technicalities, and the case was closed for judgment on the 8th May 1920. The learned Munsif's judgment was on the merits entirely in favour of the plaintiff, but in writing it he came across Mr. Wazalwar's *vakalatnama* and noticed the defect in it. He also imagined there was nothing on the record to show that the plaint was returned by the Small Cause Court on the 20th of February, and later called on the plaintiff to file a certified copy of the entry in the order-sheet of the Small Cause Court showing the date of the return; this was, of course, endorsed on the plaint itself as required by r. 10 (2) of O. VII. That, however, is beside the present point.

(3) In regard to the defect in the *vakalatnama* the learned Munsif called on the plaintiff for an explanation, and the Secretary of the Compay put in a written application for permission to amend the *vakalatnama* by inserting Mr. Wazalwar's name in the blank space, backed by an affidavit that he had given the *vakalatnama* to Mr. Wazalwar intending thereby to appoint him his Pleader and that the omission of his name from the body of the document was an accident due to haste, as the plaint was returned rather late in the afternoon of the 20th of

February and it had to be presented again before 5 P. M. on the same day. There seems to have been little necessity of any affidavit to establish these matters. The learned Munsif considered it necessary to hear the other side, and when the defendant appeared he naturally pleaded that there had been no proper presentation of the plaint on account of the defect in the *vakalatnama* and that no correction of that defect ought to be allowed at such a late stage.

(4) In the judgment it is first found that the plaintiff is entitled on the merits to the decree he claims, and then held that amendment of the *vakalatnama* cannot be allowed and, on the authority of the rulings of this Court in *Dhanoolal* v. *Baji* (1) and of the Allahabad High Court in *Mohammad Ali Khan* v. *Jasram* (2), that presentation of the plaint by the Pleader under the defective *vakalatnama* was no presentation in law. The suit was accordingly dismissed with an unnecessary expression of the mistaken opinion that the claim for the first call would thereby be barred by time; section 14 of the Limitation Act would operate to save limitation if a fresh suit were filed even now. The same view of the matter of the presentation of the plaint was taken in the Court of the District Judge and the plaintiff's appeal was dismissed. He has now come here in second appeal.

(5) There are so many points of view from which this decision can be seen to be wrong that it is not easy to state them all. The ruling of Stanyon, A. J. C., in *Dhanoolal* v. *Baji* (1) is easily distinguishable. In that case the Pleader who presented the appeal had no written authority at all; he had merely added his signature to the acceptance of a *vakalatnama* given to another Pleader, who apparently had the power to delegate his authority but had not done so in writing. My learned predecessor expressed his concurrence with the ruling of the Allahabad High Court in *Mohammad Ali Khan* v. *Jasram* (2), but him elf drew the di tinction whi h I have pointed out when he said: "We do not find here, as was the case before the Allahabad Judges, a belated objection to a mere inadvertent omi sion from the body of the *vakalatnama* of the name of a Pleader whom the appellant desired to appoint. Here there was no power at all in favour of the Pleader who presented the appeal, but his unauthorised and improper signature on a power given to another Pleader and objection was taken at the first hearing, *inter partes*."

(6) The facts of the Allahabad case certainly do appear to be exactly those of the present case, but I feel bound, with all due respect, to dissent from the decision on them. Mittra, A. J. C., has already expressed his dissent in the unreported* case of *Masumbi* v. *Dongar Singh* [Second Appeal No. 497 of 1917, dated 24th February 1919] in the following words: "A preliminary objection has been raised on behalf of the respondents that the appeal was not properly filed, inasmuch as the name of the Pleader who filed it has been omitted in the body of the *vakalatnama*. In support of this, reliance is placed upon *Mohammad Ali Khan* v. *Jasram* (2). The learned Judges of the Allahabad High Court follow an earlier ruling of that Court in *Pokhpal Singh* v. *Dambar Singh* (3). I have not been able to trace that ruling, and as no reasons are given in the decision reported in the Indian Law Reports, I must decide the case upon a construction of the Civil Procedure Code bearing on the point. O. III, r. 4, requires the appointment of a Pleader to be in writing signed by the person for whom the Pleader is to appear and to act, and every such appointment when accepted by a Pleader shall be filed in Court. Where a party delivers a duly signed *vakalatnama* to a Pleader without putting his name in the body of the *vakalatnama* he impliedly authorises him to fill in the detail, and if, as in this case, the Pleader simultaneously accepts the *vakalatnama* and signs his name in token of acceptance, the provisions of the law have been sufficienltly complied with. The acceptance is in writing and was made in the presence of the party's agent who executed the power-of-attorney. The irregularity passed unnoticed in the office, otherwise the appellant's Pleader had sufficient time to have the oversight rectified. I hold, therefore, that no objection can be successfully taken to the proper presentation of the appeal."

(7) I agree in this expression of opinion,

(1) 37 Ind. Cas. 103; 12 N. L. R. 189.
(2) 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015.
(3) 6 A. L. J. 110 *Notes*.

*Since reported in 55 Ind. Cas. 415.—[*Ed.*]

and I might add that in the Allahabad case it was taken for granted, or rather as settled in the previous undiscoverable case, that the presentation was invalid, and the only matter really examined was whether it made any difference that the objection to its invalidity was taken at such a late stage in the case. The matter seems to me entirely one of the admissibility of evidence. There was certainly an authorisation in writing of a sort, but its terms are ambiguous and do not clearly indicate that Mr. Wazalwar was the Pleader authorised by it. If further evidence can be received to clear up that ambiguity, then we have it in abundance and the document becomes clear and complete. If that evidence is to be excluded the document by itself cannot possibly be called an authorisation of Mr. Wazalwar or anybody else. The evidence is undoubtedly excluded in the first place by section 91 of the Evidence Act, but I am very distinctly of opinion that the ambiguity in the document is not a patent ambiguity such that section 93 of the Evidence Act would exclude evidence to explain it, but is a latent ambiguity which may be cleared up by extrinsic evidence under section 96 of the same Act. The meaning of the document as it stands is : " I give this *vakalatnama* to one of the Pleaders practising in the Court of the Munsif of Nagpur." That makes it clear that the language was meant to apply to one only of several ascertained persons, and evidence may, therefore, be given of facts which show to which of these persons it was intended to apply.

(8) The reasons for the opinion distinctly expressed in both the lower Courts that amendment of the *vakalatnama* could not possibly be allowed are hard to understand. The learned Additional District Judge says the mistake can be condoned, but he probably meant to offer sympathy and not condonation to the plaintiff, as he goes on to say that to allow the Pleader's name to be inserted after the case had been closed " would be an act not warranted by law or equity." There might conceivably be some law forbidding such an act, though there is not, but equity and ordinary common sense very loudly demand that that correction of the formal defect, if indeed it can seriously be called a defect at all, should be allowed, not refused. The main basis of the refusal in both judgments appears to be the very sound but inapplicable principle stated in *Dhanoolal* v. *Baji* (1) that " the provisions of O. III, r. 4, Civil Procedure Code, 1908, are clear and imperative and the Courts have no power to relax them." There is no question, as seems to have been assumed, of allowing the plaintiff's Pleader to appear and act for him without written authority. He had a written *vakalatnama* of a sort, and the only question was whether it was of the proper sort. The rule provides that the authorisation must be in writing, not that it must be in any particular form, nor that it must show the Pleader's name in the main body of the document. As long as it is a writing which states that the party authorises the Pleader to act for him and is signed by the party and the Pleader, there is no relaxation of the provisions of the rule in accepting it. From the document in this case it certainly was not apparent at the first glance that Mr. Wazalwar was the Pleader authorised by it, but there would be just as much doubt if an ignorant European plaintiff had given him a *vakalatnama* in which he entered his name as Mr. Budge L. Warre, and I feel confident that such a *vakalatnama* would always be accepted, probably without any question.

(9) The observations of Piggott and Walsh, JJ., in *Raman Lalji* v. *Gokul Nathji* (4), which are quoted in *Jairam* v. *Motilal* (5), as pertinent to that case, are all equally applicable here, but only the last two sentences need be repeated. The learned Judges said : " It is not in the interests of the litigants themselves that a Court should be astute to defeat a claim, not on a consideration of the merits but on some technical point of procedure. There is no defect in procedure which anybody is capable of making which cannot, as a rule, be amended and compensated for by an order as to costs." I would go further and say that the Courts are bound to be astute to prevent the defeat of a just claim in this way ; the astuteness shown here was not only for the promotion of injustice but also mistaken and, above all, came spontaneously from the Court. In allowing an amendment to be made in exactly similar circumstances to those of the present cases in *Chhayunnessa Bibi*

(4) 39 Ind. Cas. 462; 39 A. 343; 15 A. L. J. 309.
(5) 58 Ind. Cas. 961; 17 N. L. R. 22.

v. *Basirar Rahman* (6) the learned Judges of the Calcutta High Court remarked: "No comprehensive formula can be framed to define precisely the power of a Court to allow such amendments to be made, but this much may be laid down as the cardinal rule, that the allowance of amendments must in every stage of the case rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. If a limit to amendments may be laid down, it is this: that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court."

(10) I am prepared to go much further in this particular case and to say that even if the defect in the *vakalatnama* had been brought to the notice of the Court by the defendant, it would have been practically outside its discretion to refuse to allow the amendment. In *Kendall* v. *Hamilton* (7) Lord Penzance observed that " procedure is 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." Section 151 of the Civil Procedure Code reminds us of the inherent and already existing power of a Court to prevent injustice and abuse of its own process. But to do that is much more than a matter within the power of the Court; it is its first duty, and indeed the chief if not the only object of its existence. Here the irregularity or defect in form or procedure, if any such term is applicable, has not made one atom of difference to anybody; nobody has been damaged or benefited by it in the slightest degree, and if throwing out the plaintiff's claim for such a reason is not allowing or rather perpetrating an injustice, and if letting the defendant succeed for such a reason is not helping him to abuse the process of the Court to his unrighteous advantage, I do not know what injustice or abuse of the process of the Court is.

(6) 5 Ind. Cas. 532; 39 C. 399; 11 C. L. J. 285.
(7) (1879) 4 A. C. 504 at p. 525; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97.

(11) Another of the reasons for which it must be held tha Mr. Wazalwar had full and proper authority to act for the plaintiff and to present the plaint in the Court of the Munsif, is that the *vakalatnama* which he presented with it in the Small Cause Court, was still in force and empowered him to present the plaint in the Munsif's Court as well, though it was wrongly retained in the Small Cause Court when the plaint was returned to him. As far as I have been able to ascertain, the printed forms of *vakalatnamas* used in these provinces contain no express provision authorising the Pleader to present the plaint in another Court if it should be returned under r. 7 of O. X by the Court to which it is originally presented, and I would call the attention of the Bar Association, as I did in another case decided earlier in the year, to the desirability of having some such express provision in the printed forms generally used. The provision is, in my opinion, not actually necessary, as I shall proceed to explain, but it might well be inserted *pro majore cautela*. The number of cases that are instituted on the last possible day, as this was, is astonishingly great, and when the plaint in such a case is returned to the Pleader who filed it, if he has to get a fresh *vakalatnama* and his client does not happen to be present, the suit is bound to be time-barred.

(12) But it appears to me that the original *vakalatnama* enures for the purposes of the suit in the Court in which the plaint is subsequently filed, under r. 4 (2) of O. III, even if it contains no express provision to that effect, and therefore, ought in every case to be returned along with the plaint. That it must be returned if it does contain such a provision is, of course, beyond question, but I doubt whether a *vakalatnama* has ever been examined to see whether it did or did not. The express provision that a *vakalatnama* remained in force till all proceedings in the suit were ended first appeared in the Procedure Code of 1882. But the principle had been accepted long before that. In 1867 in *Shah Mukhun Lal* v. *Sreekishen Singh* (8) the Calcutta High Court allowed a Pleader to appear without fresh authority in an application for leave to appeal to the Privy Council, because he

(8) 8 W. R. 92.

had filed a *vakalatnama* in the appeal to the High Court. Similarly, in 1869, the Pleader who had appeared in the original suit which was dismissed in default was held in *Rajah Sutto Churn Ghossal Bahadoor* v. *Suroop Chunder Doss* (9) not to require a fresh *vakalatnama* to enable him to file an application for restoration. In 1892 in *Raghunath Singh* v. *Raghubir Sahai* (10) the Allahabad High Court allowed a Pleader to put in an application for the restoration of an appeal that had been dismissed in default by virtue of the *vakalatnama* authorising him to conduct the appeal. Lastly, the Bombay High Court in 1895 enunciated in *Sadashiv Ganpatrao* v. *Vithaldas Nanchand* (11) the principle that has always been accepted since then, that for the purposes with which we are now concerned execution proceedings are a part of the original suit. [*Debilal* v. *Krishnaji* (12).] I cannot see how the presentation of a plaint in another Court, after its return by the Court to which it was first presented by mistake is less a continuation of the original suit than the various proceedings mentioned in these cases.

(13) Finally, I may add this. If the defect in the *vakalatnama* were an absolute technical bar to the success of the plaintiff's suit, I should still feel bound to carry out my duty of passing such orders as are necessary to prevent injustice. Those orders would be that the defendant should pay the whole costs of this litigation up to the present, and delivery of this judgment would be held up till the plaintiff had made all arrangements to file a fresh suit on the day of its delivery. Under section 14 of the Limitation Act that suit would be treated as filed on the day on which the original presentation was made in the Small Cause Court. It may be that on these findings the respondent is in strictness entitled to have the case remanded to the lower Appellate Court for a decision of the appeal on the merits which has not been given in that Court, though I do not think he is. But his learned Pleader does not ask for any such remand, seeing that the decision is a foregone conclusion and the remand can only add to the costs he will have to pay. The decree of the lower Appellate Court will be set aside and in lieu of it a decree will issue ordering the defendant to pay to the plaintiff Company the full amount claimed together with interest thereon at five per cent. per annum from the date of the institution of the suit till the date of actual payment and also all the costs of the whole litigation.

G. R. D. *Decree set aside.*

(9) 12 W. R. 465.
(10) 15 A. 55; A. W. N. (1892) 222; 7 Ind. Dec. (N. S) 751.
(11) 20 B 198; 10 Ind. Dec. (N. S.) 691.
(12) 67 Ind. Cas. 295; (1922) A. I. R. (N.) 125.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1092 OF 1921.
January 9, 1923.
Present :—Mr. Justice Gokul Prasad.

LACHMAN DAS AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MULCHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pleadings—Suit for ejectment of tenant—Denial of plaintiff's title—Tenancy not proved—Ownership found in plaintiff—Decree for ejectment, whether may be passed—Fraudulent transfer—Fraud carried out—Advantage of one's own fraud—Estoppel.

Where in a suit for ejectment of a tenant the defendant denies the title of the plaintiff to the property, the latter, if he proves his ownership, is entitled to a decree for ejectment even though he fails to prove the specific tenancy set up by him, as in such a case the defendant cannot be said to have been taken by surprise. [p. 442, col. 2.]

Balmakund v. *Dalu*, 25 A. 498; A. W. N. (1903) 112 (F. B.), relied upon.

Shivabasava v. *Sangappa*, 29 B. 1; 1 A. L. J. 637; 8 C. W. N. 865; 6 Bom. L. R. 770; 8 Sar. P. C. J. 720; 31 I. A. 15 (P. C.), distinguished.

If an owner of a certain property transfers it fraudulently in order to defeat his creditors and thus succeeds in compounding the claims of all his creditors for much smaller amounts than they were entitled to, he is precluded from subsequently putting forward his own title to the property by taking advantage of his own fraud. [p. 442. col. 2.]

Pethperumal Chetty v. *Muniandy Servai*, 5 A. L. J. 290; 10 Bom. L. R. 590; 12 C. W. N. 562; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 265 (P. C.), followed.

Second appeal from the decree of the District Judge, Jhansi, dated the 7th of April 1921.

Mr. *Haribans Sahai* and Dr. *S. N. Sen*, for the Appellants.

Mr. *S. P. Sinha*, for Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment and arrears of rent brought against them by the plaintiff. The pleas taken in defence were that the plaintiff was not the owner of the house, he having sold it to his own father-in-law in 1895. It was further pleaded that the defendants had become owners thereof by virtue of adverse possession for more than 12 years. It also came out that during the trial of the suit in the First Court the plaintiff had sold the house to one Khub Chand. The Trial Court found, (1) that the plaintiff was the owner, (2) that the tenancy had not been proved, and (3) that the defendants did not acquire title by prescription. It decreed the claim for ejectment and dismissed that for rent. The defendants went up in appeal and the plaintiff filed cross-objections. The learned Judge of the lower Appellate Court confirmed the findings of the First Court and dismissed the appeal. He also found that the sale of 1895 by the plaintiff to Bansi Dhar, his father-in-law, was made to defeat creditors and was fictitious and fraudulent with the result that the plaintiff compounded the claims of the creditors at annas four in the rupee with some and at annas eight in the rupee with the others and, therefore, the defendants could not rely on that sale in defeasance of the plaintiff's claim. He also held that the second sale made during the pendency of the suit did not affect the claim. The defendants come here in second appeal and their first contention is, that the plaintiff's claim, based on the tenancy of the defendants, having failed the suit should have been dismissed and reliance has been placed on the case of *Shivabasava* v. *Sangappa* (1). That case does not apply to the facts of the present case, but the case which is exactly on all fours with the present case is the case of *Balmakund* v. *Dalu* (2), where it was held that, although the plaintiff failed to prove the specific tenancy set up by him, he was entitled to a decree on the ground of ownership, because the defendant had in no way been taken by surprise. In this case also the plea of ownership has been tried and found against the defendants. This ground of appeal fails. The second plea taken in appeal is, that the plaintiff having succeeded in carrying out the fraud under the sale-deed of 1895 and being able to compound the claims of his creditors for much smaller amounts than they were entitled to, is now precluded from putting forward his own title to the property by taking advantage of his own fraud. This plea has a good deal of force behind it [see the case of *Petherpermal Chetty* v. *Muniandy Servai* (3)]. This plea must prevail. The third plea taken is that the plaintiff had no title at the date of the decree because of the sale of the 26th of November 1919 during the pendency of the suit in favour of Khub Chand and reliance is placed on the case of *Ram Gopal* v. *Piari Lal* (4). It is not necessary to deal at length with this plea, because the suit ought to have been dismissed on the second plea which I have discussed above. The upshot of the above findings is, that the plaintiff's suit ought to have been dismissed. I, therefore, allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's claim with costs in all Courts.

S. D. *Appeal allowed.*

(1) 29 B. 1; 1 A. L. J. 637; 8 C. W. N. 865; 6 Bom. L. R. 770; 8 Sar. P. C. J. 720; 31 I. A. 154 (P. C.).

(2) 25 A. 498; A. W. N. (1903) 112 (F. B.).

(3) 5 A. L. J. 290; 10 Bom. L. R. 590; 12 C. W. N. 562; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 72; 4 L. B. R. 266 (P. C.).

(4) 21 A. 441 at p. 445; A. W. N. (1899) 163; 9 Ind. Dec. (N. S.) 988.

DHAH KUMARI DEVI V. MAHENDRA SINGH.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 23 OF 1922.

November 25, 1922.

Present:—Mr. Batten, J. C. and Mr. Hallifax, A. J. C.

Rani Saheba Rani DHAN KUMARI DEVI —NON-APPLICANT—APPELLANT

versus

Thakur MAHENDRA SINGH—APPLICANT —RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 17, 19, 25—Minor—Father not unfit—Guardian, appointment of—Father, suit by, for custody of minor, competency of.

No order declaring or appointing a guardian of a minor's person can be made under section 19 of the Guardians and Wards Act during the lifetime of the minor's father unless, in the opinion of the Court, he is unfit to be such a guardian. [p. 444, col. 1.]

Annie Besant v. *Narayaniah*, 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.), followed.

The provisions of section 19 of the Act are not subject to those of section 17, but expressly override them. [p. 444, col. 1.]

There is no provision under the Guardians and Wards Act by which a father can obtain the custody of his minor child who has never been in his custody before. [p. 444, col. 2.]

Achratlal Jekisendas v *Chimanlal Parbhudas*, 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582, referred to.

Sham Lal v. *Bindo*, 26 A. 494; 1 A. L. J. 266; A. W. N. (1904) 135, not followed.

Appeal from the order of the District Judge, Saugor, dated 27th April 1922, in Miscellaneous Judicial Case No. 40 of 1921.

Messrs. *M. Gupta* and *G. L. Subhedar*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—This appeal and the cross-objection filed by the respondent under r. 22 of O. XLI, First Schedule of the Civil Procedure Code, arise from an order of the District Judge, Saugor, under the Gaurdians and Wards Act, VIII of 1890, appointing guardians of the person and property of the minor daughter of the respondent, a little girl 3 years old. The respondent, Thakur Mahendra Singh, a Deputy Collector in the United Provinces, applied under section 9 of the Act to be appointed the guardian of the person and property of his minor daughter. The non-applicant, the present appellant, is the maternal grandmother of the minor who since her birth has resided with her and her husband, who died during the proceedings in the lower Court. (It is to be mentioned that though the order-sheet of 25th February 1922 states that he is dead and his name is struck off, his name is even now to be found throughout the record as the first non-applicant). The minor's mother, the respondent's wife, died shortly after the birth of the child. The learned District Judge appointed the minor's father and grandmother as joint guardians of the person and property of the minor until she completes her seventh year, ordering that till that date she is to remain in the custody of the grandmother and the father is at all times to be allowed to have access to her. As regards the property, it was ordered that the shares and other property of the minor shall be transferred by the grandmother into the joint names of herself and the child's father and interest shall be invested in Government Securities for the minor's benefit. It was also ordered that on the minor's completing her seventh year she and all her property are to be handed over to her father who will thenceforth be the sole guardian of her person and property.

In this Court neither party wishes to have any interference made with the order of the District Judge regarding the minor's property. The grandmother appeals against the limitation of her guardianship to the completion of the minor's seventh year and asks that she may remain as joint guardian of the minor's person until the girl attains her majority. The father makes a cross-objection claiming to be appointed the sole guardian of the person of his minor daughter.

The learned Judge is of opinion that sub-section (*b*) of section 19 of the Guardians and Wards Act precludes the Court from appointing any one other than the father of the minor as guardian of the minor unless the minor's father is found by the Court to be unfit to be guardian of the minor's person. He has, however, expressed the view that section 19 is subject to the provisions of section 17 of the Act and has held that he is bound to consider what will be for the welfare of the minor. In view of the principles laid down in section 17 he has made the arrangement de-

tailed above. The learned Judge has taken a wrong view of the law, and has read the word "unfit" in section 19 as meaning "less fit than some other possible person." The relevant portions of section 19 are as follows: "Nothing in this Chapter shall authorise the Court, . . . to appoint and declare a guardian of the person . . . . of a minor whose father is living, and is not, in the opinion of the Court, unfit to be guardian of the person of the minor." Section 17 is in the same Chapter of the Act and it is clear that nothing in section 17 authorises the Court to appoint any guardian of the person of a minor whose father is living and is not unfit to be her guardian. The words of section 19, so far from being subject to the provisions of section 17, expressly override them. No other view of the meaning of section 19 is possible, but if any authority is needed it is to be found in the judgment of their Lordships of the Privy Council in *Annie Besant* v. *Narayaniah* (1), a case cited by the learned Judge himself, where it is said: "no order declaring a guardian could, by reason of the 19th section of the Guardians and Wards Act, 1890, be made during respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case." Here the Court has found the father a fit person to be a guardian of the minor, for the learned Judge has appointed him to be a joint guardian. While a father is alive who is not unfit to be guardian of the minor's person, no one, not even the father himself, can be appointed guardian of the minor's person. In holding that the father's remedy lay by an application to be made a guardian of the person of his minor daughter under the Guardians and Wards Act and not by a separate suit, the learned Judge has relied on *Sham Lal* v. *Bindo* (2) in which it was held that a suit would not lie and that the father should make an application under the Guardians and Wards Act. It is to be observed that the learned Judges made no reference to the provisions of section 19, Guardians and Wards Act, which apparently was not brought to their notice. In *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (3) it was held that where the parents are not European British subjects no one can be appointed guardian of the person of a minor if the father is alive and is not, in the opinion of the Court, unfit to be the guardian of the minor's person. It was also held that the father had no remedy under section 25 of the Act since he had never had the custody of his infant child; the same is the case here. There is thus no provision under the Guardians and Wards Act by which the father in this case can obtain the custody of the child. The application to the District Judge was misconceived and the District Judge had no power to pass the order which he has passed appointing guardians of the minor's person.

The order of the District Judge so far as it relates to guardianship of the person of the minor is set aside and the application made by the respondent to the District Judge is dismissed. The parties will bear their own costs throughout.

G. R. D. *Appeal dismissed.*

(1) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.).

(2) 26 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135.

(3) 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 1193 OF 1921.

January 10, 1923.

Present:—Mr. Justice Gokul Prasad.

MUKHTARA—DEFENDANT—APPELLANT

versus

SARDARA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 26, 31—Issues referred to lower Court—Return received—No objection made within time—Duty of Appellate Court.

On the receipt of findings on issues referred to a lower Court, under r. 25 of O. XLI, Civil Procedure Code, it is the duty of the Appellate Court, under r. 31 of O. XLI, to consider the findings on the merits even if no objection has been preferred under r. 26 of O. XLI, within the time fixed by the Court.

Mumtaz Begam v. *Fateh Husain*, 6 A. 391; A. W. N. (1884) 129; 4 Ind. Dec. (N. S.) 61, followed.

Second appeal against the decree of the Additional Judge, Meerut, dated the 4th of August 1920.

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

Mr. *S. B. Johari*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for possession of a house against the defendant as a trespasser. The suit was decreed by the Court

of first instance. The defendant went up in appeal and the learned Judge of the lower Appellate Court referred certain issues for trial to the Court of first instance. After the findings which were against the defendant had been received the defendant failed to prefer objections to the findings within ten days' time allowed. The learned District Judge thereupon without considering the findings on the merits decided the appeal considering those findings to be final, and dismissed the appeal. The defendant comes here in second appeal and says that this action of the learned District Judge was not warranted by law, and that he ought to have himself considered whether the findings were good or bad findings and should have then decided the case. In support of this contention the case of *Mumtaz Begam* v. *Fateh Husain* (1) has been referred to me. This contention is fully borne out by the ruling relied upon and the learned District Judge ought to have himself considered the correctness or otherwise of the findings returned by the Munsif before deciding the appeal. I, therefore, refer the following issue to the lower Appellate Court for decision :—

(1) Was the house in dispute appurtenant to Shibba's holding or not, and did it revert to the *zemindar* on his dying issueless ?

The Court below will decide the issue on the evidence already on the record and return its finding to this Court at an early date. On receipt of the finding the usual ten days will be allowed for objections.

S. D. *Issue remitted.*

(1) 6 A. 391; A. W. N. (1884) 129; 4 Ind. Dec. (N. S.) 61.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 449-B OF 1921.

November 20, 1922.

Present:—Mr. Kotwal, A. J. C.

ARJUN—DEFENDANT—APPELLANT

versus

NARAYAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 114—Lease—Non-payment of rent—Forfeiture, relief against—Period of grace in lease, effect of,—Failure to pay arrears in lower Court—Plea of payment—Failure to prove—Relief against forfeiture, grant of—Discretion of Court.

The fact that a period of grace is allowed by a lease for the payment of rent is no bar to the granting of relief against forfeiture, as the law treats the condition of forfeiture as a penalty intended to enforce the payment of the rent and liable to be relieved against by the Court. [p. 446, col. 2.]

A Court of Appeal is not precluded from granting relief against forfeiture because the offer to pay the arrears was not made in the lower Courts. [p. 447, col. 1.]

Vidyapurna Thirtha Swamiar v. *Rangappayya*, 21 Ind Cas 405; 25 M. L. J 486; 14 M. L. T. 344; (1913) M. W. N. 901, followed.

The failure of a tenant to prove a plea of payment set up by him does not necessarily in itself disentitle him to the equitable relief against forfeiture. [p. 447, col. 1.]

Ramakrishna Mallay v. *Baburaya*, 17 Ind. Cas. 947; 23 M. L. J 715; 12 M. L. T. 656, followed.

But a Court does not exercise its discretion improperly in refusing to grant relief against forfeiture when there is the failure of the plea of the payment coupled with the failure to offer the arrears during the hearing in the lower Courts and particularly the fact that a sufficiently long period of grace given by the lease was allowed to pass without payment. [p. 447, col. 1.]

Appeal from the decree of the Second Additional District Judge, Amraoti, dated 23rd November 1921, in Civil Appeal No. 121, of 1921.

Sir *B. K. Bose*, Messrs. *V. Bose* and *R. R. Jaiwant*, for the Appellant.

Mr. *M. B. Niyogi* and Mr. *K. V. Brahma*, R B., for the Respondent.

JUDGMENT.—The plaintiff's father Madhobhat was the manager of the Shri Narshiwa Saraswati Deosthan of Anji in the Kelapur Taluk till 1920 when he was removed from the management, and the plaintiff was appointed in his place. In 1901 Madhobhat had given to the defendant a permanent lease in writing of S. No. 9 of Mouzah Anji which belonged to the Deosthan. The plaintiff as manager of the temple sues for possession of the field on the grounds, among others, that the lease was not for the benefit of the temple and Madhobhat had no authority to give it, and that it had been forfeited for non-payment of rent for the year 1919-20 under an express condition of forfeiture in the lease. The Trial Court held that Madhobhat had exceeded his powers in giving a permanent lease which was not for the benefit of the temple and that the defendant had by non-payment of the rent for

feited his lease, and decreed the plaintiff's suit. The lower Appellate Court found that the lease was for the benefit of the temple. It, however, confirmed the decree of the Trial Court on the ground that the defendant had forfeited his lease by non-payment of rent for the year 1919-20. It held that under the special terms of the lease it could not grant relief against forfeiture, nor did it appear to it necessary to do so. The defendant appeals.

In his grounds of appeal he urges that the condition in the lease and *kabuliyat* is really not one of forfeiture and that in any case, the forfeiture should have been relieved against. The respondent by way of objections urges that the permanent lease was not for the benefit of the temple and should not have been given effect to. He does not dispute that relief can be granted on equitable grounds in the present case which is one of an agricultural lease. The learned Advocate for the appellants who argued th s appeal had apparently been given to understand that a *kabuliyat* corresponding to the *patta* (Exhibit P-2) but containing somewhat different recitals was filed in the record. The *kabuliyat*, however, has not been filed and consequently he gave up his first ground.

The *patta* states:—

"S. No. 9 * * * * has been leased out for Rs. 28. Accordingly you should cultivate the same and pay the lease money on the 15th January.* * Unless you relinquish the field I would not take it from you and would not remove you from possession, but if you fail to pay the lease-money by the end of August the field would be taken."

It is now admitted by the appellant's Advocate that this amounts to a condition of forfeiture.

As regards relief against forfeiture, the lower Appellate Court writes:—

"But the document Exhibit P-2 shows that the rent was payable on the 15th January each year and though the provision as to forfeiture is penal, it gave the defendant a period of grace till the end of August for payment. In such a case it cannot be said that the provision as to forfeiture was intended to be *in terrorem* which the Court should relieve against [see *Naraina Naika* v. *Vasudev Bhatta* (1)]."

(1) 28 M. 389; 15 M. L. J. 208.

The case cited above was considered in *Appayya Shetty* v. *Mahammad Beari* (2) where the fact that a period of grace was allowed by the lease was held to be no bar to the granting of relief against forfeiture. To the same effect is the case in *Krishnaji Govind* v. *Sitaram Hanmant* (3). The law as to forfeiture for non-payment of rent in England, to which a sufficient reference has been made in *Appayya Shetty* v. *Mahammad Beari* (2), goes further than the enacted law in India and allows relief even after judgment. In my opinion, the later Madras decision and the Bombay case take the proper view. The law treats the condition of forfeiture as a penalty intended to enforce the payment of the rent and liable to be relieved against by the Court. Assuming that the period of grace till the end of August did not find place in the lease in dispute and that the condition of forfeiture was to operate on default in payment on the 15th January, the condition would undoubtedly have been penal, and in such a case the extent of the relief in point of time would have been within the discretion of the Court. To contend that the fixing of a period of grace in the lease ties the hands of the Court is to contend that it is open to the lessor to take away the discretion of the Court to decide what the extent of the relief shall be. If the lease fixes, say, one day only as the period of grace, it cannot be said that the hands of the Court are tied, and that it cannot grant the relief which it considers would be equitable in the case. I, therefore, think that it cannot be laid down broadly that if a lease provides for a period of grace, the Court has no power to relieve against forfeiture for default in payment of rent.

The question, therefore, is whether in this particular case relief should be granted. The discretion in granting relief against forfeiture for default in payment of rent should as a rule be exercised in favour of the lessee, unless sufficient reasons for refusing it are shown. The lower Appellate Court has held that it does not appear necessary to grant the relief in the present case. The defendant resisted the plaintiff's claim on the ground, among others, that he had paid the rent for 1919-20 but failed to prove the payment.

(2) 30 Ind.Cas. 596; 39 M 834 at p. 835; 29 M. L. J. 381; 18 M. L. T 336; (1915) M. W. N 857.
(3) 59 Ind Cas 769; 45 B 300; 22 Bom. L. R 1439.

Though he took a number of alternative pleas to defeat the plaintiff's claim for ejectment, he did not pray for relief against forfeiture and did not offer to pay the rent in case his plea of payment was not proved. The suit was instituted on the 22nd December 1920 and was decided against the defendant on the 16th July 1921. The appeal to the lower Appellate Court was filed on the 16th August 1921. It was heard on the 2nd November 1921 and the 12th November 1921 was fixed for judgment. Judgment not being ready on that day it was postponed to the 23rd November 1921. It was only on this day that the appellant offered to deposit the rent in Court and even then asked for a fortnight's time to do so, though the amount of rent was a small one. In *Ramakrishna Mallay* v. *Baburaya* (4) it was held that the failure of the tenant to prove the plea of payment set up by him did not necessarily in itself disentitle him to the equitable relief, and in *Vidyapurna Thirtha Swamiar* v. *Rangappayya* (5) the learned Judges thought that they were not precluded in second appeal from granting relief against forfeiture because the offer to pay the arrears was not made in the lower Courts. But considering all the facts together, *viz.*, the failure of the plea of payment, the failure to offer to pay the arrears during the hearings in the lower Courts and particularly the fact that a sufficiently long period of grace given by the lease was allowed to pass without payment, I am not prepared to say that the lower Appellate Court has exercised its discretion improperly in refusing to grant the relief.

As the plaintiff succeeds on the ground of forfeiture, it is unnecessary to go into the question whether the lease should not be given effect to on the ground of its not being for the benefit of the temple.

The appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(4) 17 Ind Cas 947; 23 M.L.J. 715; 12 M. L. T 656.
(5) 21 Ind. Cas. 405; 25 M.L.J. 486; 14 M.L.T. 344; (1913) M. W. N. 901.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 798 OF 1921.
December 22, 1922.
Present:—Mr. Justice Ryves.
SITA RAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
CHAIT RAM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 79, 167—Declaratory suit between rival tenants—Forcible dispossession of person recorded as tenant in Khewat *—Claim for possession as occupancy tenant and damages for crops cut—Jurisdiction of Civil and Revenue Courts—Claim for damages, whether must fail if claim for possession fails for want of jurisdiction—Possession, suit for—Plaintiff must prove better title than defendant's.*

A suit for a declaration between two rival tenants may be brought in a Civil Court. But where on the death of an occupancy tenant, a person, not an heir, takes possession of the holding and gets himself recorded in the *Khewat* as an occupancy tenant in succession to the deceased, and on being forcibly dispossessed by a person who takes a registered lease from the *Zemindar*, brings a suit for possession of the holding "*together with occupancy rights*", that is, brings a suit not merely for possession of the holding, but also wants to get back possession "*as the occupancy tenant in succession to the deceased*", the suit is not cognizable by a Civil Court and must be brought in a Revenue Court, under section 79 of the Tenancy Act with the *Zemindar* as a defendant. [p. 450, col. 1.]

Where a suit for possession and damages for crops forcibly cut and appropriated is brought in a Civil Court, and the claim as to possession fails on the ground that it is cognizable, only by a Revenue Court, the claim for damages must also fail. [p. 450, col. 2]

A suit for possession must fail where the plaintiff fails to prove a better title than that of the defendant. [p. 450, cols. 1 & 2]

Second appeal from the decision of the District Judge, Farrukhabad, dated the 18th of February 1921.

JUDGMENT.—This appeal raises a very difficult question of law in the conflict of jurisdiction between the Revenue and Civil Courts.

The plaintiff, Chait Ram, brought this suit in the Court of the Munsif of Kanauj on the following allegations:—

(1) Plot No. 3404 was part of the occupancy holding of one Ghissa deceased. The plaintiff alleged himself to be Ghissa's first cousin, (that is, Ghissa's father's sister's son,) and he says, that during Ghissa's lifetime he was joint with him in culti-

vation and after Ghissa's death became the rightful owner and possessor of the entire agricultural holding. (2) Besides this, after the death of Ghissa, the plaintiff was recognized by all the Zemindars of the said cultivatory holding as its occupancy tenant, and Raghubar Dayal, the *Lambardar* of the village, testified to his being an occupancy tenant in the village papers before the officers concerned. (3) The plaintiff pays the rent of the holding in dispute to the Zemindars, and in this way also, has acquired occupancy rights in respect thereof. (4) The defendants in collusion with the *Lambardar* and others forcibly cut and appropriated in March 1920 the *Rabi* crop which the plaintiff had sown on this field, during his absence. It is further alleged that the defendants have no connection or concern of any kind either with the said cultivatory holding or with the said crop. In the 6th paragraph of the plaint it is stated that when the plaintiff returned and complained to the defendants about their wrongful acts the defendant No. 1 said that he was himself the tenant of the said holding under a lease.

This allegation is said to be quite false. It is denied that defendant No. 1 could get any rights under any lease and that the lease set up by him, had never been acted upon.

The reliefs sought by the plaintiff are :—

Firstly, Rs. 100, the value of the crop illegally cut by the defendants.

Secondly, that if the defendants assert their possession over the said plot then they may be ejected therefrom, and the plaintiff awarded absolute possession thereof and a decree for recovery of possession may be passed in his favour.

Thirdly, if the defendants denied the rights of the plaintiff as tenant with respect to this plot and of the holding in dispute, and if the plaintiff be found by the Court to be out of possession of the whole or any part of the holding in dispute, then he asked for possession thereof *together with occupancy rights* and that the defendants be ejected therefrom and a decree for recovery of possession may be passed in his favour.

And lastly, a perpetual injunction restraining the defendants from ever interfering in future with the plaintiff's possession of the property specified below and from doing any act which may be likely to interfere with and prove prejudicial to his rights in respect to the said property.

The main plea for the defendants was that they were in possession of the plots in dispute under a registered lease dated 13th February 1919 and being admittedly in possession the suit is not cognizable by a Civil Court. "Section 79 of the Tenancy Act is applicable.".

They also asserted that, as a matter of fact, they had sown the crop themselves and cut it as of right.

The learned Munsif after recording all the evidence tendered by the parties, came to the conclusion that the act of the defendants in taking possession of the field under the lease executed in their favour by the Zemindars, amounted to an act of dispossession by the Zemindar and as such the plaintiff's proper remedy was a suit in the Revenue Court under section 79. He accordingly returned the plaint for presentation to the proper Court. The plaintiff appealed. The facts found on appeal are these :— Ghissa died in the early part of 1918 without heirs. The plaintiff's assertion that he was entitled as heir to the occupancy holding or under section 22 of the Tenancy Act was incorrect. But it was held that on the 4th February 1919 the *Lambardar* got it recorded in the *khewat* that he was the occupancy tenant in succession to Ghissa. He sowed the *Kharif* crop for 1919 and harvested it himself, sowed the *Rabi* crop at the end of that year, and it was this crop which the defendants cut and took away in March 1920. There is no finding that the fact of the *Lambardar* getting the plaintiff recorded in any village papers had the effect of making him the occupancy tenant in place of Ghissa deceased. But it was held that he was a tenant of some sort and was in legal possession of the field and that the *Lambardar* accepted rent from him. It was also held that, although it was proved that the permanent lease in favour of the defendant had been proved to have been executed by the Zemindars on the 13th of February 1919, the defendants had not entered into possession under this lease until March 1920, when they cut the crop which had been sown by

the plaintiff. On the question of the jurisdiction of the Civil Court it was held, apparently, that as the lease given by the Zemindars was not given effect to for over a year, and in the meantime the *Lambardar* had accepted rent from the plaintiff, this acceptation of rent amounted in law to a revocation of the registered lease; and in any case that it could not be held that the action of the defendant in cutting the crop amounted to a dispossession of the plaintiff by the Zemindar within the meaning of certain rulings which had been relied upon by the Trial Court because of the delay, which occurred between the execution of the lease and the possession taken by the defendants in spite of the plaintiff's own assertion that the defendants were acting in collusion with the *Lambardar* when they cut the crop. Without, however, coming to a very definite conclusion on this question of law, the Court held that under the provisions of section 197 (1) of the Agra Tenancy Act, as all the materials necessary for a decision were before it, it was bound to decide the points in issue regardless of whether the suit had been instituted in the right Court. Having come to the conclusions on the evidence which I have mentioned above, the Appellate Court gave the plaintiff a decree for Rs. 80, the value of the crop, and for possession of plot No. 3404, *the holding of Ghissa deceased*, and for an injunction against the defendants fr m interference in future, with full costs in both Courts.

The decree itself runs as follows:—

"The plaintiff's claim for recovery of possession of plot No. 3404 .....be decreed. An injunction restraining the defendants fr m future interference in any way with the plaintiff's rights and interests in the aforesaid holding is issued to them."

From this decree the defendants have appealed. They have not contested the jurisdiction of the learned District Judge to entertain the suit but they have urged that the plaintiff having been found not to be the heir of the deceased occupancy tenant, he was merely a trespasser, and that the defendant having a registered lease in his favour was entitled to remain in possession of the holding, and that, therefore, no decree should have been given for possession or injunction.

It will be noted that the Zemindar is no party to this suit, and, of course, it is a truism to say that a suit for a declaration between two rival tenants may be brought in a Civil Court. But, put baldly in this way, it seems to me to be too broadly stated having regard to the more recent rulings of this Court, in which the doctrine of the "exclusive jurisdiction" of the Revenue Courts in certain matters has been developed, and emphasis directed to the wording of section 167 which says, "no Court other than a Court of Revenue shall take cognizance of *any dispute or matter in respect of which* a suit" lies under the Fourth Schedule. The latest case on the point is that of *Jagannath* v. *Balwant Singh* (1).

I do not, however, intend to decide this case on the point of jurisdiction, although I doubt whether the learned Judge was right in holding that the mere fact that there was a delay of a year between the execution of the lease and the defendants' taking possession differentiates this case from those relied upon by the Munsif.

On the findings, the *Lambardar* had orally let in the plaintiff as a tenant of some kind but certainly not as an occupancy tenant.

After that date the Zemindar executed a registered permanent lease in favour of the defendant under which he was entitled to get possession of the holding and eventually did so. The fact that he waited a year or more before taking possession seems to me really to make no difference. I do not think the mere acceptance of rent by the *Lambardar* from the plaintiff before the defendant took possession under the lease in any way operated as a revocation of the registered lease. In this view of the case the learned Munsif was right. Apart from this, it seems to me, that the plaint, with regard to some of the reliefs which are sought, offends against section 167 of the Agra Tenancy Act, because it seems to me that the object of this suit is really to prejudice, if possible, the rights which the defendants or the Zemindar may

(1) 68 Ind. Cas. 247; 20 A. L. J. 570; (1922) A. I. R. (A.) 372; 4 U. P. L. R. (A.) 194; 44 A. 692.

have, and which if they wish to establish, they must have recourse to the Revenue Court. At any rate, it seems to me to be an attempt to evade the provisions of the Tenancy Act. Some of the reliefs claimed might have been brought appropriately in the Civil Court. For instance, I think a suit to recover damages for wrongfully cutting the crop would, *prima facie*, lie within the jurisdiction of the Civil Court; or the plaintiff might have brought a suit for possession under section 9 of the Specific Relief Act, and to such a suit, I take it, there could be no answer—but obviously his object is not merely to get back into possession and to indemnify himself, but to get back into possession *as the occupancy tenant in succession to Ghissa, deceased.* The honest and straightforward course for him to adopt was to bring a suit under section 79 of the Tenancy Act, joining the Zemindars as defendants.

Instead of that, he virtually asks the Civil Court to determine that he is the occupancy tenant and as such entitled to possession. And this is the effect of the decree which the District Judge has given him. It seems to me idle to say that such a declaration by a Civil Court will not avail him hereafter in the Revenue Court—it is enough to look at section 167 of the Tenancy Act, to find that it is beyond the jurisdiction of the Civil Court—irrespective of consequences, to make such a declaration.

Having regard to the way the case has been argued before me, I must, I think, treat this suit as an ordinary suit for ejectment and mesne profits or damages, for a tortious dispossession, properly brought in a Civil Court. Treating it in this way it seems to me the suit must fail. On the day of suit defendants were in possession, and were entitled to hold possession unless and until the plaintiff showed a better title. In other words, it becomes a question, *prima facie*, of title The plaintiffs rely on an oral lease, given by the *Lambardar*, the defendants rely upon a registered lease executed by the Zemindars. The Civil Court cannot investigate, even much less find on the allegations of the plaintiffs, that he is for one reason or another an occupancy tenant—nor, for the same reason, can it decide whether the defendants are permanent lessees—but between the two, it seems to me the plaintiff has failed to prove that he has a better title than the defendants; and "*melior est possessitio defendentis.*" As he fails on the main ground I think he must also fail on the claim for damages. It is his own fault; he has deliberately framed his suit in a way to defeat the provisions of the Tenancy Act, and must pay the penalty. I allow the appeal, and dismiss the suit with costs in all Courts including in this Court-fees on the higher scale. I do not merely set aside the decree of the lower Court, and restore that of the Munsif, because the plaintiff himself did not accept the direction of the Munsif but pressed the lower Court to decide the suit on its merits, and the appeal before me has been argued on the basis that it was a purely civil suit properly instituted in the Civil Court.

S. D. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 423 OF 1921.

November 10, 1922.

Present:—Mr. Justice Ramesam.

CHINTAMANENI VENKATAPPAYYA—PLAINTIFF COUNTER-PETITIONER—PETITIONER

versus

CHINTAMANENI VENKATAPPAYYA—DEFENDANT NO. 2—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 95, O. XXXIX, r. 1—Injunction pending suit granted after hearing both parties—Petition for compensation, maintainability of.

Where an order for injun tion pending the disposal of a suit is passed after hearing both parties, a petition under section 95 of the Code of Civil Procedure for compensation for obtaining an injunction on insufficient grounds can, if at all, be maintained only when the suit is heard. Till then such an application does not lie. [p. 451, col. 2]

Sokkalinga Chetty v. *Krishnaswami Ayyar*, 55 Ind. Cas. 786; 11 L. W. 479; (1920) M. W. N. 192; 38 M. L. J. 324; 27 M. L. T. 259, followed.

CHINTAMANENI VENKATAPPAYYA *v.* CHINTAMANENI VENKATAPPAYYA.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the decree of the Court of the Subordinate Judge, Bezwada, in Civil Miscellaneous Appeal No. 11 of 1920, preferred against the order of the Court of the Temporary District Munsif, Nuzvid, at Bezwada, dated 7th February 1920, in Civil Miscellaneous Petition No. 1966 of 1919, in Original Suit No. 852 of 1919.

Messrs. *G. Lakshmanna* and *A. Satyanarayana*, for the Petitioner.

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

JUDGMENT.—In this case the petitioner filed a suit (Original Suit No. 852 of 1919) in the District Munsif's Court of Nuzvid, at Bezwada. On 27th November 1919 he applied under O. XXXIX, r. 1, Civil Procedure Code, for an order of temporary injunction. On the same day an *ad interim* injunction was issued and notice to the defendant was also ordered. The defendant appeared on 5th December 1919 and opposed the plaintiff's application. The District Munsif passed an order directing that, if the defendant furnished security or deposited an amount representing the value of the crop, "the temporary injunction will be dissolved and till then, the temporary injunction shall stand." On 7th December 1919 the defendant furnished security and the temporary injunction was dissolved. As I read the District Munsif's order of 5th December 1919, the District Munsif was of opinion that there were sufficient grounds for the plaintiff's application. On 19th December 1919, *i. e.*, within 12 days after the order, the defendant filed an application for compensation from the plaintiff on the ground that his application for temporary injunction was made on insufficient grounds. (The suit was actually tried in March 1921). The District Munsif dismissed the application holding that there were sufficient grounds for the plaintiff's application. But on appeal the Subordinate Judge, on reading the affidavit filed in support of the original application, held that it was based on insufficient grounds and awarded compensation. The present revision petition is against the order of the Subordina e Judge.

In my opinion, the petition of the respondent does not lie. It is not pretended that the application was based on anything that appeared in the trial of the suit (which actually took place in March 1921). It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds and the plaintiff has not ultimately failed in his suit, [see *Roulet* v. *Fetterle* (1)]. But assuming that even where, after an order was made on hearing both parties and the plaintiff has ultimately succeeded, a petition lies under section 95 for compensation—such cases must be very rare indeed—the stage for such an application would be only when the suit is heard. Up to then, such a petition would be premature [see *Sokkalinga Chetty* v. *Krishnaswami Ayyar* (2)]. I am not saying that, when the order was refused, compensation cannot be asked immediately without waiting for the suit.

In my opinion, to allow a petition of this kind immediately after the main petition was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit will be generally to permit a Court to come to a conclusion inconsistent with and opposed to its prior order. I do not think such an anomaly is intended by section 95.

The proceedings in the Courts below are without jurisdiction. I, therefore, reverse the order of the Subordinate Judge. The respondent will pay petitioner's costs throughout.

V. N. V. *Petition allowed.*

(1) 18 B. 717; 9 Ind. Dec. (N. S.) 987.
(2) 55 Ind. Cas. 786; 11 L. W. 479; (1920) M. W. N. 192; 38 M. L. J. 324; 27 M. L. T. 259.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 346 OF 1919.

November 15, 1922.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

NOOR MAHOMED VEERJIBHAI VEELMAHOMED—PLAINTIFF —APPELLANT

versus

NATWAR LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10, O. VI, r 17— Addition of co-plaintiff Amendment—Duty of Court Registration Act (XVI of 1908)—Agreement to lease Registration.

An application, made at a very late stage, to join a person as a co-plaintiff, should be granted if it does not operate in any way to the prejudice of the defendant. It is the duty of a Judge to try to put an end, once for all, to all the questions that can arise in relation to a particular transaction. [p. 452, col. 2]

Where an amendment is necessary for the purpose of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, Judges should make such amendments. [p. 452, col 2.]

Where a letter is not merely the evidential record of an oral agreement but states in so many words that it embodies the terms and conditions agreed upon, and that it is the letter which is to be the binding, formal, unalterable record of the conditions for creating the lease in question, it is a document in the nature of an agreement to lease within the meaning of sections 2 (7) and 17 (1) (*d*) of the Registration Act, and is inadmissible in evidence if unregistered, even if it is stated therein that a proper lease containing full details will be executed and registered before a fixed date. [p. 453, col. 1.]

First appeal from a decree of the Subordinate Judge, Agra, dated the 19th of September 1919.

Mr. *B. E. O'Conor* and Hon'ble Mr. *N. P. Asthana*, for the Appellant.

Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—This was a suit for specific performance brought in the name of Noor Mahomed Veerjibhai Veelmahomed, who asked for specific performance based upon a letter signed by the defendant whereby, according to the plaintiff, the defendant agreed to lease to the plaintiff a Bone Crushing Factory at Agra. In the Court of the Subordinate Judge one of the questions which arose was whether, assuming there to be a contract, it had been made with the plaintiff or with the plaintiff's father. Ultimately the Subordinate Judge decided that the contract had been made with the plaintiff's father, and although there was an application by the plaintiff that the father should be joined as a co-plaintiff in order to get over any technical difficulty, and although it appeared that the father himself came from Bombay to the Court to testify his willingness to become a plaintiff and signed an application which was made by a Pleader so as to verify the statements made therein, the learned Subordinate Judge refused to allow the father to be joined, on the most narrow and technical ground that the father, Veerjibhai Veelmahomed, had not himself filed a petition to be made a plaintiff. It is true that the application of the son to join the father as co-plaintiff was made at a very late stage of the case, but it was not suggested that it would operate in any way to the prejudice of the defendant. In the absence of any such prejudice an application of this kind ought to have been granted. We disagree most strongly with the procedure adopted by Mr. Govind Sarup Mathur, because it is the manifest duty of a Judge to try to put an end, once for for all, to all questions that can arise in relation to a particular transaction; and he, when the Pleader had stated to him that the father had come from Bombay to his Court, should at once have told the Pleader to put the matter in order by the father himself making an application, and that application should have been granted. In the particular circumstances of this case it so happens, however, that no injustice has been done; but that does not in the least detract from our view that where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, Judges should make such amendments.

The learned Subordinate Judge took the evidence on the whole case but he decided the matter adversely to the plaintiff, first, on the ground, as we have said, that the contract, if any, was not made with him; and then on the more general

ground that with whomsoever the contract may have been made, it was a document which, when properly construed, came within the terms of section 17 of the Registration Act, being a document in the nature of an agreement to lease (section 17 and section 2, definition 7). The document in question is in the form of a letter addressed, curiously enough, to the defendant himself and signed by the defendant. The addressee, however, was admitted to be N. Veelmahomed. The letter undoubtedly is the result of an interview at Agra, and is dated the 19th of September 1918, and sets out substantially all the conditions which would be necessary to create a lease. The important passage which bears upon the question of registration is this:—"The period will commence from the first of December 1918, and before that date a proper lease will be executed and registered; *this letter*, a copy whereof signed by you has been kept by me, *will be binding upon both of us so far as the main conditions are concerned*. Full details will be given in the coming lease." The parties had in fact written to each other identical letters. It will, therefore, be seen that this letter in terms states that the letter really embodies the terms and conditions agreed upon and that it is the letter which is to be the binding, formal, unalterable record of the conditions. It is conceivable that the claim might have been pleaded in another way and the agreement alleged to have been an oral agreement But when one turns to the plaint one observes that the Pleader took precisely the same view of the value of this letter, not that it was merely the evidential record of an oral arrangement, but that it did constitute the repository of the arrangement and superseded the oral agreement. The plaint in paragraph 1 sets out that "the defendant agreed to give a lease and the plaintiff agreed to take on lease the Bone Crushing Factory.....on the terms and conditions mentioned in the letter of the defendant, hereto attached." And when the relief sought is examined, the prayer is "that the contract of lease may be specifically enforced between the parties by enforcing the execution of the lease by the defendant ...in terms of the letter mentioned in paragraph 1 of the plaint." It was, no doubt, a consideration of the form of the letter and of the method in which it was treated by the Pleader that induced the Judge to come to the decision that this was a document which was an agreement for a lease for a period of five years. Under these conditions he, rightly in our view, applied section 17 and held that, as it had not been registered, it was inadmissible in evidence; and once that document was cut out from the case, nothing was left for the plaintiff to rely upon. Being of the same opinion, we think this appeal must be dismissed with costs and fees on the higher scale.

S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1251 OF 1920.

May 26, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

BHAIRAB CHANDRA DUTTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

KALI KUMAR DUTTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 96, 100, 151, O. XLI, rr. 23, 27, O. XLIII, r. 1—Suit, dismissal of—Fresh evidence—Order for re-trial by Appellate Court—Inherent power—Order, if appealable.

Where a suit is dismissed and upon appeal the plaintiff asks for permission to adduce fresh evidence which has become available long after the dismissal of the suit, an order made by the Appellate Court, setting aside the decree of the first Court and directing a re-trial of the suit with reference to that evidence is made in exercise of the inherent power of the Court and amounts to a decree as it reverses the decree of the Court of first instance and deprives the defendant of the valuable rights he had acquired thereunder. Consequently, the appeal is competent, not as an appeal from an order under O. XLIII, r. 1 (*u*) of the Code of Civil Procedure, but as an appeal from a decree under section 96 read with section 100 of the Code. [p. 454, col. 2.]

Abdul Karim Abu Ahmed Khan Ghaznavi v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929; 20 C. L. J. 49; 21 C. W. N. 877, relied on.

An order of the Settlement Authorities, pronounced in proceedings which are *inter partes*, is admissible in evidence in a civil suit. It is, no doubt, not conclusive but a presumption attaches to orders finally published under the Bengal Tenancy Act. [p. 455, col. 1.]

BHAIRAB CHANDRA DUTTA *v.* KALI KUMAR DUTTA.

Ram Pershad Sookul v. *Rajunder Sahay*, 6 W. R. 762, *Baid Nath Sahay* v. *Nanku Mahton*, 29 Ind. Cas. 219, *Young* v. *Kershaw*, (1899) 81 L. T. 531; 16 T. L. R. 52, distinguished.

Where after a suit for partition of land is dismissed, the plaintiff asks the permission of the Appellate Court to adduce in evidence an entry in the Record of Rights published during the pendency of the appeal, there is sufficient cause within the meaning of O. XLI, r. 27 for allowing him to do so. [p. 454, col. 1.]

Kessowji v. *G. I. P. Railway Co.*, 31 B. 381; 34 I. A. 115; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M L. J. 347; 2 M. L. T. 435 (P. C.), referred to.

Appeal against the decree of the District Judge, Tipperah, dated the 2nd March 1920, reversing the decree of the Subordinate Judge, Third Court of that District, dated the 10th of August 1918.

Babu *Upendra Kumar Roy*, for the Respondents took a preliminary objection that the appeal was incompetent, inasmuch as the order of remand had not been made under O. XLI, r. 23 of the Civil Procedure Code. It is only when the remand order is made under that rule that an appeal lies. See O. XLIII, r. 1 (*a*).

Babu *Jyotir Bhusan Bhattacharji*, for the Appellant.—The order for re-trial was made in the exercise of the inherent power of the Court. This order deprived me of the valuable right acquired by me under the decree of the Court of first instance. There is thus no substance in the preliminary objection taken by the respondents. Refers to *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Limited* (1).

On the merits my submission is that the lower Appellate Court was not justified in adopting the course it took: Reads *Kessowji* v. *G. I. P. Railway* Cc. (2). Without going through the evidence on the record, the lower Appellate Court erred in law in setting aside the decree of the Trial Court: See O. XLI, r. 27, Civil Procedure Code. See also *Kumar Sarat Kumar Roy* v. *Sripati Chatterjee* (3), *Ram Pershad Sookul* v. *Rajunder Sahoy* (4).

Babu *Upendra Kumar Roy*, was not called upon to reply.

(1) 41 Ind. Cas. 598; 44 C. 929; 26 C. L. J. 49; 21 C. W. N. 877.

(2) 31 B. 381 at p. 390; 34 I. A 115; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T 435 (P. C).

(3) 50 Ind. Cas. 119; 23 C. W. N. 242.

(4) 6 W. R. 262.

JUDGMENT.—This is an appeal by the defendants in a suit for partition against an order for re-trial of the matters in controversy. The defendants resisted the claim of the plaintiffs in the primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had been in separate possession for more than a century. The Subordinate Judge held in favour of the defendants and dismissed the suit. Upon appeal the plaintiffs asked for permission to adduce in evidence an entry in the Record of Rights which had been finally published on the 5th August 1919, long after the decree of dismissal had been made by the Trial Court on the 10th August 1918. The District Judge came to the conclusion that before the matters in difference were finally decided, the entry in the Record of Rights should be taken into account. In this view he allowed the appeal, set aside the decree of the Court of first instance and directed a re-trial of the suit with reference to the entry in the Records of Rights and such other evidence as might be adduced by both the litigants. Against this order for re-trial, the defendants have preferred this appeal.

On behalf of the plaintiffs, a preliminary objection has been taken that the appeal is incompetent, because the order was not, and could not have been made under O. XLI, r. 23, Code of Civil Procedure. We are of opinion that there is no force in this contention. The order does not purport to have been made under O. XLI, r. 23 It has been made in the exercise of inherent power of the Court, as explained by the Full Bench in *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Limited* (1). The order so made is a decree which reverses the decree of the Court of first instance and deprives the defendants of the valuable right they had acquired thereunder. The appeal is, consequently, competent, not as an appeal from order under O. XLIII, r. 1, sub-r. (*u*), but as an appeal from a decree under section 96 of the Code read with section 100. Indeed, the appellants have described this appeal, not as an appeal from an order, but as an appeal from a decree. The preliminary objection cannot be sustained and must be overruled.

The appellants have assailed the order of the District Judge on the ground that addi-

tional evidence should not have been allowed to be adduced in contravention of the principle recognised in O. XLI, r. 27 of the Code, as explained in *Kessowji* v. *G. I. P. Railway Co.* (2). We are of opinion that the District Judge has not disregarded the principle enunciated in O. XLI, r. 27. That rule authorises the Court to afford opportunity to a party litigant to adduce additional evidence if the Appellate Court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause. In the case before us, there is such a substantial cause. The Record of Rights proceedings were in progress during the pendency of the trial in the Court of first instance, but the order for final publication had not then been made. It was consequently impossible for the plaintiffs to produce the decision of the Revenue Authorities. The order for final publication was made during the pendency of the appeal in the Court of the District Judge. At this stage alone, it became possible for the plaintiffs to bring before the Court the decision of the Revenue Authorities. The appellants have, however, contended that in view of the decisions of this Court in *Kumar Sarat Kumar Roy* v. *Sripati Chatterjee* (3) and *Baid Nath Sahay* v. *Nanku Mahton* (5) the decision of the Revenue Authorities should not be used in evidence. These decisions are clearly distinguishable, as the subsequent judgment which the Court was called upon to receive in evidence was not a judgment *inter partes*. In the case before us the order of the Settlement Authorities has been pronounced in proceedings which are *inter partes*. It is, no doubt, not conclusive, but a presumption attaches to the order finally published under the Bengal Tenancy Act. Consequently, the decisions in *Young* v. *Kershaw* (6) and *Nundo Lal* v. *Punchanon* (7), which disapprove of the reception of additional evidence in proceedings in review, cannot be applied to the circumstances of this case. The course adopted by the District Judge is, in our opinion, eminently reasonable, and is well-calculated to avoid that ultimate conflict between the decision of the Civil Court and the decision of the Revenue Authorities which would inevitably arise if this suit were decided without reference to their proceedings.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

N. K. & N. H. *Appeal dismissed.*

(5) 29 Ind. Cas. 219.
(6) (1899) 81 L. T 531; 16 T. L. R. 52.
(7) 42 Ind. Cas. 484; 45 C. 60; 21 C. W. N. 1076; 26 C. L. J. 187.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1386 OF 1921.
October 27, 1922.

Present:—Justice Sir P.C. Banerji, KT., and Mr. Justice Gokul Prasad.

BHIRGUNATH RAI—PLAINTIFF—APPELLANT
versus
APNARAIN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint possession—Decree.

A decree for joint possession may be given in a suit between co-sharers. [p. 456, col. 1.]

Sarbjit Singh v. *Raj Kumar Rai*, 63 Ind. Cas. 806; 44 A 5; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; (1922) A. I. R. (A.) 162, followed.

Bhairon Rai v. *Saran Rai*, 26 A. 588; 1 A. L. J. 183; A. W. N. (1904) 106 (F.B.), *Jagar Nath Ojha* v. *Ramphal*, 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312, and *Bisheshar Singh* v. *Hanuman Singh*, 63 Ind. Cas. 802; 44 A. 1; 19 A. L. J. 780; 3 U. P. L. R. (A.) 143; (1922) A. I. R. (A.) 314, referred to.

The mere fact that a decree for joint possession might lead to difficulty and trouble by reason of the parties not being on good terms, is not sufficient for refusing a co-sharer a decree for joint possession, though there may be cases in which such a decree ought not to be granted. [p. 456, col. 1.]

Jagar Nath Ojha v. *Ramphal*, 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312, *Watson & Co.* v. *Ramchund Dutt*, 18 C. 10; 17 I. A. 110; 5 Sar. P.C. J. 535; 9 Ind. Dec (N. S) 7 (P. C.), referred to.

Second appeal against the decree of the District Judge, Ghazipur, dated the 6th of August 1921.

Dr. *M. L. Agarwala* and Mr. *J. M. Banerji*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The plaintiff claimed joint possession of nine plots of land comprising 8 *highas* and 13 *biswas*. He is one of the co-sharers in the village and is also the *lambardar*; the principal defendants are also co-sharers in the village. It was alleged that the defendants had forcibly turned out the non-occupancy tenants who cultivated these lands, that the tenants brought a suit

for restoration of possessio and that the matter was compromised and in the end the principal defendants took exclusive possession of the nine plots in question. The plaintiff as a co-sharer claims a declaration of his right to the lands in dispute and also joint possession. The Courts below have decreed the claim for a declaration of his right but have refused, to grant him joint possession. In our opinion in so doing the Courts below are in error. It is true that under certain old rulings of this Court in a suit between co-sharers a decree for joint possession was refused but in the recent course of rulings of this Court it has been held that a decree for joint possession ought to be granted. We may refer to the cases of *Bhairon Rai* v. *Saran Rai* (1), *Jagar Nath Ojha* v. *Ramphal* (2), *Bisheshar Singh* v. *Hanuman Singh* (3) and *Sarljit Singh* v. *Raj Kumar Rai* (4). The case last mentioned is almost exactly on all fours with the present case. In that case it was held that the plaintiff was entitled to a decree for joint possession. In the present case the learned Judge of the lower Appellate Court has stated in his judgment that a decree for joint possession might lead to considerable difficulty and trouble by reason of the parties not being on good terms. In every case in which one co-sharer forcibly dispossesses another or keeps another co-sharer out of possession there is undoubtedly a good deal of bad feeling between them, but that is no reason for depriving a plaintiff of the possession to which he is entitled. No doubt there may be cases in which joint possession ought not to be granted. Some of these cases were pointed out in the ruling in *Jagar Nath Ojha* v. *Ramphal* (2), and a similar case is the case of *Watson & Co.* v. *Ramchund Dutt* (5) referred to by the learned Judge in his judgment. If a co-sharer were allowed to take possession to the exclusion of other co-sharers he would be able to convert land held under all the co-sharers by non-occupancy tenants into his own *khudkasht*, and in this way he may usurp the whole of the land in the village and take actual possession of it. This certainly is not what the law contemplates. We think that the Courts below were wrong in refusing to grant a decree for joint possession and that they ought to have followed the ruling in *Sarbjit Singh* v. *Raj Kumar Rai* (4). We allow the appeal, vary the decrees of both the Courts below and make a decree for joint possession in addition to the decree already made by those Courts. The appellant will have his costs of this portion of the claim in the Courts below and the costs of this appeal including in this Court-fees on the higher scale.

S. D. *Appeal allowed.*

(1) 26 A. 588; 1 A. L. J. 183; A. W. N. (1904) 106 (F. B.)
(2) 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312.
(3) 63 Ind. Cas. 802; 44 A. 1; 19 A. L. J. 780; 3 U. P. L. R. (A.) 146; (1922) A. I. R. (A.) 314.
(4) 63 Ind. Cas. 806; 44 A. 5; 19 A. L. J. 783; 3 U. P. L. R. (A.) 143; (1922) A. I. R. (A.) 162.
(5) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 118 OF 1922.
January 18, 1923.
Present:—Mr. Justice Daniels.
PEARE LAL AND ANOTHER—APPLICANTS
versus
ASHRAF KHAN—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Guardian ad litem unfit to represent minor defendant—Ex parte decree—Restoration—Revision.

The only point which a Court has to consider in an application for setting aside an *ex parte* decree, under O. IX, rule 13, Civil Procedure Code, is whether the defendant was prevented by any sufficient cause from appearing. Therefore, where a Judge holds that there was no guardian *ad litem* appointed for a minor defendant because the guardian appointed, though not actually insane, was of a childish and emotional temperament, and, therefore, not a fit person to represent the minor, he cannot refuse to set aside the *ex parte* decree against the minor on the ground that the minor was not prejudiced by the fact of his not being represented by his guardian, as the case was fully contested by his adult co-defendant brother.

If an *ex parte* decree is passed against a non-represented minor, there is sufficient cause for his non-appearance and restoration of the suit; and if the Judge refuses to restore it he fails to exercise a jurisdiction vested in him by law which he was bound to exercise.

Civil revision from an order of the District Judge, Saharanpur, dated the 22nd June 1922.

Mr. *Baleshwari Prasad*, for the Applicants.

Mr. *S. P. Sinha*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the District Judge of Saharanpur dismissing an appeal from an order refusing to set aside a decree passed

ex parte against the applicants, Piare Lal and Bishen Sarup, who are minors. The suit was one for redemption of a mortgage. The claim as amended was against four brothers of whom two, the present applicants, were minors and the other two were adults. The applicants were represented in the litigation by their mother as guardian *ad litem*. The present application was based on an allegation *inter alia* that their mother was insane and, therefore, could not represent them. The learned Munsif rejected this contention. The learned District Judge held that the mother, *Musammat* Bhagirathi, if not actually insane, was of a childish and emotional temperament and, therefore, not a fit person to represent the minors. It is not open to me sitting as a Court of revision to go behind this finding. The learned Judge held that he must decide the case upon the assumption that there was no guardian *ad litem* appointed for the minors. He then went on to consider the question whether the minors had been prejudiced by the fact that they were not represented and holding that they were not, as the case had been fully contested by their adult brothers, he refused to set aside the decree. If this had been a subsequent suit to set aside the decree this point might, under the rulings of this Court, have been material. In an application under O. IX. r. 13, however, the only point which the Judge had to consider was whether the defendants were prevented by any sufficient cause from appearing. O. IX, r. 13 is very clear on this point. If the minors were not represented then clearly there was sufficient cause for their non-appearance and the District Judge was bound by the provisions of the rule to order the restoration of the suit. In not doing so he has failed to exercise a jurisdiction vested in him by law which he was bound to exercise. I, therefore, allow the application, reverse the orders of both the Courts below and setting aside the *ex patre* decree so far as it affects the minors, direct the Trial Court to restore the case to the file and after taking steps to appoint a proper guardian for the minors to dispose of it according to law. The respondents will get their costs of this application in all these Courts.

S. D. *Application allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 110 OF 1922.

January 4, 1923.

Present :—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

MAHADEO PRASAD—OBJECTOR—APPELLANTS

versus

Musammat HAMIDAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Compromise decree directing payment to third person—Payment made but not certified—Recognition of payment by Court.

The payment of money contemplated by O. XXI, r. 2, is not necessarily a payment to the decree-holder. If by a compromise decree the payment is directed to be made to a third person, it comes within the scope of the rule and if it is not certified in Court, as required by the rule, it cannot be recognised by the Court, even if its receipt is admitted by such third person. [p. 459, col. 1.]

Execution second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Cawnpore, dated the 23rd September 1921.

FACTS.—One Abdul Aziz Khan executed a mortgage in favour of Lachhmi Narain and Romeshwar in 1908. Subsequently, he mortgaged the same property to Mahadeo in 1913. By the subsequent mortgage Mahadeo agreed to make certain payments by instalments to the prior mortgagees, Lachhmi Narain and Romeshwar. Mahadeo having made default, Abdul Aziz Khan sued Mahadeo for cancellation of the mortgage-deed and redemption. To this suit the prior mortgagees were made parties as *pro forma* defendants. The suit resulted in a compromise decree, dated 28th April 1917. According to the terms of this decree Mahadeo was to pay a sum of Rs. 595 odd to prior mortgagees by 12th May 1917, and from Jeth 1324 to continue to make certain other payments in instalments. In case of default his mortgage-deed was to be deemed cancelled and Abdul Aziz Khan was entitled to recover possession of the property. After the stipulated time was over, Abdul Aziz Khan applied to Court for execution of the decree of 28th April 1917 by recovery of possession of his property on the ground that Mahadeo had not made payments as stipulated. Mahadeo pleaded

payment and Lachhmi Narain and Romeshwar deposed that they had received payment. But the Court overruled the plea of payment and ordered execution to issue on the ground that the payments not having been certified in accordance with the provisions of O. XXI, r. 2 could not be recognized.

Mr. *M. A. Aziz*, for the Appellant.—The prior mortgagees, Lachhmi Narain and Romeshwar, being only *pro forma* defendants are not the decree-holders in respect of the amount payable to them under the decree. Payment to them is like the performance of a condition the fulfilment of which need not be certified to Court. But even if they be considered decree-holders, inasmuch as they have received payment of their shares, it is not necessary that payment to them should be certified. I rely upon *Sultan Moideen* v. *Savalayammal* (1).

It is true that the case was under the Civil Procedure Code of 1882, but what is now clause (3) of O. XXI, r. 2 was introduced in the corresponding section 258 of the old Code in 1888 so that there is no difference in the two Codes.

Further, although the words of the sub-rule (1) 'any money payable under a decree of any kind...' appear to be rather wide, the case-law shows that every case of money payable under a decree does not come under O. XXI, r. 2. The case of *Gajjala Yella Reddi* v. *Muhammad Alli* (2) supports my contention. In this case, the mortgagee decree-holder got into possession of the property of which he was to take profits and render account of the surplus. It was held that the receipts by the decree-holder of the income from land were not payments under or adjustment of the decree under section 258 (O. XXI, r. 2) and did not require to be certified.

JUDGMENT.—This is an execution second appeal arising under the following circumstances]:—

It appears that Abdul Aziz Khan, the respondent, made a mortgage of some property in favour of Lachhmi Narain and another in the year 1908. In the year 1913 he made a usufructuary mortgage of the same property in favour of Mahadeo Prasad, the appellant, and some money was left with Mahadeo Prasad to pay off the first mortgage in favour of Lachhmi Narain and another. He failed to do so and upon that Abdul Aziz sued to redeem the mortgage of the year 1913 in favour of Mahadeo Prasad. This suit resulted in a compromise under which Mahadeo Prasad was directed to pay off the first mortgage by certain instalments and it was further provided that in case Mahadeo Prasad failed to do so the mortgagor, Abdul Aziz Khan, would be entitled to recover possession of the property mortgaged to him. This was on the 28th of April 1917. Abdul Aziz has now applied to recover possession of the property mortgaged by him to Mahadeo Prasad on the allegation that Mahadeo Prasad has failed to pay the amount due to Lachhmi Narain and another, the prior mortgagees, by instalments as contemplated in the compromise decree. Mahadeo Prasad pleaded payment to the prior mortgagees as contemplated by the compromise decree. This payment to the prior mortgagees by Mahadeo Prasad was not certified in Court as required by O. XXI, r. 2 of the Code of Civil Procedure, and, accordingly, the Courts below have dismissed the plea of payment raised by Mahadeo Prasad under clause (3) of O. XXI, r. 2 of the Code of Civil Procedure. Mahadeo Prasad comes here in second appeal and says that as the decree did not contemplate any payment to Abdul Aziz Khan, the mortgagor decree-holder, O. XXI, r. 2 did not apply and such payment could be recognised and ought to have been recognised by the Court executing the decree. It might be mentioned here that Lachhmi Narain and another, the prior mortgagees, have supported Mahadeo Prasad by admitting receipt of the money in accordance with the compromise decree to which they were parties. The learned Counsel for the appellant contends that the payment of money contemplated by O. XXI, r. 2 is a payment to the decree-holder, and, as the payment directed by the compromise decree was not a payment to be made to the decree-holder but to a third person, O. XXI, r. 2 does not apply and the Courts below ought to have given effect to the payment pleaded by the appellant. The wordings of r. 2 are very general and there is nothing in them to limit the payment to the decree-holder only. The words used

(1) 15 M. 343; 2 M. L. J. 50; 5 Ind. Dec. (N. S.) 591.
(2) 38 Ind. Cas. 675; 39 M. 1026.

are: "Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted etc., etc." We have no difficulty in coming to the conclusion that the payment directed to be made to a third person under a decree like the present one comes within the scope of this rule and the decision of the Courts below was correct. Mahadeo Prasad ought to have proceeded under clause (2) of r. 2 to safeguard his interest. Such payments having not been certified the Courts below were right in refusing to accept them. In our opinion the decree of the Court below was a right decree. We dismiss this appeal but without costs, as the respondents are not represented.

Appeal dismissed.

S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1094 OF 1921.
November 16, 1922.
Present:—Mr. Justice LeRossignol
and Mr. Justice Zafar Ali.

AGENT, B. B. & C. I. RAILWAY, BOMBAY
—DEFENDANT—APPELLANT
versus
FIRM MANOHAR LAL-PARWIN CHAND
PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), ss. 77, 140—Notice to Railway Company Service on Agent's subordinate, whether sufficient—S. 140 of Act IX of 1890, whether exhaustive.

Notice to a subordinate of the Agent of a Railway Company, *e. g.*, the General Traffic Manager, is not the notice contemplated by section 77 of the Railways Act, unless it is established that the Agent had invested him with the authority to receive service on his account. [p. 460, col. 1.]

Great Indian Peninsula Railway Company v. *Chandra Bai*, 28 A 552; 3 A. L. J 329; A. W. N.(1906) 101, *Great Indian Peninsula Railway Company* v. *Dewasi*, 31 B. 534; 9 Bom. L. R. 942, *Nadiar Chand Shaha* v. *Wood*, 35 C 194; 12 C. W. N 450, *Manikonda Seshachellum, In re*, 12 Ind. Cas. 76; 36 M 65; 10 M. L. T. 236; (1911) 2 M. W. N 195, cited.

Section 140 of the Railways Act is not exhaustive, and if it can be established that, as a matter of fact, the Agent of a RailwayCompany has received notice of a claim against the Company in a way not mentioned by that section, such notice is sufficient or the purposes of section 77 of the Railways Act. [p. 459, col. 2.]

Second appeal from the order of the District Judge, Delhi, dated 8th March 1921, reversing that of the Sub-Judge Delhi, dated 29th November 1920.

Mr. *M. L. Puri*, for the Appellant.
Mr. *Sardha Ram*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff against the Bombay, Baroda and Central India Railway for compensation for loss of a consignment of goods, and the only question calling for decision by us is whether notice under section 77, Indian Railways Act, was given to the Railway Administration. The learned District Judge has held that the Railway Administration had notice of the plaintiff's claim, inasmuch as the General Traffic Manager of the Railway had notice of it.

Under section 77 of the Indian Railways Act, a claim for compensation must be preferred in writing to the Railway Administration within six months from the date of the delivery of the goods to the Railway, and the words "Railway Administration" are defined in section 3, clause (6) to be, in the case of Railway administered by a Company, that Railway Company. The normal method of serving notice upon a Railway Company is by delivering notice at its head office, but in the case of a Railway administered by a Railway Company, service upon its Agent in India is sufficient service, *cf.* section 140 of the Indian Railways Act. That section further gives instances of methods by which the Agent may be served with notice of a claim, but it is argued that that section is not exhaustive and that if it can be established that, as a matter of fact, the Agent has received notice of the claim in a way not mentioned by that section, such notice is sufficient for the purposes of section 77 of the Act.

With this contention we have no quarrel, but the question in this case is, whether the Agent received notice of the plaintiff's claim. We have been referred to *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1), *Great Indian Peninsula Railway Company* v. *Dewasi* (2), *Nadiar Chand Shaha* v. *Wood* (3) and *Manikonda Seshachellum*,

(1) 28 A 552; 3 A. L. J 329; A. W. N (1906) 101.
(2) 31 B. 534; 9 Bom. L. R 942.
(3) 35 C. 194; 12 C. W. N. 450.

In re, (4), but none of these rulings is an authority for the view that service on a subordinate of the Agent of the Railway is service upon the Agent. If it could be shown by evidence that the Agent had invested some subordinate with authority to receive service on his account, he would, no doubt, be estopped from pleading that notice had not been served upon him personally. But in this case there is no evidence that the Agent has given any such authority to the General Traffic Manager, and it is no reply to the Agent's objection that, in practice, the Agent entrusts the disposal of such claims to his General Traffic Manager. There is in this case no evidence that notice sent to a General Traffic Manager reaches the Agent automatically, so that we have no ground for holding that, as a fact, the Agent was informed of this claim by his General Traffic Manager. Section 77 of the Railways Act insists that notice shall be given in writing to the Agent of the Railway Company in India and we must hold that notice to a subordinate of the Agent is not the notice contemplated by the section.

We accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

N. K. *Appeal accepted.*

(4) 12 Ind. Cas. 76; 36 M. 65; 10 M. L. T. 236; (1911) 2 M. W. N. 195.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1371, 1372 AND 1373 OF 1919.

December 22, 1922.

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

DR. SADIQ ALI—DEFENDANT—APPELLANT

versus

ABDUL BAQI KHAN AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Muhammadan Law—Pre-emption—Talab-i-istishhad (*2nd demand*), *requirements of.*

In making the affirmatory demand (*Talab-i-istishhad*), it is necessary to call upon the witnesses who accompany the pre-emptor to the premises to bear witness to the fact that the immediate demand (*Talab-i-mawasibat*) had already been made. The mere making of the *Talab-i-istishhad* in the presence of the witnesses, in whose presence the *Talab-i-mawasibat* was made, is not a sufficient compliance with the requirements of the Muhammadan Law. [p. 463, col. 1]

Cholu v. *Husain Bakhsh*, A. W. N. (1893) 101, *Baru Mal* v. *Tansukh Rai*, 29 Ind. Cas. 1001; 13 A. L. J. 717; 37 A. 524, *Mubarak Husain* v. *Kaniz Bano*, 27 A. 160; A. W. N. (1904) 201; 1 A. L. J. 569, *Sarjug Singh* v. *Jagmohan Singh*, 51 Ind. Cas. 40 and *Rujjub Ali Chopedar* v. *Chundi Churn*, 17 C. 543; 8 Ind. Dec. (N. S.) 902, referred to.

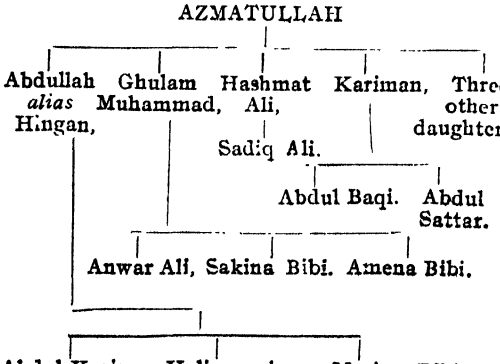
Second appeals against the decree of the District Judge, Cawnpore, dated the 17th June 1919.

Dr. *S. M. Sulaiman* and Dr. *K. N. Katju*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The three second appeals Nos. 1371, 1372 and 1373 arise out of three pre-emption suits instituted by Abdul Baqi Khan against Sadiq Ali and others in the year 1918. Two of them were instituted in the Court of the Munsif and the third in that of Subordinate Judge.

In order to understand the pleadings in the case it is advisable to give a pedigree of the parties to the three appeals.



Musammat Sakina Bibi was married to Abdul Karim Khan. Some time ago a house was purchased by Azmatullah and his son Abdullah *alias* Hingan in equal shares. Some years afterwards Sadiq Ali, son of Hashmat Ali, sold his interest in the house to Ghulam Muhammad. The latter also acquired the shares of his three sisters other than *Musammat* Kariman. In 1909 Ghulam Muhammad sued for partition against the other members of the family whose shares he had not purchased and obtained a decree. In 1915 Abdul Karim Khan and his sister, Halim-un-nissa, brought

a suit for the recovery of their shares against *Musammat* Kariman and others. The chief defence to the suit was put forward by Abdul Baqi who was also a defendant in the case. He resisted the suit by pleading adverse possession. The claim was decreed by the learned Munsif on the 7th August 1915. On appeal the decree of the First Court was set aside on the plea that the claim was barred by the principle of *res judicata*. Thereupon Abdul Karim filed a second appeal to this Court which was admitted in November 1915 and the case was remanded by this Court on the 15th November 1918 for trial on the merits. While the second appeal was pending in this Court Abdul Karim and his wife *Musammat* Sakina Bibi executed on the 22nd December 1917 two sale-deeds in respect of their separate shares in the house mentioned above in favour of Sadiq Ali. On the 15th March 1918 Anwar Ali sued to recover possession of their shares on the ground of pre-emption. The claim was brought against the vendors, Abdul Karim and Sakina Bibi, as also against Sadiq Ali, the vendee. On the 14th May 1918 the vendee and Anwar Ali, the pre-emptor, entered into a compromise by which not only the sale-deed of the 22nd December 1917 was allowed to remain but Anwar Ali agreed to convey his own share also to Sadiq Ali. On the 20th August 1918 a decree was passed by the learned Munsif in the suit of Anwar Ali in terms of the compromise filed. On the 7th September 1918 Abdul Baqi instituted two suits on the basis of pre-emption against Sadiq Ali, namely, one in respect of the transfer made by Sakina Bibi and the second in respect of the transfer of the share of Anwar Ali under the compromise of the 14th May 1918 which was incorporated into the decree of 20th August 1918. On the 16th December 1918 a third suit was instituted by Abdul Baqi against Sadiq Ali in respect of the transfer made by Abdul Karim on the 22nd December 1917 in favour of Sadiq Ali. Of these three suits the suit relating to the transfer of Anwar Ali was instituted in the Court of the Subordinate Judge of Cawnpore. The other two suits were filed in the Court of the Munsif and were transferred to the file of the Subordinate Judge. Sadiq Ali resisted all the three suits on various grounds. The evidence for all the parties in the three suits was recorded in Anwar Ali's case and one judgment governed all the three suits. The learned Subordinate Judge, after a careful consideration of all the evidence in the case, came to the conclusion that the plaintiff's claim in all the three suits should fail. He was of that opinion in respect of the transfers of Abdul Karim and Sakina Bibi on the ground that the two demands required by the Muhammadan Law had never been made. In the suit of Anwar Ali he was of opinion that, as the transfer was by means of a decree, no right of pre-emption could be asserted. Abdul Baqi preferred three appeals from the decree of the learned Subordinate Judge. The lower Appellate Court disagreed with the first Court on the evidence and came to the conclusion that the two demands required under the Muhammadan Law were made. The learned Judge of the lower Appellate Court was definitely of opinion that the first demand or the *Talab-i-mawasibat* was made as soon as the plaintiff-pre-emptor heard of the sales of Abdul Karim and Sakina Bibi. As to the second demand he was also of opinion that it was made on the spot where the property transferred is situate. As to the transfer by Anwar Ali, the learned Judge was of opinion that the transfer was not, properly speaking, by a decree of a Court, but in any case in the circumstances the plaintiff-pre-emptor had the right of pre-emption. The decrees of the first Court were accordingly set aside and the claim of the plaintiff-pre-emptor was decreed in all the three suits.

Sadiq Ali has preferred the three appeals before us. We take up first the appeals that relate to the transfers made by Abdul Karim and his wife, Sakina Bibi, on the 22nd December 1917. Three objections are urged on behalf of the appellant to the findings of the lower Appellate Court. It is urged on behalf of the appellant that the learned District Judge misread and misquoted the evidence of Rajjab Beg and was not, therefore, justified in disagreeing with the first Court and holding that the first demand was made by the plaintiff-pre-emptor. The second objection is that on the evidence of Rajjab Beg himself the demand, if made, was of no value, as no sale

had taken place at the time the matter was reported by Rajjab Beg to the plaintiff-pre-emptor. The third objection is that the second demand on the evidence for the plaintiff-pre-emptor was an invalid demand under the Muhammadan Law. The learned Counsel for the appellant has cited case-law in support of his second and third objections. We think it sufficient to remark with regard to the first objection that after hearing the evidence of Rajjab Beg read we are not prepared to agree with the contention of the learned Counsel for the appellant that the lower Appellate Court has misread or misquoted the statement of Rajjab Beg. The learned Judge of the lower Appellate Court was quite justified in interpreting the evidence of Rajjab Beg as he has done and his finding on that point is a finding of fact which we are not permitted to disturb. We do not think that there is much force in his second objection also. It also depends upon the interpretation of the evidence of Rajjab Beg. The learned Judge of the lower Appellate Court has construed the statement of Rajjab Beg to mean that he reported to the plaintiff-pre-emptor that a sale of the shares of Abdul Karim and Sakina Bibi had taken place. The plaintiff-pre-emptor was justified on that evidence to make the first demand. It would serve no useful purpose in view of our finding on the third objection to discuss the case-law as to when should the first demand be made, that is, whether the first demand should be made when the sale is completed under the provisions of Act IV of 1882, or when the sale according to the intention of the parties has been completed. We think that the third objection of the appellant must prevail. The learned District Judge has not come to a clear finding on the question whether at the time of making the second demand the plaintiff-pre-emptor called the attention of his witnesses to the fact that he had already made the first demand. The finding of the lower Appellate Court upon this point is in the following words :—

"As regards the affirmatory demand, it was urged on behalf of the respondent that it was irregular that the witnesses who had accompanied the plaintiff-appellant to the premises were not called upon to bear witness to the fact that the immediate demand had already been made."

This is true as far as the evidence of the witnesses is concerned, though the plaintiff himself states that the witnesses were invoked after the second demand on the premises. Even assuming that there was no special invocation the requirements of Muhammadan Law were sufficiently complied with when the *Talab-i-istishhad* was made in the presence of the witnesses in whose presence the immediate demand had been made [see *Chotu* v. *Husain Bakhsh* (1)]. The learned Counsel for the respondent-pre-emptor asks this Court to consider this finding as a finding that at the time of the second demand the plaintiff had called the attention of his witnesses to the fact that he had made the first demand.

We are unable to accede to this contention. The language of the learned Judge just quoted above would not bear any such interpretation. After reciting that the witnesses had not stated that at the second demand their attention was called by the plaintiff to the first demand the learned Judge goes on to say that the plaintiff states that he had done so. The learned Judge stops there and goes on to the consideration of the case from another point of view, taking it for granted that the plaintiff had not called the attention of his witnesses to having made the first demand. We are, therefore, of opinion that the learned Judge of the lower Appellate Court did not hold that he believed the evidence of the plaintiff-pre-emptor not only uncorroborated but against the statements of his own witnesses. There were only two courses open to us, either to remand the case to the Court below to get a definite finding on the question raised or to hear the evidence ourselves and record a finding. We have adopted the latter course. We have heard the evidence for the plaintiff-pre-emptor read to us *in extenso* and criticised. We have no hesitation in holding that the plaintiff's statement, uncorroborated by any of his witnesses, cannot be believed and we do not believe it. We, therefore, hold that the second demand deposed to by the plaintiff and his witnesses was an invalid demand under the Muhammadan Law. This finding would

(1) A. W. N. (1893) 101.

at first sight dispose of the two Appeals Nos. 1372 and 1373, but the contention on behalf of the plaintiff-pre-emptor is that even assuming the omission at the second demand referred to above, the requirements of the Muhammadan Law are sufficiently complied with when the *Talab-i-istishhad* is made in the presence of the witnesses in whose presence the first demand was made. In support of this contention reliance is placed on the cases of *Cholu* v. *Husain Bakhsh* (1) and *Baru Mal* v. *Tansukh Rai* (2). The case of Chottu was considered by several learned Judges of this Court subsequent to 1893 and was dissented from: *vide* the case of *Mubarak Husain* v. *Kaniz Bano* (3). We would also refer to the cases decided in other High Courts on the same point, namely, those of *Sarjug Singh* v. *Jagmohan Singh* (4) and *Rujjub Ali Chopedar* v. *Chundi Churn* (5). The case reported as *Baru Mal* v. *Tansukh Rai* (2) does not really touch upon the question under discussion. In that case it was decided that the two demands may be combined together if the vendor and the vendee are present at the time the demand is made or the demand is made on the property sold. In the present case it is not pretended that when either of the two demands was made the vendor or the vendee was present or that the first demand was made on the property. We, therefore, hold that the claim of the pre-emptor fails. We allow the appeals of Sadiq Ali in respect of the transfer made by Abdul Karim and Sakina Bibi, *i. e.*, we allow Appeals Nos. 1372 and 1373.

The Appeal No. 1371, as we have already stated above, relates to the transfer made by Anwar Ali. We need not discuss the question whether any right of pre-emption accrued to Abdul Baqi, because the transfer was in terms of a compromise which compromise was embodied in the decree. Sadiq Ali, according to our decision in Appeals Nos. 1372 and 1373, had acquired a good title on the 22nd December 1917 in the house in question. He thus became a co-sharer of Anwar Ali by virtue of his purchase of 22nd December 1917. The share of Anwar Ali was not transferred till the 27th August 1918. Abdul Baqi's right of pre-emption is based upon vicinage. Sadiq Ali had on the 27th August 1918 a better and a superior right of pre-emption to that of Abdul Baqi. The claim of the latter, therefore, with regard to the share of Anwar Ali also fails.

We allow Appeal No. 1371 also.

The result is, we allow all the three Appeals Nos. 1371, 1372 and 1373 of 1919, set aside the decrees of the Court below with costs to Sadiq Ali of all the Courts including fees in this Court on the higher scale.

S. D. *Appeals allowed.*

(2) 29 Ind. Cas. 1001; 13 A. L. J. 717; 37 A. 524.
(3) 27 A. 160; A. W. N. (1904) 201; 1 A. L. J. 569.
(4) 51 Ind. Cas. 40.
(5) 17 C. 543; 8 Ind. Dec. (N. S.) 902.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1425 OF 1920.
November 6, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

RANGASWAMI NAYUDU AND ANOTHER —DEFENDANTS—APPELLANTS
versus
V. KRISHNASWAMI AIYAR AND OTHERS —PLAINTIFFS—RESPONDENTS.

Charitable endowment—Temple property—No regular trustees—Right to sue for possession—General body of worshippers—Civil Procedure Code (Act V of 1908), O. I, r. 8.

Property bequeathed to an idol or temple, although notionally held by the deity, must be in some human being or beings. If there is a trustee or manager, he can sue for its possession; where there is no trustee or manager the right to sue for possession on behalf of the trust may vest in the regular body of worshippers of the temple. In such a case, worshippers who obtain permission under O. I, r. 8 of the Civil Procedure Code to sue on behalf of the general body are entitled to maintain the suit and obtain a decree for possession. [p. 464, col, 2.]

Venkatasubban Patter v. *Ayyathurai*, 54 Ind. Cas. 202; 37 M. L. J. 554; 26 M. L. T. 364, followed.

Noor Mahammad Saib v. *Karima Bibi Ammal*, 25 Ind. Cas. 559; 27 M. L. J. 270; 16 M. L. T. 165, distinguished.

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 52 of 1919, preferred against the decree of the Court of the District Munsif, Villupuram, in Original Suit No. 245 of 1917.

RANGASWAMI NHYUDU *v.* KRISHNASWAMI AIYAR.

Messrs. *K. Bhashyam Iyengar* and *P. J. Kuppanna Rao*, the Appellants.

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

JUDGMENT.

Schwabe, C. J.—This is an appeal from a decision of the Acting District Judge, South Arcot, by certain persons entitled in reversion to the property of the husband of one Tailammal. That lady left some property to a religious charity. It has been found as a fact and is not disputed that this lady owned that property herself and was entitled to leave it by Will. The defendants, therefore, admittedly have no right to the possession of the property at all. They are sued by the plaintiffs in alternative capacities, either on behalf of themselves and all other worshippers or frequenters of the charitable institution in question or as managers of the charity. The learned District Judge has found as a fact that they are managers of the charity. There was ample evidence which entitled him to come to that conclusion, as they had in fact been acting since the death of the brother of one and father of the other plaintiff, who admittedly was a properly constituted trustee or manager of this property and the learned Judge was quite entitled to infer from the fact of their having acted undisputedly for some years that they had been properly appointed or that their self-appointment as managers or trustees had been ratified and adopted by those persons, namely, the frequenters of the charity.

This being a question of fact, it is not open for this Court on second appeal to interfere with the finding, even if it does not, as we do in this case, agree with that finding. That is sufficient to dispose of this case, because it is not disputed that the managers of a charity are the persons who are entitled to sue for possession of the charity properties from anybody in possession. But, as the point has been argued, it is perhaps desirable to say something about the plaintiffs in the other capacity, namely, that as representing themselves and all other worshippers.

As I understand the law, property bequeathed to idols or temples, although notionally held by the deity and although it has been said that the deity represented by the idol can own the property, in fact, the right to possess the property, must be in some human being or beings. If there is a trustee or a manager, that trustee or manager is the human being who can sue for possession. But if there is none, then the question is, in whom is the right vested? I think the answer must depend on the circumstances of each bequest or trust. In this one, I should say, it was vested in the worshippers, meaning thereby not casual worshippers but the regular worshippers at this particular shrine, and so it was held in *Venkatasubban Patter* v. *Ayyathurai* (1) that in the case of a village temple owned in common by the villagers the right of management of the temple and its properties vests in the inhabitants of the village as a corporation. Now, such a body as inhabitants of a village or worshippers at a particular shrine is ordinarily represented by a manager, or a trustee or a committee or some elected or nominated representative of that kind. But, if no such representative has been nominated the right to possession would, in my judgment, vest in the general body, and the general body can sue; but as a matter of convenience, rules have been provided that general bodies can be represented in Court, for, without such rules the number of plaintiffs or defendants would make the suit impossible to handle. So one finds in O. I, r. 8, a provision that, with the permission of the Court, when there are numerous persons having the same interest in the same suit, one or more such persons may sue on behalf of or for the benefit of all persons so interested. Ordinarily the application for such permission would be made at an earlier stage of the suit, but in this case, the plaintiff without objection received from the Court at the hearing, its sanction to represent the numerous persons, namely, the general body of worshippers. In my judgment, that is in order, and if the general body are entitled to possession, these are proper representatives admitted by the Court under O. I, r. 8 and are entitled to an order for possession.

A case was quoted as being to the contrary. In *Noor Mahammad Saib* v. *Karima Bibi Ammal* (2) the head-note was to the effect

(1) 54 Ind. Cas. 202; 37 M. L. J. 554; 26 M. L. T. 364.

(2) 25 Ind. Cas. 559; 27 M. L. J. 270; 16 M. L. T. 165.

that the worshippers of the mosque cannot, whether in their individual or collective capacity, maintain a suit for the possession of the properties belonging to the mosque. That head-note is, in my judgment, much too wide. If the case means that where there is a representative such as a trustee, then individual members of the mosque or the charity cannot sue, I agree with it; but, if it means that persons in representative capacity cannot get an order for possession when the persons they represent are entitled to possession, I do not agree with it. The authorities quoted in the judgment in that case are not authorities in support of any such proposition, but they are authorities for the proposition that if there is a trustee or other properly constituted representative, then individual worshippers cannot sue for possession.

The appeal fails and must be dismissed with costs.

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

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1008 OF 1922.
January 12, 1923.
Present:—Mr. Justice Daniels.
TIRLOK SAITHWAR—PLAINTIFF—APPELLANT
versus
LALSA SAITHWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage by Hindu father before birth of son – Antecedent debt.

A mortgage by a Hindu father before the birth of a son, that is, when there was no joint family in existence, and, therefore, no joint family property, is a valid antecedent debt which cannot be challenged by the son.

***Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.) and *Suraj Prasad* v. *Makhan Lal*, 66 Ind. Cas. 134; 44 A. 382; 20 A. L. J. 51; (1922) A. I. R. (A) 200, followed**

Second appeal against the decree of the Additional Subordinate Judge, Basti, dated the 7th of July 1922.

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

JUDGMENT.—The present appeal raises a question of what constitutes antecedent debt within the meaning of *Sahu Ram Chandra* v. *Bhup Singh* (1). The mortgage in suit was executed by the father of the plaintiff as head of the joint family. Part of the consideration was applied to pay off a mortgage executed by the father at a time when the plaintiff was not born and no joint family was in existence. The lower Appellate Court held that this constituted a valid antecedent debt and that the plaintiff was not entitled to challenge it. There is direct authority for the view which it has taken in the case of *Suraj Prasad* v. *Makhan Lal* (2). Even apart from authority, the question appears to me as a matter of principle to be perfectly clear. The Privy Council laid down that to constitute antecedent debt the original debt must have been incurred apart from the security afforded by the joint family property which the manager is not, except under particular conditions, entitled to alienate. Here, at the time when the original debt was incurred, there was no joint family property because no joint family was in existence. The debt was, therefore, not incurred on the security of any joint family property and the transaction entered into by the father was one which he was perfectly entitled to enter into and which no one could question. There is no reason either of principle or of authority why this should not constitute valid antecedent debt for the purpose of supporting a subsequent alienation. Agreeing with the view of the Court below I dismiss the appeal under O. XLI, r. 11.

S. D. *Appeal dismissed.*

(1) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.).

(2) 66 Ind. Cas. 134; 44 A. 382; 20 A. L. J. 51; (1922) A. I. R. (A) 200.

KUNHIKUTTIALI *v.* KUNHAMMAD.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1631 OF 1920.
November 14, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice and Mr. Justice Wallace.

T. T. P. KUNHIKUTTIALI AND OTHERS —DEFENDANTS—APPELLANTS

versus

T. P. KUNHAMMAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 61 85, applicability of—Mutual, open and current account, meaning of.

In order to prove a mutual, open and current account under Art. 85 of Sch. I to the Limitation Act, it is sufficient to prove mutual dealings between the parties creating mutual duties or reciprocal demands on either side. [p. 466, col. 2.]

A person was appointed the agent of a mosque under a *karar* authorising him to collect dues payable to the mosque, pay the outgoings, take his remuneration, advance monies of his own to the mosque whenever necessary and keep an account of all transactions. In a suit by the agent for money mainly made up of advances made by him to or for the benefit of the mosque:

Held, that the obligations being mutual and the dealings reciprocal, the account was a mutual, open and current account to which the proper Article to apply was not 61 but 85 of Sch. I to the Limitation Act. [p. 467, col. 2.]

Ram Pershad v. *Harbans Singh*, 6 C. L. J. 158, *Hirada Basappa* v. *Gadigi Muddappa*, 6 M. H. C. R. 142 followed.

Padwick v. *Hurst*, (1854) 18 Beav. 575; 23 L. J. Ch. 657; 18 Jur 763; 52 E. R. 225; 104 R R. 536, referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeals Suits Nos. 291, 292 and 300 of 1918, preferred against the decree of the Court of the District Munsif, Cannanore, in Original Suit No. 728 of 1914.

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

Dr. *S. Swaminadhan*, Messrs. *K. P. M. Menon* and *Pocker*, for the Respondents.

JUDGMENT.

Schwabe, C. J.— In this case the plaintiff was the manager of a mosque. He held his position under a *karar*, dated the 21st of October 1910, which was a yearly appointment authorising him to collect the various dues due to the mosque, to pay the outgoings of the mosque and to take his remuneration according to stipulations in a previous *karar* which stipulations were also incorporated in this document. Turning to the previous *karar*, Exhibit XXXII in the case, dated the 9th of November 1903, one finds there a more detailed account of the payments to be made by the manager of his duties and liabilities and a detailed account of what is to be given as remuneration for the work he did which included a right to take 720 seers of paddy and Rs. 12 per annum. One of the terms was that he was to maintain a correct account of receipts and disbursements and that they were to be rendered and the balance struck on a certain date each year after the end of the year's management. It was arranged between the parties that when the mosque was short of funds the manager advanced monies of his own, and that yearly a balance was taken on one side which showed the expenditure by him, the advances by him and the salary due to him, and on the other side all that he had received on account of the mosque. His employment came to an end in February 1912 and before the expiration of three years he brought a suit for an account and payment to him of the amount he claimed as due, mainly made up of advances made by him to or for the benefit of the mosque. It has been found that the balance due to him was Rs. 923. He is met with the defence that this amount is not recoverable, because it is barred under the Limitation Act, 1908, Art. 61. That Article applies to money paid for and on account of another which becomes barred after three years from the date when the money is paid. The plaintiff replies to that, that Art. 61 has no application but Art. 85, which is "for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties," the period for bringing a suit in respect of which is three years from the close of the year in which the last item admitted or proved is entered in the account. It is argued for the trustees that this Article has no application, because there is not in this case a mutual, open and current account, and we are referred to English cases and particularly to *Padwick* v. *Hurst* (1), in which it was held that for an account properly to be called a mutual account there must be mutual dealings in the sense that both parties come under liability to each other. That principle has been

(1) (1854) 18 Beav. 575; 23 L. J. Ch. 657; 18 Jur. 763; 52 E. R. 225; 104 R. R. 536.

applied in many cases in India in reference to the interpretation to be put upon Art. 85. But in applying the principle one has to look at it rather carefully and it was most carefully examined by Mookerjee, J. in his judgment in *Ram Pershad* v. *Harbans Singh* (2). In that case dealing with the earlier leading authority of *Hirada Basappa* v. *Gadigi Muddappa* (3), a judgment of Holloway, J., he points out and approves of the statement by the learned Judge that "in order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." He then enters on a discussion of the various cases on those lines and points out that "where you have a case of a shifting balance, sometimes in favour of one side, sometimes in favour of the other, it is a test of mutuality, but its absence is not conclusive proof against mutuality." The meaning of that, as I understand it, is that, if you may get a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other; if the balance is always in favour of one party in the very nature of the transcations, there you have got a case where you have not separate mutual dealings. Later in his judgment, having quoted that and applied the English cases referred to above, he says thus: "In order to prove a mutual and open account current, it is sufficient to prove mutual dealings between the parties consisting of sales made, or services performed, by each party, to, or for the other, creating mutual debts or reciprocal demands." I think that is a fair statement of the principle to be applied and one has to look at each particular case and see if it is really a case of debtor and creditor only or a case of mutual obligations which will in the ordinary way result in enforceable liabilities on either side. Looking at the facts of this case, it seems to me that it is clearly a case where you have a mutual, open and current account with reciprocal demands. That the account was open and current there can be no doubt whether it is mutual or not, and whether the demands are reciprocal or not. In this case it is enough to say that there is an obligation, on the one hand, to pay salary and an obligation on the other hand, to account for and pay over to the principal the amounts that may yearly be found due on balance to the principal. I think also it would be enough if the course of dealing is, as in this case, the lending of money by the agent to the principal, which is not an ordinary part of an agent's duty, such loans by the agent to the principal being brought into the account, you would have, apart from the question of salary, reciprocal dealings between the parties in the sense required to fulfil the conditions stated by Mukerjee, J. A clear instance of the application of an Article of the Limitation Act of 1877, similar in terms to Art. 85 of this Act, is to be found in *Lakshmayya* v. *Jagannatham* (4).

It follows that, in my judgment, the judgment of the Subordinate Judge is right. I should think it right to add that I consider it a great pity that such a point should have been taken by the trustees of a mosque, assuming the facts to be as they have been stated to us, namely, that this agent assisted the mosque from his own pocket and to a great extent without being under any obligation to do so. This appeal must be dismissed with costs of the plaintiff.

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

V. N. V. *Appeal dismissed.*

(2) 6 C. L. J. 158.
(3) 6 M. H. C. R. 142.
(4) 10 M. 199; 3 Ind. Dec. (N. S.) 891.

SONOO *v.* BHADARIA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 44 OF 1921.

November 16, 1922.

Present:—Mr. Hallifax, A. J. C.

SONOO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHADARIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (X V I of 1908), ss. 2 (7), 17 (2)—Agreement to lease—Registration.

An agreement to lease within the meaning of section 2 (7) of the Registration Act is compulsorily registrable under section 17 of the Act only if it creates an immediate interest in the property agreed to be leased out, even before any other document has been executed. [p. 469, col. 1.]

The distinction between agreements to lease which are covered by section 2 (7) of the Registration Act and those which are not, lies in the fact of the lease itself being intended to begin at once or at some time in the future. Every promise to grant a lease must in its nature create or declare or assign some interest in the property to be leased, but unless the promise is to grant an immediate lease which is to come into existence at once, even before any other document has been executed, it is an agreement to lease outside the class of such agreements of which section 2 (7) of the Registration Act speaks. [p. 470, col. 1.]

Parmanand v. *Birkhu*, 1 Ind. Cas. 903; 5 N. L. R. 21, *Hemanta Kumari Debi* v. *Midnapore Zemindari Co.*, 53 Ind. Cas. 534; 47 C. 485; 37 M.L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.), *Panchanan Basu* v. *Chandi Charan Misra*, 6 Ind Cas. 443; 37 C. 808; 14 C. W. N. 874, referred to.

Appeal from the decree of the Subordinate Judge, Balaghat, dated the 28th February 1921, in Civil Suit No. 79 of 1920.

Messrs. *C. B. Parakh* and *K. K. Gandhe*, for the Appellants.

Mr. *B. R. Pendharkar*, for the Respondents.

JUDGMENT.—The two defendants, who are appellants here, executed a document which described itself as a receipt and was so stamped in favour of the plaintiffs. The gist of that document is as follows: "We have this day given you a lease for twelve years of a half share in the *lakh parasadi* of our *malguzari* jungle for Rs. 7,000. We have received Rs. 6,000 of this to-day and you will pay us the remaining Rs. 1,000 at the time of execution and registration of the lease-deed As no 8 anna stamp is available at this time we have passed this receipt. Within two months we will execute the deed of agreement and the deed of lease and get them registered. If we fail to do this we will pay you twice six thousand, that is, twelve thousand. From this day you may look after the jungle and propagate lac in it or you may sell the right in it to another person. You are to take all the crops for twelve years, that is twenty three crops, twelve *sihari* and eleven *unhari*."

(2) The plaintiffs took possession of the property mentioned in the document and are still in possession of it, but the defendants have refused to execute the deed of lease they promised and the plaintiffs have accordingly filed this suit praying for a decree to compel them to do. The defendants raised many false pleas in defence and, alongside an admission that they had promised to give a lease for at least nineteen crops and had actually given it and had received 6/7ths of the consideration, they placed the contention that, for various technical reasons, they were not bound to give one at all. They took up the same attitude in their petition of appeal and abandoned it only when it was made plain to them that a decree for a lease of at least nineteen crops was inevitable and persistence in that attitude would entail payment of the whole costs of this appeal by them. They now rely on the completely immaterial contention that they never agreed to pay a penalty of Rs. 12,000 for breach of the contract and on the very material allegation that the term of the lease they promised to give was, as they put it, ten years and not twelve years, or, to be more precise, was to include nineteen crops and not twenty-three crops. This last is the only point now requiring decision, that is to say, whether the term of the lease which the defendants promised to give the plaintiffs was to include nineteen crops or was to cover twenty-three crops.

(3) The document already mentioned was held to be an agreement in the lower Court and was validated by the levy of the deficient stamp duty and a penalty. If section 17 of the Registration Act makes registration of this "receipt" com-

pulsory, then, not having been registered it is entirely excluded from evidence in this suit by section 49 of the same Act, and further its acknowledged existence will exclude all oral evidence of the terms of the agreement contained in it under section 91 of the Evidence Act. In that case there would be no legally admissible evidence that the period of the lease was to be more than that admitted by the defendants, and a decree would have to issue directing the execution of a deed of lease covering nineteen crops. If, however, the document does not require registration then it is admissible in evidence to prove that the term of the lease was to include twenty-three crops, and it would in this case be conclusive evidence to that effect. The only real issue in this case is, therefore, whether section 17 of the Registration Act makes the registration of this document compulsory or not

(4) The document undoubtedly contains an agreement and it cannot be denied that the agreement is to grant a lease for more than a year of what was held in *Parmanand* v. *Birkhu* (1) to be immoveable property. Clause (*d*) of section 17 of the Registration Act makes registration compulsory in the case of all leases of immoveable property for any term exceeding one year, and section 2 (7) of the same Act lays down that the word " lease " used in it is to be understood as including an agreement to lease. In *Hemanta Kumari Debi* v. *Midnapore Zemindari Co.* (2) their Lordships of the Privy Council, citing with approval the judgment of the Calcutta High Court in *Panchanan Basu* v. *Chandi Charan Misra* (3), said that the mention of an agreement to lease in section 2 (7) of the Registration Act " must, in their opinion, relate to some document that creates a present and immediate interest in the land." Unless the " receipt " in the present case does that, it cannot come within the meaning of clause (*d*) of section 17 and will be saved from the necessity of registration by clause (*v*) of sub-section (2), whether it falls primarily within the meaning of clause (*b*) or clause (*c*).

(5) In the case before the Privy Council the agreement was that if the defendant succeeded in a suit then pending against the Government in respect of certain lands a lease of those lands should then be granted to the plaintiff on specified terms, and their Lordships said: "The present agreement is an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase 'agreement for a lease,' which, in the context where it occurs and in the Statute in which it is found, must in their opinion relate to some document that creates a present and immediate interest in the land."

(6) In the Calcutta case also the agreement, which was embodied in a *solehnama*, was to execute a document in the future and thereby grant a lease; the lease was not to come into being at once but when the document was executed. In reading the following passage from the judgment of Sir Lawrence Jenkins, C. J. it is to be remembered that clause (*v*) of sub-section (2) of section 17 in the present Act and clause (*h*) of section 17 of the Act as it then stood are identical. The learned Chief Justice said: "In my opinion, the *solehnama* here does not amount to a lease within the meaning of clause (*d*) of section 17 of the Registration Act. On a fair reading of the document, I think that no immediate interest was created, there was no present demise, and the document was merely an agreement to create a lease on a future day, the terms of which were to be defined by documents to be thereafter executed. The case, therefore, seems to me to fall within clause (*h*) of section 17 of the Registration Act. This being so, I think the appellants have rightly contended before us that the document was admissible in evidence."

(7) The learned Subordinate Judge has held that the document, like that in the

(1) 1 Ind. Cas. 903; 5 N. L. R. 21.
(2) 53 Ind. Cas. 534; 47 C. 485, 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.)
(3) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.

Calcutta cases cited, comes within the meaning of section 17 (2) (*v*) of the Registration Act. It appears to me that the distinction drawn there and by their Lordships of the Privy Council between agreements to lease which are covered by section 2(7) of the Act and those which are not, lies in the fact of the lease itself being intended to begin at once or at some time in the future. Every promise to grant a lease must in its nature create or declare or assign some interest in the property to be leased, but unless the promise is to grant an immediate lease which is to come into existence at once, even before any other document has been executed, it is an agreement to lease outside the class of such agreements of which alone section 2 (7) of the Registration Act speaks.

(8) In this view it is clear that the agreement with which we are concerned is of the class mentioned in clause (*d*) of section 17 of the Act, and it is, therefore, excluded from evidence in this case by section 49 of the Act. It is further to be noticed that the document in this case is partly what it calls itself, a receipt, and, therefore, unlike the documents in the two cases mentioned, would come within the words of clause (*c*) of section 17 and not within those of clause (*b*). But whether clause (*b*) or clause (*c*) of sub-section (1) applies to it primarily, it is prevented from being exempted from that application in virtue of clause (*v*) of sub-section (2) by practically the same reason that brings it within the application of section 2 (7) of the Act, that it brings a lease into existence immediately and is not a document *merely* creating a right to obtain another document.

(9) The only contest between the parties was, however, as has been explained above, in reference to the last four of the twenty-three crops; they both agreed that the lease was to be for at least the first nineteen, and as the plaintiffs have no admissible evidence to show that the last four were agreed to be included, the finding must be that they were not. In the last paragraph of his judgment and also in the decree the learned Subordinate Judge, who found that a lease was to be given for twenty-three crops, has by a mistake in calculation ordered that one shall be given for twenty-five. The decree will be modified by the excision from it of the words: "for 12 years, that is, twenty-three harvests ending with the *sihari* harvest of 1931" and by the substitution for them of the words: "for nineteen harvests of which the last will be the *sihari* harvest of A. D. 1928." The period within which the document is to be executed will also be extended to the 15th of January 1923. In view of the line of defence taken and of all the circumstances of the case I order that the defendants shall pay the whole of the costs in the lower Court and nineteen twenty-thirds of those in this Court, the plaintiffs paying the remaining four twenty-thirds.

G. R. D. & N. H.

Decree modified.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1215 OF 1920.

January 9, 1923.

Present.—Mr. Justice Ross.

CHATURGUN BIND AND OTHERS.—DEFENDANTS—APPELLANTS

versus

TILAKDHARI SINGH—PLAINTIFF—RESPONDENT.

Construction of document -Mortgage—Zarpeshgi *lease* Raiyati *interest, transfer of Lease, simple, by mortgagee in favour of mortgagor—Default in payment of rent—Suit by mortgagee—Bengal Tenancy Act (VIII of 1885), s. 48, application of.*

One *R*, a *raiyati* tenant, executed a *zarpeshgi* lease of his land in favour of one *T* for nine years in consideration of a specified amount. The document recited that *T* would hold possession of the *zarpeshgi*

CHATURGUN BIND *v.* TILAKDHARI SINGH.

property and appropriate the produce thereof and pay a certain specified sum of money annually to the proprietor of the village on account of the rent of the property, that at the end of the stipulated period the executant would re-enter into possession of the property on payment of the *pesghi* money and that in case of dispossession of *T*, the amount of the *pesghi* money would be realised with interest from the executant. Two days after the execution of the above document, *R* executed a *kabuliyat* in favour of *T*, which recited that he had taken a simple lease for a term of nine years of the property mortgaged by him with *T* two days before, that he would cultivate the land and appropriate the produce thereof from year to year till the expiry of the term of the *kabuliyat* and pay a fixed rent annually to the *malik*, *T*, the *zarpeshgidar*. *R* defaulted in payment of rent, and *T* brought a suit to recover the same. The defence was that *R* was an under-*raiyat* and *T* was not allowed to claim more rent than what he was entitled to under section 48 of the Bengal Tenancy Act:

Held, (1) that the *zarpeshgi* lease in favour of *T* was both a lease and a mortgage, that by it *R* transferred his *raiyati* interest to *T*, who thereby acquired the right to hold the land for the purpose of cultivating it and that, as *T* was to hold directly under the landlord and not under *R*, *R* ceased to be a *raiyat* as long as the lease was outstanding against him; [p. 472, col. 1.]

(2) that the simple lease in favour of *R* was not a lease of the *raiyati* interest of the land to the original *raiyat* as *R* was not to pay rent to the proprietor but to *T*, the *zarpeshgidar*; [p. 472, col 1]

(3) that, therefore, the rent recoverable by *T* was to be regulated by section 48 of the Bengal Tenancy Act, and *T* was not entitled to a greater rent than that to which he was entitled under that section; [p 472, col. 2.]

(4) that the two transactions of the mortgage and the lease were separate and independent of each other and the mere fact that the lease was made in favour of the mortgagor would not alter the relation of landlord and tenant between the parties. [p. 472, col. 2]

Chimman Lal v. *Bahadur Singh*, 23 A. 338; A. W. N. (1901) 95. *Khuda Bakhsh* v. *Alimunnissa*, 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715 and *Uttam Chandra Daw* v. *Raj Krishna Dalal*, 55 Ind. Cas. 157; 47 C. 377; 24 C. W. N. 229; 31 C. L. J. 98 (F. B.), referred to.

Second appeal from a decision of the District Judge, Saran, dated the 7th September 1920, reversing a decision of the Munsif, First Court, Chapra, dated the 8th January 1920.

Mr. *Jadubans Sahay*, for the Appellants.

Mr. *B. N Mitter*, for the Respondent.

JUDGMENT.—The facts of this case are these: On the 16th January 1917 the defendants executed a *zarpeshgi* lease of 2 *bighas* 7 *cathas* and 12 *dhurs* of *kasht* land in favour of the plaintiff in consideration of Rs. 975. On the 18th January 1917 the defendants executed a *kabuliyat* in favour of the plaintiff for a term of nine years from 1324 to 1333 in respect of the same land, the rent reserved being Rs. 75-5-0 a year. As they defaulted in payment of the reserved rent the plaintiff brought this suit for 1325 and part of 1326. The defence was that the *kabuliyat* was executed by the defendants' father when he was old and incapable of understanding the transaction: that during the revisional Survey the rent was recorded as Rs. 24-7-0 and that the plaintiff is not entitled to claim more. The Munsif decreed the suit at a rental of Rs. 24-7-0. With regard to the allegation that the defendants' father was unable to understand the transaction into which he entered no definite finding was arrived at. The learned District Judge on appeal did not discuss the question whether the defendants' father was able to understand the transaction or not, but holding that the tenancy created by the *kabuliyat* was a new tenancy and that the defendant, while executing the *zarpeshgi* lease, did not loose his original status of a *raiyat* decreed the suit in full. The defendants appeal.

In order to decide the question involved in this case it is necessary to refer to the terms of the documents. The *zarpeshgi* lease was executed on the 16th January 1917 by Ram Piyar Bind. It recites that the executant gave in *zarpeshgi* 2 *bighas* 7 *kathas* 12 *dhurs* of *quaimi kasht*, hitherto held and possessed by him, for a term of nine years from 1324 to 1333 to Tilakdhari Singh and put him in possession and occupation thereof in consideration of Rs. 975, received by the executant; that the *zarpeshgidar* should have and hold possession of the *zarpeshgi* property and appropriate the produce thereof and pay Rs. 16-13-0 annually to the proprietor of the village on account of rent of the *zarpeshgi* property. On re-payment of the *peshgi* money to the *zarpeshgidar* by the end of *Jeth* 1333 *Fasli*, or any time in the month of *Jeth* of a subsequent year, the executant should re-enter into possession of the mortgaged property. In the event of failure to pay the *peshgi* money on the due date the above stipulations were to stand and in case of dispossession of the *zarpeshgidar* the amount of the *peshgi* money would be realised with interest from the executant,

Now, what is the effect of this instrument? It is both a lease and a mortgage. In consideration of Rs. 975, the *raiyat* of 2 *bighas* 7 *kathas* of land puts the plaintiff in possession and occupation of the land for a term of nine years. The plaintiff is to appropriate the produce and pay the rent to the landlord, that is to say, the plaintiff is to hold directly under the landlord and not by way of sub-lease under the *raiyat*. The term of the lease is to be extended automatically until the *peshgi* money is paid. It seems clear that by this instrument the original *raiyat* transferred his *raiyati* right to the plaintiff who thereby acquired the right to hold the land for the purpose of cultivating it; and the defendant consequently ceased to be *raiyat* as long as the lease was outstanding against him. He had only the reversion of the *raiyati* interest on the expiry of the term of the lease, but during the term of the lease the *raiyati* interest was in the plaintiff.

The *kabuliyat* was executed on the 18th January 1917 by the same Ram Piyar Bind in favour of the same Tilakdhari Singh. It recited that by the *zarpeshgi* lease the executant had received the *zarpeshgi* money and had put Tilakdhari Singh in possession of the lease-hold property and the said *zarpeshgidar* had been in possession and occupation since then. But as the executant desired to keep the said mortgaged land under his cultivation and to pay Rs. 75-5-0 annually as rent to the said *zarpeshgidar*, the said *zarpeshgidar* had granted a simple lease for a term of nine years from 1324 to 1333 to the executant. The executant was to cultivate the land, appropriate the produce thereof from year to year till the expiry of the term of the *kabuliyat* and pay the fixed rent of Rs. 75-5-0 annually to the said *malik*, that is, Tilakdhari Singh, the *zarpeshgidar*. When the term of the *kabuliyat* expired at the end of *Jeth* 1333 the executant was to give up possession of the lease-hold property. Now, this is clearly not a lease of the *raiyati* interest of land to the original *raiyat*. The defendant is not to pay rent to the proprietor but to the *zarpeshgidar*. He becomes the tenant of the *zarpeshgidar* at a rent of Rs. 75-5-0. He cannot be deemed to be a *raiyat* because he does not hold the land either immediately under a proprietor or immediately under a tenure-holder; he is an under-*raiyat* and the rent recoverable by the plaintiff must, therefore, be regulated by section 48 of the Bengal Tenancy Act. That these two transactions are separate is established by the authority of *Chimman Lal* v. *Bahadur Singh* (1) and the decision quoted in the foot-note to that report and also by *Khuda Bakhsh* v. *Alimunnissa* (2). The effect of the second transaction in such a case is stated in the Full Bench decision in *Uttam Chandra Daw* v. *Raj Krishna Dalal* (3), where Mr. Justice Chatterjee observed that the legal relation between the parties after the execution of the *kabuliyat* was that of landlord and tenant and that the mere fact that the lands were let out to the mortgagor would not alter the relation between the parties. It follows, therefore, that the decision of the Munsif in this case was right and that the appeal must be decreed with costs and that the decree of the District Judge set aside and the decree of the Munsif restored.

N. H. *Appeal decreed.*

(1) 23 A. 338; A. W. N. (1901) 95.
(2) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.
(3) 55 Ind. Cas. 157; 47 C. 377; 24 C. W. N. 229; 31 C. L. J. 98 (F. B.).

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 116 OF 1922.
January 16, 1923.
Present:—Mr. Justice Daniels.
BHOLA NATH AND ANOTHER—DEFENDANTS—PETITIONERS
versus
RAM SAHAI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Wrong decision on question of law—Revision.

A wrong decision on a pure question of law, when the Judge has applied his mind to the question and has decided it to the best of his ability, is insufficient to bring a case within the provisions of section 115, Civil Procedure Code.

Civil Revision against an order of the District Judge, Furrukhabad, dated the 12th July 1922.

MOSAFIR LAL DAS *v.* GANESH JHA.

Mr. *Gulzari Lal*, for the Applicants.

Mr. *P. L. Banerji*, for the Opposite Party.

JUDGMENT.—This is an application under section 115, Civil Procedure Code, for revision of an appellate order of the District Judge of Furru habad in a case in which no second appeal lay. The suit was one to recover the price of potatoes. The applicants obtained certain potatoes from *Musammat* Ganeshi and Ram Sahai. There was a dispute between these two as to the ownership of the potatoes but it has been found that they really belonged to both jointly. In view of the dispute the applicants sent a money-order addressing to both as payees but the money was actually taken by *Musammat* Ganeshi alone. The question which the Court below had to consider was whether this was a good payment or whether the plaintiff who had not received his share of the price was entitled to sue the applicants for it in spite of the payment made to *Musammat* Ganeshi. The learned Judge applied his mind to this question and decided. though in view of section 38 of the Contract Act it appears to me that he decided wrongly, that the plaintiff, Ram Sahai, was entitled to recover his half share of the amount. The case is a hard one for the applicants, but I am bound to hold on the preliminary objection of the respondent that there was no material irregularity in the exercise of jurisdiction which would bring the case within section 115. It has never been held that a wrong decision on a pure question of law when the learned Judge has applied his mind to the question and has decided it to the best of his ability is sufficient to bring a case within the provisions of section 115. On this ground I dismiss the application. Under the circumstances the parties will bear their own costs.

S. D. *Application dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 727 OF 1920.

June 29, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

MOSAFIR LAL DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GANESH JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 171—Payment into Court—Payment to decree-holder, under Court's direction, whether payment into Court.

Where the mortgagee of an occupancy holding applies to the Court for permission to deposit in Court the amount of a decree for rent, and under the direction of the Court pays the money to the landlord direct, such payment is tantamount to payment into Court, within the meaning of section 171 of the Bengal Tenancy Act.

Appeal against the decision of the District Judge, Darbhanga, dated the 28th June 1920, reversing that of the Munsif, Madhubani, dated the 22nd December 1919.

Mr. *Lachmi Kant Jha*, for the Appellants.

Mr. *Murari Prasad*, for the Respondents.

JUDGMENT.

Coutts, J.—The facts of this case are shortly as follows. The defendants, second party, had an occupancy holding which they had mortgaged to the defendant, first party. In 1916 the landlord obtained a decree for rent, the defendant No. 1 paid up this decree to the landlord. On the 1st of November 1917 the plaintiffs purchased the property from the defendants, second party, and obtained possession. On the 19th of November the defendant No. 1 filed an application for possession under section 171 of the Bengal Tenancy Act and in December of the same year got possession. The plaintiffs brought this suit for a declaration that the defendant, first party had no right to possession, and for delivery of possession to them by evicting the defendant, first party. The suit was contested by the defendant, first party. It was partly decreed by the Court of first instance; the defendant, first party, appealed and on appeal the decree was modified to the extent that the plaintiffs were given a decree for redemption of the mortgage. The plaintiffs have appealed to this Court.

The only point which is really urged in this appeal is that section 171 of the Bengal

Tenancy Act has no application to the present case, inasmuch as the money was not paid into Court by the defendant, first party, as required by that section. What in fact happend was that the defendant, first party, asked permission to deposit the money in Court, the Court instead of granting that permission allowed the defendant, first party, to pay directly to the plaintiffs and this was done. The learned District Judge has found that this is tantamount to payment into Court as required by Art. 171 of the Bengal Tenancy Act and in my opinion this is so. I would accordingly dismiss this appeal with costs.

Das, J.—I agree.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 97 OF 1922.

January 16, 1923.

Present:—Mr. Justice Daniels.

BADLU SINGH—PLAINTIFF—APPLICANT

versus

PANTHU SINGH—DEFENDANT, OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17 (1) Prov.—Application for restoration—Unregistered bond of immoveable property given on date of application—Cash security deposited next day, whether sufficient compliance with proviso.

It is not a sufficient compliance with the requirements of the law if the applicant files with his application for restoration an unregistered, and, therefore, invalid security-bond, purporting to hypothecate immoveable property, and the next day on being directed by the Court deposits the amount in cash.

Jagan Nath v. *Chet Ram*, 28 A 470; A. W. N. (1906) 93; 3 A. L. J. 318 and *Chhotey Lal* v. *Lakhmi Chand*, 34 Ind. Cas. 113; 38 A. 425; 14 A. L. J. 549, followed.

Civil Revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 22nd April 1922.

Dr. *K. N. Katju*, for the Applicant.

Mr. *S. D. Singh*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of a Small Cause Court restoring to the file. The application is based on the ground that section 17 of the Small Cause Courts Act was not complied with. That section requires that the applicant shall, at the time of presenting his application, either deposit the amount due from him or give security to the satisfaction of the Court for the performance of the decree. In this case the applicant gave a security bond on the date of his application. The next day the learned Judge of the Court below directed the applicant to deposit the amount in cash and the applicant did so in accordance with the order. The Court below did not record the reason for passing this order but the reason is apparent on an examination of the security bond itself. The bond was one purporting to hypothecate immoveable property. It was, therefore, invalid without registration and it was not registered. Under these circumstances I must hold that the applicant had failed to comply with the requirements of law as interpreted in the rulings of this Court *e. g.*, *Jagan Nath* v. *Chet Ram* (1) and *Chhotey Lal* v. *Lakhmi Chand* (2). The respondent has referred me to certain rulings of the Calcutta and Madras High Courts in which it was held that it was sufficient if the security was deposited by the applicant within the period of thirty days allowed for making his application, but this is not the view which has prevailed in this High Court nor is it in accordance with the language of the section which specifically says that the security must be tendered "at the time of presenting his application." I accordingly allow this application and set aside the order of the Court below restoring the suit with costs of these proceedings in this Court and in the Court below.

S. D. *Order set aside.*

(1) 28 A. 470; A. W. N. (1906) 93; 3 A. L. J. 318.
(2) 34 Ind. Cas. 113; 38 A. 425; 14 A. L. J. 549.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1243 OF 1921.
January 15, 1923.
Present:—Mr. Justice Daniels.
JASRAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
Babu AMAR NATH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 202—Ejectment suit—Plea of tenancy—Bona fides, question of—Duty of Civil Court.

If in a suit relating to an agricultural holding the defendant pleads a tenancy, the Civil Court has no option but to refer him to a Revenue Court under section 202 of the Agra Tenancy Act, as there is nothing in the section which requires the Court before applying it, to decide that the claim to tenancy is *bona fide*.

Second appeal against a decree of the Second Additional Subordinate Judge, Aligarh, dated the 9th May 1921.

Mr. *Gulzari Lal*, for the Appellants.

JUDGMENT.—The issue in these cases is as to the application of section 202 of the Agra Tenancy Act. The plaintiff sued for possession of certain plots of agricultural land on the allegation that the defendants had been ejected by the Revenue Court and were mere trespassers. It appears that the defendants had been ejected on 11th October 1918 and the plaintiff had obtained formal possession. The present suits were brought on 9th August 1920, nearly two years later. The defendants pleaded that they had been re-admitted to the tenancy. The Courts below practically admit that this was a state of things to which section 202 was applicable, but they did not apply the section because they thought the defendants' claim was not *bona fide* and because they held that the defendants could go on delaying their ejectment by raising this plea whenever the plaintiff came to the Civil Court to get actual possession. As regards the first point, here is nothing in the section itself to require the Civil Court to decide that the claim to a tenancy is *bona fide* before applying section 202, and in deciding this point the Courts below were really usurping the functions of the Revenue Court. There appears to be no force in the dilemma raised that the defendants

can continue indefinitely to raise pleas of this kind. If the Courts below had required the defendants to institute a suit in the Revenue Court, as they should have done, and the Revenue Court had decided against the defendants the latter would have been ejected absolutely and no further pleas on their part would have been of any avail. The lower Court has urged the delay that might have been caused by an appeal to the Board of Revenue but in fact the appeal to this Court has caused more delay than any on the Revenue side could have done. I set aside the decrees of the Courts below and pass the order which the lower Appellate Court should have passed requiring the defendants to institute a suit in the Revenue Court within three months of this date for the determination of their plea that they hold the land as the tenants of the plaintiff. I at the same time send back the case through the Court below to the Trial Court with directions to decide the suit in accordance with the provisions of sub-section (2) of section 202 of the Tenancy Act. Costs here and heretofore will abide the result.

S. D. *Decree set aside.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 6 of 1921.
January 12, 1923.
Present:—Mr. Justice Ross.
DASI CHAMAR—DEFENDANT—APPELLANT
versus
RAM AUTAR SINGH—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), s. 36—Document, insufficiently stamped, admitted in evidence—Subsequent removal from record, whether justified.

DASI CHAMR *v.* RAM AUTAR SINGH.

When a document is admitted in evidence and exhibited, it is not open to the Court to remove it from the record of evidence on it being subsequently pointed out that it is not properly stamped. Such a procedure is prohibited by section 36 of the Stamp Act. [p. 477, col. 1.]

Appeal from a decision of the Subordinate Judge, Saran, dated the 29th September 1920, reversing a decision of the Munsif, Chapra, dated the 21st July 1919.

Mr. *Nirsu Narain Sinha*, for the Appellant.

Messrs. *K. P. Jaiswal* and *Baikuntha Nath Mitter*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant No. 1 against the decree of the Subordinate Judge of Saran reversing the decree of the Munsif of Chapra in a suit brought by the plaintiff for possession of 1 *bigha* 1 *katha* and 7 *dhurs* of land. The plaintiff alleged that one Palak Chamar was the cousin of defendant No. 1 and that two of them together owned 1 *bigha* 10 *kathas* and 5 *dhurs* of land. Three years before, Palak died without heirs other than defendant No. 1 who on the 24th of June 1915 sold the property in suit to the plaintiff for Rs. 200, which the plaintiff paid to Kawaldeo Narayan Singh, the landlord of the defendant to whom the defendant was indebted in that amount. But during the Survey operations the defendant No. 1 set up defendant No. 2 as the son of Palak Chamar and got his name recorded in the Record of Rights for Palak's share. The defence was that the defendant No. 2 was the son of Palak Chamar, that the defendant No. 1 did not owe anything to the landlord Kawaldeo Narayan Singh but that, on the contrary, he had agreed to sell his share of the property to Kawaldeo Narayan Singh for Rs. 200, but the latter had fraudulently got the sale-deed drawn in respect of the whole property and executed in the name of the plaintiff who is his *benamidar* with a false recital as to the payment of the money.

The Munsif found that the plaintiff was a nominal purchaser and dismissed the suit on this and other grounds. The Subordinate Judge, however, held that Palak and Dasi, the defendant No. 1, were indebted to the landlord; that the plaintiff was the real purchaser, and that consideration passed, and he decreed the suit in appeal. It may be noted that the defendant No. 2 was not a party to that appeal.

In the present appeal the first point taken is that, in the absence of defendant No. 2, the plaintiff's title cannot be determined so far as the share of the defendant No. 2 is concerned. It is argued that the decree of the Munsif was in favour of defendant No. 2 and, therefore, he could not appeal and, as he was not made a party to the appeal by the plaintiff, his rights could not be determined in that appeal and cannot be determined now. This contention is undoubtedly sound and the rights of the defendant No. 2, if any, stand unaffected by this appeal.

The second contention is, that the judgment of the Appellate Court is not in accordance with law on the question of the *farzi* nature of the plaintiff's purchase. It is contended that the Munsif has dealt elaborately with the question of *benami*, he has considered the evidence and has given several reasons for his conclusion, whereas the Subordinate Judge has not dealt with the evidence at all but has based his decision on one single consideration. I do not think that this is a fair description of the judgment of the Subordinate Judge. He begins by saying that the lower Court had overlooked a very important piece of documentry evidence. This implies that he had considered what the Munsif has said on this subject and he came to the conclusion that the really decisive consideration was the inference to be drawn from this particular document. With that inference and its soundness I am not concerned. But I cannot hold that the treatment of the case by the Subordinate Judge on this point is not in accordance with law.

Then, it is argued that the sale was without consideration, because the debt which it purported to pay off was barred at the time when it was acknowledged and there was no promise to pay it. This argument might have required consideration, if it had been found that Kawaldeo Narayan Singh, to whom the debt was due, was the real purchaser, although even in that case it could hardly be said that the sale was without consideration. But here it has been found as a fact that the plaintiff was the purchaser, no question of the debt of

Kawaldeo Narayan Singh being barred arises. It must be taken on the findings that consideration was paid by the plaintiff as an independent and real purchaser of the holding by his parting with Rs. 200 to Kawaldeo Narayan Singh. Consequently, in no view can the sale be without consideration.

Lastly, it is argued that the learned Subordinate Judge erred in admitting certain *chithas* in evidence which the Munsif had refused to admit on the ground that they were not stamped according to law. What happened exactly was, that the documents were admitted in evidence and exhibited and subsequently when it was pointed out that they were not properly stamped the Munsif removed them from the record of the evidence. But section 36 of the Stamp Act prohibits such a procedure, enacting that where an instrument has been admitted in evidence its admission shall not be called in question at any stage on the ground that it has not been duly stamped. On this point, therefore, the Subordinate Judge was undoubtedly right. The *chithas* were evidence and he was entitled to rest his finding on them. The appeal must, therefore, fail and is dismissed with costs.

W. C. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 90 OF 1921.
November 3, 1922.
Present:—Mr. Batten, J. C.
TATYA—PLAINTIFF—APPELLANT
versus
SAWANIA—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92—Bond—Condition precedent—Oral agreement, admissibility of.

An oral agreement which constitutes a condition precedent to the attaching of any obligation under a bond, may be proved under section 92 (3) of the Evidence Act, but not an oral agreement inconsistent with and contradicting the terms of the written agreement. [p. 477, col. 2; p. 478, col. 1.]

Appeal from a decree of the District Judge, Hoshangabad, dated the 13th November 1920, in Civil Appeal No. 109 of 1920.

Mr. *S. B. Gokhale*, for the Appellant.
Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The defendant leased his absolute occupancy field to the plaintiff for a term of seven years, but they had not obtained the landlord's consent, and the landlord brought a suit against them to cancel the lease. As the plaintiff and defendant were bound to fail as against the landlord, the lease was given up and in its place the defendant, the tenant, executed in favour of the plaintiff, his sub-tenant, a series of six bonds, of which three are sued on in this suit, undertaking, in lieu of the lease, to pay off the lease-money by giving an instalment of 12 *khandis* of wheat every year. These circumstances are fully set out in the bonds sued on.

The defendant pleaded that the real arrangement between the parties was that, in order to pay off the lease-money, the defendant should cultivate his own tenancy land but should give half the produce every year to the plaintiff who had been his sub-tenant, and that the plaintiff should pay him half the rent every year. It was also alleged that, in order that the landlord should not be aware of this arrangement, the bonds were executed in the form in which they stand. The bonds are described in the defendant's pleadings as "security" for the real oral agreement. The defendant pleaded that the produce had been divided every year except one year when there was no produce and that the plaintiff had been giving his half share of the rent according to the oral agreement.

The First Court held the oral agreement unproved and also that the re-payment had not been proved, that is to say, re-payment by division of produce. The District Judge took a different view; he held that the oral agreement set up by the plaintiff had been proved, that the crops had been divided, and that the plaintiff had received his half share of such crops as there were. He also held that, under proviso (3) to section 92 of the Evidence Act, the oral agreement could be proved.

No doubt, as the District Judge says, an oral agreement which constitutes a

condition precedent to the attaching of any obligation under the bonds could be proved under proviso (3) to section 92 of the Evidence Act. But after careful perusal of the pleadings of the parties and of the evidence adduced by the defendant I am satisfied that what the defendant had pleaded and has attempted to prove is not an oral agreement constituting a condition precedent but an oral agreement inconsistent with and contradicting the terms of the actual written agreement. As I have said, the full facts giving rise to the agreement are set out in the bonds. In lieu of the rent money, the defendant was to cultivate his own tenancy land himself and pay 12 *khandis* of wheat per year in lieu of the consideration for the lease that was still owing to the plaintiff. The bonds are not simple grain bonds with the conditions and circumstances not set out, but they give a full history of the circumstances in which the bonds were executed. The story pleaded by the defendant sets up an oral agreement prior to "the execution of the bonds and one entirely inconsistent with the terms of the bonds. To style the agreement set up "a condition precedent" for the enforcement of the bonds is a misuse of terms and it is also a misuse of terms to say that the bonds can be regarded as "security" for the carrying out of the oral agreement. The defendant candidly admits that he and the plaintiff wished to conceal the real nature of their agreement from the landlord and *malguzar* and that the bonds were executed in the terms contained in them with a view to deceive the landlord. The ultimate agreement was the agreement which was reduced to writing and the attempt to show that the agreement was not what it purported to be but something different is directly against the provisions of section 92 of the Evidence Act and is not covered by proviso (3).

I may add that the use of the term "*batai*" in this case is misleading. Both under the agreement and under the alleged oral agreement the tenant of the field, that is to say, the owner of the field as against the plaintiff, was to cultivate the land himself and pay his debt to the plaintiff in the form of produce. That is not a *batai* contract properly so-called, since the plaintiff was to take no part whatever in the cultivation and was to contribute neither seed-grain nor labour. It was simply a method for the payment of a debt. The District Judge has erred in law in allowing evidence to vary the terms of the contract that was reduced to writing. If it is a fact that the defendant has actually paid grain to the plaintiff on the division of crops, the value of that grain must be taken into consideration against the plaintiff's claim.

The appeal is remanded to the District Judge. He will give the plaintiff a decree for such amount as he finds claimable by him less grain re-payments made by the defendant. Costs will be costs in the suit. There will be no refund certificate.

G. R. D. *Case remanded.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1010 OF 1920.

December 13, 1922.

Present:—Mr. Justice Adami.

Musammat JANTRA KOER—PLAINTIFF—APPELLANT

versus

ALI JAN DARJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Suit for declaration of title—Decision of Criminal Court under section 145, Criminal Procedure Code, as to possession—Presumption.

The mere fact that a Criminal Court has, in a proceeding under section 145 of the Criminal Procedure Code, decided that a particular party is in possession of the property in dispute, is not sufficient to give rise to a presumption in a Civil Court in favour of that party in a suit brought against him for declaration of title to the property. [p. 479, col. 2; p. 480, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 30th June 1920, reversing a decision of the Munsif, Arrah, dated the 29th May 1919.

Mr. *Sambhu Saran*, for the Appellant.

Mr. *Siveshwar Dyal*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for a declaration of the title of the plaintiff No. 1 to the northern half of Survey plot No. 216 in *khata* No. 134. It appears that one Isri Lal had three sons, Rambhanjan, Rambahadur and Girwardhari. Rambhanjan had a son-in-law Mahadeo

Lal, who sold the whole of the plot No. 216 to the defendants. The paintiff, as wife of Rambahadur, claimed that she was entitled to possession of the northern half of the plot. According to the plaintiff, the three brothers separated, and on Rambahadur's death she obtained his share which was a half. It is not explained why Rambahadur should get a half in this plot, seeing that they were three brothers; but it has been found by the Munsif that it may well have happened that the other brothers got shares in other properties and in the arrangement between the three brothers half of this plot was given to Rambahadur and the other half to Rambhanjan.

The defendants' case was that Rambahadur died joint with his two brothers and after his death Rambhanjan and Girwardhari separated and, therefore, the plaintiff would only be entitled to maintenance and would have no claim to the property in suit.

The Munsif decreed the plaintiff's suit finding that there was no evidence of a partition of the land between Rambhanjan and Girwardhari only. He held that the burden of proving that the separation took place after the death of Rambahadur lay on the defendants and they had failed to prove it. In the Survey Record the names of plaintiff and Rambhanjan only are entered, each having a half share, and the Munsif held that the presumption attached to the Survey Record had not been rebutted. He held that the two witnesses of the plaintiff had proved possession and that the case of possession set up by the defendants had failed entirely. With regard to the sale by Mahadeo Lal to the defendants, it could not be enforced since Mahadeo Lal was only a *farzidar* for Rambhanjan and had no power to sell the land to the defendants.

The learned Subordinate Judge on appeal has taken a different view. He holds that, since the Record of Rights had not been produced, it, therefore, could not be taken in evidence, and, since there had been proceedings under section 145, Criminal Procedure Code, between the parties, in which the defendants had been found to be in possession, that fact must weigh very heavily in favour of the defendants, and he seems to have considered that this threw the burden of proof on the plaintiff, for he only examines the plaintiff's evidence as to possession. With regard to separation, he remarks that the plaintiff herself did not give evidence and her witnesses failed to prove separation previous to the death of Rambahadur. He was of opinion that it was likely that the surviving male members of the family wanted to get back the property which had been transferred to strangers and, therefore, the plaintiff had been put up to institute the suit. The learned Subordinate Judge has said that there is nothing on the record to show that there was separation in the family in the lifetime of Rambahadur, but in this he is evidently wrong, for the learned Munsif pointed out in his judgment that the defence witness No. 2 stated in evidence that there was a partition 35 years before the suit and that Rambahadur had died 25 years before. It is true that the Munsif found the defence witness No. 2 to be unreliable; but, at the same time, the statement of the learned Subordinate Judge is shown to be incorrect. The finding, too, of the learned Subordinate Judge as to Record of Rights cannot be upheld. It is true that the Record of Rights has not been marked as an exhibit in the case, but the pleadings of both the parties admit that in the Record of Rights the plaintiff and Rambhanjan are shown to be in possession each of half a share. Thus, the Record of Rights is admitted, and, that being so, it was for the defendants to rebut the presumption which the Record of Rights gave rise to, and I think that the learned Subordinate Judge has clearly laid the *onus* on the wrong party.

Taking the judgment of both the Courts, it appears that while one Court held that the defendants' evidence as to separatian and as to possession was unsatisfactory, the other Court held the plaintiff's evidence was equally unsatisfactory, and that being so, the learned Subordinate Judge should have given weight to the entry in the Record of Rights. I do not think that he was justified in finding that a decision in proceedings under section 145, Criminal Procedure Code, threw the *onus* on the loser in those proceedings. The decision in proceedings under section 145, Criminal Procedure

Code is not of such nature as to give rise to a presumption in a Civil Court in favour of the winning party in those proceedings. Moreover, the learned Subordinate Judge has not considered the finding of the Munsif that Mahadeo Lal, being a mere *farzidar*, had no power to sell the property to the defendants. This is a point which he should have considered.

The only course, I think, is to direct that the decree of the lower Appellate Court should be set aside and the case be remanded to the learned Subordinate Judge for a re-hearing of the appeal. Costs will follow the result.

W. C. A. *Decree set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 709 OF 1921.
January 11, 1923.
Present:—Mr. Justice Ryves and
Mr. Justice Daniels.

SHEO RAMJI AND OTHERS—DEFENDANTS—APPELLANTS
versus
SRI RIDHNATH MAHADEOJI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Idol—Mahant, *minor*—*Suit for recovery of temple property*—*Guardian of minor, suit by, as next friend of idol, competency of.*

Where the *Mahant* of an idol is a minor and a person appointed to supervise the management appoints a guardian of the property on the minor's behalf, a suit brought by such guardian as next friend in the name of the idol and not in the capacity of a trustee or *Shebait* for recovery of property belonging to the idol is competent.

Jodhi Rai v. *Basdeo Parshad*, 11 Ind. Cas. 47; 33 A. 735; 8 A. L. J. 817 (F. B.), relied upon.

Second appeal from a decree of the District Judge, Benares, dated the 12th of January 1921.

Dr. *K. N. Katju*, for the Appellants.

Mr. *Kamuda Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought in the name of an idol through Vivakanand as next friend to recover property belonging to the idol which had been wrongfully sold by a relative of the original *Mahant* Ajudhia Puri. The suit has been decreed by both the Courts below. The defendant-appellant does not assert that his vendor had any right to dispose of the property, which admittedly belonged to the idol; but he attacks the decree on the technical ground that Vivakanand was not authorised to sue on behalf of the idol. Other pleas taken in the grounds of appeal were not urged. The endowment is a recent one and there is no rule of succession laid down in the deed establishing it. The original manager of the property was one Ajudhia Puri who is dead. Two persons, Ram Kishun Das and Baijnath Tewari, were appointed to supervise the management. Ajudhia Puri's *chela* and successor is a minor and Ram Kishun Das in virtue of the powers of his supervision has, rightly or wrongly, appointed Vivakanand guardian of the property on the minor's behalf. Vivakanand is in possession of the title-deeds and has no interest adverse to the idol. It is important to note that this is not a suit brought by Vivakanand in the capacity of a trustee or *Shebait*. The real plaintiff is the idol, and, as was pointed out in the Full Bench case of *Jodhi Rai* v. *Basdeo Parshad* (1), a person suing on behalf of the idol is not personally interested in the suit any more than is the next friend or guardian of a minor. In our opinion Vivakanand has a sufficient interest in the subject-matter of the suit to be entitled to bring the suit in the name and on behalf of the idol. We accordingly dismiss the appeal with costs on the higher scale.

S. D. *Appeal dismissed.*

(1) 11 Ind. Cas. 47; 33 A. 735; 8 A. L. J. 817 (F. B.).

SUKH DIAL *v.* BHOPI.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 797 OF 1919.

November 21, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

SUKH DIAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BHOPI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 11—Res judicata *between co-defendants.*

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants, but for this result to follow there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. [p. 483, col. 1.]

Ramchandra Narayan v. *Narayan Mahadev*, 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142, relied upon.

Fakirchand Lallubhai v. *Nagindas Kalidas*, 33 Ind. Cas 423; 40 B. 210; 17 Bom. L. R. 1106, distinguished.

Per *Moti Sagar, J.*—Courts are generally reluctant to extend the doctrine of *res judicata* to co-defendants, and if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. [p. 483, col. 2.]

Cottingham v. *Shrewsbury* (*Earl of*), (1843) 15 L. J. Ch. 441; 3 Hare 627; 67 E. R. 530, relied upon.

The widow of a deceased Hindu mortgaged a portion of the estate left by her husband. After her death her husband's nephews took possession of the mortgaged property. The mortgagee brought a suit for possession of the property and impleaded the nephews of the deceased and his two daughters as defendants to the suit. The nephews pleaded that the deceased was joint with their father before his death and that on his death his property went to their father by survivorship and the mortgage by the widow was, therefore, invalid. The daughters of the deceased pleaded that their father was separate from his brother and admitted the plaintiff's claim. It was decided that the deceased was separate from his brother. Subsequently, the nephews of the deceased sued his daughters for a declaration that the latter were not entitled to succeed to his property, inasmuch as he was joint with the former's father at the time of his death and his property went by survivorship to the plaintiffs' father:

Held, that the suit was barred by *res judicata* by virtue of the decision in the previous suit in which the parties were co-defendants. [p. 484, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Rawalpindi, dated the 18th December 1918.

Mr. *M. S. Bhagat*, for the Appellants.

JUDGMENT.

Abdul Raoof, J.—(*November* 14, 1922).—This was a suit for a declaration that certain property detailed in the plaint situate at Rawal, *Tahsil* Rawalpindi, and certain other land situate at Tahlian, belonged to the plaintiffs and had been wrongly entered in the names of the defendants, as the latter had no concern with it. The pedigree-table given in the judgment of the Court below describes the relationship between the parties. Sunder Das and Kanhaya Lal were two brothers and belonged to a family which, according to the admissions of the parties, was governed by Hindu Law. Sunder Das died leaving a widow, *Musammat* Ganga Devi and two daughters *Musammat* Bhopi, defendant No. 1, and *Musammat* Viran, defendant No. 2. Sunder Das died and his property was mutated in the name of *Musammat* Ganga Devi, his widow. Kanhaya Lal also died leaving four sons who are the plaintiffs in this suit. On the death of *Musammat* Ganga Devi a dispute arose as to the right of inheritance. The plaintiffs contested the right of the daughters in the mutation proceedings. At first the names of the plaintiffs were ordered to be mutated, but on an appeal by defendants Nos. 1 and 2 the property was mutated in their names. Thereupon the plaintiffs instituted the present suit. The suit was based mainly on the ground that the two brothers, Sunder Das and Kanhaya Lal, being joint, the property left by Sunder Das went by the rule of survivorship to Kanhaya Lal and that the plaintiffs as the sons of Kanhaya Lal were entitled to it. The two daughters of Sunder Das, on the other hand, contended that the two brothers, Sunder Das and Kanhaya Lal, were separate, and that, therefore, they were entitled to inherit the property after the death of *Musammat* Ganga Devi. The main question to be decided in the case was whether the two brothers were joint. Among the legal objections raised on behalf of the defendants was a plea of *res judicata* set forth in paragraph 3 of their petition, dated the 9th October 1918 in these words:—

"Previously, in the Court of the Junior Subordinate Judge, it was decided between

the parties that they are governed by Hindu Law and that Kanhaya Lal and Sunder Das were not the members of a joint Hindu family. Therefore, section 11 of the Civil Procedure Code operates as a bar to this suit."

This plea has been given effect to by the lower Court and the suit has been dismissed. The plaintiffs have accordingly preferred this appeal.

It is contended by Mr. M. S. Bhagat on behalf of the appellants that the rule of *res judicata* has been wrongly applied to this case by the Court below, inasmuch as the present plaintiffs and the present defendants were impleaded as co-defendants, for there was no dispute between the present plaintiffs and the present defendants on this question. It is, therefore, necessary to examine the facts and the pleas decided in the previous suit. That suit came up to the High Court and all the necessary facts are given in the judgments of the two Courts below and that of this Court. The facts as gleaned from those judgments may be summarised as below:—

When *Musammat* Ganga Devi came into possession of the properties left by her husband, Sunder Das, she mortgaged a house and a shop by a registered deed, dated the 6th May 1908, to one Ram Chand. In spite of the fact that Kanhaya Lal was then alive he raised no objection to the transfer. Shortly after Kanhaya Lal died and his death was followed by that of *Musammat* Ganga Devi. It appears that after the death of *Musammat* Ganga Devi the present plaintiff and *Musammat* Lachmi, the widow of Kanhaya Lal, took possession of the mortgaged house and shop without the permission of the defendants in the present suit. They were prosecuted under section 448, Indian Penal Code, and were fined. The Magistrate under section 522, Criminal Procedure Code, ordered the restoration of the property trespassed upon. Finally, when the matter came up before the Chief Court on revision the conviction was upheld, but the Court declined to restore the possession of the property to the complainant, and directed her to seek her remedy in the Civil Court. It was then that Ram Chand, the mortgagee, instituted a suit on the strength of his mortgage for possession impleading defendants Nos. 1 and 2, the present plaintiffs and *Musammat* Lachmi as co-defendants. Defendants Nos. 1 and 2 confessed judgment, but the present plaintiff contested the suit pleading that the two brothers, Sunder Das and Kanhaya Lal, were members of a joint family, that the property in dispute was their ancestral property and that *Musammat* Ganga Devi was not competent to mortgage it. Ram Chand the plaintiff, *Musammat* Bhopi and *Musammat* Viran, defendants Nos. 1 and 2, traversed their pleas. The following issues were struck, namely, (1) Were Sunder Das and Kanhaya Lal members of a joint Hindu family and was the property in suit their ancestral and joint family property? and (2) Was the mortgage for consideration and legal necessity?

The Trial Court after discussing the entire evidence on the record recorded the following finding:—

"All this shows that though Sunder Das and Kanhaya Lal never divided their ancestral property they had separated and were no longer members of a joint Hindu family when Sunder Das died. I, therefore, find upon the first issue that though the property in dispute was their undivided ancestral property they were not members of a joint Hindu family."

It found on the question of consideration and necessity also in favour of the plaintiff and decreed the suit. On appeal Mr. F. W. Skemp, District Judge, in his judgment, dated the 16th November 1918, upheld the findings of the Trial Court. Mr. Justice Broadway also in his judgment, dated the 5th November 1919, upheld the finding on the issue of jointness.

Now, it is clear from the pleadings in the previous suit that a contention was raised between the present defendants Nos. 1 and 2 and the plaintiffs on the question of jointness of the family. It is also clear that without deciding this issue it was not possible to decide the question whether *Musammat* Ganga Devi had a right to mortgage the house and shop to Ram Chand plaintiff. In order, therefore, to give an appropriate decree to Ram Chand it was absolutely necessary to decide the question and it was so decided.

SUKH DIAL *v.* BHOPI.

In the case of *Ramchandra Narayan* v. *Narayan Mahadev* (1) it was held that where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiffs, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*.

Dr. Agarwala in his work entitled "The Indian Practice", II Edition, at page 66, states the rule on the point thus:—

"As regards parties arranged on the same side, *e. g.*, as co-defendants, an adjudication between them which is necessary to give the appropriate relief to the plaintiff is *res judicata* as between them, as well as between the plaintiff and the defendants, provided there is a conflict of interests between the defendants, giving rise to a distinct issue between them, and a judgment defining the real rights and obligations of the defendants."

Mr. M. S. Bhagat relied on the case of *Fakirchand Lallubhai* v. *Nagin hand Kalidas* (2). The facts of that case disclosed that "a deposit of money in a firm was owned in equal moieties by *D.* and *L.* In a suit brought by *D.* in the High Court of Bombay to recover his moiety of the deposit, his brother *L.* who was a partner in the firm admitted his claim, but it was contested by the other partners, defendants Nos. 1 and 2. Defendants Nos. 3 to 6 contended that they were not partners in the firm at all. The Court passed a decree against *L.* and defendants Nos. 1 and 2. The firm made losses and ceased to work. *L.*, thereupon, filed the present suit in the Court of the Subordinate Judge at Surat for a dissolution of the firm and for taking its accounts. *D.* was made a party to the suit as a creditor of the firm. The defendants Nos. 3 to 6 again contended that they were not partners in the firm. A question having arisen whether the contention was *res judicata* in the present suit:—

"*Held*, that the relief given to *D.* in the earlier suit did not require or involve a decision of any case between the co-defendants and, therefore, the co-defendants were not to be bound as between each other by the Court's proceeding and decision which were necessary only to the decree which *D.* obtained."

In the above case the point was not necessary for the purpose of giving an appropriate decree to the plaintiff and any decision arrived at on the point between the co-defendants could not operate as *res judicata*. That case is clearly distinguishable from the present case. In the present case it was not only necessary to decide the question of jointness between the co-defendants to grant an appropriate decree to the plaintiffs but it was absolutely impossible to decree the suit of the plaintiffs without finding that the two brothers were separate and that *Musammat* Ganga Devi had by that reason succeeded to half the joint properties.

We are clearly of opinion that the view taken by the Court below is correct and that the suit has been rightly dismissed. We accordingly dismiss the appeal but without costs, as no one appears for the respondents.

Mott Sagar, J.—(*November* 21, 1922).—I entirely concur. I confess I felt very doubtful at first as to the soundness of the lower Court's decision on the question of *res judicata*, but after giving a very careful consideration to the arguments of Mr. Bhagat, and to the various authorities bearing upon the point, I have come to the conclusion that the view taken by the lower Court and by my learned brother is correct. I fully appreciate the argument that Courts are generally reluctant to extend the doctrine of *res judicata* to co-defendants, and, as observed by Vice-Chancellor Wigram in the case of *Cottingham* v. *Shrewsbury* (*Earl of*) (3): "If the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains," but in the present case it

(1) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142.

(2) 33 Ind. Cas. 423; 40 B. 210; 17 Bom. L. R. 1106.

(3) (1843) 15 L. J. Ch. 441; 3 Hare 627; 67 E. R. 530.

appears to me that all the conditions necessary under the law to make a previous decision binding between the co-defendants have been fulfilled, and there does not appear to be any room for doubt that the present suit is barred. In order that a finding in a case be *res judicata* between co-defendants three things are necessary, (1) there should be a conflict of interest between co-defendants, (2) that it should be necessary to adjudicate upon that conflict in order to give appropriate relief to the plaintiff, and (3) that the judgment should in fact determine the rights and liabilities of the defendants *inter se*.

That there was an active conflict between the two sets of defendants in the former litigation is admitted. It is also admitted that it was absolutely necessary to adjudicate upon that conflict to give an appropriate relief to the plaintiff. What is denied is that there was a decision in that litigation as to the rights and liabilities of the defendants *inter se*. I am afraid I am unable to appreciate this argument. An issue as to the jointness or otherwise of the family was distinctly raised, and evidence given by both sets of defendants in support of their respective cases. The finding of the Court was that a disruption in the family had taken place, and that the family was not joint at the death of Sunder Das, the father of the present defendants. This was clearly a decision of the question raised as between the co-defendants, and the co-defendants are, therefore, bound as between each other by the Court's proceeding and decision which was necessary to give the appropriate relief to the then plaintiff.

In my opinion the decision in the former litigation must be held to be *res judicata* of the question arising in the present suit, and I would, therefore, concur with my learned brother in holding that the appeal should be dismissed.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 161 OF 1922.

January 5, 1923.

Present:—Mr. Justice Das and Mr. Justice Adami.

SHEONANDAN CHOWDHURY —APPELLANT

versus

DEBI LAL CHOWDHURY AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 4, O. XXI, r. 100—Application under O. XXI, r. 100, nature of—O. IX, r. 4, applicability of.

An application under O. XXI, r. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and O. IX, r. 4 would apply to such an application by force of section 141 of the Code. [p. 486, col. 2; p. 487, col. 1.]

Satya Narayan Lal v. *Gobind Sahay*, 43 Ind. Cas. 951; 3 P. L. J. 250; 4 P. L. W. 102, followed.

Hari Charan Ghosh v. *Manmatha Nath Sen*, 19 Ind. Cas. 683; 18 C. W. N. 343; 41 C. 1, distinguished.

Bhubaneswar Prasad Singh v. *Tilakdhari Lal*, 49 Ind. Cas. 617; 4 P. L. J. 135; (1919) Pat. 75 (F. B.), not followed.

Section 141 of the Civil Procedure Code does not operate so as to make the provisions of O. IX, r. 4 of the Code and all cognate provisions applicable to execution proceedings. [p. 486, col. 1.]

Thakur Prasad v. *Fakir Ullah*, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 520; 8 Ind. Dec. (N. S.) 393, (P. C.), relied upon.

Appeal from an order of the Subordinate Judge, Muzaffarpur, dated the 16th May 1922, reversing an order of the Munsif, Hajipur, dated the 30th June 1922.

Messrs. *S. M. Mullick* and *S. N. Ray*, for the Appellant.

Messrs. *S. C. Mitra* and *N. K. Prasad II*, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of an order passed by the learned Subordinate Judge of Muzaffarpur on the 16th of May 1922. The respondents are the purchasers of the property in dispute at a sale held in execution of their decree. The appellant applied under the provisions of O. XXI, r. 100 of the Code for being put in possession of the disputed property. He contended that he was in possession of the property on his own account and he complained that he was dispossessed of the property by the respondents in execution of a decree which they had obtained against another person. This

application was dismissed for default on two different occasions. Ultimately, it was restored under the provision of O. IX, r. 4 of the Code; and on the 5th August 1916, the claim of the appellant was allowed in the absence of the respondents. On the 2nd October 1920, the suit, out of which this appeal arises, was instituted by the respondents for recovery of possession of the property in dispute. The suit was resisted by the appellant on two grounds, first, on the ground that it was barred by limitation, secondly, on the ground that the suit was not maintainable, as a previous suit by the plaintiff was allowed to be improperly withdrawn by the Court. The Court of first instance thought that the suit was well within time; but he came to the conclusion that the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit was without jurisdiction and in this view he dismissed the plaintiff's suit. On appeal, the learned Subordinate Judge agreed with the view of the Court of first instance that the suit was not barred by limitation, but he differed from that Court as to the effect of the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit. He thought that, however erroneous that order might have been, it could not be said that the order was without jurisdiction. He accordingly allowed the appeal and remanded the case to the Court of first instance for disposal according to law. The present appeal is against the order of the learned Subordinate Judge remanding the case for trial.

The only question which we have to consider is, whether the Courts below are right in holding that the suit is not barred by lapse of time. The suit is *prima facie* governed by Art. 11A of the Limitation Act and the period of limitation provided in Art. 11A is one year from the date of the order. The suit was obviously instituted in order to avoid the effect of the order passed on the 5th August 1916. The suit itself was instituted on the 2nd October 1920. *Prima facie* the suit is barred by limitation; but it was argued on behalf of the respondents that the order of the 5th August 1916 is a nullity and that he is entitled to disregard that order and bring his suit within 12 years from the date he was dispossessed by the defendants. According to the learned Vakil, O. IX, r. 4 is not applicable to a proceeding under O. XXI, r. 100 of the Code. He accordingly argues that the Court had no jurisdiction to restore the application which was presented under O. XXI, r. 100 after it had been dismissed for default. The learned Vakil maintains that, that being so, the order of the 5th August 1916 allowing the claim of the defendants was without jurisdiction and null and void. The argument advanced on behalf of the respondents is supported by the decision of the Calcutta High Court in the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) but is negatived by the decision of this Court in *Satya Narayan Lal* v. *Gobind Sahay* (2). The learned Vakil argues before us that the decision in *Satya Narayan Lal* v. *Gobind Sahay* (2) has been overruled by the decision of the Special Bench in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (3). According to the contention of the learned Vakil, we are conclusively bound by the decision in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (3) and that we are bound to hold that O. IX, r. 4 is not applicable to a proceeding under O. XXI, r. 100 of the Code.

It is admitted by Mr. Susil Madhab Mullick on behalf of the appellant that O. IX, r. 4 of the Code of Civil Procedure does not, of its own force, apply to a proceeding under O. XXI, r. 100; but he contends that he is entitled to apply O. IX, r. 4 to a proceeding under O. XXI, r. 100 by force of section 141 of the Code. Section 141 of the Code runs as follows:—"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." In the case of *Thakur Prasad* v. *Fakir Ullah* (4) the Judicial Committee pointed out that the proceedings spoken of in section 141 of the Code include original matters in the nature of suits such as proceedings in Probate, guardianships and so forth and that they do not include executions. It was also pointed out by the Judicial Committee that both from the Code

(1) 19 Ind. Cas. 683; 41 C 1; 18 C. W. N 343.
(2) 43 Ind. Cas. 951; 3 P. L. J 250; 4 P. L. W 102.
(3) 49 Ind, Cas. 617; 4 P. L. J 135; (1919) Pat 75 (F. B.)
(4) 17 A. 106; 5 M. L. J 3; 22 I. A. 44; 6 Sar. P. C. J. 324; 8 Ind. Dec. (N. S) 393 (P. C.).

itself and the provisions of the Limitation Act, the Legislature contemplated that there might be a succession of applications for execution and that it was unlikely that the Legislature should make O. IX, r. 4 applicable to an execution proceeding, since it was open to the decree-holder to make a succession of applications for execution. I regard the decision of the Judicial Committee in *Thakur Prasad* v. *Fakir Ullah* (4) as establishing that section 141 of the Code does not operate so as to make the provision of O. IX, r. 4 and all cognate provisions applicable to execution proceedings.

But this conclusion, in my opinion, does not decide the present case. The question which we have to consider is, whether a proceeding under O. XXI, r. 100 is a proceeding in execution. As to this I have expressed my opinion very frequently to the effect that an application under O. XXI, r. 100 cannot be regarded as an application in execution. I have stated the reasons so fully in a recent case which came up before my learned brother and myself that I do not think it necessary to repeat them. The case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) does, indeed, support the arguments of the respondents; but that case assumed, rather than decided, that an application under O. XXI, r. 100 is an application in an execution proceeding. The case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) is confessedly based on the decision of the Judicial Committee in the case to which I have referred; but all that the Judicial Committee decided is that the proceedings spoken of in section 141 of the Code include original matters in the nature of suits and that they do not include execution. The other ground upon which *Hari Charan Ghosh* v. *Manmatha Nath Sen* (1) is based is that the order in a proceeding under O. XXI, r. 100 is not conclusive, but is subject to the right of the person aggrieved to bring a suit: but it seems to me that the right to apply under O. XXI, r. 100 does not stand on the same footing as a right to maintain a suit, if the application under O. XXI, r. 100 is dismissed. All that the applicant has to establish in a proceeding under O. XXI, r. 100 is that he was possessed of the property on his own account or on account of some other person than the judgment-debtor; but if he is compelled to institute a suit he has to establish the right which he claims to the present possession of the property. The question, in my opinion, is not solved by a reference to the provision of O. XXI, r. 103 of the Code.

The question came up for decision in our Court in *Satya Narayan Lal* v. *Gobind Sahay* (2). Mr. Justice Roe, in delivering the judgment of the Court, very properly pointed out that all that was decided by the Judicial Committee in *Thakur Prasad* v. *Fakir Ullah* (4) was that O. IX, r. 9 was not applicable to proceedings in execution and the learned Judge thought that the decision of the Judicial Committee did not support the conclusion that O. IX, r. 9 was not applicable to a proceeding under O. XXI, r. 100. The learned Judge pointed out that an application under O. XXI, r. 100 is in the nature of a summary suit and that in that view the provision of O. IX, r. 9 should apply to such an application. In my opinion, the case of *Satya Narayan Lal* v. *Gobind Sahay* (2) was correctly decided and is binding on this Court. It was strongly pressed before us that *Satya Narain Lal* v. *Gobind Sahay* (2) has been overruled by the decision of the Special Bench in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (3); but I am unable to take the view that it was within the scope of the decision in the Special Bench case to overrule *Sataya Narayan Lal* v. *Gobind Sahay* (2). What is actually decided in the Special Bench case is that O. IX, r. 9 does not apply to an application under O. XXI, r. 90 of the Code. No doubt the arguments employed by the learned Judges deciding the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (3) apply with equal force to an application under O. XXI, r. 100; but, though the decision itself is binding on me, I do not think that I ought to be compelled to accept that which logically follows from that decision as equally binding on me, especially as I consider that the decision in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (3) needs re-examination.

The whole problem is, whether O. IX, r. 4 applies, by force of section 141, to a proceeding under O. XXI, r. 100. Now, an application under O. XXI, r. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and

in my opinion, the decision of the Judicial Committee in the case cited is an authority for the proposition that O. IX, r. 4 would apply by force of section 141 to original matters in the nature of suits.

I am unable to look upon the order of the 5th August 1916 as a nullity. That being so, the suit, which was instituted on the 2nd October 1920, was clearly barred by limitation under the provision of Art. 11 A of the Limitation Act. I would accordingly allow the appeal, set aside the order passed by the learned Judge in the Court below, and restore the decree passed by the Court of first instance. The appellant is entitled to his costs throughout.

Adami, J.—I agree.

W. C. A. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 581 OF 1922.

January 19, 1923.

Present—Mr. Justice Abdul Raoof.

THE COLONY FLOUR MILLS COMPANY, LIMITED, LYALLPUR, THROUGH MIAN MUHAMMAD, MANAGER—DEFENDANT—PETITIONER

versus

THE FIRM *Bhai* SANT SINGH-BHAGWAN SINGH, THROUGH BHAGWAN SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 20, 115—Jurisdiction, decision as to—Revision.

Where, on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides that it has jurisdiction the order of the Court does not amount to a decision of a case within the meaning of section 115 of the Civil Procedure Code and no revision lies against it.

Sawan Mal v. *Kanhaya Lal-Gopal Das* 59 Ind. Cas. 680; 40 P. W. R. 1921, *Makhan Lal-Parsottam Das* v. *Chunni Lal-Brij Lal*, 47 Ind. Cas. 610; 16 A. L. J. 777; 41 A. 42 and *Buddhoo Lal* v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 (F. B.), relied on.

Petition, under section 44, Act IX of 1919, for revision of the order of the Senior Subordinate Judge, Rawalpindi, dated the 19th June 1922.

Sheikh *Niaz Muhammad*, for the Petitioner.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—The suit was instituted in the Court of the Senior Subordinate Judge, Rawalpindi, for recovery of earnest money and damages. The defendant objected that the Court at Rawalpindi had no jurisdiction to decide the case. The Court found that the contract had been entered into at Rawalpindi and the delivery of goods was to be made at Rawalpindi and that, therefore the cause of action had arisen at Rawalpindi. The learned Senior Subordinate Judge accordingly overruled the objection raised by the defendant.

Against this order the present application for revision has been presented. At the hearing Mr. M. S. Bhagat, Counsel for the respondent, raised a preliminary objection to the hearing of this petition of revision on the ground that the order complained of is merely an interlocutory order and as such is not open to revision. In my opinion there is force in this contention. In the case of *Sawan Mal* v. *Kanhaya Lal-Gopal Das* (1) Mr. Justice Martineau held that, "where on the objection of the defendant that the Court has no jurisdiction to entertain the suit the Court decides, it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it." This, in my opinion, lays down the correct rule. I, myself, sitting singly as a Judge of the Allahabad High Court, expressed a similar opinion in the case of *Makhan Lal-Parsottam Das* v. *Chunni Lal-Brij Lal* (2). My decision was approved of by the majority of the Judges of the Full Bench who decided the case of *Buddhoo Lal* v. *Mewa Ram* (3).

Mr. M. S. Bhagat has further contended that this Court ought not interfere with the order in revision, because it will be open to the petitioner to raise this question in any appeal which he may file to this Court against the final decree. It has been held repeatedly that a High Court ought not to entertain an application for revision where any other remedy is open to the petitioner. I allow the preliminary objection and dismiss the application with costs.

Z. K. *Application dismissed.*

(1) 59 Ind. Cas. 680; 40 P. W. R. 1921.
(2) 47 Ind. Cas. 610; 16 A. L. J. 777; 41 A. 42.
(3) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 553. (F. B.).

RAM CHARITARA *v.* MOHAN DEI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 426 OF 1921.

January 9, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

RAM CHARITRA—PLAINTIFF—APPELLANT

versus

Musammat MOHAN DEI AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue (Act III of 1901), s. 233 (k)—Partition by Revenue Court—Civil suit to disturb title established in partition, maintainability of.

In partition proceedings, started in 1911, the plaintiff was ordered to establish his proprietary title in a Civil Court. He instituted a suit which was dismissed by the First Court but was decreed by the lower Appellate Court on 9th April 1912. In between the decisions of the two Courts, the partition proceedings were completed. The plaintiff took no steps to bring the decision of the Civil Court to the notice of the Revenue Court either before or after the completion of the partition proceedings. In 1918 he sued for the recovery of possession of his share:

Held, that section 233 (*k*) barred the suit.

Second appeal from a decree of the Subordinate Judge, Basti, dated the 2nd November 1920.

Mr. *G. L. Agarwala*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—This appeal raises an unusual point of law and has, therefore, been referred to a Divisional Bench for disposal

Musammat Mohan Dei, one of the proprietors of a *mahal*, applied for a perfect partition under the Land Revenue Act sometime in 1911. Ram Charitra, the plaintiff-appellant here, filed an objection claiming that he was a proprietor of an eight-pies share in the *mahal* of which partition was sought. The Revenue Authorities proceeded under section 111 (*b*) of the Land Revenue Act and directed him to establish his claim in the Civil Court. Ram Charitra accordingly brought a suit but that suit was dismissed on the 29th November 1911. He appealed and the Appellate Court reversed the Trial Court's decision and gave him a decree declaring him entitled to the declaration which he sought. This was on the 9th April 1912. After the decision of the First Court and before the decision of the Appellate Court it appears that partition proceedings were completed. It must be the case that Ram Charitra took no steps to inform the Revenue Court either that he intended to appeal or had appealed against the decision of the Trial Court. Nor did he take any steps even after the case was decided in his favour by the Appellate Court, in the Revenue Courts, either by way of appeal or by an application for review. On the 17th January 1918, that is, seven years afterwards, he brings this suit for the recovery of possession of the eight-pies share which he claimed. His plaint entirely ignores the partition and his claim is based on the decision of the Appellate Court in 1912. The only defence to the suit with which we are now concerned was, that it was barred by section 233 (*k*) of the Land Revenue Act. This was the view taken by the lower Appellate Court and, in our opinion, it was right. Section 233 provides that no person shall institute any suit in the Civil Court with respect to any of the following matters:—

Paragraph (*k*): Partition or union of *mahal* except as provided in section 111 and section 112.

This suit is clearly not a suit such as is contemplated by section 111 of the Land Revenue Act. No doubt the former suit was, but this suit clearly is not. It has been held in a series of rulings by this Court that section 233 (*k*) bars a suit in the Civil Court which attempts to disturb the title to land as established in a partition in the Revenue Court. The result is the appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

DUKHIT OJHA *v.* JANKI SINGH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 48 OF 1920.

January 9, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

DUKHIT OJHA AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

JANKI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family Debts—Legal necessity—Long series of transactions—Proof, nature of—Judgment-debt—*Prima facie *proof of necessity.*

In determining the existence of legal necessity for debts contracted by a Hindu joint family, where there has been a long series of transactions, it is not always possible to prove exactly the purpose for which any particular item was borrowed, and, in such a case, it will be sufficient for the creditor to show that the family was in chronic need of money, and that the moneys were advanced on the representation of the manager that they were needed for objects of necessity. [p. 491, col. 1.]

Where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity, and he is under no obligation to go behind the judgment in order to inquire whether the debt covered by the decree was for legal and binding necessity of the family. [p. 491, col. 1.]

Appeal from a decision of the Subordinate Judge, First Court, Muzaffarpur, dated the 31st May 1919.

Mr. *S. C. Mitra*, for the Appellants.

Messrs. *L. N. Sinha* and *N. N. Sinha*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—The suit out of which the present appeal arises was instituted by the plaintiffs-respondents to enforce two mortgage-bonds, dated 6th March 1905 and 15th July 1908, executed by three brothers, Dukhit Ojha, Mahgu Ojha and Kuldip Ojha, who are defendants Nos. 1 to 3 in this case. Defendants Nos. 4 and 5, Ramdeo Ojha and Ramasis Ojha, are the minor grandsons of Dhukit Ojha and they have been joined in the suit on the allegation that all the five defendants form members of a joint Hindu family and the mortgages were executed for the necessities of the family. Defendants Nos. 6 and 7 are subsequent purchasers and mortgagees of some of the mortgaged properties and they did not appear and contest the suit.

The defence of the defendants Nos. 1 and 3 was that they were separate from the defendant No. 2; that the bonds in suit were not read over to them and they did not know the contents thereof; that the debts for the satisfaction whereof the mortgages in suit were executed were the personal debts of the defendant No. 2, Mahgu Ojha, and they merely signed the bonds in suit as sureties, and received no consideration for the same. Defendant No. 2 also alleges separation and denies receipt of the whole of the consideration money. The real defence in the suit was by the minor defendants Nos. 4 and 5 who did not admit the execution of the bonds and alleged that they were not benefited thereby, and that the same were not binding on the family property. They further alleged that their father, Rupdawan Ojha, the son of Dukhit Ojha, was living separate from his father, and that there was no legal necessity for the mortgages in suit.

The learned Subordinate Judge held that the family was not separate as alleged; that the bonds were executed by the defendants Nos. 1 to 3 with full knowledge of their contents; and on receipt of the consideration money; that the loans advanced were for legal and justifying family necessities; that one of the minor defendants was not born on the date of the bonds in suit; and that the other minor defendant was born before the second bond but the transaction for which that bond was executed took place before his birth, and therefore, the minors could not object to the validity of the mortgages; and he accordingly made the usual preliminary decree for sale.

The defendants Nos. 1 to 5 appeal and the contentions raised on their behalf in this appeal are:—That there was no legal necessity for the mortgages in suit and that the minors, although not born on the date of the bonds, were still entitled to question the validity thereof, as their father Rupdawan Ojha was then living and he could question the validity thereof.

As regards the first contention raised on behalf of the appellants it will be observed that the defendants Nos. 1 to 3 being the executants of the mortgage cannot raise the question as regards the validity thereof or the execution of legal necessity and the question can only be raised on behalf of the minor defendants.

The first bond, dated the 6th March 1905, was for a consideration of Rs. 775 which was made up as follows:—

	Rs.	A.	P.
I. Sum due on a prior bond, dated 19th May 1903, executed by Mahgu Ojha and Dukhit Ojha in favour of the plaintiffs for a sum of Rs. 215 . .	273	6	3

This sum of Rs. 215 was made up as follows:

	Rs.	a.	p.
(1) Sum due on a simple bond, dated 8th July, 1901, executed by Mahgu Ojha in favour of plaintiffs for a sum of Rs. 33 . .	47	10	6
(2) Sum due on a simple bond, dated 4th August 1901, executed by Mahgu Ojha in favour of the plaintiffs for a sum of Rs. 25 . .	35	8	0
(3) Cash taken for the marriage of Dukhit's daughter . .	132	7	3
Total . .	215	9	9

II. Sum due on a bond, dated 4th March 1904, for Rs. 125 executed by Dukhit Ojha and Mahgu Ojha in favour of the plaintiffs . .	143	12	0

(This sum of Rs. 125 was borrowed to pay a prior simple bond, dated 3rd September 1903, for a sum of Rs. 35 executed by Mahgu Ojha and a cash advance of Rs. 87 odd for the purpose of a suit).

III. Sum due on a promissory-note executed by Dukhit Ojha and Mahgu Ojha in favour of the plaintiffs on the 16th of January 1905 for a sum of Rs. 20 . .	206	10	0

(Out of this sum of Rs. 200, Rs. 100 was taken to meet the cost of an appeal in the High Court and Rs. 100 to pay the decree of one Amir Chand on a prior mortgage).

IV. Cash taken for payment to one Amir Chand in satisfaction of a decree. .	132	0	0
Cash for family expenses . .	19	3	9
Total . .	775	0	0

The second bond, dated the 15th July 1908, was for a sum of Rs. 1,350 only which was made up as follows:

I. To pay off a simple bond, dated 16th May 1906, for Rs. 275 executed by defendant No. 2, Mahgu Ojha in favour of the plaintiffs . .	355	7	0

This sum of Rs. 275 was made up as follows:

	Rs.	a.	p.
(1) To pay off a simple mortgage, dated 8th July 1905, executed by Mahgu Ojha in favour of the plaintiffs for a sum of Rs. 49 to meet the expenses of the joint family . .	54	10	0
(2) To pay off a simple unregistered bond, dated 2nd June 1905, executed by Mahgu Ojha in favour of the plaintiffs for a sum of Rs. 41 only to meet necessary household expenses and cost of cultivation of the joint family . .	45	14	0
(3) Cash taken for the marriage expenses of Mahgu's daughter . .	174	8	0

II. To pay off a simple mortgage, dated 26th November 1906, executed by Mahgu Ojha in favour of one Titai Singh for a sum of Rs. 83-5-0 . .	99	12	0

(This sum of Rs. 83-5-0 was made up of Rs. 43-5-0 due to the said Titai Singh under a previous bond of 26th June 1906, and a cash advance of Rs. 40 to meet the expenses of an appeal which was to be filed in the High Court).

III. To pay up the mortgage-decree of Maniar Ojha . .	864	3	0
IV. Cash . .	30	10	0
Total . .	1,350	0	0

From the above statement of the transactions between the parties it appears that the transaction which the plaintiffs began sometime in the year 1901 and the bonds in suit were executed mostly to pay off prior debts incurred by Mahgu Ojha and Dukhit Ojha. It has been contended that the prior debts were mostly the personal debts of Mahgu Ohja, but it has been found by the learned Subordinate Judge, and the finding has not been challenged before us, that the three brothers, Dukhit, Mahgu and Kuldip, were joint and the defendants Nos. 4 and 5 are still joint with them; and the fact of Dukhit and Kuldip joining in the execution of the bonds in suit is, in my opinion, sufficient to hold that they having accepted the validity of the prior debts and agreed to mortgage

the family properties for payment thereof, is sufficient indication of the fact that the prior debts were for family necessities. The earliest of these debts is of the year 1901, and it appears that there have been a long series of borrowings by the family of small sums of money, and the plaintiffs appear to be the family Mahajan who used to advance money from time to time as occasion arose. Plaintiff No. 1 has given his evidence in the case and he says that on every occasion he made enquiries about the necessities for the loan, he enquired from the defendants first party and from other people in the village and other creditors of the defendants first party. There is evidence on the record to show that there was a real pressure upon the estate and that money was required for the marriage of the daughters of Dukhit and Mahgu. Some of these loans were incurred to pay off the decrees of creditors at a time when the family property was about to be sold in execution of those decrees. Where there has been a long series of transactions it is not always possible to prove exactly the purposes for which any particular item was borrowed, and, in such a case, it will be sufficient for the creditor to show that the family was in chronic need of money and that the moneys were advanced on the representation of the manager that they were needed for such objects. Moreover, where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity and he is under no obligation to go behind the judgment in order to enquire whether the debt covered by the decree was for legal and binding necessity of the family. The evidence adduced in the case is, in my opinion, sufficient to prove that the debts covered by the mortgages were for valid and justifying family necessities and that the plaintiffs advanced the loans after a careful and *bona fide* enquiry and honest belief in the existence of the necessities. In my opinion, the learned Subordinate Judge has come to a correct finding on these points, and the minor defendants are equally liable with the defendants Nos. 1 to 3 for the debts covered by the mortgages in suit and the properties mortgaged thereunder are liable to be sold.

In this view of the case, it is not necessary to consider the question as to whether the minor defendants who were not born at the time of the mortgages can question the validity thereof or whether the mortgages in suit were executed for debts which under the law can be treated as antecedent debts. The debts having been found to have been incurred for valid family necessities the mortgages are valid and binding on the family properties, and the decree made by the Court below must stand. The appeal is, therefore, dismissed with costs.

Das, J.—I agree.

W. C. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 493 OF 1921.
December 15, 1922.

Present:—Mr. Prideaux, A. J. C.

GANPAT—PLAINTIFF—APPELLANT
versus
FIRM OF BISSESSARLAL-GOVINDRAM, OWNERS HARDATTA AND BISSESSARLAL DEFENDANTS—RESPONDENTS.

Hindu Law—Step-mother, whether guardian de jure—Transaction by de facto guardian—Legality—Test - Powers of delegation.

Although under the Hindu Law, a step-mother is not the *de jure* guardian of her minor step-son, where she is the guardian *de facto* she has power to enter into transactions such as a prudent manager of the property would have entered into for legal necessity or benefit of the minor, and such transactions will be upheld by the Courts. [p. 494, col 2]

Vithu v. *Devidas*, 51 Ind. Cas. 943; 15 N. L. R. 55 and *Mata Din* v. *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213; 23 M. L. J. 6; 16 C. W. N. 338; 11 M. L. T 145; (1912) M. W. N. 183; 9 A. L. J. 215, 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 39 I. A. 49 (P. C.), referred to.

Husen v. *Rajaram*, 26 Ind. Cas. 813; 10 N. L. R. 133, disapproved.

A *de facto* guardian of a minor has power to delegate his authority to an agent. [p. 495, col. 1.]

Appeal from a decree of the Additional District Judge, Wardha, in Civil Appeal No. 108 of 1920, dated the 9th July 1921.

Dr. *H. S. Gour* and Mr. *M. B. Niyogi*, for the Appellant.

Mr. *D. N. Khare*, R. B., for the Respondents.

JUDGMENT.—The appellant in this case is a co-sharer and Lambardar of Khel C of Mouza Paakwadi or Wardha. He sues, stating that the site on which defendants' houses stand formed part of his *sir* field No. 28. The plaintiff contends that he attained majority on 25th August 1916.

The houses were built when he was a minor, defendants being in possession of the site for the last four or five years. He claims possession.

Defendants denied that field No. 28 was *sir* or that it belonged to plaintiff. They put in a map showing the plots marked *A*, *B* and *C* which are all in suit. As regards the plot *A*, a license to build on it and on another plot was granted to defendants in 1916 on payment of Rs. 312 by the plaintiff's step-mother Baijabai, his *de facto* and *de jure* guardian. As regards the plot B, Baijabai granted a license to one Fattechand in 1906 on receipt of Rs. 60. Fattechand built on that site and sold it to defendants in 1908 with his right to the site. Then, in 1911, they obtained Baijabai's consent to the transfer paying that lady Rs. 20 as consent money. With regard to the plot C it was pleaded that it was granted them on payment of Rs.30 in 1911. These transactions were by Baijabai for necessity and benefit of the minor. They were entered into in the course of the family business. Other pleas were set up which are stated in the issues. Plaintiff, in reply, admitted that Baijabai was his *de facto* guardian, and pleaded that the licenses being of *sir* land required the sanction of the Commissioner. The following issues were framed which cover the points at variance between the parties :-

(1) Whether field No. 28 has fallen to the plaintiff's share in a partition with his co-sharer as alleged ?

(2) Whether the site in suit is a part of field No. 28 ?

(3) Whether the site in suit is *sir* or whether it is declared *abadi* site ?

(4) Whether the site in dispute was given for consideration of 16th June 1906 and on 30th July 1911 to the firm of Bissessarlal-Bhagwandas for building purposes on terms similar to those on which *abadi* sites are held for building purposes under the provisions of the *wajib-ul-arz* as contended by defendant ?

(4*a*) Whether Baijabai was the *de facto* and *de jure* guardian of plaintiff when the transactions were entered into ?

(5) Whether the site *B* marked on the defendant's map of the site in dispute was given to one Fattechand on conditions mentioned in Issue No. 3 above ?

(6) Whether the said Fattechand had built on the land *B* and whether he has sold the site and building to the defendant for consideration on 23rd July 1908 ?

(7) Whether plaintiff's agent, Sonba, and plaintiff's mother, Baijabai, consented to the transfer by Fattechand for consideration on 30th July 1911 as contended by the defendant ?

(8) Whether the transactions mentioned in Issues Nos. 4, 5, 6 and 7 are binding on the plaintiff for the reasons stated by the defendant in paragraph 4 of his written statement ?

(9) If the site in dispute be recorded as *abadi* can plaintiff eject the defendant ?

(10) If the plaintiff succeeds in getting a decree for ejectment, is he liable to compensate the defendant for the nature of the structure and the well on the site as contended by the defendant ? If so, what is the value of the said structure and the well ?

(12) If the transfer of the site in suit for building purposes be proved is it void for want of sanction of the Collector and on the ground that it contravenes the provisions of law forbidding the use of *sir* for non-agricultural purposes ?

(13) Whether the rent of the site in suit was recovered by the plaintiff's agent Kashi Nath on 20th July 1917 ? If so, did it amount to ratification of the transactions entered into with the defendants regarding the site in suit during plaintiff's minority ?

(14) To what relief is the plaintiff entitled?

The lower Court's findings are these. I quote from the judgment of the lower Appellate Court.

(1) The field No. 28 fell to plaintiff's share and belongs to him. The plot in suit forms part of No. 28/2. In the Settlement of 1891-92 No. 28 was *sir*, but it has been *abadi* since the current Settlement of 1909-10.

(2) Baijabai's agent Sonba gave to the defendant's firm plot *A* in 1906 and plot *C* in 1911 for consideration. The transactions were in the nature of a lease coupled with a license to build.

(3) Baijabai was a *de facto* guardian. She was not a *de jure* guardian of the plaintiff.

(4) The giving of plot *B* to Fattechand is not proved. The sale of the house by Fattechand to defendants in 1908 is proved. The consent is proved.

(5) The transactions in question were not prudent. They were not justified by necessity or benefit of the minor.

(6) The suit is not time-barred.

(7) The transactions are void *ab initio*.

(8) The defendants spent Rs. 800 on the houses and Rs. 200 on the well. They are not entitled to claim any compensation.

(9) There was no ratification of the transactions by the plaintiff.

(10) The plaintiff can eject the defendants.

The claim was decreed, the defendants being directed to vacate the site within three months.

In the lower Appellate Court two additional issues were framed: (1) Had Sonba express or implied authority from Baijabai to grant licenses and leases and to execute documents in connection therewith? (2) Was Baijabai competent to grant such authority to Sonba in respect of the minor's estate?

The lower Appellate Court finds that Sonba Mahimaji was managing the minor plaintiff's estate on behalf of Baijabai, his *de facto* guardian, Sonba holding a general power-of-attorney from Baijabai. The granting of leases and licenses in respect of culturable land in the vicinity of the town of Wardha for building purposes has been the family business from the time of plaintiff's grandfather. It was held that Sonba had implied authority from Baijabai from 1904 and express authority from 1908 to grant licenses and leases and to execute documents in connection therewith. Dealing with the question of Baijabai's competence to confer authority upon the agent, the Court writes:-

"The circumstances of the present case, however, were rather peculiar. Baijabai assumed the management, as she was plaintiff's step-mother and as he was living with her. Sonba was her daughter's son-in-law. He was her relative, and a near relative and not a stranger. She has admitted in the witness-box as appellant's witness No. 7 that she had confidence in Sonba. As between the two, Sonba was much more competent than Baijabai to manage the property in an efficient and able manner. Baijabai was illiterate and being a female necessarily lacked the freedom of movement and intercourse which male possesses. While Sonba was a literate and experienced man whose experience of the world equipped him for efficient management of the minor's estate. Then the management of the estate involved the carrying on of the family business of granting leases and licenses of cultivable land for building purposes and the management of the village in general. Having regard to all these circumstances, it seems to my mind that the delegation of duties was under the circumstances necessary and highly desirable from the standpoint of the minor's interests and the interests of his estate. The conferral of the authority did not, therefore, involve any violation of the principle enunciated in section 47 of the Trusts Act, which principle will ordinarily regulate powers of a *de facto* guardian. I hold that Baijabai was under the circumstances competent to confer the authority on Sonba and that she did well in granting the authority expressly or impliedly to Sonba."

The Judge further held that the defendants' claim that they had license for building and not a building lease was well-founded. The latter would involve the transfer of an interest in immoveable property and could only be made by a registered instrument; while the former involved no such transfer and needs no registration or even writing: *Narsingdas* v. *Ratan Lal* (1). He held that Sonba granted a mere license and not a lease. The finding of the lower Court as regards plots *A* and *C* was upheld and Baijabai's consent to the transfer of plot *B* by Fattechand to defendants was held established and it was held that there was no doubt that Fattechand took the plot *B* with the permission of Sonba. As the three grants of the plots were licenses and not leases, no question as regards the Collector's sanction could arise.

In dealing with the main point in the case whether Baijabai was competent to grant the licenses in question the lower Appellate Court, after a careful scrutiny of the authorities on the subject, has come to the conclusion that she could and that such grants of licenses were for the benefit of the minor's estate. The Judge holds that it has not been established that there was unavoidable necessity for the said transactions, but after dealing

(1) 34 Ind. Cas. 471; 12 N. L. R. 75.

at length with the circumstances which led to the granting of the licenses on the sites in suit the Judge finds that, during Baijabai's management of the minor's estate, she acquired for the plaintiff immoveable property valued at least at Rs. 26,611 to which may be added money invested in money-lending business, a *chawl* built in plaintiff's minority, Dehlaj built in his minority, *khota* and bungalow near Ramnath's garden built in his minority, in the same period money spent on his marriage and his father's debt paid off, making the total of over Rs. 45,000. There was another fact which made these grants of licenses prudent transactions. There is evidence to show that since 1906 the compulsory acquisition of lands in the village of Palakwadi under the Land Acquisition Act was under contemplation, the idea was to furnish the town with building sites, and it was beneficial to the plaintiff's interests and the interests of his estate for his guardian to give these licenses rather than let the land be acquired by the Government.

Dealing with all necessary facts the Judge came to the conclusion in an interesting and a painstaking judgment that the appeal must be affirmed and he set aside the decree of the lower Court and dismissed the plaintiff's suit. Hence the present second appeal.

Though the memorandum of appeal contain no less than 15 grounds, the only question, argued here are, whether the *de facto* guardian Baijabai had through Sonba the power to grant these licenses, and, if she had, whether the giving of the licenses were prudent acts done in the ordinary course of family business and for the benefit of the minor.

It is contended as regards the *de facto* guardian's power, that she did not possess this power, and the following cases were quoted in support of the proposition argued: *Husen* v. *Rajaram* (2), which lays down that an alienation of the property of a minor by a person who is that minor's guardian *de facto* but not *de jure* is not merely voidable but absolutely void; *Vithu* v. *Devidas* (3), which states that under the Hindu Law the step-mother is not the natural guardian of the minor step-son; and *Mata Din* v. *Ahmad Ali* (4) dealing with a case of Muhammadan Law.

It seems to me that the principle enunciated in *Husen* v. *Rajaram* (2) has been too widely stated. A step-mother, no doubt, is not the *de jure* guardian of a minor step-son but she may be his *de facto* guardian and, looking to the cases quoted by the learned Judge of lower Appellate Court in paragraphs 10, 11, 12 and 13 of his judgment, I have no doubt that the correct law is that when such transactions are such as a pudent manager of the property would have made and are covered by legal necessity or benefit to the minor they can be upheld. There is ample proof that Baijabai managed the estate of the present appellant prudently. She increased the value of that estate very much. From the time of plaintiff's grandfather it was usual, as it is in the case of ground landlords of a rising town, to grant licenses and leases for building purposes. Baijabai continued what the family had been doing. It is no argument to say that if these licenses had not then been given, plaintiff would have gained more; for, as found, there was a danger of Government acquiring the vacant land, and once it had been acquired no future profits could have accrued to the plaintiff. I agree with the lower Appellate Court in thinking that Baijabai as *de facto* guardian had power to make or to extend the licenses covering the sites in suit.

It is next contended that she had no power to delegate this authority to Sonba. The Privy Council case of *Bonnerji* v. *Sitanath Das* (5) is quoted by the appellant's Counsel as an authority in support of the argument that Baijabai could not delegate the power of granting licenses to her agent. From 1908 that agent had written power to grant these licenses.

(2) 26 Ind. Cas. 813; 10 N. L. R. 133.
(3) 51 Ind. Cas. 943; 15 N. L. R. 55.
(4) 13 Ind. Cas. 976; 34 A. 213; 23 M. L. J. 6; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 39 I. A. 49 (P.C.).
(5) 66 Ind. Cas. 140; 26 C. W. N. 236; (1922) M. W. N. 98; 30 M. L. T. 182; 20 A. L. J. 294; 15 L. W. 452; 35 C. L. J. 320; 24 Bom. L. R. 565; 49 C. 325: (1922) A. I. R. (P.C.) 209; 42 M. L. J. 403 (P. C.).

Prior to that there is little question that he had implied authority. If the *de facto* guardian herself could grant these licenses it seems to me that she can delegate her power to Sonba.

I have already touched on the question whether the granting of these licenses was for the minor's benefit. No question of legal necessity arises. There can be no hard and fast rule in these cases as to benefit. But as a question of fact it has been found that the granting of the licenses was beneficial to the minor's estate; that is a finding of fact and I have no doubt a correct one. The real facts are that the plaintiff's estate was well and prudently managed by his step-mother Baijabai after his father's death. She increased by her judicious management of the estate that estate greatly to the minor's benefit. On coming of age he, hoping that the principle enunciated in *Husen* v. *Rajaram* (2) would be followed by the Courts, has attempted to extract further money from the licensees and tenants who, relying on the *bona fides* of the alienations made by the *de facto* guardian, have built on the sites acquired. In many cases such demands have been acceded to but the refusal of others to pay has led to a large crop of suits. It seems to me that plaintiff's attitude in these cases of attempting to obtain more than the lands were once granted for is open to question. Every transfer or license requires the sanction which is only accorded on the payment of a fee. So it is not as if he has lost all touch with the land.

It seems to me that all the material questions in the case have been rightly decided by the lower Appellate Court. The result is, that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1917 OF 1919.

November 24, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

HUKAM CHAND—PLAINTIFF—APPELLANT

versus

SHAHAB DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 9, Sch. I, Art. 135—Mortgage—Suit for possession—Limitation.

Defendant executed a deed of possessory mortgage in favour of plaintiff in 1894. Out of the mortgage-money a sum of Rs. 500 was left with the mortgagee to pay off a prior mortgage which was without possession. There was a clause in this mortgage entitling the mortgagee to claim possession in the event of a default in payment. The mortgagee failed to make the payment and the prior mortgagee obtained a decree for possession in 1903, in execution of which he obtained possession of the mortgaged property. In 1917 defendant paid off the prior mortgage and took possession of the land. In 1918 plaintiff brought a suit for possession as mortgagee on payment of Rs. 500;

Held, (1) That, inasmuch as on the date of the execution of the plaintiff's mortgage the mortgaged property was in the possession of the mortgagor, time began to run against the mortgagee from that date; [p. 496, col. 2.]

(2) that limitation having begun to run, the mere fact that possession of the mortgaged property was subsequently taken by the prior mortgagee did not stop it from running; [p. 496, col. 2.]

(3) that the period during which the prior mortgagee had remained in possession could not be excluded from the computation of the period of limitation prescribed for the suit, inasmuch as no such ground of suspension or extension was recognised in the Limitation Act; [p. 496, col. 2]

(4) that, therefore, the suit was barred by time under Art. 135 of Sch. I, to the Limitation Act. [p. 496, col. 2.]

No suspension or extension of limitation is allowable unless it is provided in the Limitation Act. [p. 496, col. 2.]

Muthu Korakkai Chetty v. *Mahamad Madar Ammal*, 54 Ind. Cas. 60; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1; 11 L. W. 487; (1920) M. W. N. 42 (F. B.), relied upon.

Second appeal from a decree of the District Judge, Jullundur, dated the 2nd May 1919, affirming that of the Munsif, First Class, Jullundur, dated the 19th, December 1918, and dismissing the claim with costs in both Courts.

Lala *Mehr Chand Mahajan*, for Lala *Jagan Nath*, for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—The facts giving rise to this second appeal are few and simple and

may be summarised as below :—

On the 17th February 1894 Umar Din mortgaged the land in dispute with possession to one Lachhman Das for Rs. 820, out of which Rs. 320 were paid to the mortgagor and Rs. 500 were left with the mortgagee to be paid to a previous mortgagee, Mohan Lal. The mortgage in favour of Mohan Lal was dated the 2nd October 1890 and was a simple mortgage without possession. There was a clause in this mortgage entitling the mortgagee to claim possession in the event of a default in payment of any of the instalments fixed in the deed. Lachhman Das did not pay Rs. 500 to Mohan Lal which led to a suit for possession by him in 1903 against Umar Din and Beli Ram, son of Lachhman Das, who died in the meantime. A decree for possession was passed in the suit on the 21st May 1903 and Mohan Lal succeeded in getting possession of the land in execution of this decree. He remained in possession till 1917 when the heirs of Umar Din paid off his mortgage, redeemed the property and took possession. Thereupon the present suit was instituted on the 21st February 1918 by Beli Ram for possession as mortgagee on payment of Rs. 500. The suit was resisted on the plea of limitation. Both the Courts below, holding that Art. 135 of the Indian Limitation Act was applicable, dismissed the suit. Hence this second appeal.

Mr. Mehr Chand Mahajan, holding the brief of Mr. Jagan Nath, has put forward two contentions before us in support of the appeal, namely :—

(1) that the mortgagor Umar Din had been allowed to retain possession of the mortgaged property under a lease executed on the date of the mortgage. This allegation is not supported by any evidence. A copy of the lease was produced in the Courts below but it was not in favour of the mortgagor and, moreover, as the loss of the original lease had not been proved the copy could not be accepted in evidence. This contention, therefore, must be disallowed.

(2) That inasmuch as there was a clause in Mohan Lal's mortgage-deed entitling him to take possession under the contingency mentioned in his previous mortgage-deed it was not possible for Lachhman Das or his heirs to sue for possession. This contention also cannot prevail, because the mortgagor Umar Din was admittedly in possession of the mortgaged property at the time the mortgage-deed was executed, the mortgagor's right to possession had determined on that date and Lachhman Das could at once have sued for possession. As under the deed the plaintiff was entitled to immediate possession and the time had begun to run from the date of the mortgage; no subsequent disability or inability to sue could stop it, *see* section 9 of the Indian Limitation Act.

Mr. Mehr Chand Mahajan, however, has argued that his client was entitled to a deduction of the period during which Mohan Lal had remained in possession. There is no warrant for such a plea in the Limitation Act. No suspension or extension of limitation is allowable unless it is provided in the Limitation Act. In the case of *Muthu Korakkai Chetty* v. *Mahamad Madar Ammal* (1) Seshagiri Aiyar, J., is reported to have made the following observation :—

"The Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. The Judicial Committee have drawn attention to sections 9 and 14 of the Act and have held that exemptions not covered by these and the other sections should not be imported by Courts to relieve a party from the bar of limitation."

There can be no doubt that this is the law and, in the face of it, the contention put forward cannot prevail.

The appeal fails and we accordingly dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M. L. J. 1; 11 L. W. 487; (1920) M. W N. 42 (F. B.).

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE CASE NO. 48 OF 1921.
January 10, 1922.
Present:—Mr. Justice Newbould and Mr. Justice Pearson.
EMPEROR—PROSECUTOR
versus
BISESWAR DE *alias* BISWESHAR RAJ AND OTHERS—ACCUSED—RESPONDENTS.

Evidence Act (I of 1872), s. 24—Confession—Evidentiary value of retracted confession—Principles applicable.

It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually, unless the confession is corroborated by credible independent evidence. [p. 499, col. 2.]

A retracted confession should carry practically no weight as against a person other than its maker. [p. 499, col. 2.]

Reference under section 307, Criminal Procedure Code, from the Sessions Judge, Noakhali.

Mr. *Orr*, Babu *Atindra Nath Mukherjee*, for the Crown.

Babus *Manmatha Nath Mukherjee* and *Probod Ch. Duti*, for Accused Nos. 3 and 4.

Babu *Santosh Kumar Bose*, for Accused Nos. 1 and 2.

JUDGMENT.—Five accused persons were put on their trial before the Sessions Judge of Noakhali and a special Jury. They were all charged with conspiracy to murder Bipin Behari Shaha; one of the accused, Biseswar Dey, *alias* Biseswar Raj, was charged with having actually committed the murder; two of them, Jatindra Mohon Das and Satish Chandra Shaha, were charged with having been present abetting the murder, and Jotindra Mohon Das was further charged with having abducted Bipin Behari Saha in order that he might be murdered; the remaining two, Kshetra Mohon Saha and Maharani, were charged with abetment of the murder. After a trial held for 28 days the Jury returned a unanimous verdict stating that the case against the first four accused was doubtful and they gave them the benefit of the doubt, and that Maharani was not guilty. The Sessions Judge agreed with the verdict as to Maharani and acquitted her. In respect of the others he disagreed with the verdict and held it to be perverse and thought it necessary for the ends of justice to refer the case to this Court under the provisions of section 307, Criminal Procedure Code In his opinion these four accused are guilty of the offences mentioned in the charges laid against them.

The case against the accused rested mainly on the evidence of an approver, Bidhu Bhusan Saha, (P. W. No. 1), and retracted confessions of the accused. Before considering the strength of the case so made out, it will be convenient to state certain facts which are either undisputed or which have, in our opinion, been proved beyond reasonable doubt.

Bashpara is a village in the jurisdiction of the Chhagalmaya Police Station and the Feni Sub-Division of the Noakhali District. It is 1½ miles from Chhagalmaya and nine miles from Feni. In this village a rich Shaha family, of which the principal member is Babu Amar Krisha Chouduri, owns a large *pucca* house. Babu A. K. Chouduri, who is called by the witnesses Amar Babu, lived sometimes in Chittagong and sometimes at Bashpara. The accused Maharani was a servant of Amar Babu and came from Chittagong to Bashpara at the time of the Durga Puja of 1920. The accused Kshetra Mohon Saha is the brother-in-law of Lal Mohon Babu, who is brother of Amar Babu. The accused Satish Chandra Saha is a nephew of Amar Babu, Jotindra Mohon Das is the son of Ambika who had long worked for the family as a mason and was maintained by Amar Babu and his co-sharers. The accused, Biseswar De, was brought by Ambika a few months before the occurrence to work as a mason. Bidhu Bhusan Saha, the approver, is the brother of the widow of a cousin of Amar Babu. The accused Kshetra had a tailor's shop in one of the rooms of the Shaha's house. The accused Satish and Jatindra and the approver Bidhu were students at the Chhagalmaya School. The ages of the accused are, as recorded by the Sessions Judge, Biseswar 22, Jotindra 18, Kshetra 20, Satish 16 and Maharani 19.

Bidhu's age is about 16 years.

Bipin Behari Saha, whom the accused are charged with having murdered, was aged about 21 years. He was a nephew of Amar Babu and came from Amar Babu's house in Chittagong to Bashpara on the 10th March last. On the night of Sunday, 12th March, Jotindra, Bipin, Bidhu and Kshetra were seen palying cards at about 9 or 9-30 P.M. The following morning the corpse of Bipin was found lying on the masonry platform of a tank about 300 feet distant from the place where he and the others had been seen playing cards. The right hand was amputated and there was a wound on the throat cutting the wind pipe, gullet and corotid arteries. There were also cuts on the left and right ears. From the quantity of blood on the pavement and the marks of spurting of blood there can be no doubt that Bipin was killed near the place where his corpse was found. Information of the finding of the corpse was given to Sub-Inspector Promatha Nath Mukerjee at the Chhagalmaya Police Station at 8 A.M. and he came to the place and recorded a First Information there at 9 A.M. on the 13th March. The enquiry into the case was commenced by this Sub-Inspector. The Sub-Divisional Officer went to the place of occurrence accompanied by the Feni Inspector of Police, Ananda Charan Bhandopadhya, on the afternoon of the 13th. The Inspector personally took charge of the investigation on the 15th March. The Deputy Superintendent arrived at the place on the 16th March and supervised the investigation. Kshetra, Jotindra and Bidhu said that Bipin had played cards until about 10 or 10-30 P.M. and had left them saying he would sleep at his father's house and go to Feni the next morning to get his cycle repaired. An examination of Bipin's father's house showed that Bipin could not have slept there at any time during his visit to Bashpara. On the 20th March Amar Babu's house was searched. In the room occupied by Maharani was found a blood-stained quilt. Maharani was arrested at 8 or 9 o'clock that morning. In consequence of statements made by her, Jotindra, Kshetra, Satish and Bidhu were arrested at 8 or 9 o'clock that night. The following day Biseswar was arrested at 1-30 P.M. On the 22nd these six accused persons were sent to the Sub-Divisional Officer at Feni to have their confessions recorded. They were produced before him at 12-20 P.M. and, on hearing that they had just arrived and had not had their meal, he told the Court Sub-Inspector to feed them and give them a rest in the Court lock-up and to produce them before him at 3 P.M. They all made confessions that after-noon and were remanded to custody. For some reason that has not been disclosed, Jotindra was sent to the Noakhali Jail on the 26th March while there he admitted to the Officiating Civil Surgeon who was in charge of the Jail that he was present at the murder and held down the feet of the man whom the Raj Mistri gave the finishing stroke. On the 2nd of May the hearing before the Sub-Divisional Officer of Feni as Committing Magistrate commenced. After the case had been opened by the Government Pleader, the confessions made by them on the 22nd March were read to each of the accused and each of them said: "I made this confession. It is true. I have nothing more to say." Bidhu was then tendered a pardon and examined as a prosecution witness. At the close of the day's proceeding Jotindra, Satish and Kshetra retracted their confession. Witnesses were examined daily till the 6th May, on which date the accused were again examined. Jotindra, Satish and Kshetra denied having committed any offence and said their confessions were false and made under threats and inducements. Biseswar De said; " I committed the offence. I have nothing more to say here." Maharani only said, 'I am guilty.' The following day at the commencement of the sitting of the Court, Maharani said that the previous day through mistake she stated that she was guilty although she was not guilty. The trial in the Sessions Court commenced on the 6th June and when the charges were read all five accused pleaded not guilty. Bidhu, the approver, was examined as a prosecution witness on the 6th and 7th June. The Court did not sit on the 8th and 9th. On the 10th June he resiled and said that all he had previously said was false. When examined by the Sessions Judge at the conclusion of the trial all the male accused made statements accusing the Police of ill-treatment and alleging that they were tutored to make their confessions. Maharani made a statement denying the truth of certain evidence

implicating her to which her attention was drawn by the Judge, but she was not asked and said nothing about her own previous admission. The story told by the accused in their confessions and by the approver before he resiled is to the following effect. Maharani was a woman of loose character. Satish and Bidhu used to sleep in the verandah of the room where Maharani lived and carried on an intrigue with her. Jotindra became enamoured of her and threatened Satish and Bidhu with disclosure to the Babus and got them to agree to call Maharani mother and to go and sleep elsewhere. Kshetra had also been misbehaving with Maharani at the same time as Satish and Bidhu, but Kshetra and Jotindra were fast friends and continued visiting the woman together. When the deceased Bipin came he visited Maharani on the Thursday and Friday nights. According to Jotindra it was Kshetra and, according to Kshetra, it was Jotindra who suggested that Bipin should be killed in order to prevent him taking the woman back to Chittagong and informing Amar Babu. Biseswar was promised Rs. 500 if he would commit the murder. Satish and Bidhu were persuaded to join the conspiracy for fear of their misconduct being revealed. On the Saturday night Kshetra, Jotindra and Bidhu got Bipin to play cards with them after supper. They stopped playing about midnight and then Jotindra took Bipin to the platform of the tank where the murder was committed. Bidhu went and woke up Satish. A *kharga* (sacrificial knife) had been placed in readiness under Satish's bed. Bidhu and Satish went with the *kharga*—there are discrepancies as to which of the two carried it—and called Biseswar. Biseswar did not get up and they started back. They met Kshetra and told him they could not wake up Biseswar and then Kshetra went and woke Biseswar by poking him with a bamboo. The *kharga* was given to Biseswar and Kshetra went off to bed. Bidhu, Satish and Biseswar then went to the place where Joindra and Bipin were sitting talking. Biseswar came behind Bipin and struck him on the neck. Bipin fell down and began to groan. Biseswar struck him again and Jotindra held Bipin's leg while he was writhing in agony and dragged the dead body to the water where it was found the next morning. According to Jotindra and Maharani, Kshetra and Jotindra took a blood-stained quilt to show her that her lover had been murdered but Kshetra denies that he came out of his house again that night.

The priniciples which should govern a Court in considering the evidential valu of retracted confessions have frequently been considered by the High Courts in India. It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reason given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually, unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker.

On a consideration of the circumstances under which these confessions were made and retracted, it is clear that the confessions made by the approver and the three accused, other than Biseswar, were made in the belief that they would be tendered a pardon and made King's Evidence. Apart from other reasons, this view is strongly supported by their behaviour on the 2nd May. Though these accused had adhered to their confessions in the morning, at the end of the day when they realised that Bidhu alone had been selected as an approver, they retracted, then alleging they had been made under threats and inducements. We do not believe the statements made by the accused at the trial as to positive ill-treatment by the Police. Nor do we believe that the whole story was a concoction by the Police. We think the learned Sessions Judge was misled by the falsity of a great part of the case for the defence set up before him. If the defence at the trial had been conducted with the same ability and moderation as it was before us, we doubt if he would have thought

it necessar to make this reference. That Maharani was threat ned when the blood stained cloth was found in her room is not unlikely and the fact is deposed to by witnesses who seem the more credible since they speak with moderation. The denial of this fact by the Police witnesses who were present renders their conduct open to suspicion. What we believe to have happened was, that after Maharani's arrest Jotindra, Kshetra, Bidhu and ati h were arrested on suspicion because she stated they were her lovers and because three of them were the last people with whom Bipin was seen alive. These accused were then closely questioned by the Police and threatened and cajoled into making various statements. A statement made by one accused would be made the basis of further questioning of another and each would be told that when so much had been discovered his only hope of safety lay in making a confession. Out of the facts ascertained and such admissions as were made, a theory of the crime would be constructed and this would be put to the accused individually. Once they had been convinced that their best hope of safety lay in becoming King's Evidence they would be only too willing to adopt the suggestion made to them. There is no direct evidence that this was what happened in the present case, but from the circumstances under which these confessions were made and retracted and from the nature of the confessions th mselves we have no doubt that they were obtained in ome such manner under threats and inducements which render them inadmissible under section 24 of the Indian Evidence Act. Apart from these confessions, there is no evidence to support a convic ion of any of these three accused. The evidence of Bidhu is absolutely worthless, not only on account of his denial of its truth but, apart from that, the story told by him is highly improbable and there are discrepancies on important points between the evidence given by him before the Committing Magistrate and that given at the trial. The most incriminating evidence is that relating to the card-party on the night of occurrence. But it is not shown that the account given the next mo ning by the accused a to the termination of the party is fal e. The learned Sessions Judge appears to have overlooked the possibility that Bipin may have given his companions a false reason for his departure. Though it is clea that Bipin did not go to his father's house that night, this does not prove that Jotindra and the other accused were not telling the truth when they said Bipin had made this statement. Other facts, like the swooning of Jotin on arrest, are equally consistent with the guilt and innocence of the accused. Jotin's confession to the Civil Surgeon at Noakhali is of no more value than his first confession to the Magistrate. He may well have thought that repeating his confession would strengthen his chance of being made an approver.

When the confession and evidence of the approver are rejected the circumstantial evidence is insufficient to do more than raise some suspicion against these accused and this suspicion is increased by the falsity of their statements at different times. But we agree with the Jury that they cannot be convicted on any of the charges framed against them.

The case of Biseswar remains to be considered. He did not, as did the other three accused, retract his confession on the 2nd of May after Bidhu's examination, but adhered to it even on the 6th May. It may be that being, unlike the others, uneducated he had still hopes of a pardon. There is no reason to think that he was treated differently from the others during the Police investigation and this renders it difficult to act on his cofession now that it has been retracted. However that may be, we are not in a position to come to the unhesitating conclusion that this confession is true. The whole story of the murder is improbable. We are unable to believe that these young men would conspire in the way alleged to deliberately murder Bipin because he was carrying on an intrigue with a woman of Maharani's character. Nor can we believe that a mere promise of Rs. 500 from a man in Jotindra's position would be a sufficient inducement for the commission of a murder. We also cannot overlook the possibility that Biseswar may have been induced to make himself a scape-goat. Further, we find absolutely no corroboration of his retracted confession. The retracted confession of his co-accused would be of no evidential value against him even if we had not rejected them as against the makers and Bidhu's evidence, as already stated,

is worthless. The learned Sessions Judge has stated in his letter of reference that a foot-print found close to pool of blood was, according to the foot print expert, the foot-print of the accused Biseswar. But we can find no such statement in the evidence given by the foot-print expert, Inspector Ananta Kumar Chakraverty (P. W. No. 20). He has stated in detail the points of similarity and dissimilarity between the impression that was taken of Biseswar's foot-print and the foot-print found at the scene of the murder. But he has not stated that the points of similarity preponderate over those of dissimilarity nor has he expressed his opinion as an expert that the two foot prints are of one and the same person. We are told by the learned Counsel for the Crown that he did give evidence to this effect before the Committing Magistrate. But this deposition was not put in evidence at the Sessions trial and cannot be considered by us. In the case of Biseswar we, therefore, hold there are no materials on the record to justify our setting aside the unanimous verdict of the Jury.

We accordingly acquit the accused on all the charges framed against them and direct that they be released.

B. N. *Accused acquitted.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 793 OF 1922.

November 16, 1922.

Present:—Mr. Justice Stuart.

DURGA PRASAD AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 239—Joint trial—Prosecution, duty of—Dacoity and dishonest possession of property stolen—Joint trial, whether permissible.

A separate trial being the rule and a joint trial the exception, it is always for the prosecution to justify a joint trial. [p. 502, col. 1.]

Where the evidence establishes an offence of dacoity and two offences of dishonest possession of stolen property knowing it to have been stolen in the commission of dacoity, all the offences must be held to have been committed in the same transaction, and a joint trial of the several persons participating in such offences is permissible under the provisions of section 239 of the Criminal Procedure Code. [p 502, col. 1]

Criminal appeal from an order of the Sessions Judge, Allahabad.

Messrs. *Uma Shankar Bajpai, Iqbal Ahmad, Kamuda Prasad* and *Gadhadhar Prasad*, for the Appellants.

Mr. *Sankar Saran*, Government Pleader, for the Crown.

JUDGMENT.—The four appellants, Durga Prasad, Sarabjit, Budhai and Manmath Nath Das were convicted on the unanimous verdict of a Jury by the learned Sessions Judge of Allahabad, on the 12th of August 1922. The transaction in which they were concerned was an extremely audacious dacoity (the first of its kind, so far as I know, which has occurred in these provinces) that was committed in Allahabad, at 1 o'clock, in the afternoon, on the 2nd of May 1922, less than half a mile from the High Court, on one of the most frequented roads in Allahabad. The criminals had marked down an Assistant Cashier and a *chaprasi* of the Allahabad Bank who were returning on an *ekka* from the Imperial Bank to the Allahabad Bank with over Rs. 30,000 worth of currency notes in their possession. They came up behind this *ekka* in a motor-car which had been brought from Calcutta for the purpose. They stopped the motor-car, two of their numbers got out, assaulted the servants o the Bank, robbed them of the notes in their possession and re-entered the motor-car which drove off at full speed. The number of persons taking part in this attack was more than five. Eventually the following persons were arrested and put upon their trial:—Budhai, Sheo Harakh, Manmath Nath Das, Durga Prasad, Sarabjit and *Musammat* Sundari. One of the dacoits, Kashi Pershad, was tendered a pardon and gave evidence for the Crown. Budhai, Sheo Harakh, Manmath Nath Das and Durga Pershad were tried for the actual commission of the dacoity. Sarabjit was tried under a charge under section 412 of the Indian Penal Code to the effect that the day after the dacoity he was found in dishonest possession of certain of the stolen notes knowing that they had been stolen in the

dacoity of the previous day. Sarabjit, it is to be noted, is the brother of one Sudhai who, on the evidence, took part in the dacoity. *Musammat* Sundari was charged of being in possession of notes stolen in the dacoity. She was in the motor-car when the Police overtook it. The Jury found Budhai, Sheo Harakh, Manmath Nath Das and Durga Parshad guilty of dacoity and Sarabjit and *Musammat* Sundari guilty on charges under section 412 of the Indian Penal Code. Sheo Harakh has already appealed against his conviction and sentence. His appeal has been dismissed.

I take first the appeals of Sarabjit and Budhai. Their learned Counsel has raised the following questions of law. The first is that the trial is bad in law because Sarabjit and Sundari could not be tried jointly with the remaining four accused persons. Now, it is always for the prosecution to justify a joint trial. A separate trial is the rule and a joint trial is the exception. In the circumstances of this case, however, a joint trial was permissible under the provisions of section 239, Code of Criminal Procedure, for upon the evidence the offence of dacoity and the two offences of dishonest possession of stolen property knowing it to have been stolen in the commission of a dacoity or dishonest reception of such property knowing it to be stolen from a known dacoit, were committed in the same transaction. The view which I take is the view which was taken by a Bench of the Bombay High Court in *Emperor* v. *Balabhai Hargovind* (1). This is not a case of separate charges of receiv ng stolen property each in itself forming a separate transact on and unlinked by something which brings them into the same transaction. If Sarabjit and Sundari had been tried jointly by themselves, their trial would have been bad in law but the circumstances that they were tried with persons charged with the dacoity in which the property was stolen links up all the three charges into one transaction. This is the view which has been taken by the Bombay High Court and it is the view which commends itself to me. The Jury had before them evidence which justified the conclusion that both Sarabjit and Sundari each took possess on of stolen notes, stolen in the dacoity with full knowledge that they had been stolen in that manner. Their verdict shows that they believed that evidence. I, therefore, find that the joint trial was a good trial n law.

The second point taken on behalf of Sarabjit and Budhai is that the learned Judge's summing up was bad in law. I find against this plea. I have been through the summing up and the evidence in the case and I consider not only that the summing up cannot be attacked in any way as disclosing any illegal ty or any irregularity but I further consider that the summing up is an admirable summing up and a model of what a summing up should be. It is clear and succinct, absolutely fair and presents both the law and the facts to the Jury in a manner on which it would be difficult to improve. The last point is taken by all the appellants together and can be considered for all of them. It is the only point which has been pleaded in respect of Durga Pershad and it is the only point that can be pleaded in re - pect of Manmath Nath Das who has appealed from Jail. This point is that the sentence on each individual is too severe. I do not consider the sentence severe in the case of any individual. The offences committed were very serious offences and it is absolutely necessary that persons committing such offences should be made to recognize the enormity of what they have done by the passing of salutary sentences. I do not consider that the learned Sessions Judge has, in any instance, passed too severe a sentence. I, therefore, dismiss these appeals.

W. C. A. *Appeals dismissed.*

(1) 6 Bom. L. R. 517; 1 Cr. L. J. 584.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No 252 OF 1922.
April 12, 1922.
Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.
RASIK LAL DAS—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Calcutta Police Act (I V of 1866), s. 54-A—Prosecution for possession of stolen goods—Condition for conviction.

The first condition necessary for a conviction under section 54-A of the Calcutta Police Act is for the prosecution to show that the goods had been stolen or fraudulently obtained. The mere evidence of a Sub-Inspector of Police that the goods were recovered from the house of the accused, would not warrant the conclusion that they had been stolen or fraudulently obtained.

Rule.

Mr. *J. W. Chippendale* and Babu *Jatindra Mohan Mukerjee*, for the Petitioner.

JUDGMENT.

Walmsley, J.—The petitioner, Rasik Lal Das, has been convicted under section 54-A of the Calcutta Police Act, and sentenced to undergo three months' rigorous imprisonment. According to the Police Officer, P. W. No. 1, there were found in the house of the accused 23 ties, three pairs of gloves, two scarfs, two braces, one pair of stockings and one night cap. There is no evidence as to the condition of these things. The case for the accused is, that they are old worn-out things such as are to be found with *bikri wallas* and are of no further use. For the purpose of section 54-A of the Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained. It appears to me in this case that the mere evidence of the Sub-Inspector that second-hand articles of clothing were recovered from the house of the accused would warrant us in saying that there is reason to believe that the articles found in the possession of the accused had been stolen or fraudulently obtained. There must, necessarily, be a great deal of property of this kind disposed of in Calcutta, and I think without further evidence we ought to hold that the first condition necessary for a conviction under section 54-A of the Police Act has not been established. That being so, I think the petitioner is entitled to an acquital. The Rule must, therefore, be made absolute and an order passed directing that the petitioner be discharged from his bail. The articles may be returned to the petitioner.

Suhrawardy, J.—I agree.

W. C. A. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 428 OF 1922.
August 19, 1922.
Present:—Mr. Justice Stuart.
GOKAL AND OTHERS—ACCUSED
versus
EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 352—Criminal force, use of, to Police Constable executing warrant—Warrant technically defective—Offence.

The use of criminal force towards a Police Constable, acting honestly within the scope of his authority, to prevent the execution of a warrant containing a technical defect, but of which neither he, nor the person using such force, had knowledge, is an offence punishable under section 352, Penal Code.

Criminal Reference made by the Sessions Judge, Moradabad.

REFERRING ORDER.—In this case Enayat Chaukidar, Gokal, Lokman and Nandan Lal were charged with offences under sections 225 (*b*) and 323, Indian Penal Code. The case for the prosecution was that two constables, Bhagwandas and Mohammed Rafiq, were deputed, on the 30th of March 1922, to arrest one *Musammat* Ram Piari in connection with a case under section 498, Indian Penal Code. A warrant for her arrest had been issued by the Court of the Bench Magistrates of Bilari. *Musammat* Ram Piari was found in the house of the accused Lokman and was arrested, whereupon the other accused came up, tore up the warrant, seized the constables and rescued the woman. The learned Magistrate has sentenced the accused under section 323, Indian Penal Code, only and has sentenced Enayat Chaukidar to one month's rigorous imprisonment and the other three accused to a fine of Rs. 50 each. He found that the warrant under which the arrest of the woman was made was not legally issued and, consequently, no

offence under section 225 (*b*) was proved. The accused come up in revision.

It is pointed out with reason that the arrest of the woman being illegal, the accused were technically justified in rescuing her. Further, there is no evidence whatever on the record to show that the offence of causing hurt was committed. What the evidence shows is that constables were seized and that a scuffle took place. There is nothing to show that any bodily pain, disease or infirmity was caused to any body or that any act was done with the intention of doing so. This being so, I think that the applicants have been wrongly convicted. The record will be submitted to the Hon'ble High Court with the recommendation that the conviction be set aside.

JUDGMENT.—I do not agree with the learned Sessions Judge that no offence was committed. Upon the facts the four persons convicted clearly used criminal force, I am not disposed to go out of my way to find technical excuses for persons who use criminal force towards constables acting honestly within the scope of their authority. The circumstance that the warrant which they were endeavouring to execute contained a technical defect, which the constables could not possibly have any idea of, would affect the case only this much that it renders the persons convicted not guilty of a more serious offence. They have already been found not guilty of that offence. The position of the constables was that they had to obey orders. The persons convicted had not the vaguest idea that the warrant contained a technical defect but used criminal force to prevent the warrant being executed. I change the convictions from sections 323 to convictions under section 352 and uphold the sentences. If Enayat has been released on bail, he will surrender to his bail and serve the remainder of the sentence of one month's rigorous imprisonment.

W. C. A. *Conviction altered.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 104 OF 1922.
(CRIMINAL REVISION PETITION NO. 95 OF 1922.)

August 10, 1922.

Present:—Mr. Justice Krishnan.

JAYARAMULU AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Madras Abkari Act (I of 1886), s. 55 (2)—"Possession," meaning of.

The term "possession" in section 55 (2) of the Madras Abkari Act means actual, and not constructive, possession. Consequently, only those persons who are in actual possession of contraband liquor without a license are punishable under the section. [p. 505, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, and section 107, Government of India Act, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Chingleput, in Criminal Appeal No. 33 of 1921, preferred against the judgment of the Court of the Third Class Magistrate, Uttaramerur, in Calendar Case No. 152 of 1921.

Mr. *E. Vinayaka Rao*, for the Petitioners.

Mr. *J. C. Adam* (Public Prosecutor), for the Crown.

ORDER.—This revision case is filed by accused Nos. 2 and 3 only in Calendar Case No. 152 of 1921, on the file of the Third Class Magistrate of Uttaramerur. They have been convicted under section 55 clause (*a*) of Act I of 1886—the Madras Abkari Act—for being in possession of liquor without a proper license obtained for the purpose. The first accused has not come up here at all. It is argued on behalf of accused Nos. 2 and 3 that there is no evidence on record to show that they were in possession of the liquor. The finding of the lower Court is, that the liquor was found in a cattle-shed which belonged to accused Nos. 2 and 3 in which the first accused was selling the liquor. When the authorities came up on the scene the first accused seems to have locked up this shed and bolted, and the door of the shed had to be broken open to get access into it. The lower Court no doubt holds that the second and third accused should also be considered to have been in possession of the liqour because they were the owners of the shed, but

I think the finding cannot be accepted; for, in section 55 (*a*), the word 'possession', I think, does not mean constructive possession but actual possession. It is only people who are actually in possession of contraband liquor without license that can be punished under the section. In the circumstances of the case, there is no clear evidence that accused Nos. 2 and 3 had anything to do with the liquor, and the only point against them is, that they were the owners of the cattle-shed which, I think, is not sufficient to justify a conviction as regards them.

The conviction will, therefore, be set aside as regards accused Nos. 2 and 3 and the fines, if paid, will be refunded.

V. N. V. *Conviction set aside.*
W. C. A.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 626 OF 1922.
November 1, 1922.
Present:—Mr. Justice Stuart and
Mr. Justice RYVES.
RAM PRASAD—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 235, 239—Gang taking part in several dacoities—Same object—Joint trial of offences and persons.

Where a gang of dacoits assemble on a public highway and commit several acts of dacoity, each act of crime is committed in pursuance of the same object, it being immaterial whether all the members of the gang took an active part in each dacoity, or whether as many as five of them took an active part in any one dacoity.

Criminal appeal from an order of the Additional Sessions Judge, Cawnpore at Fatehpur.

Mr. *Ram Nama Prasad*, for the Appellant.

Mr. *Lalit Mohan Banerji* (Government Advocate), for the Crown.

JUDGMENT.—Ram Prasad has been convicted by the Additional Sessions Judge of Cawnpore on three separate charges of dacoity under section 395 of the Indian Penal Code and sentenced to five years' rigorous imprisonment, the sentences to run concurrently. He appeals. The Local Government has applied that the sentence should be enhanced.

On the facts, a gang of dacoits assembled on the highway between Khajua and Jahanabad, on the 24th April 1922. Two *ekkas* passed carrying passengers; the passengers were robbed and maltreated; after another interval, a cart passed carrying passengers; these passengers were robbed and maltreated. Now, it is perfectly clear to us, upon the evidence, that the same gang of dacoits was present during the whole time and that a dacoity was committed in each instance. It is not material whether all the members of the gang took an active part in each dacoity. It is not material if as many as five of them took an active part in any one dacoity. They were there. Some of them robbed each *ekka* and the cart and each act of crime was committed by the same gang in pursuance of the same object. Thus clearly all these offences were committed in the same transaction and sections 235 and 239 of the Criminal Procedure Code have application.

The first point taken by the appellant, Ram Prasad, that there was irregularity in his trial, fails.

In regard to the second point, his Counsel argues that, on the facts, he was not properly identified. We have gone through the evidence of identification and are satisfied that the identification of Ram Prasad was genuine and honest. We see no reason to make the reservation which the learned Additional Sessions Judge made. We believe the evidence of Badlu and Dayal. Thus the appellant was identified by no less than five witnesses. So far from any undue advantage having been taken to procure his identification, the Deputy Magistrate, who conducted the identification proceedings, took action to help the appellant, as far as possible, to avoid identification. The appellant is a one-eyed man. He had been described as a one-eyed man before he was ever arrested. The Magistrate, who conducted the identification proceedings, as the appellant was a one-eyed man, made the appellant and several other persons who were in the identification parade cover up a corresponding eye. Thus the witnesses were unable to observe a very important point

by which they could have identified the appellant. Nevertheless five of them did so identify him. He was convicted on very satisfactory evidence, and we dismiss his appeal.

In respect of the application for enhancement of sentence, we agree with the learned Government Advocate that this was a very serious offence. A gang of highway men were holding up an unfrequented road and committing dacoity on every harmless person who was passing in that direction. The members of the public must be protected from the depredations of such people.

We enhance the sentence passed upon Ram Prasad to one of ten years' rigorous imprisonment on each charge. The sentences will run concurrently.

W. C. A. *Appeal dismissed; Sentence enhanced.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 491 OF 1922.

June 30, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

Hajl MOHAMMAD ISMAIL—1ST PARTY—PETITIONER

versus

Munshi BARKAT ALI AND OTHERS—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144—Dispute concerning conduct of prayers in mosque—Breach of peace—Order forbidding reading of prayers, whether proper—Procedure.

In a dispute concerning the conduct of prayers in a mosque, there being an apprehension of a breach of the peace, the Magistrate drew up a proceeding under section 144 of the Criminal Procedure Code, and eventually recorded an order that "no man of either party will be allowed to read prayers in the mosque:"

Held, that the order was misconceived; that if the effect of the order was that no Muhammadan would be allowed to say his prayers in the mosque, it was not justified under section 144 of the Criminal Procedure Code, and that the proper course was for the Magistrate to ascertain which party was in the wrong and was interfering unnecessarily with the legal exercise of the legal powers of the other party, and to bind down that party restraining them from committing any act which may lead to a breach of the peace. [p. 507, col. 2]

Rule against an order of the Sub-Divisional Magistrate, Asansol, dated the 2nd May 1922.

Mr. *M. A. K. Fuzl-ul-Huq* and Babu *Radhika Ranjan Guha*, for the Petitioner.

Messrs. *Nag*, and *M. Amiruddin Ahmed* and Babu *Profulla Chunder Ghose*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule was issued against an order passed under section 144, Criminal Procedure Code, by the Sub-Divisional Magistrate of Asansol, on the 2nd of May 1922. The grounds upon which the Rule was issued are grounds Nos. 1, 3, 5 and 6 of the petition of motion, namely, that the order of the Magistrate was without jurisdiction and that section 144, Criminal Procedure Code, was not intended to authorize a Magistrate to stop prayers in a mosque in the manner done in this case. It appears that the petitioner is the *Mutwalli* of a mosque in Raniganj Kasaipara, by virtue of a *waqfnama* executed by his grandfather. The petitioner appointed Hafez Abdus Sobhan as the *Pesh Imam*, or the leader of the prayers, in the mosque some time ago. The men of the locality followed his leadership for a number of years, but having, as alleged, subsequently discovered that he used to lend money on interest, they refused to read their prayers with him. The matter went so far as to necessitate the interference of the Police. Ultimately, proceedings had to be drawn up against both parties under section 144, Criminal Procedure Code. No evidence was taken in the case, but attempts were made from time to time to bring about a settlement of the dispute between the parties. The learned Sub-Divisional Officer appointed some persons who intervened and brought about a settlement, but it did not last very long; for, shortly after, the petitioner again applied for proceedings under section 144, Criminal Procedure Code, saying that the second party were about to commit a breach of the peace. On this, the Magistrate passed the following order: "The only course left for me to be taken is to pass orders under section 144, Criminal Procedure Code, to the effect that no man of either party will be allowed to read the prayers in the above mosque." Against this order, the petitioner moved the District Magistrate of Burdwan who

tried to bring about a settlement again by asking the Muhammadan Marriage Registrar of Raniganj 'to report on the subject of dispute and to arrange for the parties to come to terms.' The Marriage Registrar reported that the petitioner was the *Mutwalli* of the mosque and that he was unable to bring about a settlement of the dispute. The learned District Magistrate thereupon declined to interfere with the order of the Sub-Divisional Officer passed under section 144, Criminal Procedure Code.

It seems to me that the order is a misconceived one. The petitioner is the *Mutwalli* of the mosque and, unless he is displaced from his position as such, no one has any right to interfere with the management of the trust property. As the Superintendent, or the *Mutwalli*, apparently, he has the right to appoint a servant of the mosque and, if the congregation is not satisfied with the appointment made by him, the only course open to them would be to go to the proper Court to have the *Mutwalli* removed, or to make him adopt the proper and legal mode of managing the *waqf* property. But I doubt not that they have no right to interfere with his management and to threaten to commit a breach of the peace if a certain person appointed as the *Pesh Imam* is not removed from office. Apart from the question whether the public will follow the lead of Sobhan, the conduct of the opposite party seems to me to be far from justifiable as it has resulted in the mosque being practically deserted. If the effect of the order of the learned Magistrate is that no Muhammadan would be allowed to say his prayer in the mosque, I do not think that such an order is justified under section 144, Criminal Procedure Code. I do not like to comment on the effect of this order upon the religious sentiments of the people of the locality, but I only wish to suggest that such an order is not proper and justified by the law. I may add that the learned Counsel who appears for the opposite party admits and, in my opinion rightly admits, that the order complained against is indefensible. But he asks us to direct the petitioner to remove the objectionable *Imam* from office, which we are unable to do. It seems to me that the proper course that the Magistrate ought to follow is to find out which party is wrong and, if he finds on the evidence that the second party is in the wrong and is interfering unnecessarily with the exercise of the legal powers of the first party, he ought to bind down the second party restraining them from committing any act which may lead to a breach of the peace. With these observations, I make the Rule absolute and set aside the order of the Sub-Divisional Magistrate of Asansol, dated the 2nd May 1922, passed under section 144 of the Code of Criminal Procedure.

Walmsley, J.—I agree.

W. C. A. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 505 OF 1922.
November 8, 1922.
Present:—Mr. Justice Stuart.
GANESHI LAL AND ANOTHER—APPLICANTS
versus
EMPEROR.

Criminal Procedure Code (Act V of 1898), s. 239—Public Gambling Act (III of 1867), ss. 3, 4, offences under—Same transaction.

The offence of keeping a common gaming-house and the offence of using it as such are offences committed in the same transaction. The trial, therefore, of the owner or keeper of a common gaming-house under section 3 of the Public Gambling Act, together with the trial of persons found gaming, or present for the purpose of gaming in such house under section 4 of that Act in one trial is not illegal.

Criminal Revision from an order of the District Magistrate, Dehra Dun.

Mr. *J. M. Banerjee*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The main point taken in these revisions is, that the trial of the owner or keeper of a common gaming house, under section 3 of Act III of 1867, together with the trial of persons found gaming or present for the purpose of gaming in such house under section 4, in one trial, is illegal. It is always necessary to justify a joint trial and

to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception, and this trial can only be justified if the provisions of section 239 of the Criminal Procedure Code have application. It must be found that the persons tried together were accused of different offences committed in the same transaction. The words " same transaction " are not defined in the Code. It would be hardly possible to define them satisfactorily, and, in arriving at what is the meaning of those words, a Court has to look for guidance to the illustrations to section 235 remembering that those illustrations are not exhaustive. But, in this particular instance, it appears to me that there is no real difficulty. The two offences charged are the complements of one another. It is not easy to see how one could exist without the other. It would be hard to conceive how there could be a common gaming house if no persons went there for the purpose of gaming. In these circumstances, the offence of keeping the gaming house and the offence of using it, both appear to me to be offences committed in the same transaction. Apart from this point, there is nothing brought out in the applications in revision on which I need comment. But as Ganeshi Lal and Kalka Prasad were sentenced only to one month's rigorous imprisonment and were released on bail after they had served several days, it does not seem to me desirable to send them back to prison to serve a few extra days. I accordingly, in the case of Ganeshi Lal and Kalka Prasad, reduce the sentences to the period of im risonment already undergone a .d cancel the bail-bonds. The remaining convictions and sectences will stand.

W. C. A. *Revision allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 41 OF 1922.
(CRIMINAL REVISION PETITION NO. 41 OF 1922).

April 5, 1922.

Present:—Mr. Justice Venkatasubba Rao.

SINANAN SHUKULATHI ROWTHER AND OTHERS—COUNTER-PETITIONERS NOS. 1 TO 6—PETITIONERS

versus

GULAM MOIDEEN ROWTHER *alias* KARUPPATLI ALLAPICHAI ROWTHER—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Preliminary order—No finding as to possession—Revision.

Where in a preliminary order made by a Magistrate in a proceeding under section 145 of the Criminal Procedure Code, there is no finding regarding possession of the property in dispute, but there are very general observations in regard to the ownership of the property, the order constitutes an infringement of the provisions of sections 145 and 146, and being without jurisdiction, the High Court is justified in setting aside such order, in the exercise of its revisional jurisdiction, as null and void. The mere fact that the order purports to be passed under section 145, will not bring it within that section. [p. 509, col. 1.]

Sreeman Kumara Triumalraja Bahadur, Rajah of Karvetnagar v. *Sowcar Lodd Govind Doss Krishna Doss*, 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91; *Dyawappa Basgunda Patil, In r*, 29 Ind. Cas. 66; 17 Bom. L. R. 382; 10 Cr. L. J. 434, *Juthan Singh* v. *Ram Narain Singh*, 22 Ind. Cas. 986; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J 202; *Manindra Chandra Nandi* v. *Barada Kanta Chowdhury*, 30 C. 112; 6 C. W. N. 417, *Kamal Kuty* v. *Udayavarma Raja of Chirakal*, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; (1912) M. W. N 1154; 23 M. L. J. 499; 13 Cr. L. J. 753, referred to.

Petition under section 107 of the Government of India Act, 1915, praying the High Court to revise the order, dated 19th November, 1921, of the Court of the Sub-Divisional Magistrate, Usilampatti, in Miscellaneous Case No. 6 of 1921.

Mr. *F. S. Vaz*, for the Petitioners.

Mr. *S. Ranganada Aiyar*, for the Respondent.

ORDER.—The petitioner purchased the house in question at a Court-auction and obtained delivery on the 1st March 1918. The counter-petitioners caused disturbance whereupon various proceedings were taken from time to time. Finally, the keys of the house were handed over to the Sub-Inspector of Police on the 14th November 1918. The petitioner made

several applications for possession of the keys on the ground that they had been taken from him by the Sub-Inspector; but on the 15th February 1921 an order was made by the Sub-Divisional Magistrate directing the return of the keys to the counter-petitioners. Within twenty days of this order the petitioner moved the same Magistrate to take action under section 145. It is contended that, in the order passed by the Magistrate, there is no finding regarding the possession of the property in question. The contention seems to be well-founded, and I find that the Magistrate does not even attempt to deal with the question of possession and that he makes some very general observations in regard to the ownership of the property. He concludes the order with the statement:

"I declare the petitioner to be in possession of the house and direct the counter-petitioners not to interfere with it till eviction in due course of law."

Sub-section 4 provides that the Magistrate shall, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, if possible, decide whether any and which of the parties was, at the date of the preliminary order, in possession of the property; and under sub-section 6 the Magistrate is required to issue an order declaring such party to be entitled to possession.

The Magistrate in this case does not record a decision under sub-section 4; nor does he issue an order containing a declaration contemplated by sub-section 6. The Magistrate apparently thinks that the petitioner has a right to possession and passes a decree for possession. This constitutes an obvious infringement of the provisions of sections 145 and 146.

The only other point that remains to be decided is, whether any question of jurisdiction is involved and whether the exercise of the revisional powers by the High Court is justified. If an order is challenged to be without jurisdiction, that is to say, if it be outside the section, the mere fact of the order purporting to be so passed will not bring it within the section so as to debar the exercise of the power of the High Court to set it aside in revision as null and void and without jurisdiction: see *Sreeman Kumara Tirumalraja Bahadur, Rajah of Karvetnagar* v. *Sowcar Lodd Govind Doss Krishna Doss* (1), *Dyawappa Basgunda Patil, In re* (2), *Juthan Singh* v. *Ram Narain Singh* (3), *Manindra Chandra Nandi* v. *Barada Kanta Chowdhury* (4) and *Kamal Kutty* v. *Udayavarma Raja of Chirakal* (5).

The order of the Magistrate is, therefore, set aside. But in the circumstances of the case I make no order as to costs.

V. N. V. *Order set aside.*
W. C. A.

(1) 29 M 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91.
(2) 29 Ind. Cas. 66; 17 Bom. L. R. 382; 16 Cr. L. J. 434.
(3) 22 Ind. Cas. 986; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J. 202.
(4) 30 C. 112; 6 C. W. N. 417.
(5) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; (1912) M. W. N. 1154; 23 M. L. J. 499; 13 Cr. L. J. 753.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 226 OF 1922.
April 11, 1922.
Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.
GOSTO BEHARY BASU AND OTHERS—ACCUSED—PETITIONERS
versus
BAISTOM DAS DENRE—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 260—Summary procedure, adoption of, in middle of regular trial—Prejudice to accused.

A Magistrate cannot, to the prejudice of the accused, change his procedure in the middle of a trial. Consequently, a Magistrate cannot, after examining the prosecution witnesses-in-chief in the regular manner, change his procedure to that allowed for summary trials, if such procedure prejudices the accused. [p. 510, col. 2.]

Rule against an order of the Sub-Deputy Magistrate, Uluberia.

Babus *Nagendra Nath Ghose, Dwigendra Krishna Dutt*, for the Petitioner.

Babu *Nagendra Nath Chowdhury*, for the Opposite Party.

JUDGMENT.

Walmsley, J.—The petitioners have been convicted under section 186, Indian Penal

Code, and sectenced to pay fines of Rs. 150, Rs. 30 and Rs. 75 respectively. The Magistrate purported to dispose of the case under summary procedure. So under section 414, Criminal Procedure Code, the petitioners had no right of appeal. They moved the Sessions Judge for a reference to this Court, but without success.

The circumstances under which we issued a Rule are as follows. The petitioners were summoned under section 186 and section 206, Indian Penal Code. Offences under the latter section cannot be tried summarily, and the learned Magistrate began to try the case under Chapter XXI, recording the evidence in the manner prescribed in Chapter XXV. Seven witnesses for the prosecution were thus examined-in-chief on September 17th, the accused were also examined on that day. Then the Magistrate recorded this order: "As no offence under section 206, Indian Penal Code, has been made out, the case will go on under sections 186, 143, Indian Penal Code, and will be tried under section 260, Criminal Procedure Code." Afterwards, on the 29th of September, the prosecution witnesses were re-called for cross-examination. Then defence witnesses were examined, and the Magistrate then made use of one of the forms authorized for use in summary trials, and recorded a judgment, which began on the first page of that summary form.

So far as the examination of the witnesses is concerned, it may be that the record is as full as it would have been if there had been no change of procedure. The cross-examination of the prosecution witnesses covers a fair amount of paper, and, save of the fact that the usual details of parentage, residence and occupation are not given, the same is true of the evidence given by the defence witnesses.

The argument pressed before us, and the ground on which we issued the Rule is, that the learned Magistrate could not, after examining the prosecution witnesses-in-chief in the regular manner, change his procedure to that allowed by Chapter XXII.

The learned Magistrate in his explanation has drawn our attention to several reported decisions, but none of them touch the point now raised. We are not concerned with the question whether a Magistrate may strip a story of its embellishment, but with the question whether he may change his procedure in the middle of a trial. The Code itself provides, by the second clause of section 260 (2), for the converse of what has happened here, and requires in effect a *de novo* trial. I doubt, however, whether any useful inference can be drawn from the absence of any provision as to what should be done when, in the course of a regular trial, it appears desirable that the case should be tried summarily.

It appears to me that the question resolves itself into the question whether the petitioners have been prejudiced or not. The learned Magistrate says that they have not been prejudiced. I cannot agree. On the contrary, I think the petitioners have suffered prejudice in two ways. The first is in the recording of evidence. Possibly in fact the record is as full as it would have been, had the Magistrate continued to try the case in the regular manner, but we have to look at what the law required of the Trying Magistrate and an accused person may reasonably complain of a procedure which has caused the examination-in-chief of the prosecution witnesses to be recorded in the form of a narrative under section 339, Criminal Procedure Code, while the cross-examination of those same witnesses, and the whole evidence of the defence witnesses, need not appear on the record at all. The second and graver prejudice is, that two of the petitioners have lost the right of appeal. That is a loss which needs no comment. I only wish to point out that the gravity of the prejudice seems enhanced rather than lessened by the fullness of the record actually prepared by the Magistrate. *Prima facie* there is material on which an Appellate Court could exercise its judgment, but a few words in the order-sheet and the use of a form with a particular heading have deprived two of the petitioners of the right they would otherwise have had.

In my opinion the Rule must be made absolute on the ground that the Magistrate's procedure is not authorized by law and has caused prejudice to the petitioners.

The result is, that the convictions and sentences are set aside; and it is ordered that the fines, if paid, be refunded.

We are asked to say that the case should not be re-tried by the same Magistrate as he has shown cause before us and also before

the Sessions Judge, and consequently he may find it difficult to approach the case with an open mind. As the learned Pleader on behalf of the petitioners undertakes, that his clients will not ask for the prosecution witnesses to be again examined-in-chief, I think this concession may be allowed. The case will go back to be tried by some competent Magistrate, other than Mr. R. L. Acharjee, to be nominated by the District Magistrate; and such Magistrate will proceed with the case from the point which it reached on September 17th, and dispose of it in accordance with law.

Suhrawardy, J.—I agree.

B. N. *Rule made absolute.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 179 OF 1922.
(CRIMINAL PETITION NO. 159 OF 1922.)
March 3, 1922.

Present:—Mr. Justice Odgers.

In re SUBBA RAIDU—COMPLAINANT—PETITIONER.

Criminal Procedure Code (Act V 1898), ss. 369, 520—Conviction for theft set aside on appeal—Property not restored to accused—Omission accidental—Subsequent order for restoration, validity of.

Where in setting aside a conviction for theft, an Appellate Court omits to pass orders under section 520 of the Criminal Procedure Code for restoration of the property taken from the accused, if the omission is accidental, it can be subsequently corrected under section 369 of the Code.

Rash Mohun Goshamy v. *Kali Nath Raha*, 19 W. R. 3, Cr. distinguished.

Laxman Rangu Rangari, In re, 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169, *Vemireddy Babu Reddy, In re*, 39 Ind. Cas. 309; 18 Cr. L. J. 469, referred to.

Petition, under sections 435, 439 and 520 of the Code of Criminal Procedure, 1898, and section 107, Government of India Act, 1915, praying the High Court to revise an order, dated the 4th February 1922, of the Sub-Divisional First Class Magistrate, Sivakasi, in D. Dis. No. 17 of 1922, Magisterial, in Criminal Appeal No. 63 of 1921, preferred against the judgment of the Third Class Magistrate, Srivilliputhur, in Calender Case No. 213 of 1921 and to issue an order directing stay of further proceedings in D. Dis. No. 17 of 1922 Magisterial, on the file of the Court of the Sub-Divisional First Class Magistrate of Sivakasi, pending disposal of the Criminal Revision Case No. 179 of 1922 on the file of the High Court preferred therefrom.

Mr. *S. Subramania Aiyar*, for the Petitioner.

ORDER.—In this case the complainant charged the accused with theft of two bullocks and in the First Court they were convicted and fined Rs. 20, in default to suffer imprisonment for a week. The bulls were ordered to be handed over to the prosecution witness No. 1 who was the complainant. This case went on appeal to the Sub-Divisional Magistrate of Sivakasi. The Magistrate held that the witnesses, who spoke to the theft, were interested, that their evidence could not be relied on and also, that there had been long delay in the investigation of the case. He, therefore, acquitted the accused on appeal. He did not say anything about the possession of the bulls. Sometime afterwards the accused who had been successful in the appeal against their conviction for theft moved the successor, the First Class Magistrate, (who in the meantime had been transferred) for an order that the bulls should be restored to them, the appellants. The defence version of the occurrence was that the bulls had been sold to them, the appellants. This was found against by the First Court and is not distinctly found in their favour by the lower Appellate Court. The bulls, however, were ordered to be handed over to the appellants with the remark that the complainant's remedy, if any, was in the Civil Court. Mr. S. Subramania Aiyar contends that this is really an alteration or a review of the order of the lower Appellate Court as it originally stood and offends against the provisions of section 369, Criminal Procedure Code.

The lower Appellate Court purported to act under section 520 and such an order would be perfectly regular, had it been made at the time the appeal was heard.

There is no doubt about that. I anticipated an argument as to the effect of an order of restoration having been made by the succeeding Magistrate other than the

one who passed judgment in the appeal. But I heard nothing from Mr. Subramania Aiyar about that. So I conclude that there is no authority in his favour. That point, therefore, goes. The question under section 369 has been argued at some length. I have been referred to some cases. One case, the earliest case, *Rash Mohun Goshamy* v. *Kali Nath Raha* (1), is distinctly distinguishable from the present case, in that the Magistrate in the Court of first instance distinctly refused to pass any order with reference to the disposal of the buffaloes. No such refusal appears here. But I am inclined to think that that was an accidental omission which can be corrected under section 369. The other case referred to is *Kanagasabai* v. *Ramamani* (2) which simply held that under section 517 of the Criminal Procedure Code an order may be made for the delivery of the subject-matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft. There is no doubt whatever that that is so. But that is, in my opinion, no authority for holding here that the property ought to be delivered to the unsuccessful complainant. In *Laxman Rangu Rangari, In re* (3) it was held that the only Court which could deal with the order regarding the disposal of the property was the Court to which an appeal lay and that in that case the applicant was wrong in applying to the District Magistrate to raise the order. In *Vemireddy BabuReddy, In re* (4), in which the Weekly Reporter case was referred to, Mr. Justice Sadasiva Aiyar certainly says, "an order under section 517 ought to be made at the time of the passing of the judgment in the criminal case itself." He does not, however, say that any subsequent order would be illegal as made without jurisdiction. I have been referred to no authority in that behalf. With regard to allowing the complainant petitioner here to have the possession of the bulls on security, I do not think I should make any such order. My strong impression is that the petitioner having failed in his criminal proceedings has now come here in revision in order to try and nullify the effect of the proceedings in the lower Appellate Court. I think he is not justified in taking such a course. In any case, I can find no ground, however, on the question of jurisdiction for interference in revision in this case.

The petition is dismissed.

V. N. V.

N. H. *Petition dismissed.*

(1) 19 W. R. 3 Cr.
(2) 5 Ind. Cas. 468; 34 M. 94; 7 M. L. T. 179; 20 M. L. J. 425; (1910) M. W. N. 508; 11 Cr. L. J. 139.
(3) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.
(4) 39 Ind. Cas. 309; 18 Cr. L. J. 469.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 609 OF 1922.
June 16, 1922.
Present:—Justice Sir Shadi Lal, KT., Chief Justice.

GHULAM MUHAMMAD AND OTHERS—PETITIONERS
versus
THE CROWN, THROUGH *Musammat* ALLAH WASAI—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Dispute settled—Proceedings whether can be renewed—New proceedings on same materials unjustified.

Proceedings under section 145 of the Criminal Procedure Code cannot be renewed after the dispute has been settled and an order has been made that the case be sruck off, nor would a new proceeding be justified only on the materials upon which the previous proceeding was based.

Case reported by the Sessions Judge, Multan, with his No. 77-J. of 1922.

FACTS.—On 17th February 1921, *Musammat* Allah Wasai presented an application under section 145, Criminal Procedure Code, with regard to a house. After preliminary inquiry, the Magistrate passed, on 8th April 1922, an order under section 145, clause(1). In response to the notice of the Magistrate, the other party appeared in the Court. The parties, however, referred the dispute to an arbitrator and stated before the Magistrate on 20th May 1921, that the dispute had been referred to arbitration and that they did not want to proceed further with the case, and thereupon further proceedings were stopped by the Magistrate, and the papers were consigned to the Record Office,

The arbitrator, however did not do anything and on 1st July 1921, *Musammat* Allah Wasai, presented a fresh application under section 145, Criminal Procedure Code. The Magistrate treated this application as a continuation of the previous application and passed an order in favour of *Musammat* Allah Wasai.

GROUNDS.— GhulamMuhammad and others have filed an application for revision of the order of the Magistrate and it has been contended on their behalf that the order in question is illegal and was passed without jurisdiction. B. S. N. Gosh, Vakil for the respondent, has urged that under section 435, clause (3), Criminal Procedure Code, the order in question, which was passed under Chapter XII, Criminal Procedure Code, is not open to revision. On behalf of the petitioners, it is contended that an order passed under section 145, Criminal Procedure Code, is open to revision if the order was passed without jurisdiction and is illegal and in support of this contention he has cited the following authorities :—

Dewan Chand v. *Queen-Empress* (1), *Dhani Ram* v. *Bhola Nath* (2), *Abdulla Khan* v. *Ganda* (3), *Haider Ali Shah* v. *Emperor* (4), *Sri Ram* v. *Faujdar Singh* (5) and *Budhan* v. *Ram Rakha Mal* (6).

A perusal of these authorities shows that the High Court will interfere when there are grave irregularities and when the order passed by the Magistrate is without jurisdiction.

Thus we have to see whether the order in question is illegal and was passed by the Magistrate without jurisdiction. It has been stated above that the first application was struck off the file at the request of the parties on 20th May 1921, and that a fresh application was put in on 1st July 1921. The Magistrate treated the fresh application as a continuation of the previous application and the Counsel for the respondent contended that this revival of proceedings by the Magistrate was correct and in accordance with law. This view of law, however, is not correct. In *Tarini Charan Chowdhry* v. *Amulya Ratan Roy* (7) it was held that proceedings under section 145 cannot be renewed after the dispute has been settled and an order has been passed that the case be struck off. In the same case it was held that under such circumstances new proceedings would not be justified only on the materials upon which the proceedings struck off was based. Of course it was open to *Musammat* Allah Wasai to take fresh proceedings, but in order to do so it would be necessary to set forth new materials in the application. The application, dated 1st July 1921, does not disclose any fresh material and, as stated above it was merely an application for reviving the old proceeding which had been struck off the file.

Under these circumstances, the Magistrate had no power to revive the old proceedings and to pass any order under section 145, Criminal Procedure Code. In my opinion, the order passed by the Magistrate is illegal and *ultra vires* and I, therefore, submit the records to the High Court with the recommendation that the order of the Magistrate may be set aside. It may be noted here that the order has not as yet been carried out.

Mr. *Abdul Aziz*, for the Petitioners.

Mr *Badar-ud-Din Kureshi*, for Mr. *Shah Nawaz*, for the Respondents.

ORDER.—On the 17th February 1921, *Musammat* Allah Wasai made an application under section 145, Criminal Procedure Code, against Ghulam Muhammad and his sons, and after a preliminary inquiry the Magistrate issued on the 8th April 1921, an order under sub-section (1) of that section. It appears that on the 20th May the parties appeared before the Magistrate and stated that the dispute had been referred to arbitration and that they did not wish to proceed further with the case. Thereupon, the Magistrate passed an order "consigning the case to the Record Room."

On the 1st July 1921 *Musammat* Allah Wasa presented another application under section 145, Criminal Procedure Code, and the Magistrate has treated this application as a continuation of the previous application and passed a final order against Ghulam Muhammad and his sons.

(1) 2 P. R. 1899 Cr. (F. B).
(2) 23 P. R. 1902 Cr.; 135 P. L. R. 1902.
(3) 7 P. R. 1907 Cr.; 24 P. W. R. 1907 Cr.; 17 P. L. R. 1908; 6 Cr. L. J. 43.
(4) 6 Ind. Cas. 955; 24 P. W. R. 1910 Cr.; 11 Cr. L. J. 422.
(5) 16 Ind. Cas. 527; 33 P. W. R 1912 Cr.; 193 P. L. R 1912; 13 Cr. L. J 719
(6) 30 Ind. Cas. 452; 169 P. L. R 1915; 32 P. W. R 915 Cr.; 16 Cr.; L. J. 628.
(7) 20 C. 867; 10 Ind. Dec. (N. S.) 583.

Now, it is laid down in *Tarini Charan Chowdhry* v. *Amulya Ratan Roy* (7) that proceedings under section 145 cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. Under such circumstances a new proceeding would not be justified only on the materials upon which the proceeding, which was struck off, was based. It is perfectly clear that if the second application is to be treated as a fresh application, then it must fail on the short ground that *Musammat* Allah Wasai was not in possession of the property either at the date of the order referred to in section 145 (4) or within two months next before the date of such order. Further, it does not appear that there was any likelihood of a breach of the peace.

Accordingly, I accept the recommendation made by the Sessions Judge and set aside the order passed by the Magistrate under section 145, Criminal Procedure Code, against Ghulam Muhammad and his sons.

W. C. A.

Revision accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 373 OF 1922.
(CRIMINAL REVISION PETITION NO. 322 OF 1922).

November 13, 1922.

Present:—Mr. Justice Krishnan.

ARUNACHALA THEVAN—COMPLAINANT—PETITIONER

versus

VELLACHAMI THEVAN—PETITIONER—RESPONDENT NO. 1 AND NARAYANA RAJA—ACCUSED—RESPONDENT NO. 2.

Criminal Procedure Code (Act V of 1898), ss. 407, 520—Court of Appeal—Sub-Divisional Magistrate hearing appeals, competency of, to make order under s. 520.

A Sub-Divisional Magistrate who hears appeals under section 407 of the Criminal Procedure Code, is a Court of Appeal within the meaning of section 520, and is competent to pass orders on an application made under that section for the disposal of the property concerned in the case, treating such application as part of the proceedings in the appeal. But before disposing of such an application, notice thereof should be given to the complainant unless there is good reason for dispensing with such notice. [p. 515, col. 2; p. 516, col. 1]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Usilampatti, dated the 29th November 1920, and made on the petition of one Vellachami Thevan of Ava'soorampatti, in Criminal Application No. 94 of 1920, preferred against the judgment of the Court o the Stationary Second Class Magistrate, Tirumangalam, in Calendar Case No. 422 of 1920.

Mr. *S. Subramania Aiyar*, for the Petitioner.

Mr. *K. Ramanatha Shenai*, for Respondent No. 1.

JUDGMENT.—This is an application by the complainant in Calendar Case No. 422 of 1920 on the file of the Second Class Magistrate of Tirumangalam to have an order passed by the Sub-Divisional Magistrate of Usilampatti, who heard the appeal against the conviction in that Calendar case, regarding the disposal of two bulls which formed the subject-matter of the complaint, set aside.

The complainant's case was that the bulls were entrusted to the accused, and he committed breach of trust in respect of them. The accused was convicted in the First Court and the bulls were ordered by that Magistrate to be handed over to the complainant under section 517 of the Code of Criminal Procedure. On appeal the conviction was reversed by the Sub-Divisional Magistrate, but apparently he forgot to pass any orders regarding the bulls at the time. A month afterwards on a petition filed by one Vellachami Thevan the person from whom the bulls were seized, he passed an order directing that the two bulls should be handed over to him and this order he passed without any notice to the complainant. It is this order that the complainant asks this Court to revise.

Several points are taken before me in revision. It is first argued that the Sub-Divisional Magistrate had no jurisdiction whatever under section 520 of the Code of Criminal Procedure to pass the order that he did pass. It seems to me that this depends on the question whether the petition filed a month after the disposal of the appeal could be considered as part of the proceedings in the appeal itself or a new proceeding altogether. If it is to be treated as a new proceeding, I must follow the ruling of this Court in *Jogi Venkiah* v. *Station House Officer of Narsapur* (1), which says that the District Magistrate alone can pass orders on an application under section 520, when such an application is made to itself. But I have no doubt that that ruling will not apply, where, on hearing an appeal against a conviction the Sub-Divisional Magistrate is asked to set aside an order under section 517. It seems to me that he can, treating as part of the proceedings in the appeal itself, make an order under section 520, for the disposal of the property concerned in the case.

I sent for the records of the two cases cited in *Jogi Venkiah* v. *Station House Officer of Narsapur* (1), namely, Criminal Revision Cases Nos. 525 of 1905 and 84 of 1908, and I find they are both cases where the applications were confined to section 52 , and were entirely unconnected with any criminal appeal. The expression in section 520 " any Court of appeal" has no doubt been construed in these cases as meaning "Courts to which appeals ordinarily lie," but, I think, when a District Magistrate has directed that a case or a certain class of cases is to be heard by a Sub-Divisional Magistrate, under section 407 he hears the appeal, his Court comes within the words " Court of Appeal" as used in section 520 for that particular case or class of cases. In fact, it is the common practice in this Presidency for such Magistrates to pass orders under section 520, if necessary, when disposing of the appeal. See no reason to interfere with this practice. Objection has never been taken to such orders as having been passed without jurisdiction. It will also be noted that section 423 (*d*) authorises appellate Magistrates to pass consequential orders, and orders under section 520 are usually consequential orders based on the findings in the appeal. According to the contention of the petitioner, in every case where some question of disposal of property comes in, the Sub-Divisional Magistrate after hearing the appeal will have to stay his hands and let the parties go before the District Magistrate for an order regarding the disposal of property; this would seem to introduce an unnecessary and cumbersome procedure. Section 517, clause (3), which directs that an order for disposal of property should not be carried out until the period for filing an appeal is over or, when an appeal is filed, until that appeal is disposed of, clearly indicates that the Court which heard the particular appeal can pass orders regarding the disposal of the property at the time the appeal is heard. But it is altogether a different question of disposal of property, for, in such a case, I agree that the District Magistrate should hear the petition.

There is another case, *Subba Raidu, In re* (2), where it was held that where a Sub-Divisional Magistrate disposing of a criminal appeal fails to pass an order under section 520, it will be open to his successor to do so. This would depend upon whether the subsequent order could be treated as part of the original appeal proceedings. I see no reason why it should not ordinarily be treated as such, unless it is very clear from the circumstances of the case that the two are so dissociated in fact that they could not be treated as parts of the same proceeding. That may happen when the time that has elapsed is so very great that such an inference can be drawn.

I am, therefore, of opinion that the first objection that the Sub-Divisional Magistrate had no jurisdiction to pass the order, must be overruled.

The next point taken is that notice should have been given of the petition before any orders were passed. Ordinarily, in such cases it is desirable that notice should

(1) 67 Ind. Cas. 339; 15 L. W. 534; 42 M. L. J. 401; 30 M. L. T. 251; (1922) M. W. N. 191; 23 Cr. L. J. 387.

(2) 71 Ind. Cas. 511; 15 L. W. 664; 43 M. L. J. 87; (1922) M. W. N. 494; (1922) A. I. R. (M.) 329; 31 M. L. T. 367; 24 Cr. L. J. 159.

be given, especially if the order is not passed on the day the appeal is disposed of; but there is no rule of law that requires that such notice is absolutely necessary. However, as in this particular case, it is likely that the absence of notice of the hearing of the petitioner by the Sub-Divisional Magistrate has led to the passing of a wrong order, for it is not very clear from the records whether the bulls really belonged to the petitioner or to the accused. I think it better that this case should be sent down to the Sub-Divisional Magistrate, directing him to give a reasonable opportunity to the complainant to place his contention before him, and then to pass final orders as regards the disposal of the bulls.

I may refer in this connection to *Laxman Rangu Rangari, In re* (3), where it was held by a Bench of that Court that in reversing an order under section 512 the Magistrate should not act without giving notice to the complainant; the learned Judges went to the length of saying that the Magistrate (who in that case was the District Magistrate) was clearly wrong in upsetting the order of the Trying Magistrate merely on the representation of the opponent. I think this rule should ordinarily be followed, unless there is good reason for dispensing with it. As in this case no notice was given, the case, as I have said, will be sent back to he Sub-Divisional Magistrate for fresh disposal. He would come to a clear finding as to whom the bulls belong on the materials which may be placed before him before expressing his final orders.

It is also argued that the first Magist ate having once given overthe bulls to the complainant in the First Court, it is no longer open to any Court to direct them to be returned to the accused. There is no pr v.-sion in the new Code of Criminal Procedure which restricts the powers of the Court in this manner under section 520. In fact, the new section has added the words "nd make any further orders that may be just." These words seem to me to be quite wide enough to empower the Court to direct the return of property. This contention also must, therefore, be overruled.

The order of the Sub-Divisional Magistrate dated the 29th November 1920 is set aside and he is directed to pass fresh orders in the light of the observations above made.

V. N. V.

W. C. A. *Petition allowed and remanded.*

(3) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 66 OF 1922.

March 1, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

BENOWARI LAL RAM AND OTHERS—PETITIONERS

versus

PRONAB KRISHNA MAJUMDAR AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144, scope of—Ex parte *order, legality of Holding* hat *on one's own property*—*Breach of peace*—*Proper procedure.*

Every person is ordinarily entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not in itself a wrongful act The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership, when such exercise, in its ulterior consequences, and being directed primarily against the lawful exercise of another person's right of ownership, is likely to cause a breach of the peace. [p. 517, col. 2]

An order prohibiting a party from ever holding a *hat* at any place on his own property is not competent under section 144, Criminal Procedure Code. [p. 518, col. 1]

Rakhal Das Singh v. *Emperor*, 15 Ind Cas. 655; 19 C. W. N. 248; 13 Cr. L. J. 511 and *Bidhu Ranjan Mazumdar* v. *Ramesh Chandra Roy*, 11 C. W. N. 223; 5 Cr. L. J. 43, referred to.

It is not proper for a Magistrate to pass an *ex parte* order under section 144, Criminal Procedure Code, and, when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject. [p. 519, col. 1.]

Criminal revision against an order of the Sub-Divisional Magistrate, Berhampur, dated the 30th December 1921.

Babus *Dasarathi Sanyal* and *Lalit Mohan Sanyal*, for the Petitioners.

Babus *Manmatha Nath Mukherjee* and *Probodh Chander Chatterjee*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule was issued against the orders, dated the 30th December 1921 and 4th January 1922, passed by the Sub-Divisional Magistrate of Berhampur under section 144, Criminal Procedure Code, on the grounds mentioned in the petition, *viz.*, that the orders are *ultra vires*, illegal and beyond the scope of section 144. Criminal Procedure Code.

The facts of the case are that there is an old *hat* at a village Islampur, belonging to the opposite party, which is held on every Monday, and attended by, among others, the people of Chak Harharia. Some difference arose between the opposite party and the people of the Chak, and these petitioners started a *hat* in the Chak which was held on Sunday, the 25th December 1921, at a place near the Local Board road. It appears from the Police report that on hearing that the new *hat* was being held, the opposite party sent their men to the place, and there was a serious fighting between the parties which resulted in the starting of criminal cases under section 147, Indian Penal Code. On the 29th December 1921 the Police reported the above facts to the Sub-Divisional Magistrate and invited proper orders, whereupon the Sub-Divisional Magistrate issued an order under section 144, Criminal Procedure Code, in these terms :

" Whereas I have been informed that there is an apprehension of a serious breach of the peace between the above mentioned parties within the boundaries given below, I do hereby, under section 144, Criminal Procedure Code, pass this order of injunction prohibiting any person from going to buy or sell in the said place, otherwise he should be dealt with according to law ".

The petitioners then shifted the *hat* to a different plot of land but in the same village. The Police again reported that the petitioners, the second party, were holding the *hat* at another place and that "the first party is trying to prevent the sitting (holding) at the *hat* in the village Chak Harharia." Thereupon the Magistrate passed another order on the 5th January 1922, in the following terms :—

" Whereas I have been informed that there is an apprehension of a breach of the peace between the above-mentioned parties regarding holding of a *hat* by the opposite party in Chak Harharia as per boundary given below,—it is hereby prohibited, under section 144, Criminal Procedure Code, that no person should go to sell or buy any articles in the Chak Harharia, otherwise they will be dealt with according to law, dated this the 5th January 1922."

In my opinion the orders complained of are such as could not have been passed under section 144, Criminal Procedure Code. As has been observed in the case of *Rakhal Das Singh* v. *Emperor* (1) there is a " clear distinction between interfering with the rights of private proprietors with whatever ulterior motive they may do acts which they have a right to do and the perpetration of wrongful acts by such proprietors. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace ". These observations apply with particular force to the facts of the present case. Every person is ordinarily entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership, when such exercise in its ulterior consequences, and being directed primarily against the lawful exercise of another person's right of ownership, is likely to cause a breach of the peace.

In the present case no evidence has been gone into and we have to proceed on the materials disclosed by the record. The petitioners claim exclusive possession of the land on which they want to hold the

(1) 15 Ind. Cas. 655 ; 19 C. W. N. 248 ; 13 Cr. L. J. 511.

hat. They further intend to hold it on a day other than the day on which the *hat* of the opposite party assembles. Such being the case, my opinion is that the Magistrate has no jurisdiction to pass an order in the present form prohibiting the petitioners from holding their *hat* on any day of the week and on any place within a large area.

Numerous cases have been cited on both sides: most of which are based on the peculiar facts of each case. The opposite party relies on the Full Bench ruling—*Bykuntram Shaha Roy* v. *Meajan* (2). In that case it was argued that a Magistrate acting under section 144, Criminal Procedure Code, has no jurisdiction to restrain a person from doing a lawful act on his property. The Full Bench held that a Magistrate has such a power where doing of a lawful act may in his opinion occasion a breach of the peace. In that case the order passed was restraining a party from holding a *hat* on a particular day of the week. The same view has been adopted in all the cases that have since been decided out of which special reference may be made to the case of *Nagendro Nath Biswas* v. *Rakhal Das Sinha* (3). In all the cases, in which the order of a Magistrate under section 144 has been upheld, it was for restraining a party from holding a *hat* on a particular day. No authority has been placed before us in support of the contention that an order like those passed in the present case prohibiting a party from ever holding a *hat* at any place on his own property is competent under section 144, Criminal Procedure Code. But there are authorities to the contrary condemning such an order. In the case of *Rakhal Das Singh* v. *Emperor* (1), noticed above, a Rule was issued on the ground that "it is not within the jurisdiction of the Magistrate to prohibit the holding of the *hat* altogether; he can only give some directions as to dates, etc., as will prevent obstruction, annoyance or disturbance to public tranquillity temporarily." The learned Judges further directed that pending the disposal of the Rule, the petitioners in that case would be allowed to open their *hat* on dates other than those on which the *hat* of the opposite party was held. In the course of their judgment in making the Rule absolute on the grounds on which it was issued, they observed, "Now, directing a man not to use his property in a lawful manner (for the establishment of a *hat* is a perfectly lawful act) cannot, in our opinion, come within the purview of this section. What the Magistrate ought to have ordered these people to do is not to obstruct or allow their servants in any way to obstruct the public or any other person" from attending the rival market if he wished to do so. The learned Judges further remarked: "an injunction cannot be issued not to do a lawful act upon a man's own property". Though the last proposition is so broadly put, what the learned Judges meant to say was that a Magistrate is not competent to prohibit the holding of a *hat* by a person on his own property unless he or his men by force or pursuasion prevent people from attending the other *hat*. In the present case there is no allegation that the petitioners or their men obstructed or attempted to obstruct any one from attending the *hat* of the opposite party. According to the Police report the breach of the peace was occasioned by the opposite party coming to the petitioner's *hat* and interfering with the holding of it and that the further likelihood of a breach of the peace lies on the opposite party taking umbrage at the opening of a new *hat* close to theirs and interfering with it. For this state of things if any one was to blame it was the opposite party and I fail to see that there was any power in the Magistrate or any justification for issuing an injunction on the petitioners against holding the *hat*. Further, the orders complained of virtually prohibit any buying or selling in the village because some one may object to it.

To the above effect is the case of *Bidhu Ranjan Mazumdar* v. *Ramesh Chandra Roy* (4), where the injunction issued under section 144, Criminal Procedure Code, prescribed establishing a new *hat* within a quarter of a mile of an old *hat*, as "there was a probability of a breach of the peace over this matter.", The learned Judges in

(2) 18 W. R. Cr. 47; 10 B. L. R. (F. B.) 434.
(3) 49 Ind. Cas. 97; 23 C. W. N. 141; 20 Cr. L. J. 113.
(4) 11 C. W. N. 223; 5 Cr. L. J. 43.

discharging the order of the Magistrate observe: "we are of opinion that the object of section 144 is not that orders should be made proscribing the holding of *hats* indefinitely within a certain area for two months". They suggest that in such cases the proper way of preventing a breach of the peace is to proceed according to section 107, Criminal Procedure Code. I think that in the present case also that suggestion should be adopted, as I find that the Magistrate is already considering the question of proceeding under that section.

I cannot leave this case without observing that it is not proper for a Magistrate to pass an *ex parte* order under section 144, Criminal Procedure Code, and, when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject.

The Rule is accordingly made absolute and the orders of the 30th December 1921 and 4th January 1922 passed by the Sub-Divisional Magistrate will stand discharged.

Walmsley, J.—I agree.

B. N. *Rule made absolute.*

LAHORE HIGH COURT.

SPECIAL BENCH.

CRIMINAL MISCELLANEOUS No. 29 OF 1922.

August 2, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, Mr. Justice Scott-Smith and Mr. Justice Martineau.

RAJ PAL—PETITIONER

versus

EMPEROR—RESPONDENT.

Press Act (I of 1910), s. 4—Article in newspaper, objectionable—Good faith of Editor or writer, when material—"The Government established by law in British India," meaning of—"Section of His Majesty's subjects," meaning of.

In deciding the question whether the words of an article published in a newspaper may or may not have the tendency to produce the objectionable effect described in the various clauses of sub-section (1) of section 4 of the Press Act, it is immaterial whether the Editor or writer acted in good faith, or what was the motive of the writer. Such matters are material only in connection with comments expressing disapproval of the measures of the Government. [p. 521, cols. 1 & 2.]

The phrase "the Government established by law in British India" includes the collective body of men authorised by law to administer executive Government in British India as distinguished from any particular set of administrators or individuals administering the country for the time being. A few police Officials employed at a particular station cannot be identified with the Government or the general body of rulers, nor can these officials, either individually or collectively, be regarded as "the Government established by law in British India". [p. 522, cols. 1 & 2.]

Queen-Empress v. *Bal Gangadhar Tilak*, 22 B. 112 at p. 135; 11 Ind. Dec. (N. S.) 656 and *Emperor* v. *Bhaskar*, 8 Bom. L. R. 421 at p. 438; 30 B. 421; 4 Cr. L. J. 1, cited with approval.

Sundar Lal, In the matter of an application of, 55 Ind. Cas. 110; 42 A. 233; 18 A. L. J. 11; 2 U. P. L. R. (A) 1; 21 Cr. L. J. 238, distinguished.

There is a clear distinction between the Government and individual officers employed under the Government, words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter only infringe the law of libel. [p. 522, col. 2.]

The expression "section of His Majesty's subjects" in clause (*c*) of section 4 of the Press Act signifies a distinct portion of His Majesty's subjects: a fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few Policemen, who happen to be employed at a particular place, cannot be designated a section of His Majesty's subjects, much less a class thereof. [p. 523, col. 1.]

In the matter of the forfeiture of the security of the "Parkash Steam Press", Lahore, and of the petition of Lala Raj Pal, keeper of the Press, for setting aside the order of forfeiture, dated the 4th January 1922, passed by His Excellency the Governor of the Punjab in Council.

Bakshi *Tek Chand*, Messrs. *Badri Das* and *S. K. Mukerji*, for the Petitioner.

The Government-Advocate, for the Respondent.

JUDGMENT.

Shadi Lal, C. J.—This is an application under section 17 of the Indian Press Act (I of 1910) asking this Court to set aside an order made by the Punjab Government under section 4 of the Act declaring the security deposited by the keeper of the "Parkash Steam Press" to be forfeited to His

Majesty. The circumstances which led to the order of forfeiture lie within a narrow compass. It appears that the "Parkash Steam Press" was used for the purpose of printing a vernacular daily newspaper called the "Partap" and that, in compliance with an order made under section 3, the keeper of the press deposited with the District Magistrate of Lahore a sum of Rs. 2,000 as security in respect of his press. In the issue of the "Partap" newspaper published on the 27th December 1921, and bearing date the 29th December the following paragraph appeared :—

"Restlessness at Ferozpur Jhirka on the arrest of Congress and Khilafat workers. Firing by the Police on a large peaceful crowd. Fifteen killed and 200 wounded."

"On the 23rd December 1921 at 3 P. M. the Police arrested 15 members and Secretaries of the Khilafat and Congress Committee of Ferozepur Jhirka. This news got afloat in the town instantaneously, and a crowd of 5,000 people gathered. Flowers were showered on the patriots. The Police began to throw stones at the crowd which, despite violence, remained peaceful. Then the Police fired for one hour continuously with the result that 15 patriots were killed and 200 wounded."

This version of the incident attracted the attention of the Local Government who issued on the 31st December a Press *Communique* in the following terms :—

"Information has been received that an attack was made on the Police on December 23rd, at Ferozpur Jhirka, 52 miles from Gurgaon and 32 miles from Alwar, by a crowd which sought to rescue certain persons who had been arrested for serious assault on members of an Aman Sabha. Stones were thrown and several officials and Police were injured. The Police found it necessary to open fire in order to disperse the mob. Full information of the number of killed and wounded is not available. Three dead bodies have been seen by the District Magistrate, who is now on the spot with a Military force from Delhi, and commenced a formal enquiry.

The boundary of the Alwar State is only seven or eight miles from Ferozpur Jhirka, and large numbers of mob from State territory joined their fellow tribesmen of British territory in a menacing attitude. The situation was a dangerous one, and indicative of inflammable conditions in the country side. The authorities of the Alwar State sent State troops which co-operated with the British troops in restoring order.

The Deputy Commissioner reports, after enquiry, four deaths at Ferozpur Jhirka, including one who died subsequently from wounds received. One rioter was seriously wounded and twenty-two slightly wounded. Seventeen Government servants received injuries."

This *Communique* is said to have reached the 'Partap' newspaper on the 2nd January 1922, and was published *in extenso* in the issue of the newspaper which was published on that very date, but bore date the 4th January 1922

On the 3rd January another Press *Communique* was published by the Local Government which was to the following effect :—

"Two vernacular newspapers have published distorted accounts of the incident at Firozpur Jhirka, with greatly exaggerated statements of the casualties among the rioters and accompanied by articles of which the obvious intention was to arouse hatred and disaffection against the Government. Notice is, therefore, issuing under section 4 of Act I of 1910 to the keepers of the press at which those newspapers are printed declaring their security to be forfeited."

On the following date, namely, the 4th January, the Local Government, in exercise of the powers conferred upon them by section 4(1) of the aforesaid Act issued a notice, the relevant portion of which may be quoted here :—

"And whereas the said issue that is the issue of the "Partap" bearing date the 29th December, contains an article entitled *Firozpur Jhirka men Karkunan-i-Congress aur Khilafat ki giriftari par bechaini*. And, whereas, in the opinion of the Local Government of the Punjab, the said article is likely, or may have a tendency to bring into hatred and contempt or excite disaffection towards the Government established by law in British India—

Now, therefore, this notice is hereby given to the said Raj Pal that, in exercise of the powers conferred by section 4 (1) of the Indian Press Act, 1910, the Governor of the Punjab in Council declares the security of two thou-

sand rupees deposited in respect of the above-mentioned Parkash Steam Press and all copies of the aforesaid issue of the "Partap" wherever found, to be forfeited by His Majesty."

It is this order of forfeiture which the keeper of the press seeks to impugn, and the function of the Special Bench, constituted under section 18 of the Act to hear and determine the application, is circumscribed by the provisions of section 19 (1) which empowers the Special Bench to set aside the order of forfeiture if it appears to the Bench that "the words.....contained in the newspaper.....in respect of which the order in question was made, were not of the nature described in section 4 (1)."

Before determining the question whether the words complained of do not come within the purview of the aforesaid provision of the law, I may mention that at the commencement of the hearing the learned Advocate for the applicant prayed for permission to advance evidence in order to show that an account of the incident at Ferozpur Jhirka was sent by the Secretaries of the local Congress and Khilafat Committees to several newspapers at Lahore, and that, while the other papers published the account *in extenso* the "Partap" published only a brief summary thereof without making any comments thereon or writing any article about it. The object of producing this evidence was evidently to establish the *bona fides* of the Editor of the paper, but we consider that if the words in their plain grammatical meaning are of the nature mentioned in section 4 (1), it is immaterial whether the Editor acted in good faith or otherwise. The operative portion of clause (*c*) of the sub section does not make the motive or the intention of the writer material in deciding the question whether the words are not of the nature indicated in that sub-section. It is only in connection with comments expressing disapproval of the measures of the Government that the protection afforded by Explanation II to the sub-section can be invoked and then it can be shown that the comments were made with a view to obtain alteration of the measures of the Government by lawful means. Apart from this explanation, the intention of the writer has no bearing upon the question whether the words may or may not have the tendency to produce the objectionable effect described in the various clauses of sub-section (1). The case before us is admittedly not one to which the explanation applies, and we, accordingly, disallowed the request for the production of evidence relating to the good faith of the Editor.

On the merits our attention has been invited to the fact that, while the paragraph complained of was merely a summary of the news communicated by the correspondents at Ferozpur Jhirka, the notice declaring the forfeiture of security misdescribed it as an article, and that the Press *Communique* of the 3rd January wrongly stated that the account of the incident was accompanied by an "article." Now it may be that the expression "article" ordinarily means a literary composition of which the Editor is actually or presumptively the author, and that the same thing cannot be said with respect to a paragraph containing merely news communicated by a correspondent. Further, it appears that so far as the "Partap" newspaper is concerned, no such article as is alluded to in the *Communique* was published. It is, however, unnecessary to dwell upon this subject, because it is beyond dispute that if the paragraph in question falls within the ambit of sub-section (1) of section 4, the keeper of the press cannot derive any help from the fact that it was wrongly described as an "article", or that there was an erroneous impression that it was also accompanied by an article.

The vital question for consideration is whether the words complained of do not fall within the scope of that sub-section. It is to be observed that the paragraph contained no reference to the Government and that the only officials referred to therein were the Police Officials stationed at Ferozpur Jhirka who participated in the affair. I do not think that these officials can either individually or collectively be regarded as "the Government established by law in British India." As pointed out by Strachey, J. in the well-known case of *Queen-Empress* v. *Bal Gangadhar Tilak* (1) this expression means—

"British Government and its representatives as such—the existing political system as distinguished from any particular set of administrators."

(1) 22 B. 112 at p. 135; 11 Ind. Dec. (N. s) 656.

The phrase includes the collective body of men authorised by law to administer executive Government in British India, as distinguished from any particular set of administrators or individuals administering the country for the time being. The position is correctly described by Mr. Justice Batty in the following words, *vide Emperor* v. *Bhaskar* (2) :—

" It is not necessary that the individual should be the object of hatred. What is contemplated under the section is the collective body of men. The Government, defined under the Penal Code, as the person or persons authorised by law to administer executive Government in any part of India. That does not mean the person or persons for the time being. It means the person or persons collectively, in succession, who are authorised to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government, because they are only individuals, and are not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain. The individual is transitory and may be separately criticised, but that which is essentially and inseparably connected with the idea of the Government established by law cannot be attacked without coming within this section. And you do not need to be reminded that it is of the essence of Government in India that it is British Government and British Rule, and so long as it continues to be that, the Government remains unchanged, however much the persons administering it may change."

The learned Government Advocate places his reliance upon a judgment of the Allahabad High Court reported as *Sundar Lal, In the matter of an application of* (3), where it was laid down that the expression " Government established by law in British India " means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.

(2) 8 Bom. L. R. 421 at p. 438; 30 B. 421; 4 Cr. L. J. 1.

(3) 55 Ind. Cas. 110; 42 A. 233; 18 A. L. J. 11; 2 U. P. L. R. (A.) 1; 21 Cr. L. J. 238.

I have no quarrel with this *dictum*, because it is clear that the articles dealt with in that case excited hatred against the rulers as a whole or the ruling class in British India. In the present case the persons, against whom the paragraph was directed, were a few Police Officials employed at a particular station, and it is impossible to identify them with the Government or the general body of rulers. An attack upon certain Policemen at a particular place does not convey any reflection upon the governing authority; indeed, the governing authority, if satisfied of the justice of the complaint, will probably repudiate the alleged misdeeds and may even punish the delinquent officers for their misbehaviour. I fail to understand why the Government should be identical with the individual officers or why an attack on such officers should reflect upon the Government. It is necessary to draw a clear distinction between the Government and individual officers employed under the Government, words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter can only infringe the law of libel.

Mr. Jai Lal, for the respondent, however, argues that though the persons directly attacked are only certain officials the paragraph has a tendency indirectly to bring into hatred and contempt the Government established by law in British India. I consider that this argument is not well-founded. As I have already pointed out, there is no reason why the acts or conduct of individual officers should be attributed to the Government, and I do not see why an adverse criticism of their action should lead, even indirectly, to the result of bringing the Government into hatred or contempt. We must construe the Statute in a reasonable manner and should have regard to the effect which the words may produce on the mind of a normally constituted person. I do not think that such a person would think ill of the Government because one or more of its officers may have been guilty of excesses or misdeeds. I accordingly hold that whatever effect the words complained of may have on the Police Officials referred to therein, they cannot be reasonably construed as affecting, directly or indirectly, the Government established by law in British India.

I now proceed to examine the contention urged by the learned Government Advocate that the Police Officials concerned are a class or section of His Majesty's subjects in British India within the meaning of the latter portion of class (*c*) of section 4 (1); and that consequently the words complained of fall within the purview of the said clause. Now, it is true that the Local Government in their order of forfeiture did not invoke the aid of this portion of the clause, but I do not think that the respondent is confined by the law to the particular provision quoted in the notice or is precluded from showing that the words are covered by another provision of that clause or by any other clause. The language of section 19 makes it clear that the High Court can set aside the order of forfeiture on one ground and one ground only, namely, that the words to which objection has been taken, do not fall within the purview of any of the clauses of sub-section (1).

I am not, however, prepared to accede to the contention that the Police Officials referred to in the paragraph constitute a class or section of His Majesty's subjects. In my opinion, a class or section as contemplated by clause (*c*) connotes a well-defined group of His Majesty's subjects, and I do not think that a fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few Policemen, who happen to be employed at a particular place, can be designated a section of His Majesty's subjects, much less a class thereof. The expression "section of His Majesty's subjects" signifies a distinct portion of His Majesty's subjects and it would be straining the language to describe the aforesaid group of officials by that phrase.

Accordingly I hold that the paragraph complained of is not obnoxious to the provisions of clause (*c*), nor is it suggested that it can be condemned under any other clause of the sub-section. I would accordingly accept the application and set aside the order of forfeiture.

The respondent must pay the costs incurred by the applicant in this Court.

Scott-Smith, J.—I concur entirely with the learned Chief Justice.

Martineau, J.—I also concur.

W. C. A.

Application accepted.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 158 OF 1922.

August 24, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

In re VASUDEO RAMCHANDRA JOSHI —PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Proceeding in contemplation before Criminal Court—False evidence, abetment of—Prosecution—Sanction, whether necessary—Pleader for accused, prosecution of, while proceedings pending, advisability of.

Where a person instigates certain others to give false evidence in a criminal proceeding which is about to come before a Magistrate and does in fact come before that Magistrate, sanction, under section 195 of the Criminal Procedure Code, is necessary before a Court can take cognizance of a complaint against that person of the offence of having abetted the giving of false evidence. [p. 524, col. 2.]

Khanderao, In re, 15 Ind. Cas. 799; 14 Bom. L. R. 362; 13 Cr. L. J. 527 and *Mahadev Yadneshwar, In re*, 17 Ind. Cas. 63; 14 Bom. L. R. 715; 13 Cr. L. J. 751, referred to.

The prosecution of a Pleader defending an accused person for abetment of the giving of false evidence while the trial is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence has been appreciated by the Court, is inadvisable. If such a prosecution is to be started it ought to be started after the principal proceeding, in relation to which the offence is said to have been committed, has terminated. [p. 524, col. 2.]

Ree. v. Kashinath Dinkar, 8 B. H. C. R. 126 at p. 154 Cr., referred to.

Criminal application for revision against an order passed by the First Class Magistrate, Julgaon.

Mr. *P. B. Shingne*, for the Petitioner.

JUDGMENT.

Shah, Ag. C. J.—The facts which have given rise to the present application are briefly these. Apparently in March last there was a proceeding before the Magistrate at Bhusaval against one Vana Khusal in respect of a charge under section 401, Indian Penal Code. An application was made for bail on his behalf by the present petitioner as his Pleader, but that application was refused on April 1 1922. Then the statements of three witnesses were recorded under section 164, Criminal Procedure Code, on April 18, 1922, from which it appeared that on April 10 these witnesses had an interview with the

present petitioner, and that the petitioner had instigated them to give false evidence.

On April 15 another case against Vana Khusal in respect of a dacoity, which has been described to us as the Budhgaon dacoity case, was sent up to the Magistrate; and the case for the Crown is that it was in connection with this case of dacoity which was sent up to the Magistrate on April 15, that the alleged instigation by the present petitioner instigated the witnesses to give false evidence.

On June 2 these witnesses were examined before the Magistrate in the Budhgaon dacoity case, and on June 7, a complaint was filed by the Police Officer against the present petitioner charging him with having abetted the giving of false evidence.

On June 14 the present petitioner made an application to the learned Magistrate before whom the complaint was filed that, as no sanction was obtained under section 195, Criminal Procedure Code, the Court had no power to take cognizance of the complaint. The learned Magistrate came to the conclusion that no sanction was needed because he was of opinion that the alleged offence was not committed in relation to any proceeding in any Court, and that the matter of abetment was never considered by any Court.

The present application is made to this Court on the ground that a sanction is needed under section 195, Criminal Procedure Code, because the alleged offence, if committed at all, was committed in relation to the proceeding pending before the Magistrate against Vana Khusal. It is urged that the alleged offence would have relation to the proceedings, which were already before the Magistrate on April 10, in connection with the charge under section 401, Indian Penal Code.

On behalf of the Crown it is urged that no sanction is necessary, because at the date of the alleged abetment no proceeding, in relation to which the offence is said to have been committed, was pending. It is contended that the offence had no relation to the proceedings pending on April 10, and that the proceedings, to which it related, were sent up to the Magistrate on April 19, and were not pending at the time.

It is quite clear, however, from the very nature of the offence alleged against the present petitioner that if the offence was committed, it was committed in relation to the proceeding in which those three persons were to be examined as witnesses, and it is difficult to understand how it could be said that the present proceedings against the petitioner could go on without the sanction of the Court before which these proceedings are pending at present, and in relation to which the offence is said to have been committed, I assume, without deciding, that the offence alleged against the petitioner related to the Budhgaon dacoity case and not to the case under section 401, Indian Penal Code, then actually pending. Even then the offence related to proceedings which were clearly under contemplation then and which were sent up to the Magistrate on April 15. The expression used in section 195 (1) (*b*) is wide enough to cover such a proceeding and the decisions of this Court in *Khanderao, In re* (1) and *Mahadev Yadneshwar, In re* (2) support that conclusion. I am unable to follow the reasoning adopted by the learned Magistrate in holding that no sanction is necessary. We, therefore, quash the present proceedings, without prejudice to any proceedings that may be taken after obtaining the necessary sanction.

I may also point out that the prosecution of a Pleader defending an accused person while that proceeding is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence, has been appreciated by the Court, is inadvisable. If such a prosecution is to be started it ought to be started after the principal proceeding, in relation to which the offence is said to have been committed, has terminated. It is hardly necessary to refer to the observations in *Reg.* v. *Kashinath Dinkar* (3). Those observations relate, no doubt, to the prosecution of witnesses before the proceeding has terminated but the reason of the rule appears to me to apply to a prosecution like the present prosecution.

(1) 15 Ind. Cas. 799; 14 Bom. L. R. 362; 13 Cr. L. J. 527.
(2) 17 Ind. Cas. 63; 14 Bom. L. R. 715; 13 Cr. L. J. 751.
(3) 8 B. H. C. R. 126 at p 154 Cr.

NUR MUHAMMAD KHAN *v.* EMPEROR.

Crump, J.—It is alleged in this case that the petitioner on April 10 instigated certain persons to give false evidence in a criminal proceeding which was about to come before a Magistrate, and did in fact come before that Magistrate on April 15. It is sought to be argued on behalf of the Crown that section 195 (*b*), Criminal Procedure Code, has no application to the offence so committed. In order to accept that view, it would be necessary to cut down the meaning of the words "in relation to" to an extent, which is, I think, unwarranted. The words are very general and are wide enough, in my opinion, to cover a proceeding in contemplation before a Criminal Court, though it may not have begun at the date when the offence was committed. If that is so, it is plain that sanction was necessary in the present case, and, therefore, the proceedings which have been undertaken are null and void without such sanction. I agree, therefore, that those proceedings must be quashed; and I also agree entirely with the remarks of the learned Chief Justice as to the impropriety of starting the present proceeding against the Pleader of an accused person before the trial of that accused person has been finished. It is obvious that in the circumstances of the present case this cannot be done without coming to a conclusion as to the credibility of certain witnesses whose evidence will have to be recorded in the main case.

W. C. A.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 564 OF 1922.

January 5, 1923.

Present:—Mr. Justice Ryves,

NUR MUHAMMAD KHAN—APPLICANT

versus

EMPROR.—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 367, 537—Trying Magistrate unable to come to Court—Judgment written and signed by such Magistrate pronounced by another Magistrate—Irregularity.

Where a Magistrate after finishing the trial of a case, but before delivering the judgment, is physically incapacitated to come to Court, and, therefore, writes and signs his judgment and sends it to be delivered by another Magistrate, who delivers it, the wrong procedure thus adopted is a mere irregularity and is completely covered by section 537 of the Criminal Procedure Code. [p. 526, col. 2.]

Empress v. *Jia Lal*, A. W. N. (1889) 181, distinguished.

Obiter.—(1) Where a Magistrate is so hoarse as not to be able to pronounce his judgment personally, and asks some one to read it out in his presence, that is a compliance with section 367, Criminal Procedure Code. [p. 526, col. 2.]

(2) If a Magistrate reads his judgment into a Gramophone and then sends it for reproduction in the Court that would be a compliance with the letter of the law (section 367, Criminal Procedure Code). [p. 526, col. 2.]

(3) The maxim *"qui facit per alium, facit per se"* (he who does a thing by the agency of another does it himself), applies where a Magistrate who is himself unable to come to Court writes and signs his judgment in a criminal case and gets it pronounced by another Magistrate. [p. 526, col. 2.]

Criminal revision from an order of the Sessions Judge, Agra, dated the 27th September 1922.

Mr. *N. P. Asthana*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—Nur Muhammad Khan was convicted under section 411 of the Indian Penal Code by a Magistrate of the First Class and sentenced to one year's rigorous imprisonment and to a fine of Rs. 1,000. He appealed unsuccessfully and now comes up in revision before this Court. The charge against him is that of being in dishonest possession of stolen property, namely, 20 bales of *khaki* cloth belonging to Government. Most of the grounds taken refer to the findings of fact which I am not disposed to consider at this stage. The trial in the Trial Court was very careful and lasted near-

ly a year, and the Judge has given a detailed judgment in which he has reviewed the evidence. The main ground raised in revision is that the trial was rendered absolutely void owing to the circumstance that the Magistrate did not pronounce judgment in open Court. It appears that Mr. Wijahat Husain who tried the case was so severely hurt in a motor accident after he had done everything in the case except delivering the judgment, that he was unable to come to Court and was obliged, as soon as he was able to do so, to proceed to England on long leave. He wrote his judgment, signed it and sent it to be delivered by another Magistrate who did deliver it. It is argued that, having regard to the mandatory words of section 367 of the Criminal Procedure Code, this was an illegality which vitiated the whole trial. Attention is drawn to the words that the judgment shall be dated and signed by the presiding officer in open Court at the time of pronouncement. It is admitted that this was not done in the present case. The judgment was deliverred by another Magistrate but it was written and signed and dated by Mr. Wijahat Husain who tried the case. It is not suggested that the fact that Mr. Wijahat Husain was not able to come to Court to pronounce the decision has in any way caused a miscarriage of justice or operated unfairly against the accused. Reliance has been placed on a decision of a Single Judge of this Court in *Empress* v. *Jia Lal* (1). There is no doubt that there are observations in judgment, more particularly in the second column of page 184 of the report, which suggest that in the opinion of Mr. Justice Straight an omission such as this renders the trial incomplete. That case, however, was a very exceptional one and several other illegalities had been perpetrated by the Trial Court and the case was sent back for re-trial not merely on the ground that the Judge had sent his judgment to be delivered by a Magistrate. I cannot help thinking that if the only fault that could have been found against the procedure of the Judge in that case was his omission to pronounce the judgment the case would not have been sent back for re-trial. It seems to me that section 537, which provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed on account of any error, omission or irregularity in the judgment or other proceedings during trial applies. As I have said before, it is not suggested that the failure of the Magistrate to pronounce judgment in any way prejudiced the accused in the conduct of the case. The only omission, namely, that the Magistrate did not himself pronounce the judgment in this case was due to the fact that he was physically incapacitated. It seems to me that at the most his procedure in getting another Magistrate to pronounce this judgment was a mere irregularity completely covered by section 537. I myself should have thought that the maxim *qui facit per alium, facit per se* would apply here. Suppose the Magistrate was so hoarse as not to be able to audibly pronounce his judgment personally, and asked some one to read it out in his presence, surely that would be a compliance with the section. I suppose if the Magistrate had read his judgment into a gramophone and then sent it for reproduction in the Court that would have complied with the letter of the law, but to hold that nothing short of that is a sufficient compliance with the law when the Magistrate was physically unable to go to Court, renders the argument absurd. I am fortified, in my opinion, by a decision of Mr. Justice Lindsay delivered on the 12th of July 1921 in Criminal Revision No. 299 of 1921 which has not been reported. In that case the joint Magistrate, who tried the case, wrote the judgment and then went off into camp, leaving to be delivered by another Magistrate. It does not appear that in that case the Magistrate was incapacitated from delivering the judgment, but he found it more convenient, as he was going into camp, to ask another Magistrate to deliver it for him. It was argued that this was an illegal act which vitiated the whole trial. Mr. Justice Lindsay held that " there can be no doubt that the joint Magistrate was wrong in acting in this way, regard being had to the provisions of section 367 of the Code of Criminal Procedure, but it is idle for the accused to contend that any prejudice or failure of justice has been caused by this mistake on the part of the joint Magistrate, and I hold that the mistake is covered by

(1) A. W. N. (1889) 181.

section 537 of the Code of Criminal Procedure." The only other point which has been pressed seriously is the question of sentence. It is urged that Lieutenant Reynolds who was subsequently convicted by this Court received a lesser sentence than the accused whereas he was really as guilty. The sentence no doubt is severe but having regard to the fact that unless a person like the accused was prepared to assist Lieutenant Reynolds in disposing of this misappropriated or stolen property, the original offence would not have been committed. It has often been said that the receiver is worse than the thief. I see no reason to interfere and reject the application.

S. D.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1187 OF 1920.
January 26, 1922.
Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.
NAYAN MANJURI DASI—PETITIONER
versus
FAZLEY HUQ SARDAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Possession of parties not continuous—Proceedings, whether proper.

An enquiry under section 145 of the Criminal Procedure Code must be directed to the decision of the absolute continuing possession of either party of the subject-matter of dispute. [p. 527, col. 1.]

A *hat* which is held on one day a week is not a proper subject-matter for proceedings under section 145 of the Criminal Prodecure Code between the proprietor thereof and the stall-holders where the latter do not lay any claim to actual possession of any stall for the other days in each week. Under such circumstances an order of the Magistrate under section 145 declaring the stall-holders to be in possession of the stalls is without jurisdiction. [p. 527, col 1.]

In proceedings under section 145 of the Criminal Procedure Code, the element of continuity of possession is an ingredient which is necessary, at any rate, in cases where interruption is not due to seasonal variations. [p. 527, col. 1.]

Criminal revision against an order of the Sub-Divisional Officer, Howrah, dated the 15th October 1920.

Babu *Manmatha Nath Mukerjee* (with him Babu *Dwijendra Nath Mookerjee*), for the Petitioner.

Babu *Dasarathi Sanyal* (with him Babu *Harendra Kumar Sarbadhicary*), for the Opposite Party.

JUDGMENT.

Walmsley, J.—The opposite party have been found to be the occupants of four stalls in a *hat* which is held at Howrah on one day a week. The petitioner is the proprietor of the *hat*. The *hat* is held on a place surrounded by walls, and the gates on those walls are shut at night, and the evidence is, that the stall-holders, on removing their goods, leave the *hat* entirely empty, when it remains in the charge of the *durwans* of the second party, the petitioner before us. The opposite party claim the right to continue to be in occupation of the four particular stalls in the *hat*. The proprietor, on the other hand, claims the right to let out those stalls to other stall-holders if she gets better terms, or if the opposite party refuse to pay what she asks. These are the circumstances under which the matter reached the point at which the Magistrate thought proceedings under section 145 of the Criminal Procedure Code were necessary. We are not concerned with the question whether there is any apprehension of a breach of the peace which would justify the proceedings, for the Rule is limited to two grounds which are, in effect, that the subject-matter is not proper for proceedings under section 145 of the Criminal Proceedure Code. Certainly, the facts seem, at first sight, not to lend themselves to such proceedings. The stall-holders do not lay any claim to actual possession of any stall for five days or more in each week when it is conceded that the *durwans* of the proprietor are in charge of the whole place. Several rulings have been cited before us, but, with one exception, they do not seem to have any application to the question before us. The exception is the case of *Manik Chandra Chakravarti*

v. *Preo Nath Kuar* (1). It is quite true that the facts of that case again are considerably different from those of the present case; but they have this in common that one of the parties claimed the right to hold possession of a piece of land not continuously throughout the year but at long recurring intervals once every year, while in this case the stall-holders claim possession once every week. The difference appears to be one of degree rather than of kind. The learned Judges in disposing of that case said that an enquiry under section 145 of the Criminal Procedure Code must be directed to the decision of the absolute continuing possession of either party of the subject-matter of dispute. It appears to me that that element of continuity of possession is an ingredient which is necessary, at any rate, in cases where interruption is not due to seasonal variations, in proceedings under section 145 of the Criminal Procedure Code. In my judgment the Rule must be made absolute on the grounds on which it was issued, and the order of the Magistrate declaring the stall-holders to be in possession of the stalls set aside.

Suhrawardy, J.—I agree.

B. N.

Rule made absolute.

(11) 17 Ind. Cas. 533; 17 C. W. N. 205; 13 Cr. L. J. 789; 17 C. L. J. 397.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 191 OF 1922.

May 19, 1922.

Present:—Mr. Justice Ryves.

UDAI RAJ SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Magistrate finding no case established—District Magistrate disagreeing with finding—Further enquiry, whether should be ordered.

Where a Magistrate after proper enquiry finds that there is no case established against an accused person, the mere fact that the District Magistrate does not agree with that opinion is no reason for directing further enquiry under section 437 of the Criminal Procedure Code, especially where there is no suggestion that any further evidence is available, or should be taken.

Criminal revision from an order of the District Magistrate, Jaunpur, dated the 7th April 1922.

Hafiz *Mushtaq Ahmed*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case proceedings were taken against Udai Raj Singh under section 110 of the Criminal Procedure Code. The matter was inquired into by a Magistrate who heard a large number of witnesses on both sides and in a well-considered judgment came to the conclusion that it was not proved that orders under section 110 of the Criminal Procedure Code should issue against Udai Raj Singh. The District Magistrate, without issuing notice, ordered further inquiry under section 437 of the Criminal Procedure Code. On revision this Court set aside that order. Notice was then sent to Udai Raj Singh, and the successor of the then District Magistrate ordered further inquiry. The reasons given really amount to this that if the Trying Magistrate had taken a proper view of the evidence, that is to say, the view which the District Magistrate felt inclined to take, then he would have passed orders under section 110 of the Criminal Procedure Code. He now refers the matter back to him for further inquiry as he calls it, but really, it seems to me, with a recommendation or advice that orders under section 110 of the Criminal Procedure Code were indicated. I do not think section 437 was ever intended for a case like this. In my opinion, the Trying Magistrate was quite entitled to come to the opinion which he did, and merely because another Court does not agree with that opinion, is no reason to direct the so-called further inquiry. There is no suggestion that further evidence is available or should be taken. Under these circumstances I set aside the order under section 437. If, of course, in future it becomes necessary to take proceedings against Udai Raj Singh, this will be no bar to such proceedings.

W. C. A.

Order set aside.

DINA SINGH *v.* DEVI CHAND.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 5 OF 1922.

December 8, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji., KT.

DINA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala DEVI CHAND—PLAINTIFF—RESPONDENT.

Construction of document—Wajib-ul-arz—Zemindar, *arbitrary right of, to turn out inhabitants—Proof required, nature of.*

Where the *wajib-ul-arz* of a village provides that " if the proprietors turn out, put out or eject any of the inhabitants," that does not mean that the *zemindar* can, without assigning some good cause, turn out any body, but it contemplates the turning out or ejectment of a person for good and sufficient cause. [p. 530, col. 1.]

A *zemindar* who claims an arbitrary right to turn persons out, must prove that right with great definiteness. [p. 530, col. 1.]

Appeal, under section 10 of the Letters Patent, from the judgment of Mr. Justice Gokul Prasad, dated the 14th December 1921.

Mr. *Nihal Chand*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—In this case a *zemindar* sued Dina Singh and others for the recovery of possession of a house, the materials of which are said to be of the value of Rs. 300 and the house as a standing house presumably of the value of about Rs. 1,000. The *zemindar* claimed the house shortly after the death of one Teku Sonar, who was admittedly in possession and in whose family the house had been for a number of years. The house was said in the plaint to have been erected prior to the Settlement of 1867; but of that no evidence was given at the trial. The *zemindar* alleged that the defendants were not the heirs of Teku, and he set up a further ground of claim, namely, that he had a right, in accordance with the terms of the *Wajib-ul-arz* of 1867, to resume possession of any piece of ground upon which a house might have been built at any time that he liked arbitrarily, and that he could do that leaving only to the dispossessed house-holder the right of removing the materials. The allegation that the defendants were not the heirs of Teku was decided adversely to the *zemindar* and thereupon he was thrown back upon the second branch of his claim, namely, that he could, without assigning any reason, re-possess to himself any land situated in the *abadi*. The passage of the *Wajib-ul-arz*, which has been relied upon, has been translated to us, and it is agreed that the passage runs as follows:—"If the proprietors turn out, or eject or put out (*jo malkan kisi bashinde ko uthawenge*) any of the inhabitants, that inhabitant will have the right to remove the materials." In the Court of first instance there seemed to be no discussion on this question of the text of the *Wajib-ul-arz*. At all events, the judgment of the learned Munsif is silent on this point. In the lower Appellate Court the learned District Judge purported to give "a translation of the provisions of the *Wajib-ul-arz*" and he commenced with this passage: "If the *zemindar* wishes to eject any one, he can do so." We have invited Dr. Agarwala to find that passage in the *Wajib-ul-arz*, and Mr. Nihal Chand has also searched for it, and it is agreed that that passage does not appear in the document, and it has been suggested, and it is probably the fact, that by mistake the learned District Judge was taking down what was, in Counsel's view, a short summary of the right of the *zemindar*. At all events, it must be taken that the passage which we have quoted is the only passage in the *Wajib-ul-arz* on which the *zemindar* can rely. Now, the position must be looked at broadly. The *zemindar* is undoubtedly the owner of the land in the *abadi* and he can grant a license if he so chooses to any body to erect a house in the *abadi* and he can affix to it such terms as he wishes—and no doubt it would have been competent for the *zemindar* in about the years 1860 to 1870 to have stipulated that any body wishing to build a house could only do so upon the clear understanding that the *zemindar* had a right which he could exercise at any time, without assigning any reason, of re-taking possession of the site and requiring the builder of the house to pull it down and remove the materials. Such a power implies putting the owner of the materials to great loss, to great disturbance and may very well result in ruining a trade which may

have taken years to get together. Therefore, an arbitrary right of that character ought to be proved with great definiteness. Nobody, of course, was able to come forward to say what was the original bargain between the parties. No one could be called to explain how Teku or his predecessors were allowed, some fifty years ago at least, to build a house.

Mr. Kendall, of course, had the passage before him, which in his belief appeared in the *Wajib-ul-arz*, that if the *zemindar* wishes to eject any one he could do so; and one can understand that that coloured his judgment, because that was a very clear expression of power given to the *zemindar*. Mr. Justice Gokul Prasad does not seem to have been impressed by that portion of it, and he bases his judgment strictly on the translation of the *Wajib-ul-arz* and comes to the conclusion, in the absence of any other evidence, he must be guided by that. That was in every way right and proper, and we are guided by it. But we are not satisfied that the phrase: "If the proprietors turn out, put out or eject any of the inhabitants" means arbitrarily and without assigning some good cause. That circumstances might arise which would give to the *zemindar* a proper right to turn out a man admits of no question; but it is not asserted in this case that there has been any just cause for this attempt to turn out the heirs of Teku: No reason whatever has been alleged. The *zemindar* relies on his alleged power to turn out at his pleasure. We are unable to hold that that clause in the *Wajib-ul-arz*, to which we have referred, is so clear and definite as to give him that extraordinary right. In looking at the *wajib-ul-arz* one sees that it was making provision for two events The first was, that if a tenant voluntarily left the *abadi* he had to leave the materials of his house *in situ*. If, however, the inhabitant involuntarily had to leave the site he was at liberty to remove the materials. We think the fair and proper construction of this clause ought to be not that the *zemindar* can turn out any body without reason but that it contemplated the turning out or ejectment of a man for good and sufficient cause. In that view of the case, this appeal must be allowed with costs and fees on the higher scale. The decrees of this Court and of the lower Appellate Court will, therefore, be set aside and the decree of the Munsif restored.

W. C. A. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 308 OF 1922
November 30, 1922.

Present:—Mr. Justice Wallace.

JAGANNATHA SASTRY—PLAINTIFF—PETITIONER

versus

SARATHAMBAI, AMMAL AND ANOTHER—DEFENDANTS—COUNTER-PETITIONERS.

Civil Procedure Code (Act V of 1908), s. 115, O. XVI, r. 19 (b), O. XXVI, rr. 1, 4—Revision—Interlocutory orders—Witnesses living more than 200 miles from Court-house—Commission for examination—Discretion of Court—'May issue commission,' meaning of.

In a case where the lower Court has not obeyed the law, it is the duty of the High Court to interfere in revision even in interlocutory proceedings rather than permit a trial to go on, on an illegal course which must entail unnecessary expenses to the parties and useless waste of time. [p 532, col. 1.]

Ordinarily, where a party asks for a commission for the examination of a witness who is not under the control of the party and who resides beyond the limits fixed under O. XVI, r. 19 (*b*) of the Civil Procedure Code, a commission should issue as a matter of right unless the Court is satisfied that the party is merely abusing its authority to issue a process, but it is not for the Court to decide whether he will be benefited thereby or not. That is a matter entirely for the party. [p. 531, col. 2.]

Vidya Purna v. *Seethamma*, 12 Ind. Cas. 74; 21 M. L. J. 889, *Huree Doss Bysack* v. *Meer Moazzum Hossein*, 15 W.R. 447; 8 B.L. R. App. 16, followed.

Amrith Nath Jha v. *Dhunput Singh*, 20 W. R. 253, *Adamji Khadi Bhai* v. *Issuf Ahmed Mulla*, 16 Ind. Cas. 750, *Saleji (A. E.)* v. *Ahmed Musaji*, 19 Ind. Cas. 643, *Veerabadran Chetty* v. *Nataraja Desikar*, 28 M. 28; 14 M. L. J. 329, distinguished.

The words "may issue a commission" are used in O. XXVI, r. 4, Civil Procedure Code, in the same sense in which they are used in r. 1 of that Order mean is given authority to issue a commission [p. 531, col. 2.]

Petition, under section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Mayavaram, dated the 22nd February 1922, in Interlocutory Appeal No 67 of 1922, in Original Suit No. 278 of 1921.

JAGANNATHA SASTRY *v.* SARVATHAMBAL SASTRY.

Mr. *K. Sankara Sastry*, for the Petitioner.

Messrs. *A. Krishnasami Iyer* and *C. A. Seshagiri Sastry*, for the Respondents.

JUDGMENT.—In this case the lower Court has refused to issue a commission for the examination of two of the petitioner's witnesses, who live more than 200 miles from the Court-house, and cannot, therefore, be compelled to attend by ordinary process.

The petitioner contends that, as a matter of law, the Court was bound to issue a commission. The respondent contends that it was entirely a matter of discretion of the Court. The point is one on which reported authorities speak with an uncertain voice.

2. The practice in English Courts undoubtedly is that it is a matter of judicial discretion for the Trying Court to issue a commission, and the Calcutta High Court has usually interpreted the pertinent section of the old and the present Civil Procedure Code in that sense; *vide* cases reported as *Amrith Nath Jha* v. *Dhunput Singh* (1), *Adamji Khadi Bhai* v. *Issuf Ahmed Mulla* (2) and *Saleji (A. E.)* v. *Ahmed Musaji* (3), though in *Amrith Nath Jha* v. *Dhunput Singh* (1) it was held that, ordinarily, when the witness is a stranger residing beyond the limits fixed by law for the service of direct process, and is not a person under the control of the party applying for the commission, such a commission should ordinarily issue. The Calcutta case of *Huree Dass Bysack* v. *Meer Moazzum Hossein* (4) may be read as laying down that a party has a legal right to have a commission issued.

3. In the Madras High Court, a Single Judge in *Chinnu* v. *Sambanda Moorthi* (5), held that the matter is one of judicial discretion, while a Bench in *Vidya Purna* v. *Seethamma* (6) held that it was a matter of statutory right. From the arguments in the latter case it clearly appears that the issue argued was whether a party had a statutory right to a commission or whether the Court had discretion to refuse it, and the Court held that the former view was correct. In *Veerabadran Chetty* v. *Nataraja Desikar* (7), though the matter of the issue of a commission to a witness more than 200 miles from the Court-house did not arise, it was held that the Court had power to refuse direct process in its inherent power to prevent abuse of its process.

4. The balance of authority is in favour of the view that, ordinarily, in the case of a witness not under the control of the party asking for the commission, who resides beyond the limits fixed under O. XVI, r. 19 (*b*), Civil Procedure Code, a commission should issue as a matter of right unless the Court is satisfied that a party is merely abusing its authority to issue process, and that it is not for the Court to decide whether the party will be benefited thereby or not. That is a matter entirely for the party.

5. In the present case, the two witnesses for whom a commission was asked are Pleaders residing at Salem, more than 200 miles from the Court-house, one being the father of the petitioner Neither is he under his control. The lower Court has given no definite ground for refusing a commission and certainly it does not say that the petitioner was attempting to abuse its power of issuing process. I am satisfied that, even if the matter of the issue of the commission was one within its judicial discretion and not a matter of statutory right, it has not exercised that discretion judicially.

6. Some useful guidance may be gained by a comparison of the language of O. XXVI, r. 4, Civil Procedure Code, with that of r. 1. In r. 1 the word "may" must mean "is given authority to." I am not prepared to accept the respondent's suggestion that the word "may" is explained by and refers to no more than the alternative method prescribed of proceeding either by "interrogatories or otherwise." I think that rule clearly means that, in the case of persons who, owing to illness, etc., are unable to attend the Court, the Court cannot refuse to issue a commission. If that is not the meaning of the rule then it is useless, and if the word "may" implies so much in r. 1 it is reasonable to conclude that in r. 4, where the same phrase is used, it has the same meaning, that is, the Court must, when moved, issue a commission.

7. My view, therefore, is, the law directs the Court to issue a commission in a case like the present unless it is satisfied that the

(1) 20 W. R. 253.
(2) 16 Ind. Cas. 750.
(3) 19 Ind. Cas. 643.
(4) 15 W. R. 447; 8 B. L. R. App. 16.
(5) 23 Ind. Cas. 522; 15 M. L. T. 339.
(6) 12 Ind. Cas. 74; 21 M. L. J. 889.
(7) 28 M. 28; 14 M. L. J. 329.

request for the commission is an abuse of its process and that the lower Court has, therefore, acted contrary to law. In a case where the lower Court has not obeyed the law, I think it is clearly the duty of this Court to interfere even in interlocutory proceedings rather than permit a trial to go on, on an illegal course which must entail unnecessary expenses to the parties and useless waste of time.

8. I, therefore, set aside the lower Court's order and direct it to issue the commission prayed for by the petitioner, but before issuing the commission it should decide whether the third defendant, the contesting respondent of this petition, is a necessary party of that suit. The petitioner will get his costs in this petition in any event from third defendant.

V. N. V. *Petition allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 463 OF 1920.

December 13, 1922.

Present:—Mr. Hallifax, A. J. C.

ANANDRAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARASWATIBAI AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Sale to pay off husband's debt—Consideration slightly in excess of debt—Sale, setting aside of.

A sale by a Hindu widow to pay off a legal debt due by her deceased husband cannot be set aside upon payment of the amount which it was necessary for her to raise to pay off the debt, simply because the sale was for a sum which exceeded by about one-sixth, the sum actually required for the debt [p. 533, cols. 1 & 2.]

Balaram Roy v. *Bagalanand Banerjee*, 6 Ind. Cas. 207; 14 C. W. N. 895, followed.

Appeal from a decree of the Additional District Judge, Nagpur, dated the 27th July 1920, in Civil Appeal No. 2 of 1920.

Mr. *V. V. Chitale*, for the Appellants.

Mr. *M. B. Kinkhede*, R. B., for the Respondents.

JUDGMENT.—Venubai, the fourth defendant in this case, sold to the predecessor-in-title of the remaining defendants, who are now appellants, a one-anna share in a village out of an eight-anna share which she had inherited from her husband on his death in 1904. The consideration of the sale was stated as two sums of Rs. 100 each and one of Rs. 50 advanced on 27th February 1902 and 1st August 1902 and 18th August 1903 to Venubai's husband and Rs. 250 added to those amounts as interest up to the date of sale, which was 8th September 1906. The appellants succeeded in proving the two advances of Rs. 100 each alleged by them but failed in respect of the third item of Rs. 50. In the lower Appellate Court it has been held that Venubai ought to have paid the interest on her husband's debts out of the income of her estate and was not entitled to alienate any part of the estate for payment of that interest, though she was entitled to alienate a sufficient portion of the estate to pay off the principal of the debts that were proved.

(2) I am unable to see how the interest on a debt can be called anything but a portion of the debt itself. Doing so here necessarily involves holding that Venubai ought to have paid out of the income of her estate even the interest for the period between the incurring of the debts and the date of death of her husband, and that even that interest was not a debt due by her husband, which is absurd. The interest charged on the third sum of Rs. 50, which, it may be remarked, was simple interest and not compound interest as the learned Additional District Judge seems to have thought, was Rs. 36-12-0, that is to say, the appellants have proved Rs. 413-4-0 to be a debt payable by Venubai's deceased husband but have failed in respect of the remaining Rs. 86-12-0, which exceeds one-sixth of the total consideration by less than four rupees.

(3) The decree of the lower Appellate Court declares that the sale-deed in suit is not binding on the plaintiff, who is the next reversioner after Venubai, and, further, that she will be entitled to recover possession of the property after the death of Venubai by payment to the defendants of Rs. 200 unless

that has been recovered by them out of the usufruct, and also that she is to get mesne profits for the period between the date of Venubai's death and the date on which she takes possession and that she will be entit ed to interest at 6 per cent. per annum on Rs. 200 for that period. I do not consider it necessary to give any reasons for holding that such a decree issued during Venubai's lifetime is hopelessly wrong. The only possible decree in the case was one dismissing the suit or one declaraing that the alienation was valid only during the lifetime of Venubai, with the possible addition of a condition that possession could only be recovered by the reversionary heir, whoever that might happen to be, on payment of a certain sum of money; the terms in regard to the usufruct and the mesne profits are entirely out of place.

(4) The reading of the judgment of the Privy Council in *Deputy Commissioner of Kheri* v. *Khinjan Singh* (1) by the learned Judges in *Felaram Roy* v. *Bagalanand Banerjee* (2) is preferable to the view taken by the same Court in *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (3). In the first of these two Calcutta cases the learned Judges said: "It has been held by this Court in the cases of *Lala Chatra Narayan* v. *Uba Kunwari* (4) and *Sugeeram Begum* v. *Juddoo'uns Suhaye* (5) that a sale, such as the present, cannot be set aside upon payment of the amount which it was necessary for the widow to raise to pay off a legal debt simply because the property sold was not sold for a sum which exactly covered that debt. It would manifestly be impossible and possibly prejudicial to the interest of the estate, if the widow were to be held to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor. And we are of opinion that their Lordships of the Privy Council did not intend to lay down any such rule."

(5) In this case it is not suggested that there was any cheating of the widow in respect of the third item of Rs. 50; payment of that amount to her father-in-law has merely failed of separate and direct proof. In the circumstances, it might well have been held that that proof necessarily followed from the direct proof that much the larger part of the money had been paid and the widow believed and said that this small part had also been paid, when these matters were added to a certain amount of direct evidence in regard to the smaller part. It stands, however, as a finding which cannot now be disturbed, that payment of the Rs. 50 to Venubai's father-in-law has not been proved. The position then is, that Venubai sold the one-anna share for Rs. 500 of which not more than Rs. 413-4-0 was a debt due by her husband; the remainder she received in some form or other, but in no way that would justify an alienation of the property for it. The principles stated in the passage quoted above from *Felaram Roy* v. *Bagalanand Banerjee* (2) seems to me to justify the whole alienation. The decree of the lower Appellate Court will, therefore, be set aside and a decree will issue dismissing the plaintiff's suit. The plaintiff must pay all the costs of the litigation in all three Courts.

W. C. A. *Decree set aside.*

(1) 29 A 331; 9 Bom. L. R 591; 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; 10 O. C 117; 34 I. A 72 (P. C).
(2) 6 Ind Cas 207; 14 C. W. N 895.
(3) 1 Ind Cas 434; 13 C. W. N 544; 9 C. L. J 453.
(4) 1 B. L. R. (A. C. J.) 201; 1 Ind. Dec. (N. S.) 251.
(5) 9 W. R 284.

MADRAS HIGH COURT.

CIVIL APPEAL No. 75 OF 1921.
October 26, 1922.
Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

ANNADANA JADAYA GOUNDER—DEFENDANT No. 1—APPELLANT
versus
KONAMMAL AND ANOTHER—PLAINTIFFS RESPONDENTS.

Hindu Law—Impartible **jagir**—*Succession—Joint family property or separate property—Senior branch renouncing by arrangement right of succession—Non-division of status—Effect of arrangement.*

ANNADANA JADAYA GOUNDER *v.* KONAMMAL.

Succession to an impartible estate under the Hindu Law is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is a separate property; and if the rule of survivorship applies, the senior member of the senior line is entitled to succeed. [p. 535, cols. 1 & 2.]

In an impartible *jaghir*, one of the *jaghirdars* was succeeded not by his first son who was of a weak mind but by his second son, and under an arrangement the succession of the *jaghir* thereafter for nearly 100 years and for four generations continued in the junior branch. An unsuccessful attempt was once made by a member of the senior branch by litigation to get back the *jaghir*. There was no partible property belonging to the family besides the *jaghir*. Members of both the branches of the family resided in the ancestral homes though separately. There was no distinct or positive act of division of status and the last *jaghirdar* in the junior line died without male issue. In a suit by the mother against the senior member of the senior branch who got into possession of *jaghir*:

Held, that the effect of the family arrangement was merely to substitute the junior line for the senior line to succeed to the Poligarship, but did not affect the *jaghir* being held as joint family property, and the rights of survivorship subsisting in the senior branch. The possession of the second line being consistent with the continuance of the joint family rights did not make the *jaghir* the separate property of the second line by adverse possession. The family continued to be joint in status and on the death of the last *jaghirdar* without male issue, the senior member of the senior branch was entitled to succeed by right of survivorship in preference to the mother. [p. 536, cols. 1 & 2.]

Per *Ramesam, J.*—When the individuals of a line renounce their right to an impartible estate and those of another take by a family arrangement, the persons who take the estate by the arrangement do so by an act not hostile in the sense that the members of the former line cease to be members of the joint family but hostile only to the extent that, as long as the latter line lasts, the members of the former line cannot claim it. A litigation as to the right to hold the estate between two such lines does not necessarily effect a complete separation. [p. 542, cols. 1 & 2.]

The holder of an impartible estate cannot, by giving a notice to the junior members that he intends to be divided in status as regards all the partible and impartible properties, put an end to the rights of the junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties. [p. 547, col. 1.]

Katama Natchiar v. *Rajah of Shivagunga*, 9 M. I. A. 539; 2 W. R.P.C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843, *Baijnath Prasad Singh* v. *Tej Bali Singh*, 60 Ind. Cas. 534; 43 A. 228; 19 A. L.J. 317; 33 C. L.J. 388; 40 M.L.J. 387; (1921) M. W. N. 300; 25 C.W.N. 564; 2 P. L. T 257; 23 Bom. L. R. 654; 3 U. P. L.R. (P. C.)35; 29 M. L. T. 358 (P. C.), *Naraganti Achammagaru* v. *Venkatachalapati Nayaniwaru*, 4 M. 250; 1 Ind. Dec. (N. S.) 1010, *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar*, (*Udayarpalayam case*), 32 I. A. 261; 2 C. L. J. 231; 10 C.W.N. 95; 15 M.L.J. 312; 2 A.L. J. 845; 7 Bom. L. R 907; 1 M. L. T. 12; 28 M. 508; 8 Sar. P. C. J. 855 (P. C.) *Muttuvaduganadha Tevar* v. *Periasami Tevar*, 23 I. A. 128; 19 M 451; 6 M. L. J. 149; 7 Sar P. C. J. 83; 6 Ind Dec. (N. S.) 1020, followed.

Tara Kumari v. *Chaturbhuj Narayan Singh*, 30 Ind. Cas. 833; 42 C. 1170; 19 C.W.N. 1119; 29 M. L. J 371; 18 M L. T 228; 2 L. W 843; 13 A. L.J. 1034; 17 Bom. L. R 1012; 22 C. L. J. 498; (1915) M W N 717; 42 I. A 192(P.C.), *Gurusami Pandiyan* v *Sendatti Kalai Pandia*, 61 Ind Cas. 242; 44 M. 1; 30 M L. J. 529; (1920) M. W. N 660; 28 M L. T. 365, *Periasami* v. *Periasami* (*Padamatur case*), 51. A. 61, 1 M 312; 2 C. L. R. 81; 3 Sar. P.C.J. 795; 3 Suth P. C. J. 508; 1 Ind. Dec. (N. S) 208 (P. C.), *Muthusami Mudaliar* v. *Nallakulantha Mudaliar*, 18 M. 418; 6 Ind Dec. (N. S.) 640, distinguished.

Appeal against a decree of the District Court, South Arcot in Original Suit No. 13 of 1916.

Messrs. *T. R. Venkatarama Sastriar* and *T. M. Krishnaswami Iyer* and K S. *Sankara Iyer*, for the Appellant.

Messrs. *A. Krishnaswami Iyer* and *M. S. Venkatrama Iyer* and *P. S. Chandrasekaara Aiyar*, for the Respondents.

This appeal coming on for hearing on the 26th, 27th and 28th of September, respectively, and the 2nd and 3rd of October, 1922, respectively, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Krishnan, J.—This is an appeal by the first defendant against the decree of the District Judge of South Arcot in Original Suit No. 13 of 1916 on his file. The suit was brought by the plaintiffs to recover possession of the impartible estate known as Jadaya Goundar Jaghir, one of the hill Jaghirs on the Kal ayan hills in South Arcot, and also the moveable and immoveable properties and outstandings described in Schedules B, C and D. The Jaghir is one of the estates included in the Schedule of the Madras Impartible Estates Act, II of 1904, and is thus made inalienable by the holder beyond his lifetime. The last holder of the Jaghir was one Naranappa Jadaya Goundar; the Jaghirdars are given the honorific title of Jadaya Goundars. He died in 1914 leaving a Will, which is not now disputed, by which he bequeathed all his properties to the second plaintiff. The first plaintiff is his mother and the heir-at-law to his separate properties, as he left no issue.

The two plaintiffs sue jointly, the second plaintiff as the beneficiary under the Will and first plaintiff as the heir-at-law in case the Will is found to be invalid. Clearly, the Will is of no effect by reason of Madras Act II of 1904 to pass the Jaghir to the second plaintiff. The District Judge gave a decree for the Jaghir to the first plaintiff as the heir-at-law and to the second plaintiff for the properties in the other schedules which he found to be self-acquisitions of Naranappa. Appeal No. 75 of 1921 is against that decree.

The first defendant himself had brought a suit, Original Suit No. 50 of 1916, against the first plaintiff and others to recover a house in Akkarapalayam in their possession which he claimed to be a part of the Jaghir which, according to him, passed to him on the death of the last holder by the right of survivorship taken with the rule of lineal primogeniture. The District Judge held that the house was not part of the Jaghir, and having already held in the connected suit Original Suit No. 13 of 1916, which was tried with this suit that he was not entitled to the Jaghir itself dismissed his suit. Appeal No. 76 of 1921 is against that decree.

The main question for decision is, who is entitled to succeed to the Jaghir on the death of the last holder That would depend upon whether the Jaghir in his hands was the joint family property of himself and the defendant and others or his separate or self-acquired property. It is a well-settled proposition of law that the succession to an impartible estate is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is separate property. That was so laid down in *Kalama Natchiar* v. *Rajah of Shivagunga* (1) and has since been affirmed in several cases, the last one being the case in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2). In the present case there is no difficulty in choosing a single individual out of a class for the Jaghirship, for it is conceded that if the rule of survivorship applies, the 1st defendant is entitled as the senior member of the senior line, whereas if the rule as to succession to the separate estate applies the 1st plaintiff, the mother, is entitled.

We have thus to address ourselves to the question whether on the evidence in this case the District Judge was right in holding that the Jaghir was the separate property of Naranappa, the last holder. A genealogical table showing the relationship between the first defendant and Naranappa and others is attached to the judgment of the lower Court and has been accepted as correct by both parties. That shows that one Lakshmanappa was the twenty-ninth Jaghirdar. We know that Lakshmanappa was succeeded in 1822 not by his eldest son Ramappa who was said to have been of weak mind, nor by his son Kannappa who was born at the time but was a minor of 5 years of age, but by his second son Annadana and the Jaghir has continued in his junior line till now, that is, for four generations. What exactly happened in 1822 when the senior line was set aside in favour of the junior line is not clear; nearly 100 years having elapsed there is naturally no direct evidence about it. We must gather what we can about it from the proceedings and the judgments of the First Court and of the High Court in Original Suit No. 7 of 1875 brought by the widow of the 31st Jaghirdar as guardian of her minor son, Annadana, to recover the estate for him from Lakshmanappa of the senior branch who had usurped it. The plaint and the written statement in it and the decree and the judgment of the First Court are marked together as Exhibit B, the judgment of the High Court as Exhibit C and the decree as Exhibit D. In that suit the plaintiff Annadana succeeded in recovering the estate and he became the 32nd Jaghirdar. The judgment of the Trial Judge deals more with the question whether the then plaintiff's mother was properly married and whether plaintiff was a legitimate child than with what happened in 1822, as he held as a point of law that Annadana, the 30th Jaghirdar, having succeeded to the estate his descendants had a preferential claim to it. He has, however, made some remarks in his judgment which are in point. He says that "the old father (the 29th Jaghirdar) yielded the title to him (the 30th man) before he himself died" and "that the defendant there (who was of the senior branch) was the next heir according to the ordinary rule of

(1) 9 M. I. A 539; 2 W. R. P. C 31; 1 Suth P. C. J 520; 2 Sar. P. C. J. 25; 19 E. R 843.

(2) 60 Ind Cas 534; 43 A 228; 19 A. L. J 317; 33 C. L. J 388; 40 M. L. J 387; (1921) M. W. N 300; 25 C. W. N 564; 2 P. L. T 257; 23 Bom. L. R 654; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358 (P. C.).

succession if the plaintiff, the minor, was not a legitimate child." The latter, however, is only an opinion of the Judge and we cannot attach much weight to it.

In the judgment of the High Court something more appears as regards the point before us. Their Lordships say: "We think the plaintiff's claim may be regarded as resting on family arrangement made in 1820 and not challenged until the death of the minor plaintiff's father in 1866. Regarding the 29th Poligar who possessed the proprietary right in the property it was competent to him with the members of his family to alter the succession by the arrangement referred to." What exactly the arrangement was and what its scope was it is not possible to gather from the records. It was suggested for the respondents that what the 29th Poligar did was to make a gift of the Jaghir to his second son before he died and the Jaghir was thus self-acquired property in his hands. Though according to the decision in *Sartaj Kuari* v. *Deoraj Kuari* (3) he could have probably made a gift, Madras Act II of 1904 not having been yet passed, there is no evidence on which we can hold that the arrangement in 1820 or 1822 was in the nature of a gift. The most that we can reasonably infer from the evidence is that here we have an arrangement similar to that in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (4) and *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5). The result of the arrangement was practically to substitute the junior line for the senior line to succeed to the Poligarship but there is no evidence of any further interference with the right of the senior line. It did not affect the Jaghir being held as joint family property and the right of survivorship subsisting in the senior branch as well as in the two junior branches of the 30th Poligar's brothers. (See the pedigree). The possession of the second line being consistent with the joint family rights continuing, it cannot be treated as making the Jaghir the separate property of the second line by adverse possession. The effect of that possession is no more than that of the arrangement itself The failure of Lakshmanappa of the first line in Original Suit No. 7 of 1875 did not result in any separation either; the suit was decreed in favour of the minor of the second line only on the footing that the arrangement in 1820 was not a temporary one, as Lakshmanappa contended, but was effective in continuing the Jaghirship in that line. Now, that that line has become extinct a new position has arisen and there is nothing in the two judgments to prevent the senior line from claiming the Jaghir now by survivorship.

In this connection reference may also be made to the entry in Inam Register, Exhibit III, where in column 19 the heirs of the 31st Jaghirdar are given and they include members of the lines senior and junior to the then Jaghirdar's line. This is a strong indication that the joint family character of the Jaghir wa not destroyed by what happened in 1820 or 1822.

The learned Vakil for the respondents then argued that the conduct of the parties showed that the two lines had become separate at some time or other and that the Jaghir was treated as the separate property of Naranappa's line. As apparently this family had no other joint properties of any value except the Jaghir he could not point to any particular act of partition or division, and he, therefore, contended that it was sufficient for his clients to show that Naranappa was divid d in status from his cousins of the senior line. It is very doubtful if the owner of an impartible estate can get himself divided in status with reference to that estate by a mere unilateral declaration so as to destroy the joint family right of succession by survivorship to it which the members have. It is not, however, necessary to decide this question here, for we have no evidence of any such express declaration or of anything from which it could be inferred.

The learned Vakil for the respondents then relied on the following circumstances as showing separation, *viz.*:—

(1) The removal of the residence of the Jaghirdars to Pottayam in 1872 and their continuance to live there ever after, whereas the other members of the family continued in the ancestral place of Chinna Tirupati;

(2) The absence of evidence to show that the senior line kept up any rights in the Jaghir;

(3) 10 A. 272; 15 I A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.).

(4) 9 M. I. A. 66; 1 W. R. P. C. 30; 1 Suth. P. C. J. 460; 1 Sar P. C. J. 820; 19 E. R. 666.

(5) 4 M. 250; 1 Ind. Dec. (N. S.) 1010.

(3) The absence of evidence of any application for help made by the members of the senior line to the Jaghirdar;

(4) The absence of any consciousness of the existence of a joint family when guardianship proceedings took place in 1901;

(5) Proof of the hostile attitude of the senior line in the *patta* proceedings in 1898;

(6) Separate living and separate mess for 30 or 40 years;

(7) Proof of non-participation in the worship at Chinna Tirupati temple and in the annual Durbar held by the Jaghirdars;

(8) Absence of a single joint dealing of the senior line with the Jaghirdar, all dealings being separate; and

(9) The fact that the members of the senior branch were treated just like any ordinary *ryot* with reference to collection of forest produce.

My learned brother has dealt with the evidence on these points at very great length and as I agree with his conclusions it is unnecessary to burden the record with a further discussion of the details of that evidence. It is clear that even if all the above points are found in favour of the first plaintiff, it is insufficient to establish that the Jaghir had become the separate property of the last holder. The points urged are all consistent with the Jaghir continuing as the joint family property of the members of all the branches. Considerable reliance was placed by the respondents' Vakil on the ruling of the Privy Council in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and the recent ruling of this Court in *Gurusami Pandiyan* v. *Sendatti Kalai Pandia* (7) following that case. It is true that the recent Privy Council case in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) does not refer to the case in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and that case must still be treated as of authority. I am, therefore, inclined to think that to show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned. Each case has to be decided on its own facts. The present case, however, is completely distinguishable from *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and *Gurusami Pandiyan* v. *Sendatti Kalai Pandia* (7), as in both those cases the indications of the Zemindari being the separate estate of the last holder were much stronger. Furthermore, our decision in *Gurusami Pandiyan* v. *Sendatti Kalai Pandia* (7) is now in appeal before the Privy Council. Considering the whole of the evidence, I agree with my learned brother that it falls short of proving that the joint family rights of the first defendant's line in the Jaghir were extinguished at any time. In the hands of Naranappa, the last holder, the Jaghir must be looked upon as joint family property and not as his separate property and the finding on Issues Nos. 3 and 4 must be in favour of the first defendant. In this view Issue No. 5 requires no discussion, but I may add that I agree with my learned brother that the finding of the District Judge on the point is correct. Issue No. 2 was expressly given up and the other issues were not argued before us.

In the result, Appeal No. 75 of 1921 is allowed and the suit dismissed so far as the Jaghir is concerned and the rest of the appeal is dismissed; the first respondent will pay the appellant's costs in both Courts calculated on the value of the Jaghir given in the suit. The appeal is wholly dismissed against the second respondent with costs payable by the appellant calculated on the relief claimed against him.

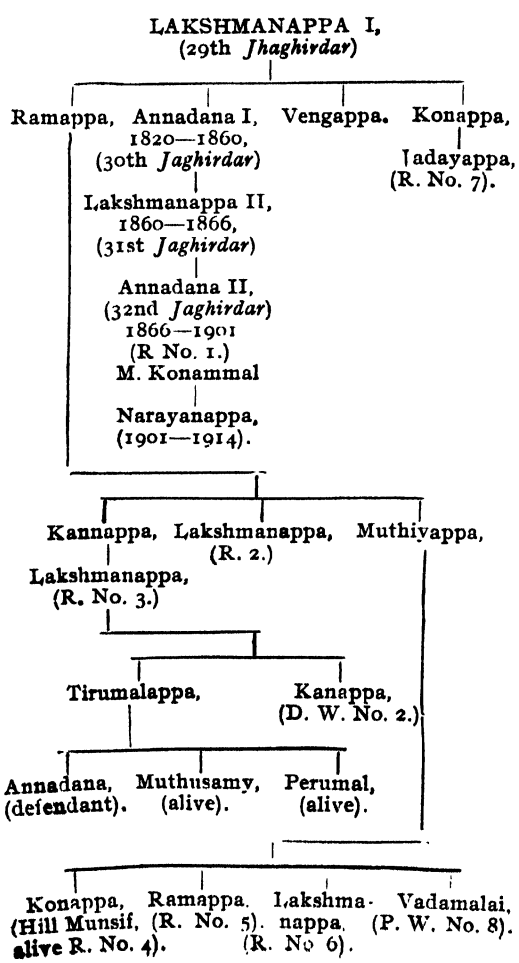
Ramesam, J.—The suit, out of which this appeal arises, was filed by two plaintiffs to recover certain properties described in Schedules A, B, C and D attached to the plaint. Of these, the property described in Schedule A is the Jadaya Goundan Jaghir in the South Arcot District, which has been declared to be impartible by Madras Act II of 1904 (*vide* Schedule to the Act). The second plaintiff claimed the properties as the devisee under the Will of the last Jaghirdar, Narayanappa, who died on 17th August 1914. The first plaintiff claimed, in the alternative, as the heir of Narayanappa

(6) 30 Ind. Cas. 833; 42 C. 1179; 19 C. W. N. 1119; 29 M. L. J. 371; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1034; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M. W. N. 717; 42 I. A. 192 (P. C.).

(7) 51 Ind. Cas. 242; 44 M. 1; 39 M. L. J. 529; (1920) M. W. N. 660; 28 M. L. T. 365.

The District Judge of South Arcot gave a decree to the first plaintiff for the Jaghir and to the second plaintiff for the properties in Schedules B, C and D. The first defendant (who will be referred to hereafter as the defendant, being the only contesting defendant) appeals. The appeal has not been pressed so far as the properties decreed to the second plaintiff are concerned. (*Vide* 6th, 9th and 10th Issues). It has been argued only in respect of the Jaghir which was decreed to the first plaintiff, who will hereafter be referred to as the plaintiff.

The plaintiff is the mother of the last Jaghirdar, Narayanappa, and the defendant is his cousin. The following genealogical tree shows the parties and a few other relations, some of whom have figured in the suit as witnesses :—



The common ancestor in the above pedigree, Lakshmanappa I, died in 1822, leaving four sons, of whom the eldest was Ramappa and the second was Annadana I. Annadana I held the Jaghir from 1820 up to his death in 1860, when he was succeeded by his son, Lakshmanappa II, who held it till 1866, when he died leaving a minor son Annadana II. It appears that Lakshmanappa, grandson of Ramappa, managed the property as the guardian of Annadana II till the end of 1871 but usurped the estate in 1872. A suit was filed by the mother of the minor as his next friend to recover the possession of the estate (Original Suit No. 7 of 1875). It was decreed by the Judge of the Small Cause Court at Cuddalore in November 1876 and the decree was affirmed in appeal (Regular Appeal No. 116 of 1876) by the High Court (Sir Walter Morgan, C. J., and Kindersley, J.) on 7th May, 1877. Annadana II held the estate till his death in 1901, when he was succeeded by his son, Narayanappa, whose death in 1914 has given rise to the present litigation. The defendant, claiming to be the person on whom the estate has devolved by survivorship on the ground that, though impartible and capable of being held only by a single person at a time, it was still the joint family property of the family, took possession of the estate and even gone through the ceremony of installation (*vide* paragraph 98 of the Judge's judgment). The plaintiff, on the other hand, contends that it was the "separate and absolute property" of the several holders of the estate who held it since 1820 (*Vide* paragraph 11 of the plaint). This is the most important point in the case. Before dealing with it, I will dispose of the other points in the case to clear the ground.

The learned Vakil for the appellant has expressly stated before us that he does not press the technical objection which is the subject of the 2nd Issue. He made no reference to the 1st, 7th and 8th Issues. The only Issues pressed before us are the 3rd, 4th and 5th. So far as the 5th Issue, which raises the existence of a custom by which women are disqualified from holding the Palayam, is concerned, I agree with the learned Judge's finding that no such custom has been made out. I agree with his reasons

as given in paragraphs 96 to 108 of his judgment. In the first place, it does not appear that the practice of prostration before a Jaghirdar at the annual Pongal (January 14th) darbar has anything to do with spiritual Headship. There has been no instance within living memory in which the succession in the direct male line has failed. Again, it cannot be said that the ceremony of installation, when the Ur Goundan places a mark on the forehead of the Jaghirdar (if a male), confers the title on the Jaghirdar. The same remarks apply to the functions of a Jaghirdar at the annual festival in the month of Peratasi (October to November) for the Idol in the temple of Chinna Thirupathi. If women cannot perform these functions, either they may not be performed at all or will be done through a deputy. Anyhow, the matter has no bearing on the right to the estate.

There remain the 3rd and 4th Issues for consideration. Before examining the law and facts on these Issues, it is necessary to describe the nature of the estate and of its people, so that the facts in the evidence may be understood in their proper setting. This estate, like four other similar estates, is situated in the Kalrayan Hills, three of the estates (including the one now in question) being in the portion of the hills which are in the South Arcot District and the other two being in the Chinna Kalrayan Hills which are in the neighbouring District of Salem. The suit estate is divided into four Nads (or sub-divisions) containing 40 villages, the population of which was 10 009 in the census of 1901. "But the villages are merely fortuitous collections of huts with no definite boundaries and containing in several instances less than a dozen persons and the number of them has varied considerably at different times and in different reports. In charge of each Nad is a Mooppan who collects the revenue and corresponds to the Revenue Inspector of Government villages, and whose post is hereditary. Every village has a headman called the Goundan or Moneygar and a menial servant known as the Kangany. The Nattan has peons called Natusevagars.

'The hill villages are never surveyed. Only five of the villages of the suit Jaghir are situated on the low grounds below the hills. On the hills, the revenue is raised in a curiously primitive and patriarchal manner which is perhaps without a parallel in any other part of the Presidency outside the Agencies of the three Northern Districts. A large part of it is derived from such old fashioned imposts as plough taxes and poll taxes. The poll tax is levied at Rs. 2 per annum for every married couple and annas eight for each widower or bachelor above the age of ten years. Women are exempt. There is also a tax of 12 annas on each plough, on payment of which a man is allowed to cultivate as much land as he likes. Other contributions levied are two annas from each married, and anna one from each unmarried, man towards the celebration of the festival at the Chinna Thirupathi temple: the same amounts towards the Poligar's expenses for Pongal; annas two and a half for Road-cess and (in the Jadaya Goundan hills) annas two for Ghee for the Poligar. Miscellaneous payments to the Poligar include subscriptions to the cost of weddings and funerals in his family and a fee (of Rs. 3 to Rs. 5) for permission to contract a marriage. Moreover, menial services in his house are performed for nothing by his subjects, men coming for a week or so at a time and hewing his wood and drawing his water.

"Other considerable items in the revenue are the receipt from timber and forest produce and from monopolies. The monopoly income is derived by leasing to some merchant of the plains the right to buy the cultivators' grain at a fixed price below the market rate. The *ryots* are obliged to sell this man certain kinds of produce at these fixed rates.

"The cultivation on the hills is either permanent or shifting. The former is carried on the level tops of the hills, which have long been cleared of practically all their growth; and the latter on the wooded slopes, the jungle being cleared and burnt, the ground ploughed, and the seed sown broadcast. After one or two crops have been thus taken off it, the land is left fallow

for a time until the growth has re-established itself, when the process is repeated." (South Arcot Gazetteer, pages 329—333).

The Vakil for the respondent expressly stated before us that he would put his case of 'absolute and 'separate property' in two ways in the alternative. (1) His branch and the defendant's branch became divided in 1820, when his ancestor Annadana I obtained it, and ever since both branches have been separate. (2) Even if the family did not become divided in 1820 they became divided in 1872. In either case, he relies on the conduct of the family since 1872 as evidence of separation. In the first case, he also relies on the fact that the junior branch has superseded the senior branch in 1820, as evidence of hostile or adverse possession since that date.

It is necessary, therefore, to examine the events that happened in 1820 and to properly estimate their legal significance. In paragraph 11 of his judgment, the District Judge stated: "It is common ground that the eldest, Ramappa, was passed over in the succession for the reason that he was a person of weak mind. Annadana appears to have succeeded about the year 1820, in the lifetime of his father, as the 30th Poligar." Apparently, this statement was based on similar statements in Exhibits B and C. In the judgment of Mr. (afterwards Mr. Justice) Parker, in paragraph 9, he states: "It appears indeed that the old father yielded the title to him in 1820 before he himself died." Again in the judgment of the High Court (Exhibit C) we have got the following passage: "In the judgment of the Court below it is stated, and *the document No. 360 among the printed papers supports this view*, that his father in his old age had relinquished to him the title and that this happened in 1820 some time before the father died. It is admitted that the eldest son, Ramappa, was a person of weak mind, and that his son, Kannappa, then born, was an infant of tender years. We think it may be gathered from the evidence that by an arrangement between the Poligar and the adult members of his family the Palayam was transferred to his son Annadana and also that intimation of this was given to the Revenue Officials and was recorded by them." Again, in the next paragraph they say: "We think that the plaintiff's claim may be regarded as resting *on family arrangement made in* 1820 and not challenged until the death of the minor plaintiff's father in 1866. Regarding the 29th Poligar Lakshmanappa Jadava Goundan as in effect possessed the proprietary right in the property, it was competent *to him with the members of his family* to alter the succession by the arrangement referred to." Their Lordships then proceed to find that the arrangement was not temporary but permanent so that the senior line had lost its right to hold the estate so long as the junior line has not failed.

The two sets of cases (1) *Naraguntу Lutchmeedavamah* v. *Vengama Naidoo* (4) and *Naraganti Achammagaru* v. *Venkatachalappati Nayanivaru* (5) [a case approved of by Lord Macnaughten in *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (*Udayarpalayam Case*) (8) by Lord Hobhouse impliedly in *Muttuvaduganadha Tevar* v. *Periasami Tevar* (9) and by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2)] and (2) *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora* (10) and *Gavuridevamma Garu* v. *Ramandora Garu* (11) show that when a line in the family holding an impartible estate has been superseded by another, this may be consistent with the former still continuing to be part of the joint family along with the latter, the only result of the supersession being that the headship of the family [to use Lord Dunedin's language in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2)] including the right to hold the estate will be in the superseding line, and the superseded line will be relegated to a subordinate position. In the first set of decisions, the history of the family can be easily seen with the help of the following pedigree [there being a printing mistake in the pedigree given in the margin of page 751 of 4 Madras in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5)]:—

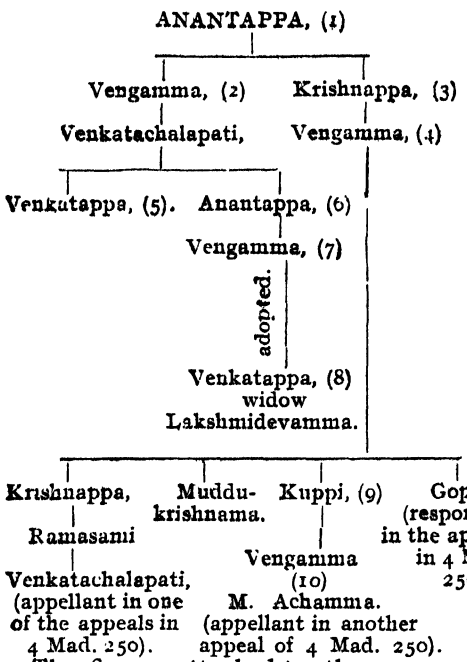
(8) 32 I. A 261; 2 C. L. J 231; 10 C. W. N 95; 15 M. L. J 312; 2 A. L. J 845; 7 Bom. L. R 907; 1 M. L. T. 12; 28 M. 508; 8 Sar. P. C. J. 855 (P. C.).

(9) 23 I. A. 128; 19 M. 451; 6 M. L. J. 149; 7 Sar. P. C. J. 83; 6 Ind. Dec. (N. S.) 1020 (P. C.).

(1) 103 M. I. A. 333; 2 Suth P. C. J. 302; 2 Sar. P. C. J 546; 20 E. R 576.

(11) 6 M. H. C. R. 93.

ANNADANA JADAYA GOUNDER *v.* KONAMMAL.



The figures attached to the names indicate the orderin which the Polliem was held.

The following points appear in the history of the case:

(1) The elder line was superseded by the younger line after the second Poligar's death.

(2) The younger line was again superseded by the elder line after the fourth Poligar's death.

(3) When Kuppi sued Venkatappa (8th Poligar) in Original Suit No. 24 of 1831, the latter pleaded, among other pleas, a *jus tertii*, that even if the adoption on which he relied was not true, the title of Kuppi's elder brothers to succeed to the 7th Poligar (Vengamma) was better than Kuppi's, on the footing that both branches were members of an undivided family. Kuppi replied that his elder brothers renounced their right of succession in his favour. Kuppi failed in this suit.

(4) On 8th Poligar's death, Kuppi sued his widow Lakshmidevamma. The suit was based on the footing of an undivided family comprising both branches. He succeeded in the High Court and the Judicial Committee [*Naragunty Luchadavamah* v. *Vengama Naidu* (4)]. It is noteworthy that the two branches continued joint even after a litigation between them (as mentioned in the preceding paragraph).

(5) In the actual litigations which were the subject of *Naraganti Achammagaru* v. *Venkatachalapati Nayanivara* (5), the effect of the renunciation by the elder brothers of Kuppi had to be considered. At page 260 their Lordships say: "When in 1831 he re-commenced proceedings, the Palayam was in the hands of a person who established title as a member of a family, and, consequently, those proceedings failed. There was neither *a hostile* possession nor a recovery. When Kuppi Naidu again asserted his claim, the Palayam was in the possession of a widow whose possession was *to this extent* hostile to the family that she denied any right in the members as co-parceners with her husband." Again at page 261: "Therein he maintained that in virtue of a family arrangement he was to be the successor of Vengamma, the 7th Poligar. He claimed, therefore, to occupy the same position which had been occupied by the 7th Poligar—a position consistent with the enjoyment by the other members of the family of their coparcenary interests in the estate represented by their enjoyment of maintenance and possibility of succession. All that it was necessary his brothers should abandon to entitle him to that position was their *preferential* right to the *immediate enjoyment of the dignity* of Palaiyagar and actual possession of the estate. Looking to the claim advanced by Kuppi Naidu and supported by his son, there is no evidence of any *more extensive abandonment* of their rights by the elder brothers of Kuppi Naidu, unless it be found in the Karars executed by two of them." Again: "We find no evidence to show that Kuppi Naidu or his son, who obtained the estate as the joint property of the family, at any time asserted a title to the Palayam as their separate property in virtue of the litigation in which they were engaged." At page 263: "So construed, the instrument is very far from being a disavowal of all right to the Palayam property as a coparcenary estate. Krishnappa intended no more than that he should stand in the same relation to Kuppi Naidu as that in which he would have stood to the son of the seventh Poligar, had a son been born to that Poligar. In favour of Kuppi Naidu, but in favour of no other person, Krishnappa consented *pro hac vice* to postpone his claim

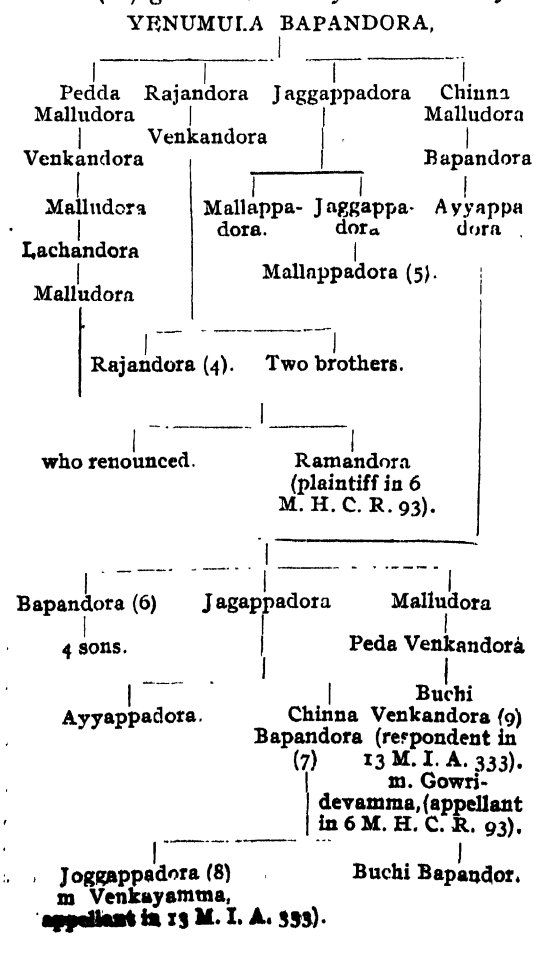
to occupy the dignity and estate of the Poligar. If, by the custom obtaining in the family, the dignity and estate passed from father to son, in assenting to the succession of Kuppi Naidu, Krishnappa must be taken to have assented also to the devolution of the Palayam to the lineal descendants of Kuppi Naidu; but, unless a construction is placed on the terms of the Karar, of which they do not naturally admit, it cannot be held that he intended to renounce all claim on the part of himself and his heirs to the succession, if it open d by reason of the extinction of the line of Kuppi Naidu * * *

* * * * *

The conduct of Krishnappa and his descendants is not inconsistent with the construction we have placed on that instrument. Until the line of Kuppi Naidu was extinct, Krishnappa and his descendants had no occasion to re-assert their claims, and, when that event occurred, a claim was immediately preferred on behalf of the appellant." At page 264 referring to *Periasami* v. *Periasami* (*Padamatur case*) (12) they say: "The decision in the Padamatur case, which the Judge has regarded as governing this case, proceeds on a renunciation differing widely in its terms from those of the Karar of July 1st, 1831, and executed under circumstances altogether dissimilar, Muthu Vaduganatha Tevar, who conceived he would succeed to a large Zemindari, renounced for himself and his offspring all interest in the small and dependent Palayam of Padamatur, and undertook the payment of all debts contracted by him as Palayagar, thus manifesting an intention to separate himself and his descendants completely from the Palayam."

The above quotations from *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5) show that (1) when the individuals of a line renounce their right to an impartible estate and those of another take, by a family arrangement, the persons who take the estate by the arrangement do so by an act not hostile in the sense that the members of the former line cease to be members of the joint family but hostile only to the extent that as long as the latter line lasts, the members of the former line cannot claim it When it fails, the members of the former line or other lines of the family can claim the estate by survivorship against a female heir, (claiming by succession strictly so-called) unless the renunciation amounted to a 'complete separation' or a 'more extensive abandonment.' (2) A litigation as to the right to hold the Zemindari between two such lines does not necessarily effect such a 'complete separation.' (This follows from the decision in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (4) and *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5).

The cases as *Siree Rajah Yanumula Venkayamah* v. *Siree Rajah Yanumula Boochia Vankondora* (10) and *Gavuridevamma Garu* v. *Ramandora Garu* (11) relate to the Totapalli estate. The following pedigree (taken from *Gavuridevamma Garu* v. *Ramandora Garu* (11) gives the history of the family.



(12) 5 I. A. 61; 1 M. 312; 2 C. L. R. 81; 3 Sar. P. C. J. 795; 3 Suth P. C. J. 508; 1 Ind. Dec. (N. S.) 208 (P. C.).

It is unnecessary to refer to the facts in great detail. It is only important to note that (1) the 5th Mansabdar (Mallappa) fell out with his overlord having joined the people called 'Desastulu' and caused much disturbance. Thereupon Bapandora (6) offered his services to turn out the said Mallappadora and, accordingly, drove him out and took possession of the estate as 6th Mansabdar. Here is a distinctly hostile act. It was held that Bapandora, the 6th Mansabdar, took possession of the estate for the undivided family and that when the 8th Mansabdar, Jaggappa died, Buchi Venkandora (9) took the estate by survivorship against Venkayamma, the widow of Jaggappa. (2) The decision of the Judicial Committee was followed and the principle therein again applied by the High Court in *Gavuridevamma Garu* v. *Ramandora Garu* (11) when the 9th Mansabdar died leaving a widow, Gouridevamma, and the plaintiff who belonged to the eldest line (superseded for a long time) got it by survivorship against the vidow. It is significant that the common ancestor of the propositus and the claimant was their ancestor in the sixth line of ascent.

The learned Vakil for the respondent conceded with reference to the above groups of cases that the supersession of one line by another may be consistent with either the continuance of the joint family, only an abandonment of the headship of the family or the right to hold the estate being intended, or (2) a more extensive abandonment involving complete separation between the two lines, but he argued that the latter view is the *prima facie* view and the burden of proving that all that happened is the former alternative is on those who allege it. Assuming that this contention is correct and without deciding a rule of burden of proof, no question of burden of proof arises where all the facts are known. In the present case, the High Court found in 1877 upon the evidence, that the supersession of the senior line was by a family arrangement due to the weak intellect of Ramappa and the infancy of his son. It is true that possession of the junior line since 1820 was adverse to the senior line in the sense that so long as Annadana I had male descendants, Ramappa's descendants could not claim the estate. This conclusion of the Courts in 1877 is perfectly consistent with the law as expounded in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5). The Courts did not decide that the succession of Annadana was adverse in the larger sense so as to effect a separation between the two lines. Such a point did not then arise and the Courts could then express no opinion on it.

It is not possible in 1920 to get evidence of what happened in 1820 and the view of the High Court in 1877 (fifty years earlier) is the view from which one would start. But there are other indications in the record that this is the correct view and the consciousness of the members of the family after 1820 was that the joint family continued. This Jaghir was enfranchised by the Inam Commissioner in 1867. The proceedings before the Inam Commissioner consist of a statement by the holder of the Inam (generally described in the proceedings as the Inam Statement) and of a Register (known as the Inam Register) prepared by the Commissioner. These proceedings were described by the Judicial Committee of the Privy Council in *Arunachellam Chetty* v. v. *Venkatachalapathi Guruswamigal* (13) as a great act of State and in this Presidency are valuable as throwing important light on the titles to Inams. The judgment of Mr. Parker in the suit of 1875 shows that a genealogical table filed before the Inam Commissioner and the endorsement given by him were exibited before him in that suit (Exhibits I and D). In the present case, the Inam Register is filed as Exhibit III. The heading of column 19 is "surviving heirs of the present incumbent." The 'present incumbent' in it was Lakshmanappa II in the pedigree. Seven persons are shown as heirs in this column. I have shown all these seven in the pedigree with the sign R—1, R—2, etc., opposite to their names. The first one is the son of Lakshmanappa II, the seventh is in a line younger than the incumbent's heir. The other five (2 to 6) all belong to the senior line of Ramappa. In what sense could these be 'heirs' except on the footing that all the members are members of an undivided family? It is noticeable that no

(13) 53 Ind Cas 288; 43 M 253 at p. 263; 37 M.L.J. 460; (1919) M. W. N 850; 17 A. L. J 1097; 10 L. W. 642; 26 M. L. T 479; 24 C. W. N 249; 46 I. A. 204; 20 Bom. L. R.457; 2 U. P. L. R. (P. C.) 10 (P. C.)

female (such as the wife or wives of the incumbent) who would be heirs if the second branch was separate was mentioned in the column 19. Again, in Mr. Parker's judgment paragraph 8, dealing with the question of the legitimacy of Annadana II (raised in that case) he says: " If plaintiff's minor son was not legitimate, defendant was the *next heir* according to the ordinary rule of succession." This can be only on the footing that he was not divided from the junior branch. It is significant that in the plaint of that case (*vide* Exhibit B) though the defendant was described as a " distant *gnati* of my husband " he was not alleged to be separate or divided. It may also be observed that, when Ramappa was superseded by Annadana, there were two younger brothers. If, as contended by the learned Vakil for the respondent, the supersession amounted to a separation, what is the exact nature of the separation—is it that Annadana and his line became separate from the third and fourth brothers as well ? If so, why should it be so ? What act of renunciation on their part or act of hostility against them resulted in their separation ? Their position is exactly that of Gopal (last brother of Kuppi) in the pedigree of *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5) whose claim was held by the High Courtto be better than Achamma's, though it did not prevail against Venkatachalapati descendant of the eldest brother of Kuppi. If it is contended that only the elder line became separate, this involves the position that Annadana's holding was on behalf of the whole joint family—exactly like Bapandora's action in *Stree RajahYauumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkandora* (10), the object of the transaction being to substitute one head for another and not to separate any line or lines of the family. On this part of the case my conclusion is that by the supersession of the senior line in 1820, it did not become separate but continued to be part of the undivided family. This seems to be the conclusion of the learned District Judge at the end of paragraph 47. In paragraph 48 also he observes that nothing certain can be said about the relations of the two branches in those early days. *Prima facie* they were undivided and it is for them who allege separation to prove it.

If there was no separation in 1820, was there a separation in 1872 or afterwards as shown by the conduct of the family ? Before discussing the evidence bearing on this part of the case, I will first refer to decisions dealing with the nature of an impartible estate and as to how one branch can get an exclusive right to it or one branch can completely lose its right in respect of it.

Following the elaborate discussion of these cases by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2), the cases may be now grouped into four heads.

(*a*). Cases up to and prior to *Sartaj Kuari* v. *Deoraj Kuari* (3).

(1) *Katama Natchiar* v. *Rajah of Shivagunga* (*Sivaganga case*) (1).

(2) *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora* (10) and *Govuridevamma Garu* v. *Ramandora Garu* (11) (*Totapalli cases*) (discussed by me above).

(3) *Maharanee Heeranath Koer* v. *Baboo Burm Narain Singh* (14).

(4) *Chintamun Singh* v. *Nowlukho Konwari* (15) not discussed by Lord Dunedin.

(5) *Periasami* v. *Periasami* (*Padamatur case*) (12).

(6) *Doorga Persad Singh* v. *Doorga Konwari* (16).

(7) *Vadrevu Ranganayakamma* v. *Vadrevu Bulli Ramaiya* (17). (This decision of the Judcial Committee is discussed in Mayne's Hindu Law, section 542, but referred to in all former editions as unreported) (not discussed by Lord Dunedin).

(8) *Naraganti Palan cases* [*Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5) and *Naraganty Lutchmeedavamah* v. *Vengama Naidoo* (4)] (discussed by me above).

(9) *Rajah Rup Singh* v. *Rani Baisni* (18).

(14) 9 B. L. R. 274; 17 W. R. 316.
(15) 1 C. 153; 2 I. A. 263; 24 W. R. 255; 3 Sar. P. C J. 537; 3 Suth. P. C. J. 204; 1 Ind. Dec. (N. S.) 98 (. C.).
(16) 5 I. A 149; 4 C. 190; 3 C L. R. 31; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21; 2 Ind. Dec. (N. S.) 121 (P. C.)
(17) 5 C. L. R. 439.
(18) 7 A. 1; 11 I. A. 149; A. W. N. (1884) 240; 4 Sar. P. C. J. 533; 3 Ind. Dec. (N. S.) 602 (P. C.).

(*b*). *Sartaj Kuari* v. *Deoraj Kuari* (3) and the cases following its line of thought.

(1) *Sartaj Kuari* v. *Deoraj Kuari* (3).

(2) *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards (First Pittapur case)* (19).

(3) *Gangadhara Rama Rao* v. *Rajah of Pittapur (Second Pittapur case)* (20).

(4) *Maharajah of Jeypore* v. *Vikrama Deo Garu (Jeypore case)* (21). [Following *Gangadhara Rama Rao* v. *Rajah of Pittapur (Second Pittapur case)* (20)] (not discussed by Lord Dunedin).

(5) *Bishen Parkash Narayan Singh* v. *Mahrani Janki Koer (Bettia case)* (22) (referred to as unreported by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2).

(*c*) Cases after *Sartaj Kuari* v. *Deoraj Kuari* (3) but keeping up the old line of thought except as to alienation.

(1) *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh* (23).

(2) *Ram Nundun Singh* v. *Janki Koer* (24).

(3) *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar [Udayarpalayam case]* (8).

(4) *Muttuvaduganadha Tevar* v. *Periasami Tevar* (9).

(5) *Parbati Kunwar* v. *Chandarpal Kunwar* (25). (Lord Collins).

(6) *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6).

(*d*) (1) *Baijnath Prasad Singh* v. *Tej Bali Singh* (2).

(2) *Shiva Prasad Singh* v. *Beni Madhab Chowdhury* (26) [applies *Baijnath Prasad Singh* v. *Tej Bali Singh* (2)].

I may say that in making the above classification I have omitted (1) cases under the Dayabhaga Law such as the *Neelkisto Deb Burmono* v. *Beerchunder Thakur [Tipperah case]* (27) [Lord Dunedin explains this case on the ground that it was on the Dayabhaga Law in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2)]: (2) Cases like *Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor* v. *Rajah Suraneni Lakhshma Venkama Row* (28) and *Sri Raja Viravara Thodhramal Rajya Lakhshmi Devi Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu* (29), as they relate to partible Zemindaris and they were discussed by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2). I will refer to the latter again on the question of separation. Prior to the *Second Pittapur case* (20), which was supposed to negative any rights to maintenance on the part of junior members of a Zemindari (except a brother) even if never divided from the Zemindar, the line of thought of the (*a*) and (*c*) groups of cases was followed by the Madras High Court in awarding maintenance to junior members of the family (when not separated or divided) even when somewhat or very remote:—(1) *Visvanathaswamy Naicker* v. *Kamu Ammal* (30) (Bodinayakanur), (2) *Abhinana Purna Priya* v. *Arni Rangasawmy* (31) (Arni Jaghir), (3) *Vencatachella Reddiar* v. *Vencatachella Reddiar* (32) [where argument exactly similar to that which was supposed to be the second ground of decision in the *Second Pittapur case* (20) was rejected by the High Court.]

I have placed the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) in a separate category, as it must be admitted that the impression created in India by the *Second*

(19) 26 I. A. 83; 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.).

(20) 47 Ind. Cas. 354; 45 I. A. 148; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 41 M. 778; 28 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 173; (1918) M. W. N. 922 (P. C.).

(21) 52 Ind. Cas. 333; 24 C. W. N. 226; 37 M. L. J. 188; 21 Bom. L. R. 930; 10 L. W. 436; 17 A. L. J. 1011; (1919) M. W. N. 824; 31 C. L. J 91 (P. C)

(22) 62 Ind. Cas. 289; 24 C. W. N. 857; 28 M. L. T. 105; 12 L. W. 349 (P. C.).

(23) 17 I. A. 128; 18 C. 151; 5 Sar. P. C. J. 596; 9 Ind. Dec. (N. S.) 101 (P. C.).

(24) 29 I. A. 178; 29 C. 828; 7 C. W. N. 57; 178 P. R. 1902; 4 Bom. L. R. 664; 8 Sar. P. C. J. 351 (P. C.).

(25) 4 Ind. Cas 25; 31 A. 457; 36 I. A. 125; 6 A.L. J. 767; 10 C. L J 216; 13 C. W N 1073; 11 Bom. L. R. 899; 12 O. C. 304; 19 M. L. J. 665 (P. C).

(26) 70 Ind Cas. 24; 1 Pat. 387; (1922) A I. R. (Pat.) 529; 4 P. L. T. 6.

(27) 12 M. I. A. 523; 12 W. R. P. C. 21; 3 B. L. R P. C. 13; 2 Sar. P. C. J. 523; 2 Suth. P. C. J. 243; 20 E. R 436.

(28) 13 M. I. A. 113; 12 W. R. P. C. 40; 3 B. L. R. P. C. 41; 2 Suth. P. C. J. 265; 2 Sar. P. C. J 496; 20 E. R. 494.

(29) 24 I. A. 118; 20 M. 118; 7 Sar. P. C. J. 185; 7 Ind. Dec. (N. S) 182.

(30) 21 Ind. Cas. 724; 24 M. L. J. 271.

(31) 15 Ind. Cas. 412; 23 M. L. J. 79; (1912) M. W. N. 790; 12 M. L. T. 245.

(32) 4 Ind. Cas. 302; 20 M.L.J. 394; 7 M.L.T. 31

Pittapur case (20) and the *Bettia case* (22), *viz.*, that in an impartible estate on co-parcenary exists—this is the argument of the appellant's Counsel before the Judicial Committee in *Baijnath Prasad Singh* v. *Tej Singh Bali* (2)—even for purposes of succession and maintenance, has been removed and the angle of vision in (*a*) and (*b*) group of cases is *restored*. At the time the District Judge decided the present case, *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) had not been decided.

The effect of the decisions is that (1) if an impartible estate is the joint property of a family, the junior members have a right in it which, however unreal it may be for the purposes of actual enjoyment and preventing alienation, is still real and gives a chance of succession by survivorship. (2) The cases of *Sartaj Kuari* v. *Deoraj Kuari* (3), which has stood "too long to be now touched," and *Rama Krishna Rao* v. *Court of Wards* [*First Pittapur case*] (19) must be confined to alienation, and cases (3), (4) and (5) in (*b*) group may be ignored. The *First Pittapur case* (19) resulted in the Madras Presidency in special legislation in Madras Act II of 1904 which prohibits alienation so as to affect a successor.

Is it to be said, then, that an impartible Zemindary can never be the separate property of its holder and can never descend to a Hindu female by heirship (as opposed to survivorship)? The answer is 'no,' for an impartible Zemindari (1) may be the self-acquired property of a particular member and, therefore, his separate property, as in the *Sivaganga case* (1), or (2) might be renounced by a member of the family, as in the *Padamatur case* (12), so that he becomes completely separate from other members of the family *quoad* that property, or (3) might be wholly allotted to a member in a family partition dealing with it and other properties of the family, as in the case in *Vadrevu Ranganayakamma* v. *Vedrevu Bulli Ramaiya* (17). I do not claim to exhaust the modes in which it may become the separate property of a member. These only illustrate the principle that the right to it may be renounced by members of the family becoming separate in some manner known to law—by actual partition or otherwise—provided the transaction, either expressly or impliedly, was meant to give up the chance of succession to the impartible property. I do not mean it should make special reference to the impartible property. It may be specially with reference to it or generally with reference to all the property of the family so as to include the impartible property of the family. It may be inferred from conduct, provided the intention to separate covers the impartible property also. Examples of such general separation occur in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and *Gurusami Pandiyar* v. *Sendatti Kalai Pandia* (7) [a decision of the Madras High Court before *Baijnath Prasad Singh* v. *Tej Bali Singh* (2), which is now under appeal to the Privy Council]. This involves the position that members of a family may be divided as to the partible properties and undivided as to the impartible estate. That members of a family may be divided as to some properties and undivided as to others was decided in *Muthusami Mudaliar* v. *Nallakulantha Mudaliar* (33). Such a state of things is inevitable in the case of a family having an impartible estate as one of its possessions. The presumption that, if there is some division, the status of the family should be regarded as divided unless the contrary is shown, *i. e.*, that some properties were reserved as the joint family properties in respect of which the undivided status continues, must be very weak in the case of a joint family with an impartible estate as one of its possessions. This is illustrated by the case in *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (34). The brothers of the Zemindar of Devarakota (*alias* Challapalli) sued him for partition. As to the Zemindari, they failed on the ground that it was impartible [*Mallikarjana* v. *Durga* (35)]. Then they sued for maintenance. It was contended that the family became separate by the former suit for partition. Their Lordships of the Judicial Committee in repelling the contention say: "Their Lordships fully agree with the High Court that the family of the parties..has not..been a divided one in consequence of the proceedings in the previous suit to which reference has already been

(33) 18 M. 418; 6 Ind. Dec. (N. S.) 640.

(34) 24 M 147; 2 Bom. L. R. 945; 5 C. W. N. 74; 27 I. A. 151; 10 M. L. J. 294; 7 Sar. P. C. J. 761 (P. C.).

(35) 13 M. 406; 17 I. A. 134; 5 Sar. P. C. J. 547; 4 Ind. Dec. (N. S.) 905 (P. C.).

made. It is true that, in that suit, a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion and *had no relation whatever to the Zemindari estate.*" In my opinion these last words furnish the true test. Even where there is some kind of separation (by partition or conduct) has it any relation to the impartible estate? If it has, the impartible estate is the separate property of the holder. If not, it is still the joint family property of the family. To hold otherwise is to allow the most anomalous results. For instance, where a family has both partible and impartible properties, if the holder of the impartible estate refuses, however wantonly, to divide even the partible properties or the members do not agree as to the manner of division and thus the junior members are driven to a Court to seek their remedies in respect of the partible properties, the result of following a different rule from *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (34) is to say that the junior members have lost all rights of maintenance from or succession by survivorship to the impartible estate. I think it also follows from these considerations, though it does not arise in this case, that the holder of an impartible estate cannot, by giving a registered notice to the junior members that he intends to be divided in status as regards all the partible properties and impartible properties put an end to the rights of junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties—the principle being one member cannot compel another member of the joint family to continue undivided when the latter wishes to divide and is willing to *share the property*. In *Girja Bai* v. *Sadashiv Dhundiraj* (36) his Lordship Right Honourable Mr. Ameer Ali refers to Harihar's " intention to *separate himself and enjoy his share in severally*, by the notice of 1st October 1908." I do not think that the correctness of *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (34) has been affected by the decision in *Girja Bai* v. *Sadashiv Dhundiraj* (36). But a junior member may, while dividing himself as to partible properties, also separate himself even as to the impartible estate, though he may not get its equivalent or may get only an inadequate *quid pro quo* for the renunciation, from motives of his own. A good example of this is the *Padamatur case* (12), where a member renounced the right to the estate thinking that he was going to become the Zemindar of a much larger estate (the Shivaganga) and though he failed to get the latter estate, it was held he had no right to the former.

In the present case, the Jaghir was the ancestral property of Lakshmanappa I (the 29th Jaghirdar). In column 18 of Exhibit III it was stated that he was the 28th male descendant in a direct line from the original grantee. In 1820, it was the joint family property of himself and his sons. I have already shown that the supersession of the senior line merely amounted to a change in the headship of the family and not to a separation of the line of his first son from the rest of the family which then consisted of a third son and fourth son also. Is there anything that happened since to constitute separation? The litigation of 1875, in which the headship of the family was in question, cannot have that effect. [This follows from *Naraganti Achammagaru* v. *Venkatachlapati Nayanivaru* (5) and *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (34)]. What else is there to constitute separation? The District Judge thinks the following points were established in this case and prove division in status. They are, (1) complete separation in food and residence, (2) no community of estate, (3) no community of household, worship and ceremonies, (4) the action of defendants on certain occasions as if they were not members of a joint family. Of these, one would suppose item (3) follows item (1) and both may be discussed together.

I regret I am not able to agree with the learned District Judge or to follow his line of though in paragraphs 47 to 95. He admits in paragraph 52 that, since the litigation of 1875, the relations between the families have been strained. That circumstance is enough to explain all the facts found by the District Judge. If his conclusion is correct, if the holder of an impartible estate,

(36) 37 Ind Cas 321; 43 C. 1031 at p. 1045; 20 C. W. N 1085; 14 A. L. J 822; 20 M. L. T 78; 12 N. L. R 113; (1916) 2 M. W. N 65; 18 Bom. L. R 621 4 L. W 114; 24 C. L. J 207; 31 M. L. J 455; 43 I. A 151 (P. C.).

owing to misunderstandings or otherwise, only takes care not to live in the same roof with the junior members and not to be on social terms with them, they lose all rights to maintenance and division Even in a family having partible properties only, joint residence is scarcely to be expected in these days, except in the case of brothers. The remoter the relationship, the less likely is joint residence. In the case of ordinary families, long separate residence will connote separation in status—the members being equivalent in social position. But in the case of the holder of an impartible property and the junior members of his family, the inequality in wealth and social position is so great that no such holder will ever permit the junior members to live with him in the same roof or assign his palace as their residence during his absence or move with them on a position of social equality in public functions—except, perhaps, in the case of brothers, so long as their relations remain cordial. One's experience shows that the feelings, between a holder of an impartible estate, and his junior members, even when not openly hostile, are normally strained and always in a state of tension. The lucky holder of the estate thinks that the junior members are jealous of him which is very often true. Even when they are not, he imagines that they must be so. He keeps them at a distance. He thinks socially they are his inferiors and his dignity suffers if he moves on terms of equality with them. This is the normal history of Zemindars and their junior members. Much more accentuated is this state of things when there are previous litigations between them always bitterly fought out With these general remarks, I proceed to consider the particular facts in this case.

1. *Residence.*—The village of Chinna Tirupati was the chief place in the Jaghir. There was an ancestral palace at that place (see Exhibit B). So late as 1878, in the Manual of the South Arcot District at page 374 we have: "The chief village in it, where he resides, is called Chinna Tirupati" It is also noticeable that in the whole litigation of 1875 (Exhibits B and C) the Jaghir itself was described not as the Jadaya Goundan Jaghir, as it is now known, but as the Palayapat of Chinna Tirupati Hill. It appears from Exhibit B that the marriages in the family usually take place there, though the marriage of Unn malai Ammal (mother and guardian of the plaintiff in the suit of 1875) had been celebrated, for special reasons, at Mundiyoor. After that marriage, Lakshmanappa II (who was then Jaghirdar) was living with his newly married wife at Pottiyam, where Annadana I had been for some time living till 1860. But it is also clear that the palace at Chinna Tirupati must have been kept up as the family residence, for, after 1860, Lakshmanappa II was living at Pottiyam and Chinna Tirupati and he died of cholera in 1866 at Chinna Tirupati. From 1866 to 1871, the family must have continued there and the relations between the defendant's branch and them must have been very cordial, for, it is said, that Lakshmanappa (defendant's grandfather) "held the infant Jaghirdar (Annadana II aged three) on his knees when the installation ceremony was performed and for five years thereafter acted as his guardian" (*Vide* paragraph 47 of the Judge's judgment). When misunderstandings arose in 1872 she removed with the minor, to 'proper places' (see the plaint in Exhibit B) probably Pottiyam, for it is admitted by both sides (see paragraph 49 of the Judge's judgment) that Annadana II lived at Pottiyam from 1875 till his death in 1900. From 1900 the last Jaghirdar was living at Akkarapalayam, in order that facilities might be afforded for the education of the last Jaghirdar. Now, I do not see any sign of intention to separate *quoad* the impartible estate in any of these changes of residence. If Annadana I began to live in Pottiyam prior to 1860, that must have been because Chinna Tirupati is on the hills (see P. W. No. 4) and Pottiyam is lower down or because he had several wives or for some other similar reason. Certainly there is no evidence that Annadana I removed to Pattiyam in token of separation from the other members of the family. Nor, can it be said that merely by removing his residence from the ancestral place, the holder of an impartible estate can effect separation from the other members *quoad* the impartible estate, so as to deprive them of the right to maintenance or the chance of succession. If this is the law, no junior member in India can be getting any maintenance. As to the ancestral palace at Chinna Tirupati, I may first ob-

serve that the so-called palace was a mere thatched building. The evidence of plaintiff's witnesses about it is indefinite. They are either not old enough to give evidence or not willing to give information, for we find some of them denying admitted facts, *e.g.*, the first witness (a Pleader) says: "I don't know that the Poligar's seat was ever Chinna Tirupati or that it was the original seat of the Poligar." The plaintiff says: "At Chinna Tirupati we ha e no palace or any other building." In cross-examination she says: "Kannappa would rarely come. For sometime Kannappa lived at Akkarapalayam in our palace and then went away" (Kannappa and Konappa are shown in the pedigree). Again: "This Thirumalappa and Lakshmanappa were all enemies to my family and were conducting hostile proceedings. I don't know that I stated in my petition that Thirumalappa in the absence of the minor could be one of the next reversionary male heirs of the deceased (Exhibit E). Even after my attention is drawn to the statements, I don't know these people." In spite of all this pretended ignorance and unwillingness, she is able to state: "The first defendant and his people live in Chinna Tirupati in an enclosed building. I don't know if there are four or five buildings built up. I have never been to that building. Why should I go to it? But I have heard of it." As to household worship: "There is no separate name for our household deity .....No idol is set up." P. W. No. 3, whose aunt was married to Konappa at Chinna Tirupati where he went for the marriage, says: "In Chinna Tirupati there is, they say, a residence of the Poligar of Chinna Tirupati. I don't know if the place where my aunt was married was a portion of the palace. I found my aunt's house in the west There were other houses on the west. There are three or four buildings close to each other. In the easternmost of these, the marriage was celebrated." I think the unwillingness of the witness to say whether the place of the marriage is or is not part of the building reputed to be the palace is apparent. P. W. No. 4, one of seven wives of Annadana II, does not know where her last co-wife, Tirumalai, is or whether she married another man or not (D. W. No. 8 has remarried D. W. No. 7). She does not know that Konappa is her husband's *pangali* (or *gnati*), though she heard that he is and saw him at the car festival. She does not know her husband's *gnatis* at Chinna Tirupati. "People said he had *pangalis* there even at the time of my marriage. Up to date, I have not seen them nor do I know whether they are alive or dead and I have never enquired about them on the occasions when I attended the car festival."....."I do not know if Tirumalappa or Konammal put in petitions to this Court to be guardian of the minor" and then admits, "They objected that I should not be appointed guardian for Naranappa, as I had a child of my own." Her brother is P. W. No. 9. P. W. No. 5 says: "There was ill-feeling between Tirumalappa and Kannappa on the one hand and the Poligar. They would not come to Pottayam or Akkarapalayam.....I n w the hill Munsif Konappa.....Neither had he any properties in common with my Poligar nor any money transactions jointly." ....."Chinna Tirupati is on the hills. My Poligar would take what things he needed.. .....He had no house at Chinna Tirupati." In cross-examination he says: "In that year I know that the Poligar's *pangalis* lived at Chinna Tirupati. I mean Thirumalappa and Kannappa and their people.....I know they have houses. I do not kn w where except that it is east of the village.....I heard that the first defendant's grandfather *Lakshmidorai had a house* there. The house of the Poligar *is called a palace out of respect.* I do not know if the father of Annadana died at Chinna Tirupati. Nor have I heard so up to date. I have spoken to the *pangalis* of the Poligar, namely, to Tirumalappa and Kannappa. At the time I spoke to them they were on bad terms with my Poligar.... .....In this case I am helping Konammal's side". P. W. No. 7 says: "For the procession Tirumalapp i and Kannappa and Annadana did not come b cause there was ill-feeling between them and the Poligar." In cross-examination he says: "Muthuswami and Perumal live in a thatched building. West of it there is not a demolished building known as the old Kutcheri." Tirumalappa referred to in the evid nce is defendant's father. P. W. No. 8, who is shown in the pedi-

gree and is also related to the plaintiff, says: "Ramayee, the mother of Peria Thambi, is married to the son of my elder sister. My elder sister's husband's sister is married to me. We lived in separate buildings. The one I lived in was towards the west. There is a *building close* to it. *I do not remember* who lived in the next house. To the south of my house was one house and to the east of it only one house and close to my house were no demolished walls. I never heard people say that those were the ruins of the Kutcheri of the former Poligars. *In connection with this suit, this is the first occasion I have come. I never got any summons.* Naranappa the Poligar who died and Annadana were not my *pangalis* nor relatives." This evidence is so interested that he denies admitted relationship and is unwilling to give any information about the Poligar's office (Kutcheri) and the other houses at the spot. P. Ws. Nos. 6, 9 and 12 do not give any information on the matter under consideration. P.Ws. Nos. 2, 3, 4, 5, 7 and 8, while going into the box with a view to give information about the junior members, their relations *inter se* and their relations towards the Poligar, are unwilling to give information about the old family residence at Chinna Tirupati. I think they are all strongly interested in plaintiff, and their evidence, whatever it is, is not entitled to any weight. D. W. No. 1 is the defendant. He says: "Prior to my taking up my residence at Pottiyam, I was living in Chinna Tirupati from infancy in the palace there. At that time at Chinna Tirupati in that place there lived my paternal uncle and my younger brothers and myself. The palace buildings consist of a building running east and west and another at right angles running north to south. The former is one block containing two or three rooms. It has a thatched roof. The latter is connected with the former by a passage. Close to the thatched house to the south is a place for holding our Kutcheri but only the brick walls are standing.....The ruins are called the Kutcheri. The access to these buildings is two-fold, one from the east and one on the south by gates in the enclosing fence." Here is detailed information that can be cross-examined, tested and contradicted if false. In cross-examination: "Kannappa lived north west of me in Chinna Tirupati from my infancy but in the same compound. A passage connects to the buildings. The entrance of this portion faces south. It and that passage have a separate thatch. The Nadai is a shed. Our building has a separate roof from that Nadai. We and Kannapa used to pound our paddy in that Nadai. Kannappa did not enclose his cattle separately from us. We had them all together in our enclosure. Our house is south of the Nadai. I lived there with my three brothers jointly. My father also lived there. There is a bamboo put round the building which we occupy which bamboo fence includes the Nadai. There is a separate bamboo enclosure round the house of Kannappa. There is no enclosure round the ruined Kutcheri. The other houses of the village lie to the west of Kannappa's building." These elaborate details about paddy sheds, bamboo fence and cattle enclosures obtained in cross-examination carry the ring of truth with them. D. W. No. 2, an uncle of the defendant but who gains nothing if the family is undivided, while he will be a nearer male reversionary heir than defendant if the family is separate, says: "We all live in the palace at Chinna Tirupati.....I live at Chinna Tirupati in the palace where also live Muthusami, Perumal, and Vadamalayappan (P. W. No. 8).....Our palace consists of one hall running east to west with two entrances; that is, one hall on the south and on the north is another building running east to west. Both thatched. Between the two is a hall for pounding paddy and for accommodating visitors. To the south is the Kutcheri building. My building is the western one. The Kutcheri is south of it. There is a bamboo fence round the palace building to keep out the cattle. Naranappa had a wife senior to Unnamalai by name Nallammal who also lived at Tirupati in the palace in the northern building." I am not inclined to accept this witness when he says: "When the first defendant was living at Chinna Tirupati, we all lived as one family." In the cross-examination: "There is one row of buildings with entrances side by side to different rooms under the same roof. We lived in the south and not in that place at the time of the minor suit etc." I do not attach any weight to the evidence of D. W. No. 4 on this matter. D. Ws. Nos. 5 to 11 say nothing D. W. No. 12 says: "I know the palace. The

palace is built east to west. There is one building east to west and another a little beyond to the east running east to west. One of the buildings has an entrance facing south and the other has an entrance facing north, and between these two is a covered hall. All are thatched. The *bin* is to the north of the northern building, *i.e.*, behind it. Besides this there is a Chavadi where the former Poligars had a Kutcheri and held inquiries. It is roofless.....The palace has a compound. All the buildings together are enclosed by a fence of twigs and split bamboos. The bamboo enclosure encloses the building occupied by Kannappa and the building occupied by Muthusami and Perumal Dorai and runs as far as the demolished Kut heri. There are no gate ways. On the western side there is an opening and another in the south.....During my time the southern building was occupied first by those who live there now and their father, namely, Perumal and Muthusami and their father....." At page 149 he gives further information in cross-examination. D.W. No. 12 is a person who served in the palace and holds the office of Goundan of Chinna Tirupati village. He says: "the palace is at Chinna Tirupati. The people who live in it are Muthusami and Perumal and Kannappa (defendant's brothers and uncle). The palace is built in two parts, one building east to west and one north to south, and a Shalai in between for pounding and husking, etc." D.W. No. 15, who is a Nambiar doing *puja* for the Swami (idol) in the Chinna Tirupati temple, and whose house is close to the temple, after giving similar details in chief examination, says in cross examination: "The Poligar lived in the northern building. The middle building was used for pounding paddy and sleeping and for visitors. Lakshmanappa only lived in the southern building. Along with the Poligar, Kannappa lived, etc.....Lakshmanappa had a junior paternal uncle Lakshmanappa whom I have seen. He also lived in the palace. He lived in the eastern portion of the northern building. He was living separately."

My conclusion from the whole evidence I have set forth is that at Chinna Tirupati there is a block of buildings known as the palace little deserving that name. Relatively to the rest of the habitations of that village the name was perhaps justified. From 1820 onwards, presumably, this block of buildings was occupied by various branches of the Jaghirdar's family. The best portion was probably in the occupation of the Jaghirdars until they finally left it. A building was used as the Jaghir office or Kutchery. After the Jaghirdars have finally left the place, this Kutcheri has fallen into ruins. The rest of the buildings is in the occupation of the junior members of the family. It may be that separate branches are occupying separate portions of the block. It is not that I differ from the District Judge as to the actual facts of residence. I agree with him in thinking that since 1875 there has been no joint residence and the Kutcheri has fallen into ruins. But I do not agree with the District Judge in making a point against the defendant that the Kutcheri was not kept up and assigned to the defendant's branch as a residence. In the first place it was only intended for an office and not for living in. Secondly, the defendants had their old place of residence and continued to live in it and there was no need to enlarge it. Thirdly, no other building except the Kutcheri had fallen into ruins and all the buildings are now in the occupation of the junior members including what used to be occupied by the Jaghirdars before 1875. The junior members thus seem to have had an addition to their total accommodation, resulting in some adjustments and changes. Thus the junior members have neither been driven away from the ancestral house nor left it, but had it added to by the abandoned residence of the Jaghirdars. This is entirely unlike the facts in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6), where the junior member built a new *pucca* house, established a Tulsi Pinda there, removed his family to it.....and established a separate Thakurbari in it. I will refer to this case again. In the present case, no junior member has changed his residence or left the ancestral home permanently so as to indicate separation.

After the above detailed reference to the evidence about the residence, I do not think it necessary to deal with the evidence about the household worship and the car festival. I will only observe that in Southern India there is no such thing as a private temple or a Thakur or idol or deity in a house,

Except in a few orthodox houses of the higher castes which are daily diminishing in numbers, no such thing as household worship exists. In the houses where it is still performed it is of a routine character and only the inmates of the house take interest in it, if at all. I have never known in my experience of Southern Indian life that relatives (even not resident in the house) participate either in such household worship or public worship (such as a car festival) as a token of *undivided status*. Nor have I been referred to any decisions where such facts are used as tests of division or non-division. Nor is there any evidence in this case tending to show such a custom as participation by members of a joint family (even when they do not reside in the same house) in household worship or car festivals. All that one could expect is that, on occasions of marriages and other festivities and funerals, kinsmen with whom the relations are cordial are expected to attend and, conversely, those with whom the relations are unfriendly *do not*. If the Jaghirdar has got some functions to discharge *qua* Jaghirdar at the annual car festival, I do not see why the junior members, who have no such functions to discharge, should participate in them. As to attendance at the festival, they may attend as sight-seers or not as they choose.

2. I now take up the second of the District Judge's items.—No community of property. It is admitted that, apart from the Jaghir, there is no property in existence which can be regarded as the joint family property of the family. The properties in Schedules B, C and D are the separate acquisitions of the last Jaghirdar or of his predecessor and cannot be joint family properties in which the defendant can claim a share unless they had been incorporated with the Jaghir. Even if they were acquired out of the income of the Jaghir (we do not know how they were acquired), as the income of the Jaghir is at the absolute disposal of the Jaghirdar on account of its impartible nature, they are the acquirer's, separate property without such incorporation. There is no evidence to prove incorporation. Only if property that was acquired by Lakshmanappa I, who died in 1822 is in existence, can we expect any community of interest outside the Jaghir. Such being the case, I am unable to follow the learned Judge's remark in paragraph 60. He admits that the reply of the defendant to his query was a correct rendering of the law and yet makes out a point against the defendant. The same remarks will apply to new residences built by the Poligars at Pottiyam and Akkarapalayam (See paragraph 61 of the Judge's judgment) and to the respondent's Vakil's contention based on the absence of joint dealings. If the family had joint partible properties of considerable value or yielding considerable income, as in *Gurusami Pendiyan* v. *Sendatti Kalai Pandia* (7), one may expect joint dealings. To raise these points is to overlook the impartible nature of the only joint family property and the fact that it is at the absolute disposal [since *Sartaj Kuari* v. *Deoraj Kuari* (3)] of its owner.

3. It is said that the conduct of Tirumalayappa, defendant's father, in taking the cause of the *ryots* in some disputes between them and the Jaghirdar when the latter attempted to change the land tenure is not of one having an interest in the Jaghir. Here again, it seems to me that the nature of the estate is overlooked. The interest of a junior member in an impartible estate, from the point of view of present enjoyment, is illusory and unreal. It is real only in the sense of a remote chance of succession. But, apart from this, the bitter enmity between the Jaghirdar and Tirumalappa is enough to explain those events

Again, it is said that in Exhibit F, a petition filed in by Tirumalappa for the guardianship of the Jaghirdar in 1901 (who was then a minor), he did not state that he was a senior member of the joint Hindu family to which the minor belonged. Now Exhibit F was prepared according to the requirements of the Guardians and Wards Act VIII of 1890 (section 10) and had to allege the petitioner's fitness for guardianship of the minor. Now, while it is true that Tirumalappa was the next heir to the Jaghir (on the defendant's case) on the ground of being senior by lineal primogeniture, it does not follow that he was competent to be a guardian. The fact is irrelevant in an application for guardianship. Very often the nearest heir (on the footing that the family is separate) would be older in age and better experienced in life and worldly affairs than the person entitled by

lineal primogeniture, and the fact that the petitioner was the next heir was, if at all, a circumstance disqualifying him for guardianship. This was the very ground on which his petition was opposed. In Exhibit G, his petition was opposed by Konappa (who would be the nearest male reversioner to the estate after the mother if the property were separate) on the ground that the petitioner was the nearest reversioner (see paragraph 3) (see also Exhibit E—a counter-petition by plaintiff). This can be correct only on the footing that the family was joint. I do not say that the statement in Exhibit G binds the plaintiff, but it shows the consciousness of a member of the family who is certainly not interested in the defendant; and it is because of this document that perhaps he does not figure as a witness in the case. In my opinion the allegation in paragraph 7 of Exhibit F that "petitioner is a near relation of the minor" was all that was relevant and the non-mention of more (taken in the light of Exhibit G) cannot be used as a point against the defendant.

I am, therefore, of opinion that all the points relied on by the District Judge and summed up by him in paragraph 62 do not make out a separation *quoad* the impartible estate. It is a matter for observation that the points relied on are negative pieces of evidence. It cannot be said that either on the Jaghirdar's side or on the defendant's side any one did any positive act with a view to separate.

On the footing that the plaintiff has made out a *prima facie* case by proving the facts noted in paragraph 62, the learned Judge proceeded to consider certain points relied on by the defendants in rebuttal of the plaintiff's case. In the view I have taken, *viz.*, that the plaintiff on whom the burden of proving separation lies has failed to make out a *prima facie* case, I need not discuss these points which are stated in paragraph 64—especially, as to the first two of those, as they are merely negations of what the plaintiffs claim to have proved. But, as regards the third and the fourth points, I wish to make a few observations. It is said that the junior branches of the family have divided *inter se* and, therefore, they are not joint with the Jaghirdar *quoad* the impartible estate. Assuming that the junior branches are divided *inter se* in respect of their private dealings and other properties, it does not follow that they are divided either between themselves or from the Jaghirdar's line *quoad* the impartible estate. To assert such a proposition is to assert that a family cannot be divided partly (*i.e.*, as to some properties) and undivided as to others—a proposition which is not always true even when no impartible property is in question and which is always false when such a property is one of the properties of the family. The anomaly which such a view leads to is this—However numerous the junior branches of a family might become they should not divide their partible properties and become separate as to their personal acquisitions but must continue to be joint, if they wish to preserve their rights of maintenance and succession as against the impartible estate. On this ground also I refuse to discuss the evidence on this heading which is contained in the evidence of P. Ws. Nos. 6 and 8. The former says that Tirumalappa and Konappa would go down the hills and sell their goods separately and purchase salt and cloths separately. P. W. No. 8 says that he and the others have no lands in common in this Jaghir of shifting cultivation in lands.

The next point relates to exemption of the defendant and other members of his family from payment of tribute to the Jaghirdar. In my opinion this is a point established in the case in favour of the defendants. P. W. No. 1 says in cross-examination: "To my knowledge first defendant cultivates some lands in the hills; he does not pay any poll-tax. Lands don't pay any rent. Members of the Poligar's family are exempt from the payment of the poll-tax and also from the plough-tax. That is the family privilege. They or any tenant can bring under cultivation any extent of land they please without limit." The defendant claims that this exemption allowed to members of the family was in lieu of maintenance. Now, when we remember that the net income of the family is Rs. 1,300 (see end of plaint) in 1915—1916 and the share of a person in the position of the defendant (if the property is partible)—omitting all extinct branches and seeing that Kannappa, P. W No. 8 is in a higher line and D. W. No. 2 in the next line and the defendant's two brothers are alive—is one-twenty-fourth or property

yielding an income of Rs. 54, if he is to be awarded maintenance, it may not be more than Rs. 10 or 12. In a primitive Zemindari like this with its primitive people and primitive mode of raising revenue, the provision for maintenance made by mutual arrangement would be rather in kind than in actual cash payment. The exemption from plough-taxes and poll-taxes exactly corresponds to this. The District Judge deals with this in paragraph 92 and says (1) that it is so smalll that it cannot be regarded in lieu of maintenance; (but the claim for maintenance could be no more than what the exemption represents); and secondly (2) that it is a family privilege, just as the Nattars, Ur Goundan and the Moopans are exempt by virtue of the office from the poll-tax. The second reply of the learned Judge seems to me really to concede the point while making a show of denying it. The Nattan and other officers render service to the Jaghirdar and instead of getting a payment get what is its equivalent, an exemption from the poll-tax. This is exactly same as a payment. In the case of the junior members of the Jaghirdar's family, they don't render any service Why should they get an exemption which is measureable in money and which is equivalent to payment? There is no legal obligation on the part of the Jaghirdar to allow such exemption, if they are separate. But if they are undivided, there is a legal obligation to pay some amount or what is its equivalent to exempt them from taxes. By saying it is only a family privilege, the legal significance cannot be got rid of under what seems to me to be a mere verbal quibble. To say that the Jaghirdar is allowing the exemption because the defendant is a member of the family is to recognise the obligations due to a member of the family. One may as well say where a defendant is actually getting some maintenance, it is given gratis and as a matter of grace and not as a matter of obligation. In all such cases, when the junior member is receiving as much as he thinks he is entitled to for maintenance, what more could he do to keep up the link between him and the holder of the impartible property? Anyhow the Jaghirdars could not say that the defendants were not getting any maintenance from them and so long as they have not asserted that it was not in lieu of maintenance the link is kept up. One of the plaintiff's witnesses P. W. No. 5 gave evidence in a former deposition that the exemption of the junior members from poll-tax was in lieu of maintenance. He admits his deposition but says: "I might have said this because it struck me at the time." It is clear that he wishes to discount his former statement, as he is now arrayed on the plaintiff's side. One other point relied on by the respondent in appeal is that no contribution was made by the Jaghirdar for the marriages and deaths in the junior branches. When we remember that in this primitive Zemindari, the costs of a wedding and funerals even in the Poligar's household were defrayed by subscriptions and fees from his subjects, one cannot expect him to make a cash contribution for similar events in the families of the junior members. There is evidence for the defendants that the people of the Nads send supplies and money for the expenses of the ceremonies attendant on these events. The learned District Judge disbelieves the evidence of the witnesses on the ground that they are for the most part Nattans and Moopans who owed their office to defendant. But as the offices of Nattan and Moopan are hereditary offices, I do not think that these witnesses can be discredited on this ground. It does not appear that Defence Witnesses Nos 5 and 6 were appointed by the defendant. Besides there is the evidence of Defence Witness No. 2 (at page 99): "On occasions of marriage we send word to the chief Nattan and he sends words to the other Moopans and Nattans and they bring what is required without payment. That is our customary due as members of the Poligar." As these things must have been going on openly, I am not inclined to discount the evidence on the other ground given by the District Judge (paragraph 93) that since it has not been shown that these presents were sent with the knowledge or permission of the Poligar. The respondent has strongly relied on *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and *Gurusami Pandiyan* v. *Sendatti Kalai Pandia* (7). In my opinion these cases do not help the respondent. In the former the facts found are :—

(1) Ranjit granted in 1879 to his brother, Bhupat Narain, a *mokurrari patta* (perpetual

lease) of a portion of the *taluk* for the maintenance of the latter.

(2) Bhupat built a separate *pucca* house, established a Tulsi Pinda there, removed his family to it and lived there separately. He established a separate Thakurbari in it.

(3) No help was given to Chaturbhuj Narayan by Ranjit at the time of the marriage of the former's daughter.

(4) Bhupat and Chaturbhuj mortgaged the property granted to them freely as if it was their absolute property.

(5) In 1905 Chaturbhuj stated in a judicial proceeding 'I am separate from the Thakur of Telwa.'

There are no facts in the present case similar to any of these. In *Baijnath Prasad Singh* v *Tej Bali Singh* (37) referring to *Tara Kumari* v. *Chaturbhuj Narain Singh* (6) Richards, C. J., and Rafique, J., said: "In this case their Lordships decided the question of separation as a question of fact and not of law." The decision in *Baijnath Prasad Singh* v. *Tej Bali Singh* (37) was affirmed by the Judicial Committee in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) (above referred to).

In *Gurusami Pandiyan* v. *Sendatti Kalai Pandia* (7) again it is a decision on the facts. These are:

(1) in 1842, the father of Peria Dorai, the Zemindar who got the estate as daughter's son, separated from him and went to live in Veppangulam.

(2) In the suit filed by Chinna Dorai, brother of Peria Dorai for partition of the partible properties, an agreement was filed and was found to be genuine and it was found by the Subordinate Court that the plaintiff had accepted by that agreement a specific allowance from the defendant in full discharge of all claims. In appeal Chinna Dorai contended that the words "no right whatever to the Zemindari" in it were subsequently added after he had signed it. But this contention was rejected by the High Court.

(3) Chinna Dorai who also was living in Veppangulam was alienating ancestral properties without any reference to Peria Dorai and was also making acquisitions separately for himself.

(4) In 1877, the Veppangulam palace was sold in Court-auction for the debt of Periasami (son of Chinna Dorai) while his brother Chinnasami filed a claim and got his share released, no claim was made by the Zemindar, who, on the other hand, purchased it. In fact, as regards all the paternal ancestral properties, there was no evidence of any interference by Peria Dorai or his descendants. The conduct showed the original ancestral properties of the family were regarded as the exclusive property of Chinna Dorai and his branch. Perhaps this was the reason why the Zemindari became the exclusive property of Pedda Dorai.

It is unnecessary to say more about this case beyond saying that it was before *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) and that it was a decision on the facts, especially as it is under appeal to the Judicial Committee.

In *Sri Raja Viravara Thodhramal Rajya Lakhshmi Devi Garu* v. *Sri Rajah Viravara Thodhramal Surya Narayana Dhatrazu* (29) grant of two villages for mainte nance and separate food and residence even for 70 years was held not to constitute separation.

To sum up the history of the family from 1820 to 1916:

(1) There is no positive act of separation—no Samakhya [as in *Vadrevu Ranganayakamma* v. *Vedrevu Bulli Ramaiya* (17)], no agreement [as in *Gurusami Pandiyan* v. *Sendatti Kalai Pandia*(7)], no grant of a large property in view of separation [as in *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6)] and no remuneration [as in *Periasami* v. *Periasami* (*Padamatur case*) (12)].

(2) No assertion that the families of the defendant and plaintiff were separate *until the plaint in this case.*

(3) Contrary assertions in the litigation of 1875 and in Exhibit G that the defendant's grandfather and father were the next heirs.

(4) The continuance of all the junior members in the ancestral homes, either contiguous to the residence of the Jaghirdar or part of the so-called palace.

(5) The exemption of all the junior members from taxes—which is measurable in money and which is equivalent to (if not in lieu of) grant for maintenance.

(6) The receipt of supplies for marriages and other occasions as in the case of the Jaghirdar.

(37) 38 Ind. Cas. 894; 38 A. 590; 14 A. L. J. 913.

JAINARAYEN BAPU *v.* VITHOBA.

In my opinion there has never been separation of the senior line and the Jaghirdar's line. I would allow the appeal in respect of the Jaghir and dismiss the plaintiffs' suit for it. As to costs I agree with the order of my learned brother.

V. N. V.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 569 OF 1921.

August 28, 1922.

Present:—Mr. Hallifax, A. J. C.

JAINARAYEN BAPU—PLAINTIFF—APPELLANT

versus

VITHOBA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 12, 19—Acknowledgment—Limitation, computation of—Exclusion of day of signature of acknowledgment.

The word "time" in section 19, and the word "day" in section 12 of the Limitation Act have the same meaning.

In computing the period of limitation for a suit under section 19 of the Limitation Act for a debt acknowledged in writing, the day on which the acknowledgment was signed must be excluded under section 12 of the same Act.

Appeal from a decree of the District Judge, Bhandara, in Civil Appeal No. 60 of 1921, decided on the 12th August 1921.

Messrs. *M. Gupta* and *V. D. Kolte*, for the Appellant.

Mr. *P. S. Deva*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit on 13th July 1920, a Tuesday, for debts which had been acknowledged in writing on 13th July 1917 to be due. This is another striking instance of the inveterate but entirely incomprehensible habit of the Indian litigant of waiting till the very last moment allowed by the Law of Limitation to do any thing whatever, which, of course, involves the obvious risk of having waited just one moment beyond the last. The learned Subordinate Judge held that the provisions of section 12 of the Limitation Act do not apply to the computation of a period starting from the signature of an acknowledgment under section 19 of the Act, for the reason that the word *time* is used in the latter section and the word *day* in the former. If anything more than plain common sense were required to show that the two words have the same meaning, it would be found in the heading of the third column of the First Schedule of the same Act. The learned District Judge came to the same conclusion though not for the same reason. His reasons are stated at some length, but I have to admit that, after careful perusal and anxious thought, I am unable to discover what they are.

2. It is beyond doubt that, for the purposes of the Limitation Act, a period of three years starting with the signature of an acknowledgment at any hour of 13th July 1917 does not end till the last moment 13th July 1920. If this were not clear enough from the very plain words of the Limitation Act, section 9 of the General Clauses Act, 1897, would make it so. Indeed, it seems to me that the principle stated would have to be enforced even if it had not been enunciated in either Act. In this case, for instance, the three years allowed for the filing of the suit did not expire, apart from that particular provision, till the exact hour and minute of 13th July 1920 at which the acknowledgment was signed on 13th July 1917, and both the Courts below, by holding that the period of limitation ended at the last moment of 12th July 1920, have allowed a period which is less than three years by at least several hours. This, of course, cannot be done, and it is obviously impossible to keep any record of the exact hour and minute at which an act from which a period is to be computed is done or a suit is filed. It would, therefore, be necessary to assume, even if the law had not directed this to be done, that the act from which the period is to be reckoned was performed at the last moment of the day on which it was performed, or at any rate at a later hour than that at which the suit was filed.

3. The suit has been dismissed on the preliminary point of limitation and must go back to be tried and decided on its merits. The appeal is remanded to the Court of the District Judge under r. 23 of O. XLI. of the Civil Procedure Code, to be similarly remanded by him to the First Court for trial

on the merits. A certificate for the refund of the amount of Court-fees paid in this Court on the petition of appeal will issue. Other costs in this Court will be costs in the suit.

N. H. *Appeal remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2095 OF 1921.
November 7, 1922.

Present.—Mr. Justice Martineau.

Hafiz HAYAT ALI SHAH AND OTHERS DEFENDANTS—APPELLANTS
versus
Musammat TAJ-UL-NISSA—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), ss. 54, 55—Suit to restrain erection of building Building erected during pendency of suit—Demolition of building, injunction for—Co-sharer in land, right of.

Where a suit to restrain the defendant from building upon a certain land which the plaintiff claims as his own is dismissed, and the defendant, without waiting for the plaintiff to prefer an appeal against the decision, erects a building on the land, the plaintiff, on succeeding in appeal, is entitled to an injunction for the demolition of the building which the defendant erected with full knowledge of his claim.

Where a person builds upon land in which another is a co-sharer, and the latter seeks an injunction for the demolition of the building, the defendant cannot successfully urge that as plaintiff owns only a portion of the land, the whole building should not be demolished, for the plaintiff, as co-sharer, has a right in every portion of the land and is entitled to demand demolition of the entire building erected upon it.

Second appeal from a decree of the District Judge, Delhi, dated 1st September, 1921, modifying that of he Senior Subordinate Judge, at Rohtak.

Mr. *Abdul Rashid*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The plaintiff was the daughter of Yakub Ali, whose half brother, Sarfaraz Ali, in 1918 made a gift of a piece of land to a school. The plaintiff claimed to be entitled to a share in the land as heir of her father, and sued for an injunction to restrain he school authorities from building on the land. The sui was dismissed by the Mun if on 29th August 1919, on the ground that the plaintiff was not in possession and a suit for injunction did not lie, but that or er was set aside on appeal by the Additional Judge wh found that the plaintiff was in possession of the property and remanded the case. A decree was then passed by the Subordinate Judge granting the injunction asked for in the plaint, the plaintiff being found to have a one-fourth share in the land, but as the defendants had in the meanwhile erected a building on the land the plaintiff appealed asking for its demolition, and the District Judge, has accepted her appeal and ordered the defendants to demolish the building and restore the site to its former condition. The defendants have filed a second appeal.

The defendants erected the building in September 1919, while the Civil Courts were closed, without waiting for the plaintiff to appeal from the order of the 29th August 1919, di missing her suit and I consider that the learned District Judge was right in holding that the plaintiff was entitled to an injunction for the demolition of th building, which the defendants had erected at their own risk with full knowledge of her claim. She applied on the 2nd August 1920 to be allowed to amend her plaint if the Court thought it was necessary, but the Subordinate Judge passed no order on the application beyond directing that it should be placed on the record.

It is urged that the defendants should be given time for bringing a suit for the partition of the land, and that pending the institution and decision of such a suit the building should not be demolished, but I fail to see the justice of this. The present litigation ha been going on for more than 3 years and the defendants could have brought a suit for partition during that time but did not choose to do so.

There is also no force in the argument that because the plaintiff owns only one-fourth of the land the whole of the building should not be demoli hed.

The plaintiff as a co-sharer has a right in every portion of the land, and the defendants were not entitled to build without her consent.

The appeal fail and is dismissed with costs.

N. H. *Appeal dismissed.*

GOVINDA *v.* ABDUL KADIR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 58-B OF 1922.

January 4, 1923.

Present:—Mr. Kotwal, A. J. C.

GOVINDA—APPLICANT

versus

Khan Sahib ABDUL KADIR—NON-APPLICANT

Receiver—Remuneration—Assests available for distribution, meaning of—Notification 35-B-XIX (19th April 1920).

Where any part of an insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution within the meaning of Notification 35-B-XIX, dated the 19th April 1920. If the Receiver sells the property free from the mortgage and realises the purchase-money, the whole of it is not assets available for distribution, but only such part as remains in his hand after paying off the mortgage. He is not entitled to a percentage on the whole of the purchase-money.

Shridharnarayan v. *Atmaram Govind*, 7 B. 455 at p. 458; 4 Ind. Dec. (N. S.) 306. relied on.

Revision of an order of the District Judge, Amraoti, dated the 6th January 1922.

Mr. *K. K. Gandhe*, for the Applicant.

Mr. *D. T. Mangalmurti*, for the Non-Applicant.

ORDER.—Notification 35-B-XIX, dated the 19th April 1920, fixes the remuneration of the Receiver, East Berar, Amraoti, at 5 per cent on the assets realised and available for distribution. Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the Receiver sells the property free from the mortgage and realises the purchase-money the whole of it is not assets available for distribution but only such part as remains in his hand after paying off the mortgagee. He is not entitled to a percentage on the whole of the purchase money. This view is in consonance with the Judicial Commissioner's Civil Circular, II-16 page 36. See also *Shridharnarayan* v. *Atmaram Govind* (1). The present case in which the First Court's order was passed on the 15th March 1921 is governed by the above Notification. By Notification 136-XVIII the following was inserted at the end of Notification 36-B-XIX: "The said percentage shall be calculated as under:—

"(*a*) On the principal sum forming the proceeds of each estate distributable as dividends;

"(*b*) On the proceeds of sale, when, on the application of a creditor who holds security over any part of the insolvent's property the Official Receiver, sells the property and realises the security under an order of the Court;

"(*c*) when the insolvent compromises or settles with his creditors on the total sum agreed to be paid by them".

It is contended by the learned Pleader for the Official Receiver that under clause (*b*) the Receiver is entitled to 5 per cent on the full purchase money. The clause refers to a sale on the application of the creditor who holds security. In the present case the creditor not only did not apply for the sale but opposed it. It is, however, urged that the words "on the application of a creditor, etc.," are redundant. I see no reason to hold that they are so. It is not likely that redundant words would be used in matter which is added for the purpose of explanation.

The property was sold for Rs. 40,000, out of which Rs. 36,141-13-6 were paid in satisfaction of the mortgage decree. The Official Receiver is, therefore, entitled to commission on the balance of Rs. 3,858-2-6 only at 5 per cent. As regards the cross-objection it seems to me that the Receiver is entitled on the principle of clause (*c*) to a commission on the sum paid to the creditor, but, in my opinion, he cannot claim commission on both this sum as well as the Rs. 3,858-2-6 stated above. He will, therefore, be allowed commission on the larger of the two sums only. I make no order as to costs in this Court.

G. R. D. & W. C. A. *Order accordingly.*

(1) 7 B. 455 at p. 458; 4 Ind. Dec. (N. S.) 306.

BADRI UPADHIA *v.* DWARKA UPADHIA.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1191 OF 1921.

January 10, 1923.

Present:—Mr. Justice Gokul Prasad.

BADRI UPADHIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

DWARKA UPADHIA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Co-sharers—Common parti *land—Cultivation by one co-sharer—Other co-sharers, whether entitled to decree for joint possession—Decree, form of.*

If one of the co-sharers brings common *parti* land under cultivation, there is no objection to other co-sharers being granted decree for joint possession with him.

Bisheshar Singh v. *Hanuman Singh*, 63 Ind. Cas. 802, 19 A. L. J. 780, 3 U. P. L. R. (A.) 143; 44 A. 1; (1922) A. I. R. (A.) 314 and *Sarbjit Singh* v. *Raj Kumar Rai*, 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A) 146; 44 A. 5; (1922) A. I. R. (A.) 162, followed.

Jagar Nath Singh v. *Jai Nath Singh*, 27 A. 88; A. W. N. (1904) 194; 1 A. L. J. 488 and *Phani Singh* v. *Nawab Singh*, 28 A. 161; A.W. N. (1905) 233, referred to.

The proper decree in such a case is to declare that the plaintiffs are co-owners of the land in dispute under the cultivation of defendant and to award them joint possession along with the defendant.

Second appeal against a decree of the Subordinate Judge, Basti, dated the 20th of April 1921.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *Kashi Narain Malaviya*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a suit for a declaration of title and recovery of joint possession by the plaintiffs as to two plots of land on the ground that the defendants co-sharers had wrongfully cultivated these plots of *parti* land and got them entered in their names. The defendants denied the plaintiffs' title. The findings of both the Courts are that the plots of land in dispute were *parti* and that the defendants brought them first into cultivation in the year 1919. They accordingly decreed the plaintiffs' claim for declaration of title and joint possession. The defendants come here in second appeal and their sole ground of appeal is that a decree for joint possession should not have been given to the plaintiffs as it would lead to disputes in future. Reliance was placed before me on the cases of *Jagar Nath Singh* v. *Jai Nath Singh* (1) and *Phani Singh* v. *Nawab Singh* (2). The latest pronouncement of this Court on this point is to be found in the cases of *Bisheshar Singh* v. *Hanuman Singh* (3) and *Sarbjit Singh* v. *Raj Kumar Rai* (4). In these later cases it has been decided that under such circumstances a joint decree can be passed and is not against the law. Sitting as a single Judge I am bound by the two cases above referred to. It has been very strongly urged before me that the giving of a decree for joint possession would result in putting a stop to new lands being brought under cultivation by co-sharers. I do not know that this would be quite the result because, a decree for joint possession is nothing more or less than a declaratory decree, and if a decree declaring the plaintiffs' title to the property can be passed without any objection I do not see any reason why a decree for joint possession in favour of the same plaintiffs should be opposed. If the one class of decree would cause the activity of bringing new lands into cultivation to cease, so would the other. The decrees of the lower Courts are, however, not very clear. I, therefore, discharge those decrees and in lieu thereof pass the following decree. I declare that the plaintiffs are co-owners of the land in dispute under the cultivation of the defendants and award them joint possession along with the defendants. As the appeal has practically failed I allow the respondents their costs against the appellants.

S. D. *Appeal dismissed.*

(1) 27 A. 88; A. W. N. (1904) 194; 1 A. L. J. 488.

(2) 28 A. 161; A. W. N. (1905) 233.

(3) 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A) 143; 44 A. 1; (1922) A. I. R. (A.) 314.

(4) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A) 146; 44 A. 5; (1922) A. I. R. (A.) 162.

JHUMAK SINGH *v.* MAHINDRA SINGH.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 1213 OF 1920.

January 4, 1923.

Present:—Mr. Justice Ross.

Babu JHUMAK SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHINDRA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Decree, suit based on—Decree not acted upon for long time—Court, whether competent to ignore it.

Plaintiff obtained an *ex parte* decree for confirmation of possession over certain land but did not apply for its execution. After the lapse of about 10 years he brought another suit for confirmation, or in the alternative, for possession, of the same land and relied upon the decree formerly obtained by him. The lower Courts refused to give effect to the decree on the ground that it was not acted upon and that the plaintiff could not rely upon it after such a long time. They went into the question of title and dismissed the claim. On second appeal :

Held, that the mere fact that the decree was not put into execution could not affect the declaration of title made therein, that the decree could not cease to have effect unless it was set aside, that the lower Courts were in error in going into the question of title again and that the plaintiff's suit should have been decreed on the production of the decree if there was no other objection to it.

Appeal from a decision of the Additional Subordinate Judge, Saran, dated the 16th August 1920, affirming that of the Munsif, Third Court, Chapra, dated the 14th July 1919.

Messrs. *Harnarayan Prashad* and *S. M. Mullick,* for the Appellants.

Mr. *R. B. Saran,* for Mr. *P. Dayal,* for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for confirmation, or, in the alternative, for recovery of possession of an undivided one-fourth share in an orchard of which the plaintiffs are in possession. It is alleged in the plaint that one Gopal Singh, father of the defendants, had been recorded in respect of this one-fourth share in the previous Record of Rights. A suit was instituted being No. 475 of 1906 in the Court of the Munsif of Chapra for confirmation of the plaintiffs' possession. That suit was decreed *ex parte* in the plaintiffs' favour. The defence with regard to that portion of the plaint was that the defendants had no knowledge of the Suit No. 475 of 1906 and that it was not binding upon them that the decree was passed after their father died in 1907 without substitution of their names as defendants in his place and that they only came to know of the existence of that suit in 1325. The Courts below have gone into the question of title as if there had been no previous litigation. With regard to the allegation in the written statement in answer to this part of the plaint, the Munsif does not seem to have accepted it. But he has refused to give effect to the decree on the ground that it was never acted upon and that the plaintiffs cannot now rely upon it after such a length of time. He further says that, as the decree was not acted upon, it cannot be taken to be binding upon the defendants. Similarly, the learned Subordinate Judge says that it is significant that the plaintiffs dared not apply for delivery of possession even on obtaining *ex parte* decree in 1907. That is all that the Subordinate Judge says about this part of the case. It is clear that these views of the Courts below are erroneous. The plaintiffs obtained title by the decree of 1907. The fact that the decree was not put into execution cannot affect the declaration of title made therein. The decree would only cease to have effect if it was set aside, but the defendants have never taken any steps to have this done. In my opinion, the Courts below were in error in going into the question of title again and the plaintiffs' suit ought to have been decreed on production of the decree of 1907 when the defendants' answer to that decree as contained in the written statement was found to be baseless. The result is, that this appeal must be decreed with costs and the suit of the plaintiffs decreed with costs throughout.

N. H. *Appeal allowed.*

PHUI *v.* DEVATIA.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 40 OF 1922.

November 13, 1922.

Present:—Mr. Justice Martineau.

PHUI—DEFENDANT—APPELLANT

versus

DEVATIA AND OTHERS—PLAINTIFFS

SHIBBA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Ancestral property—Land acquired by pre-emption.

Land acquired by pre-emption, even although it belonged at one time to an ancestor of the person so acquiring it, is not ancestral in the hands of the latter.

Sri Ram v. *Ramji Das*, 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909, followed.

Taj Muhammad v. *Islam*, 21 Ind. Cas. 631; 230 P. W. R. 1913; 95 P. R. 1913; 343 P. L. R. 1913, distinguished.

Miscellaneous second appeal from the order of the District Judge, Karnal, dated the 30th November 1921, reversing that of the Senior Subordinate Judge, Karnal, dated the 31st August 1920.

Mr *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The plaintiffs' collaterals mortgaged some land to Phui, defendant No. 4, in February 1914 and sold it to him in January 1915. Later on, by a mutation sanctioned in January 1918, they took back that land and in exchange for it gave Phui other land which they had acquired in March 1915 under a decree in a suit for pre-emption in respect of a sale effected by one Nathu. The plaintiffs have brought a suit attacking these alienations.

The First Court dismissed the suit, finding that the land which the vendors gave to Phui by the exchange was not ancestral, that the suit as regards the first plaintiff, Devatia, was time-barred, and that he was estopped from suing as he had assented to the exchange after attaining majority.

The District Judge has differed from the findings of the First Court on all these points and has remanded the case for a finding on the questions of consideration and necessity. The defendant, Phui, has appealed to this Court.

With regard to the finding as to the land being ancestral, it is argued in the first place that the lower Appellate Court has made a mistake in thinking that the Nathu, who sold the land which the plaintiffs' collaterals acquired by pre-emption, was a brother of the plaintiff Kehri's father Hansa the vendor having been another Nathu more remotely related to the plaintiffs. It is, however, unnecessary to go into this point, as even if the land originally belonged to an ancestor of the plaintiffs it must be held to have ceased to be ancestral when the plaintiffs' collaterals acquired it by pre-emption. The learned District Judge has overlooked *Sri Ram* v. *Ramji Das* (1) which is a clear authority on this point. He has referred to *Taj Muhammad* v. *Islam* (2) but that was a case of a different nature. There was no acquisition of property by pre-emption in that case, but a widow had sold some land, her reversioner put pressure on the vendees, and they accepted the price and gave up the land.

It is contended for the respondents that, even if the land acquired by pre-emption is not to be regarded as ancestral, the land which was given by Phui in exchange for it and had previously been mortgaged and then sold to him was ancestral; but there is no evidence whatever to support that contention, and the respondents are not entitled now to have the case remanded for enquiry as to whether that land was ancestral, as they did not raise the point in their appeal in the lower Appellate Court. They have based their claim throughout on the ground that the land acquired by pre-emption was ancestral, and in view of what was decided in *Sri Ram* v. *Ramji Das* (1) the claim must fail.

The case of the first plaintiff, Devatia, stands on a somewhat different footing from that of the other plaintiffs, as he was himself one of the owners of the land which was mortgaged and sold to the appellant, and he has attacked the act of his brother, Ram Chandra, in making the alienations as his guardian. It has, however, not been contended by Counsel for the respondents that Devatia's claim for his share can succeed even though the

(1) 2 Ind. Cas. 949; 59 P. R. 1909; 86 P. L. R. 1909; 94 P. W. R. 1909.

(2) 21 Ind. Cas. 631; 230 P. W. R. 1913; 95 P. R. 1913; 343 P. L. R. 1913.

land in suit is found to be non-ancestral, and it is only on the question whether or not the land is ancestral that the case has been argued. Moreover, Devatia does not appear to have any cause of action. By the exchange of 1918 he has got back the land which had been sold by his guardian to the appellant, and although he attacks the exchonge he does so, not on the ground that it was an act of his own which he can get undone, but on the ground that it was effected without necessity by his collateral, Shibba, whereas, as a matter of fact, Devatia himself was a party to the exchange.

I accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the First Court dismissing the suit. The plaintiffs-respondents will pay the appellant's costs throughout.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 522 OF 1921.

January 12, 1923.

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

RAHIMA—PLAINTIFF

versus

RAZZAK ALI AND ANOTHER—DEFENDANTS.

Pre-emption suit—Pre-emptor joining as co-plaintiff pre-emptor inferior to vendee—Effect.

A pre-emptor's suit must fail if he joins with him as co-plaintiff a person having an inferior right of pre-emption to that of the vendee.

Gupteshwar Ram v. *Rate Krishna Ram*, 15 Ind. Cas. 174; 34 A. 542; 10 A. L. J. 70, followed.

Second appeal from a decree of the Subordinate Judge, Banda, dated the 31st January 1921.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by three persons, namely, Mansur Ali, Sahab Ali and Rahima on the ground of pre-emption. It was alleged in the plaint that both the plaintiffs and the defendants vendor and the vendees were co-sharers in the village but the plaintiffs had a preferential right because they were more nearly related to the vendor. The claim was resisted on various grounds, one of which was that the plaintiffs Nos. 1 and 2 were not related to the vendor at all and, they having joined in the claim of Rahima who was related to the vendor, the claim must fail. Both the lower Courts dismissed the claim of the plaintiffs on the ground that Rahima, though having a preferential right, had associated with himself two persons whose rights were inferior to those of the vendees. Rahima alone has come up in second appeal before us and, accepting the finding against him as to the relationship of plaintiffs Nos. 1 and 2 to the vendor, contends that as he had not associated with himself strangers but co-sharers, a decree for pre-emption should be passed in his favour alone. On behalf of the vendees the contention is that the claim of Rahima together with his co-plaintiffs was rightly dismissed by the Courts below, inasmuch as Rahima had joined with him persons who were inferior in degree, according to the order of pre-emption given in the *wajib-ul-arz*, to the vendees.

We think that the position taken up by the appellant Rahima is untenable. The case of *Gupteshwar Ram* v. *Rate Krishna Ram* (1) is in point. In that case the vendee had joined with him a co-sharer in the purchase of the property sought to be pre-empted, but a co-sharer inferior in degree to the pre-emptor. On a suit by the pre-emptor the vendee pleaded that he and the pre-emptor had equal right to purchase the property as they stood, according to the order given in the *wajib-ul-arz*, in equal degree with regard to pre-emption. The pre-emptor replied that as the vendee had joined with him in the purchase of the property a co-sharer who had an inferior right to that of the pre emptor, therefore, the pre-emptor could enforce his claim against the vendee. The contention of the pre-emptor was allowed and his claim was decreed. In disposing of the appeal two learned Judges of this Court who heard it remarked as follows:—

"We also think that if we assume the custom of pre-emption to exist, a vendee, although having an equal right with the

(1) 15 Ind. Cas. 174; 34 A. 542; 10 A. L. J. 70.

plaintiff, loses his right when he brings in as a co-vendee a co-sharer having an inferior right. It is urged that the bringing in of a co-sharer, even though his right is inferior, is very different from introducting a stranger. It is admitted that the introduction of a stranger forfeits the right of the co-sharer against whom pre-emption is sought. We, however, can recognise no distinction in principle between the introduction of a stranger and the introduction of a person having an inferior right to the pre-emptor. If it were otherwise, pre-emption as between co-sharers could always be defeated if one co-sharer having an equal right could be induced to join in the purchase."

These remarks sufficiently dispose of the contention for Rahima, the appellant, in the present case. The appeal fails and is dismissed with costs

S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION
NO. 491 OF 1922.
February 2, 1923.

Present:—Mr. Dalal, A. J. C.

Musammat MAHESHA AND OTHERS—PLAINTIFFS—APPELLANTS—APPLICANTS
versus
RAMESHAR AND ANOTHER—DEFENDANTS RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code Act (V of 1908), ss. 151, 152—Appeal, decision of—Words "fails and is dismissed" used by mistake—Real intention to accept appeal—Clerical error—Duty of Court to correct.

Where the context of a judgment shows that the intention of the Judge was to decree an appeal but that by a mistake he used the words "fails and is dismissed," the Court is bound to correct such clerical error at any time it is asked to do so [p. 564, col. 1.]

Surta v. *Ganga*, 7 A. 875; A. W. N. (1885) 256; 4 Ind. Dec. (N. S.) 958, referred to.

Application against a decree of Mr. Ashworth, First Additional Judicial Commissioner, dated the 4th October 1922, upholding that of the Sub-Judge, Unao, dated the 20th January 1922.

Mr. *A. P. Sen*, for the Applicants.
Mr. *Haider Hussain*, for the Respondents.

ORDER.—This is an application under sections 151 and 152 of the Code of Civil Procedure. In the application reference is also made to O. XLVII, r. 1 (review), but it is admitted by the learned Counsel that if the matter is not one of a clerical error no question of a review will arise. In answer it was urged by the learned Counsel for the opposite party, (1) that there was no mistake or clerical error in the final order of this Court, (2) that judgment was pronounced after notice to the applicant's Counsel; so after so many months the applicants are not entitled to have an error corrected, and (3) that the Court has no jurisdiction to correct such an error as is alleged by the applicants under the provisions of sections 151 and 152, Civil Procedure Code.

I have carefully gone through the judgment of this Court. It was not pronounced by me but the reasoning of the judgment and the findings can be clearly understood. The plea of the applicants is that, on the findings the appeal ought to have been decreed and that it was only by a slip that it was dismissed. The suit of the applicants, who were plaintiffs in the litigation, was for a declaration that a certain deed of gift executed by a Hindu lady was not binding on them after the death of the lady who was their mother and that the deed was invalid so far as it transferred to the donee an absolute estate in Zemindari property. The suit was dismissed by the Trial Court on three grounds set out at the beginning of this Court's judgment. This Court then proceeded to examine every one of these three findings and disagreed with it. The findings on points Nos. 1 and 3 are clearly against the findings arrived at by the Trial Court. As regards finding on point No. 2, the learned Counsel for the opposite party pointed out that what this Court held was that the deed itself did not purport to grant absolute interest but transferred only life interest of the lady donor. On this finding it was open to this Court to dismiss the suit on the ground of want of a cause of action. This point, however, has been considered by this Court and the learned Judge held that there was sufficient cause of action under

section 42, Specific Relief Act. It is clear, therefore, that the intention of the Judge was to decree the appeal and it was by a mistake that the words "fails and is dismissed" were used.

I do not think that the applicants are prevented from obtaining an amendment of the judgment on the ground that they did not apply for such an amendment earlier than they did. A ruling of the Allahabad High Court, reported as *Surta* v *Ganga* (1), was quoted in support of the contention that the provisions of sections 151 and 152 did not apply to the present matter. That opinion was, however, given under section 206 of the old Code which was confined to the amendment of a decree. The provisions of the corresponding sections 151 and 152 of the current Code are much wider and I think that the Court is bound to correct a clerical error such as has taken place in the judgment of this Court.

I direct that the words "fails and is dismissed" in the judgment of this Court shall be cut out and in their place shall be substituted the words "is decreed." The decree shall be amended accordingly. No order is made as to costs of these proceedings.

S. D. *Application allowed.*

(1) 7 A. 875; A. W. N. (1885) 256; 4 Ind. Dec. (N. S.) 958.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1203 OF 1921.

January 11, 1923.

Present:—Mr. Justice Gokul Prasad.

KANHAIYA LAL—PLAINTIFF—APPELLANT

versus

Musammat GORA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—*Partition*—*Grandmother's share on partition between grandsons.*

A grandmother gets an equal share with her grandsons on partition between them. [p 565, col. 1.]

Sheo Dyal Tewaree v. *Judoonath Tewaree*, 9 W. R. 61 followed.

Sheo Narain v. *Janki Parshad*, 16 Ind. Cas. 88; 34 A. 505; 8 A. L. J. 749, distinguishe .

Radha Kishen Man v. *Lachhaman*, 3 A. 118; 2 Ind. Dec. (N. S.) 64, dissented from.

Second appeal against a decree of the Judge, Aligarh, dated the 15th March 1921.

Mr. *G. Banerji* for Mr. *P. L. Banerji* for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The question raised in this appeal is whether a grandmother gets a share in the family property on a partition between her grandsons. The facts are as follows: One Nain Sukh Das was the owner of certain property. He died leaving a widow, *Musammat* Gaura, and a son, Chunni Lal. The names of both the above persons were entered in the revenue papers on the property of the deceased. Chunni Lal died about 9 years ago. In the year 1920 there was some dispute between his two sons, Kanhaiya Lal, the present plaintiff, and Makhan Lal, the present defendant, about the partition of the family property The matter was referred to arbitration and under an award each of the above-mentioned two brothers was given half of the property. To this partition *Musammat* Gaura, the mother of Chunni Lal, was no party. After the award the present plaintiff wanted to have the name of *Musammat* Gaura expunged from the revenue papers but she objected successfully and hence the present suit for a declaration that he was the owner of half the property detailed in the plaint and *Musammat* Gaura has no interest in it. *Musammat* Gaura who was made a defendant pleaded that she was entitled to a share equal to that of her grandsons. The First Court came to the conclusion that on a partition between her grandsons *Musammat* Gaura was entitled to a share equal to that of the grandsons and decreed the claim of the plaintiff for 7/8ths of the property in dispute, dismissing it as to 1/8th which was the half share of *Musammat* Gaura in the property claimed by the plaintiff, the other half of her share being in the share of the other grandson, Makhan Lal. The learned Judge of the lower Appellate Court has agreed with this view of the law and confirmed the decree of the First Court except as to some formal amendment in the decree. The plaintiff comes here in second appeal, and the only point argued before me by his learned Vakil is that under the *Mitakshara* School of Hindu Law a grandmother gets no share on partition

amongst her grandsons. His learned Vakil relied on the case of *Sheo Narain* v. *Janki Parshad* (1), but that case was about the grandmother getting a share on partition between her own son and his sons, and is no authority for the proposition that a grandmother gets no share on partition between her grandsons. The only other case of this Court in which reference has been made to this matter is the case of *Radha Kishen Man* v. *Bachhaman* (2), and at page 122 the learned Judges say, " But the lower Court is wrong in giving the plaintiff's grand-mother a share on partition." No authority is cited and no reason is given, for this expression of opinion. The only text in the Sacred Books of the Hindus relating to this matter is the text of Vyasa which does recognise this right. It is referred to in the Full Bench case of *Sheo Narain* v. *Janki Parshad* (1), but as the point did not arise directly in the Full Bench case aforesaid the learned Judges did not express an opinion on this difficult question. Messrs West and Buhler in their Book on Hindu Law, 4th Edition, page 712, lay down the same proposition of law, so also does Mr Shyama Charan Sarkar in his Vyavastha Chandrika, Volume II, part 1, at page 356. The learned Judges of the Calcutta High Court in the case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (3), a case under the Benares School, laid down the same rule of law, namely that a grandmother gets an equal share with her grandsons on partition between them I am, therefore, of opinion that, having regard to Vyasa's text, the conclusion at which the Courts below have arrived is a right conclusion I therefore dismiss this appeal with costs.

S. D.

Appeal dismissed.

(1) 16 Ind. Cas. 88; 34 A. 505; 9 A. L. J. 749 (F. B.).
(2) 3 A. 118; 2 Ind. Dec. (N. S.) 64.
(3) 9 W. R. 61.

PATNA HIGH COURT.

CIVIL REVISION NO. 322 OF 1922.
January 11, 1923.
Present:—Mr. Justice Ross.

RAMESHWAR DASS-MALI RAM—PLAINTIFF—PETITIONER
versus
THE EAST INDIAN RAILWAY COMPANY, LTD.—DEFENDANT—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 30, 151—Suit against Railway for damages for short delivery—Limitation applicable—Commencement of limitation.

A short delivery of goods is equivalent to loss of the portion undelivered. Therefore, a suit against a Railway Company for damages for short delivery is governed by Art 30 of Sch. I to the Limitation Act, and time begins to run from the date when the short delivery was made.

Great Western Railway Company v *Wills*, (1917) A. C. 148; 86 L. J. K. B. 641; 116 L. T. 615, 61 S. J. 335; 33 T. L. R. 254, followed

Radha Sham Basak v. *Secretary of State for India*, 34 Ind. Cas. 130; 20 C. W. N. 790; 44 C 16; 23 C. L J. 547, distinguished.

Appeal from an order of the Subordinate Judge, Dhanbad, dated the 14th July 1922.

Messrs. *Janak Kishore* and *B. Prasad*, for the Petitioner.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Opposite Party

JUDGMENT.—This is an application by the plaintiff for revision of an order of the Small Cause Court Judge of Dhanbad who dismissed his suit against the East Indian Railway Company as being barred by time. It appears that 250 bags of flour were consigned to the North-Western Railway Company at Lyallpur on the 15th of October 1920 for delivery at Jharia, on the East Indian Railway Company's line. The consignment was delivered short by five bags and, on the 11th of February 1922, the plaintiff brought this suit alleging that the cause of action arose in November 1920 when the short delivery was made. A letter had been received from the Acting Divisional Traffic Manager, Howrah, which was dated the 7th of September 1921, informing the petitioner that the five bags received short were lost and regretting that all enquiries to trace them had been of no avail.

The question is one of limitation. The learned Vakil for the petitioner contends that the case is governed by Art. 115 of the Limitation Act, or, if by Art. 30, then the date when the loss occurred must be

proved by the Railway Company and, in this case, must be taken to be the date of the Company's letter, namely, the 7th of September 1921.

In support of the argument that Art. 115 applies, reference was made to the decision in *Radha Sham Basak* v. *Secretary of State for India* (1). But that was a case where the receipt of the consignment was denied and is, therefore, no authority in the present case. It is quite clear that the present case is governed either by Art. 30 or by Art. 31.

The learned Vakil for the defendant Company contends that this is a case of non-delivery, and that time will run from the date when the goods ought to have been delivered, and that date is fixed by the actual delivery of part of the consignment in November 1920. It was held, however, by the House of Lords in *Great Western Railway Company* v. *Wills* (2) that " non-delivery of a consignment means non-delivery of the consignment as a whole as contrasted with short delivery." This is a case of short delivery, which is equivalent to loss of the portion of the consignment undelivered, and the limitation is that prescribed in Art. 30. Then, the question is when this loss occurred. It seems to me evident that the loss occurred when the short delivery which constituted the loss was made, that is to say, in November 1920. The suit is, therefore, clearly out of time.

It was further argued that there had been an acknowledgment of liability in the letter from the Divisional Traffic Manager about the loss. Apart from the fact that the Divisional Traffic Manager has not been shown to be authorised to make any acknowledgment of liability, the letter itself so far from acknowledging liability expressly repudiates it.

The application is dismissed with costs. Hearing fee one gold *mohur*.

W. C. A. *Application dismissed.*

(1) 34 Ind. Cas. 130; 20 C. W. N. 790; 44 C 16; 23 C. L. J 547.
(2) (1917) A. C 148; 86 L. J. K. B 641; 116 L. T. 615; 61 S. J. 335; 33 T. L. R. 254.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 59 OF 1922.
December 9, 1922.
Present:—Mr. Batten, J. C.
NANA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
JOGILAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance—Blindness, congenital—Exclusion from inheritance.

Under the Hindu Law congenital and incurable blindness causes exclusion from inheritance, and this rule of law has not become obsolete.

Gujeshwar Kumar v. *Durga Prashad Singh*, 42 Ind. Cas. 849, 45 C. 17; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 34 M. L. J. 1; 20 Bom. L R 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 44 I. A. 229 (P. C.), *Muthusami Gurukkal* v. *Meenammal*, 55 Ind. Cas. 576; 43 M. 464; 38 M. L. J. 291; (1920) M. W. N. 253; 27 M. L. T. 329, *Bharmappa* v. *Ujjangauda*, 65 Ind. Cas. 216; 46 B. 455; 23 Bom. L. R. 1320; (1922) A. I. R. (B.) 173, *Callydoss* v. *Kissan Chunder Doss*, 11 W. R. (A. O. J.) 11, referred to.

Yellavajhula Surayya v. *Yellavajhula Subbamma*, 53 Ind. Cas. 498; 43 M. 41; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405, followed.

Appeal against a decree of the District Judge, Nimar, dated the 4th November 1921, in Civil Appeal No. 121 of 1921.

Messr. *M. Gupta*, and *P. C. Dutta*, for the Appellants.

Sir *B. K. Bose*, Messrs. *P. N. Rudr* and *V. Bose*, for Respondent No. 1.

JUDGMENT.—The sole question that arises in this case is, whether the plaintiff-appellant, Nana, son of Govind Gujar, is excluded from inheritance by reason of his being born blind and being incurably blind. In the plaint it was admitted that his blindness was congenital and the learned District Judge has found that he is incurable. This finding is not seriously contested in this Court, and, as the plaintiff is aged 50 and has not yet been cured, it may safely be presumed that his blindness is incurable. The learned Subordinate Judge, following the ruling of Sadasive Ayyar and Napier, JJ., in *Yellavajhula Surayya* v. *Yellavajhula Subbamma* (1), held that the rule of Hindu Law which excludes a person born blind from inheritance or from claiming a joint interest as co-owner in ancestral properties, has become obsolete.

(1) 53 Ind. Cas. 498; 43 M. 41; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405.

On appeal the learned District Judge has taken a different view. He says: "All the Madras ruling labours to show is, that there was the rule of disqualification, but it is now obsolete and should not be applied in these modern days. But a rule of law stands until it is repealed in some way, and in matters of inheritance the peoples of India have the assurance that their personal law will be respected and applied. And, furthermore, we have the authority of the highest Tribunal of law, the Privy Council, stating the law most clearly in *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (2). It may be urged that, as their Lordships found as a fact that the person then concerned was not born blind, their statement about the disqualification of one born blind is nothing more than *obiter dicta*. But their Lordships set out the main questions to be discussed in the judgment and then deliberately took up the legal question of disqualification before deciding the fact. If they had decided the fact first, they need then have only given the finding that there was no disqualification of a person who became blind after birth. But they deliberately chose to state the whole law on the matter, and I do not feel in a position to accept the Madras subsequent ruling that the rule accepted by the Privy Council has become obsolete, I think I am bound to accept the rule which the Privy Council says is the true one, and that includes the statement 'blindness, to cause exclusion from inheritance must be congenital.' If, therefore, the plaintiff in our case was born blind he must be held to be disqualified from inheriting and he acquired no interest in the property of his father or the rest of the family.

The learned Counsel for the appellant replies on the Madras ruling and says that this is a case of peculiar hardship which illustrates the correctness of the view taken therein. The main lines on which the learned Advocate for the respondents has argued the case are, that the Madras ruling is an exposition of what the learned Judges considered the law ought to be rather than of what the law is, and theirs is the sole authority for holding that the rule laid down by the texts has become obsolete, while, on the contrary, all recent commentators assume the rule to be still alive. The learned Advocate concedes that their Lordships of the Privy Council in the case cited by the District Judge do not actually decide that a man who is congenitally and incurably blind is still excluded from inheritance, but he argues, as does the District Judge, that their Lordships would not have been at the pains of discussing the question whether Bishambar was or was not born blind if they had considered that question superflous; moreover, their Lordships quote as the true rule a passage from Raikumar Sarvadhikari's Hindu Law of Inheritance that blindness, to cause exclusion from inheritance, must be congenital.

It is useless to labour the question as to what the law is as laid down by the texts, for Sadasiva Ayyar, J., has made that very clear, while saying that the law has become obsolete. I have been unable to find any recent decision that congenital blindness necessarily excludes from inheritance. The observations in *Muthusami Gurukkal* v. *Meenammal* (3) in which *Yellavajhula Surayya* v. *Yellavajhula Subbamma* (1) is referred to, relates to insanity, a state in which considerations arise different from those in blindness. In *Bharmappa* v. *Ujjangauda* (4) the Bombay High Court, while referring to *Yellavajhula Surayya* v. *Yellavajhula Subbamma* (1) declind to treat as obsolete the rule excluding from inheritance a man affected by congenital and incurable dumbness. In 1869, in *Callydoss* v. *Kissan Chunder Doss* (5) (Appeals from Original Jurisdiction) Sir Barnes Peacock and other Judges in a Full Bench treated the law of exclusion of a man congenitally blind as a living law.

With due respect, I am unable to hold that a rule, which undoubtedly is part of the Hindu Law, has become obsolete. In the last Edition of Mayne's Hindu Law the Editor refers to the Madras decision and says: "It is submitted that this decision is unwarranted by the state of the authorities and usurps a function which can only be discharged by the Legislature."

With these observations I am in agreement.

(2) 42 Ind. Cas. 849; 45 C. 17; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 34 M. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 44 I. A. 229 (P. C.).

(3) 55 Ind. Cas. 576; 43 M. 464; 38 M. L. J. 291; (1920) M. W. N 253; 27 M. L. T. 329.

(4) 65 Ind. Cas. 216; 46 B. 455; 23 Bom. L. R. 1320; (1922) A. I. R. (B.) 173.

(5) 11 W. R. (A. O. J.) 11.

CHUHA MAL *v.* RAHIM BAKHSH.

The appeal, therefore, fails, and the appellant must pay his own costs and those of the respondents. The learned Counsel for the appellant suggests that as the plaintiff is entitled to maintenance and to suitable residence in the family house, the suit should not be dismissed entirely. The learned Advocate for the respondents agrees that these questions should be decided in this suit and says that his clients are willing that the maintenance should be made a charge on the family estate. I, therefore, send back the case to the Court of the Subordinate Judge who will decide what maintenance should be allowed to the plaintiff, such maintenance to be charge on the family estate, and what residence in the family house should be allotted to him. As these claims were not made by the plaintiff in his pleadings, the parties will bear their own costs of the further proceedings in the Court of first instance.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 73 OF 1922.

November 27, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Fforde.

CHUHA MAL AND ANOTHER—PLANITIFFS—APPELLANTS

versus

Haji RAHIM BAKHSH—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 65 (c)—Secondary evidence of contents of document—Execution of original, proof of Discretion of Court—Appellate Court, interference by.

Under section 65 (*c*) of the Evidence Act secondary evidence of the contents of a document may be given when the party offering that evidence cannot, for any reason not arising from his own default or neglect, produce the original in reasonable time. [p. 569, col. 1.]

The question of the admissibility of secondary evidence is a point properly to be decided by the Trial Court, and is treated to be depending very much on its discretion. The conclusion of the Trial Court on this point should not be overruled by the Court of Appeal except on a clear cas of miscarriage of justice. [p. 569, col. 1.]

Harripria Debi v. *Rukmini Debi*, 19 C. 438; 19 I. A. 79; 6 Sar. P. C. J. 177; 9 Ind. Dec. (N. S.) 736, (P. C.) relied upon.

A party producing secondary evidence of a document is not relieved from the duty of proving the execution of the original. [p. 569, col. 1.]

Appeal under section 10 of the Letters Patent from a decree of Mr. Justice Scott-Smith, passed in Civil Appeal Case No. 322 of 1921 on 21st February 1922, reversing that of the District Judge, Delhi, dated the 3rd November 1920.

Mr. *C. H. Carden Noad* and Lala *Harbhajan Das*, for the Appellants.

Mr. *M. Obed Ullah* and Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This appeal arises out of an action for the possession of a plot of land which the plaintiffs claimed to be their property. Their claim was resisted by the defendant, Rahim Bakhsh, but both the Trial Court and the District Judge on appeal came to the conclusion that the plaintiffs had proved their title. On second appeal Mr. Justice Scott-Smith held that the plaintiffs had not proved the document relied upon by the District Judge in support of his finding and that there being no other evidence in support of the title, their suit should be dismissed.

The plaintiffs have preferred this appeal under clause 10 of the Letters Patent, and it is contended on their behalf that the document P.5 has been wrongly excluded from consideration. Now, there can be no doubt that he plaintiff's ancestor, Dhani Ram, purcha ed the plots of lands situated at Sarai Rohilla Khan, and he question for consideration wa whether the land in dispute formed part of those plots. In order to e tablish their contention the plaintiffs produced a document P.5 which is a copy of a sale-deed executed on the 17th April 1917 by one Matu in favour of Abdul Samad, Abdullah, and Abdul Hamid, by which a building on a plot of land was sold, and in the boundaries given in the deed it is shown that the sites to the east and west of the plot, upon which the structure stood, belonged to the ancestor of the plaintiffs. Now, this document has been rejected on two grounds:—

(1) that the plaintiffs should have produced the original deed, and that secondary evidence thereof was not admissible under the law; and

(2) that they have failed to prove the execution of the deed of which P.5 is a copy.

As regards the first objection, the learned Counsel for the plaintiffs argues

nat Abdul Samad, one of the vendees, who is a defendant in the case, was called upon to produce the original document, but neither he nor his co-vendees produced it in reasonable time, and the Trial Court consequently passed an order allowing secondary evidence of the contents of the deed. The learned Counsel relies upon clause (*c*) of section 65 of the Indian Evidence Act, and contends that the conclusion of the Trial Court on the question of the admissibility of secondary evidence could not be disturbed by the Appellate Court, more especially when no objection to that effect was taken in the Court of the District Judge. There can be no doubt that secondary evidence of a document may be given when the party offering that evidence cannot for any reason not arising from his own default or neglect, produce the original in reasonable time; and it seems that the Trial Court was of the opinion that this rule was applicable to the circumstances of the present case. The matter depended upon the discretion of that Court; and, as pointed out by their Lordships of the Privy Council in *Harripria Debi* v. *Rukmini Debi* (1), the question of the admissibility of secondary evidence is a point proper to be decided by the Judge of first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage. We are, therefore, of opinion that the first objection raised to the admissibility of P.5 cannot be sustained.

There is, however, no evidence to prove the execution of the original sale-deed of of which P.5 is a copy. It is urged that the plaintiff could not prove the execution of a document which was not produced before the Court, but we do not think that the difficulty, if any, should relieve the party from the duty which the law casts upon him. The scribe, to whose evidence our attention has been invited, only states that the original deed might have been executed by Matu, but that ambiguous statement cannot be treated as proof of the execution of the document. Mr. Noad, however, urges that, having regard to the fact that this objection was not raised in the first Appellate Court, his clients should have been given an opportunity to produce further evidence to prove the execution. This is a matter which is purely in the discretion of that Court, and, as we are going to remand the case, we leave it to the District Judge to decide whether in the circumstances further evidence should be taken for the purpose mentioned by the learned Counsel.

The learned Counsel for the appellants also contends that, apart from the document P.5, there was other evidence in support of the District Judge's finding on the question of ownership, and that that finding being one of fact could not be disturbed in second appeal. In this connection, our attention has been invited to the oral evidence of certain witnesses including the defendants' witness, Muhammad Ismail, which, according to the learned Counsel, proves the plaintiffs' title to the land. Now, this evidence, though mentioned by the Trial Court in its judgment, was not specifically referred to by the learned District Judge. It is true that, as he was concurring in the finding of the Court of first instance, it was not necessary for him to make an express mention of the various pieces of evidence in support of his conclusion; and it may be that when he says that "an examination of the evidence leaves no doubt," he had about the plaintiffs' title also the oral evidence in view. We are, however, unable to say whether he would have considered the oral evidence alone sufficient for establishing the title. The question is one of fact, and the conclusion of the District Judge one way or the other would not be open to challenge in the Court of Second Appeal. In these circumstances, we consider that the District Judge, who is the judge of fact, must adjudicate upon this question.

We accordingly accept the appeal and, setting aside the judgment of the Single Judge as well as that of the District Judge, we remit the case to the latter for re-decision with reference to the foregoing remarks. The costs shall abide the event.

Z. K. *Appeal accepted.*

(1) 19 C. 438; 19 I. A. 70; 6 Sar. P. C. J. 177; 9 Ind. Dec. (N. S.) 736 (P. C.).

RAM LOCHAN BAID *v.* KAMAKHYA NARIN SINGH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 52 of 1920.

January 11, 1923.

Present:—Mr. Justice Das and Justice Sir John Bucknill, KT.

RAM LOCHAN BAID AND ANOTHER—DEFENDANS—APPELLANTS

versus

Kumar KAMAKHYA NARAIN SINGH—PLAINTIFF—RESPONDENT.

Landlord and tenant—Tenancy by sufferance—Limitation, operation of—Non-payment of rent, effect of—Assent of landlord—Tenancy from year to year—Transfer of Property Act (IV of 1882), s. 116, application of.

A tenancy by sufferance does not by itself make the possession of the holder rightful, so as to prevent limitation from running; but where the landlord or the person entitled to resume the tenancy does any thing to indicate his assent to the continuance of the tenancy that would be sufficient to convert the tenancy by sufferance into a tenancy from year to year. [p. 571, col. 1.]

Ram Chandra Singh v. *Bhikambar Singh*, 6 Ind. Cas. 339; 37 C. 674, referred to.

The mere non-payment of rent by a tenant is not equivalent to an assertion of a hostile title to the knowledge of the landlord. [p. 572, col. 1.]

When the successors-in-interest of a lessee hold over after the determination of the lease, they can only be regarded as tenants by sufferance; but the acceptance by the landlord of rent from them, is an indication of his assent to the continuance of the tenancy and is sufficient to convert the tenancy by sufferance into a tenancy from year to year. [p. 571, col. 1.]

The effect of holding over upon payment of rent to the landlord is that the lessee must, under section 116 of the Transfer of Property Act, be regarded as a tenant from year to year; such a tenancy is determinable only by six months' notice expiring with the end of a year of the tenancy, and limitation for a suit to eject the tenant begins to run on the expiry of the notice to quit served by the landlord on the tenant. [p. 571, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Hazaribagh, dated the 17th January 1920.

Mr. *B. C. De*, for the Appellants.

The Assistant Government Advocate and Mr. *S. M. Mullick*, for the Respondent.

JUDGMENT.

Das, J.—On the 11th May 1866 Maharaja Ram Nath Singh, the predecessor-in-title of the plaintiff, granted the village Goniatu in *mokarrari istamrari* lease to Hiraman Baid and Sambhu Baid. The defendant No. 1 is the grandson of Hiraman Baid and defendant No. 2 is the grandson of Sambhu Baid. It is not disputed before us that the lease did not confer on the grantees a permanent interest in the land demised. It is conceded that it created in their favour a lease for life determinable on the death of the survivor of the grantees. In 1875 Hiraman Baid, the survivor of the grantees, died leaving behind him a son named Doman. Sambhu had died previously leaving a son Chattur. Although the lease came to an end in 1875 on the death of the survivor of the grantees, Doman and Chattur with their sons continued to be in possession of the demised premises up to 1899 upon payment of rent by them to the landlord. It is conceded that since 1899 no rent has been paid either by Doman and Chattur or by the defendants to the landlord. The landlord served a notice to quit upon the defendants first in September 1909 and then in September 1917 and on the 9th January 1919 commenced the suit, out of which this appeal arises, for the ejectment of the defendants from the demised land. The suit was contested mainly on the ground that it was barred by limitation; but it appears that it was also urged on behalf of the defendants that they had acquired a title to the disputed land by adverse possession. The pleas put forward on behalf of the defendants did not find favour with the learned Subordinate Judge and he has given the plaintiff a decree substantialy as claimed by him.

In my opinion, the decision of the learned Subordinate Judge is right and ought to be affirmed. In the course of a very able argument Mr. B. C. De contended before us that the lease having come to an end in 1875, the possession of the defendants was that of trespassers and that the suit is clearly barred by limitation under Art. 139 of the Limitation Act. Now, there is no dispute that Art. 139 of the Limitation Act does apply; but the question still remains, when the tenancy ought to be considered as having been determined. Mr. B. C. De argues that, subsequent to 1875, the defendants or their predecessors-in-title could only be regarded as tenants by sufferance and that as tenants by sufferance are only in by the laches of the owner, so there is no privity

between them, and that the holding over by the tenants was wrongful, and that the limitation provided by Art. 139 commenced to run against the landlord from the time when the fixed lease expired. The proposition in the form in which it is put by Mr. De may be accepted as well-founded, and there is abundant authority for the view that a tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running. But the proposition is subject to one important qualification and that is that if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. See *Ram Chandra Singh* v. *Bhikambar Singh* (1). Now on the admitted facts of the case the landlord accepted rent from Doman and Chattur and after the death of Doman from Chattur up to the year 1899. It follows that the landlord did indicate his assent to the continuance of the tenancy and, in my opinion, the receipt of rent by the landlord was sufficient to convert the tenancy by sufferance into a tenancy from year to year.

It was then contended by Mr. De that there was, at the utmost, a tenancy in favour of Chattur upto the end of the year 1899 and that Doman and Chattur were not tenants from year to year but that they were tenants for the years for which they paid rent to the landlord The argument of Mr. De is based upon the terms of section 107 of the Transfer of Property Act which provides that a lease of immoveable property from year to year can be made only by a registered instrument. The question, however, is not whether a lease from year to year was created in favour of the predecessors-in-title of the defendants by the landlord, but whether there was by implication of law a lease from year to year in favour of the predecessors-in-title of the defendants. Let it be assumed that, upon the expiry of the lease in 1875, there was no valid lease in favour of the defendants or of their predecessors-in-title, and that the position of Doman and Chattur and after the death of Doman, of Chattur, was not higher than that of a lessee for one year who held over at the end of the last year for which he paid rent. His rights must still be tested by a reference to the provisions of section 116 of the Transfer of Property Act. Now, section 116 of the Transfer of Property Act provides that if a lessee remains in possession of the demised property after the determination of the lease and the lessor or his legal representative accepts rent from the lessee or otherwise assents to his continuing in possession, the lease, in the absence of agreement to the contrary, is renewed from year to year or from month to month according to the purpose for which the property is leased as specified in section 106. The question, then is, not whether there is a lease from year to year under section 107, Transfer of Property Act, but what is the effect of holding over under section 116 of the Transfer of Property Act. There is no doubt, in my opinion, that the effect of holding over upon payment of rent to the landlord is this that we must recognize the defendants as coming within the provisions of section 116 of the Transfer of Property Act. That being so, they must be regarded as tenants from year to year; and such a tenancy is determinable only by six months' notice expiring with the end of a year of the tenancy. In my opinion limitation began to run on the expiry of the notice to quit which was served by the plaintiff upon the defendants.

It is the case of the defendants that the notice to quit was served on them sometime in 1904, and that even on the hypothesis that the defendants are tenants from year to year the suit is barred by limitation. The learned Subordinate Judge has, however, come to the conclusion that there was no notice at all in 1904, but that the first notice was in September 1909. It is quite true that the defendants have produced a notice which bears date the 9th September 1904, but it is worthy of note that the defendants have not produced the Hindi notice corresponding to the English portion nor have they produced the notice which was served upon them in 1909. The plaintiff's case is that the notice produced by the defendants was served on them in 1909 and that the date in the

(1) 6 Ind. Cas. 339; 37 C. 674.

notice was by mistake written as 1904 instead of 1909. The learned Subordinate Judge has given good reasons for accepting the explanation offered by the plaintiff and I see no reason whatever to differ from him on this point. If the notice was in fact served upon the defendants in September 1909, then there is no question that the suit is well within time.

The question as to whether the defendants acquired a title by adverse possession must also be decided against the defendants. The position of the defendants was that of tenants and, as the learned Subordinate Judge has pointed out, mere non-payment of rent is not equivalent to an assertion of a hostile title to the knowledge of the landlord.

I would dismiss this appeal with costs.

Bucknill, J.—I agree.

Appeal dismissed.

W. C. A.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 570 OF 1922.

December 5, 1922.

Present:—Mr. Justice Harrison.

Musammat KHUSHAL DEVI—2ND PARTY—APPELLANT

versus

SUKH DIAL—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34 (a), 39 (b), (c)—Appointment of guardian—Failure to give security.

An order appointing a guardian, in the sense that it can be appealed against, is a complete order as soon as it is made, but it does not become operative till security is put in by the person who is appointed a guardian. So long as the security is not put in the guardian is debarred from acting as such.

A person who is appointed a guardian is liable to be removed under clause (*b*) or clause (*c*) of section 39 of the Guardians and Wards Act if he fails to furnish security.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 24th January 1922.

Mr. *Des Raj Sawhny*, for the Appellant.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—The facts of this case are that on the 1st August 1914 one Sahib Dayal was appointed guardian of the person and property of three minors and in the same order he was directed to give ten thousand rupees security. This he never did, and on the 11th December 1914 he said definitely that he could not do so. On the 17th December 1915 Major Frizelle, District Judge, passed an order which, in my opinion, is tantamount to removal of the guardian under section 39. It recited the fact that no security had been given and said that anybody who wished to be appointed guardian could now apply. This order was interpreted as an order of removal on the 13th October 1920 by *Sheikh* Rahim Bakhsh, Senior Subordinate Judge at the time. It is a fact which appears to me to be wholly immaterial that *Lala* Maya Ram in interpreting it in 1917 was of opinion that Sahib Dayal has not been removed. Now, on the 28th August 1921, or more than seven years after the original order, Sahib Dayal applies to the Senior Subordinate Judge to be allowed to put in the security and to be treated as the guardian, the principal minor having in the meatime reached the age of 18. The Senior Subordinate Judge allowed the application and ordered a certificate of guardianship to be given him and directed that he should produce the security at once. Against that order this appeal is lodged.

Counsel has put before me the conflicting views of the Madras and Bombay High Courts as to whether an order of appointment is complete and effective before the security has been lodged or is to be treated as a conditional order which will become absolute after and when that security is lodged. I do not think it is necessary to go into this question beyond saying that the order in the sense that it can be appealed against is, in my opinion, a complete order but it does not become operative until the security is put in. Inasmuch as the person appointed definitely stated that he was not in a position to give security and did not attempt to do so, I read the order of Major Frizelle as tantamount to an order of removal under section 39 on the ground that the guardian had continuously failed to perform the duties

of his trust and had contumaciously disregarded the order of the Court. I think the view taken by *Sheikh* Rahim Bakhsh is perfectly correct. Finding, therefore, that the guardian appointed has been removed I hold that there is no guardian at present though there has been one in the past. This guardian was debarred from functioning until several conditions were fulfilled, and he did not, as matter of fact, act as such.

I, therefore, accept the appeal and set aside the order allowing security to be lodged. Costs of the appellant will be paid by the respondent.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 9 OF 1921.

January 11, 1923.

Present:—Mr. Justice Ross.

HARNARAIN PANDEY—PLAINTIFF—APPELLANT

versus

NANDKESWAR PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Decree ex parte—*Service of summons—Presumption.*

No legal decree can be passed *ex parte* without the Court being satisfied of the due service of the summons, but where there is nothing to indicate that the Court which tried the suit had not satisfied itself of the service of summons, it must be presumed that the Court was so satisfied. [p. 574, col. 1.]

Ram Lochun Soor v. *Nittya Kalee Debia*, 12 W. R. 210 at p. 211, referred to.

Appeal from a decision of the Additional Subordinate Judge, Saran, dated the 28th September 1920, affirming a decision of the Munsif, Siwan, dated the 26th August 1919.

Messrs. *Manohar Lal* and *S. K. Mitter*, for the Appellant.

Mr. *Hareswar Pd. Sinha*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decree of the Additional Subordinate Judge of Saran affirming the decision of the Munsif of Siwan, dismissing the plaintiff's suit. The subject matter of this litigation is a plot of land measuring 4 *bighas* 14 *kathas* and 2 *dhurs*. The plaintiff and the three defendants are brothers. The plaintiff alleges that they separated long ago and that after the separation he acquired this property now in suit; that during the previous Survey operations the land was recorded under the names of all the brothers jointly whereupon the plaintiff brought a suit for declaration of his title and got a decree on the 16th of December 1909; notwithstanding the decree, the land has again been entered in the names of all the brothers jointly in the recent Settlement proceedings and, consequently, the plaintiff has brought this suit for confirmation of his possession; or, if he be considered to have been dispossessed, then for recovery of possession.

The defence was, that the defendants and the plaintiff were separate in mess only but joint in business. With regard to the previous suit all that the defendant No. 1, who was the contesting defendant and is now the respondent, said was that he had no knowledge of the suit and received no summons, that the defendants Nos. 2 and 3 were in concert with the plaintiff, and that if they had done any act in concurrence with each other it could not be injurious to the defendant.

The Munsif in dealing with that previous litigation referred to the evidence of the service of summons on the defendant and discovered certain discrepancies in it. At the end of his judgment he said that, "the defendant No. 1 is not bound by the *ex parte* decree set up by the plaintiff." The learned Subordinate Judge in dealing with the same question says that the plaintiff obtained an *ex parte* decree but probably without the knowledge of defendant No. 1. He then refers to the evidence of the service of summons and concludes that, "the *ex parte* decree was obtained fraudulently behind his back" and it was never put into execution; it was, therefore, of no consequence and could not bind the defendant No 1.

The main ground taken in the present appeal is that, as the title of the plaintiff was declared by the decree of 1909, and that decree has not been impugned on the ground of fraud, effect must be given to it and the present appeal must be decreed. The learned Vakil for the respondent says that, in paragraph 5 of the written statement, fraud has been alleged and the Subordinate Judge has found fraud. Now, paragraph 5 of the written statement, in my opinion, does not amount to a proper pleading of the fraud.

The main allegation is that the defendant did not receive summons. He also alleges that the defendants Nos. 2 and 3 are in concert with the plaintiff, evidently meaning in the present litigation. The written statement then says: "If they had done any such act in concurrence with each other it cannot be injurious to the defendant." This is not even an allegation of fraud. The evidence discussed by the Subordinate Judge is only the evidence of the service of summons. The finding is non-service; but that is no evidence of fraud and the dogmatic statement that "the *ex parte* decree was obtained fraudulently" does not, to my mind, amount to a proper finding that the decree has no effect because of fraud.

It was contended on behalf of the respondents, on the authority of *Ram Lochun Soor* v. *Nittya Kalee Debia* (1), that no legal decree can be passed *ex parte* without the Court being satisfied of the due service of the summons. There is no doubt about the proposition; but in the present case what we have is, that the Court in the present litigation is not satisfied that the summons was properly served in the suit in which the *ex parte* decree was passed; but there is nothing to indicate that the Court which tried the suit of 1909 had not satisfied itself of the service of summons and it must be presumed that the Court was so satisfied before the decree was made. In my opinion the decree of 1909 concludes the matter.

The appeal must be decreed with costs, the decrees of the Courts below set aside and the plaintiff's suit decreed with costs throughout.

W. C. A. *Suit decreed.*

(1) 12 W. R. 210 at p. 211.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 318 OF 1919.

November 21, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

LACHHMI CHAND—PLAINTIFF—APPELLANT

versus

Musammat ANANDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Bequest, powers of—Will by one or more members of joint family—Family settlement.

A member of a joint Hindu family, if he is the absolute owner of the property, whether ancestral or self-acquired, can bequeath it by Will. Similarly, two or more Hindus, who own between themselves all the co-parcenary property, are competent to make a joint Will. [p. 576, col. 1.]

Nagalutchmee Ummal v. *Gopoo Nadaraja Chetty*, 6 M. I. A. 309; 1 Sar. P. C. J. 543; 19 E. R. 116, *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241, *Vallinayagam Pillai* v. *Pachche*, 1 M. H. C. R. 326, *Jotendromohun Tagore* v. *Ganendromohun Tagore*, 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P.C.); *Indar Sahai* v. *Kunwar Shiam Bahadur*, 17 Ind. Cas. 760; 17 C. W. N. 509; 13 M. L. T. 156; (1913) M. W. N. 122; 17 C. L. J. 299; 15 Bom. L. R. 418; 25 M. L. J. 57 (P. C.), *Lakshman Dada Naik* v *Ramchandra Dada Naik*, 5 B. 48 at. pp. 61, 62; 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R 320; 3 Ind. Dec. (N. S.) 34 (P.C.), *Bai Motivahu* v. *Bai Mamubai*, 24 I. A. 93; 21 B. 709; 1 C. W. N. 366; 7 Sar. P. C. J. 140; 11 Ind. Dec. (N. S.); 477 (P.C.) and *Balgobind Das* v. *Narain Lal*, 15 A. 339; 20 I. A. 116; 6 Sar. P. C. J. 313; 17 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 934 (P. C.), referred to.

Where two joint Hindu brothers having no male issue and owning between themselves the whole of the co-parcenary property execute a document which provides that in the event of one party dying without any male issue, the name of his widow shall be entered in the public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever, the document is a joint Will valid under the Law. The document, besides, constitutes a valid family settlement as it embodies a mutual bargain supported by legal consideration whereby each party gives up the possibility of his surviving his brother, with the consequential financial advantage in that case, in consideration of obtaining for his wife a far more assured monetary position than she would otherwise have had as the widow of a deceased Hindu member of a joint family. [p. 575, col. 2; p. 577, col. 1.]

First appeal from the decision of the Second Additional Subordinate Judge, Meerut, dated the 18th of July 1919.

Messrs. *B.E. O'Conor* and *Ram Nama Prasad*, for the Appellant.

Dr. *S.M. Sulaiman*, for the Respondents.

LACHHMI CHAND *v.* ANANDI.

JUDGMENT.

Mears, C. J.—On June 5, 1915, two brothers, by name Baldeo Sahai and Lakshmi Chand, Bohra Brahmans, were the owners in possession of the whole joint family property. Each had a wife, each had daughters, neither had a son. Baldeo Sahai was ill, and on June 5, 1915, the two brothers executed a document, on which this appeal is based. If on its true construction it is valid by Hindu Law, either as a Will or as a family settlement, then it is agreed that the claim of Lakshmi Chand, brought as it was against the widow of Baldeo Sahai, must fail.

In the lower Court Lakshmi Chand contended that the document had no legal validity, because on the death of Baldeo Sahai (which occurred on June 10, 1915) he, Lakshmi Chand, became thereby the owner of the entire property. *Musammat* Anandi resisted the claim on the ground that she was in possession of the property in suit by virtue of the document of June 5, 1915. On her behalf it is said that the document, whether legal as a Will or not, could not be impeached, because it had been executed by Lakshmi Chand to avert a partition upon which Baldeo Sahai had determined a few months previously; and some evidence of a rather shadowy character was given in support of this suggestion. A Pleader's clerk testified to procuring the *khewats* of upwards of 30 villages for the purpose of filing them with the application for partition. Lakshmi Chand agrees that those *khewats* were obtained, and alleges that the reason was not because of any intended partition but because other Zemindars had got like documents under the apprehension that either as the direct or indirect result of the War the buildings and records might be destroyed. We have remarked upon the absence of the evidence of Mr. Tirbeni Sahai, the Pleader, who must certainly have known about the matter, and as he has not been called we are inclined to look with some suspicion on the bare statement of his clerk as to the object with which the *khewats* were obtained. We are, therefore, not prepared to hold that there was a bargain between the brothers that if Baldeo Sahai would not proceed with the partition, Lakshmi Chand would execute a document in the terms of the one before us.

Counsel for the respondent has urged that the document in question is a joint Will and that the brothers were competent to make it. It has also been put forward that each brother was apprehensive as to the financial future of his wife in the event of his predeceasing her, and that each wished to secure for his wife (in the event of her becoming a widow) a more certain and generous provision than she would have as the ordinary widow of a deceased member of a joint Hindu family. To secure that object, each gave up his expectancy of outliving the other, with its consequential financial benefit, in consideration of the assured position which the widow of either would obtain under the document. We are of opinion that the respondent is right on both these contentions.

The document sets out that Baldeo Sahai and Lakshmi Chand are full brothers and members of a joint Hindu family, that they have no male issue but each has a wife and female issue, and they expressly state that this document is being executed in order to avoid future disputes, and they then proceed to make the following "declaration which shall be binding on ourselves and our representatives, that in the event of one party dying without any male issue, the name of his widow shall be entered in the public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever. They then provided that only in the event of both the parties dying without male issue, should the daughters or their male issue be entitled to the estate of their father, and they made other provisions for the devolution of the estate In clause 7 they agree that the document shall cease to be binding if at any time in their joint lines they divide the estate by mutual agreement, and they

provide that if either of them should subsequently have male issue, that male issue should become the owner of the entire estate. A later clause negatives any suggestion that the document was intended to effect a partition, negatives the right of the widow of the deceased party to sue for partition, and gives her what we understand to be one-half share of the profits, and the agreement concludes by referring to it as a Will —" We, therefore, execute this agreement by way of a Will in order that it may serve as evidence."

The appellant contends that this document is a Will and has urged upon us that a member of a joint Hindu family cannot make a Will. The question, however, is whether Baldeo Sahai and Lakshmi Chand, who between them owned all the co-parcenary property, could execute jointly a document of this character which would in law take effect on the death of the first of them.

Cases were cited in argument on both sides and we think that the true result of the authorities at the present day is, that if a Hindu is the absolute owner of the property, whether ancestral or self-acquired, he can bequeath it by Will, and in principle we are unable to see any objection to the same power being accorded to two or more Hindus, provided they together have the entire ownership of the whole of the co-parcenary property. In the case of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1) it was held that in Madras a Hindu who was in possession of property without male issue, kinsman or co-parcener, could dispose of his property by Will. The question was regarded as one of considerable importance and the Civil Judge laid the facts before the Pundits of the Sadar Dewani Adaulat at Madras. They gave an answer affirming the power of the Hindu to make a disposition of his property in the circumstances before them, and the Judge having pronounced an opinion in favour of the Will, the matter came before the Privy Council. They stated:—"The strictness of the ancient law had long since been relaxed, and throughout Bengal a man who is the absolute owner of the property may now dispose of it by Will as he pleases, whether it be ancestral or not .....Even in Madras it is settled that a Will of property, not ancestral, may be good; a decision to this effect has been recognized and acted upon by the Judicial Committee, and, indeed, the rule of law to that extent is not disputed in this case."

In 1867 the Privy Council laid down, in the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (2), that " Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*. "

A similar question came before the Privy Council a few years later and is reported in *Vallinayagam Pillai* v. *Pachche* (3). A reference to pages 336 to 338 shows that the Privy Council regarded the power of disposal by Will of a Hindu as settled, at all events to the extent to which a gift or other disposal by act *inter vivos* would have the force of law.

In the case of *Jotendromohun Tagore* v. *Ganendromohun Tagore* (4) their Lordships of the Privy Council at page 366 said as follows:—" As to gifts by way of Will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice, in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the assumption that gifts by Will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. " Their Lordships at page 367 lay down certain limitations as to the persons capable of taking, and it is to be noticed in this case under appeal that the learned Subordinate Judge gave a decision affecting on the case, as far as it concerned *Musammat* Anandi, who was, of course, alive at the date of the death of the testator.

(1) 6 M. I. A. 309; 1 Sar. P. C. J. 543; 19 E. R. 116.

(2) 12 M. I. A. 1; 9 W. R. 15 (P. C); 2 Suth P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

(3) 1 M. H. C. R. 326.

(4) 18 W. R. 359; 9 B. L. R. 377 (P. C.); 1 A Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J 8. (P. C.).

In the case of *Indar Sahai* v. *Kunwar Shiam Bahadur* (5) it will be noticed that their Lordships of the Privy Council at page 512, when dealing with what was a question of fact in that case, as to whether or not the members of the joint family had consented to the Will of the testator, assumed that the Will would have been valid had consent been satisfactorily proved. Other cases which might usefully be referred to are *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6), *Bai Motivahu* v. *Bai Mamubai* (7) and *Balgobind Das* v. *Narain Lal* (8).

We are, therefore of opinion that the respondent is right in claiming that the document in suit is a Will, and is a joint one, which was legally competent for Baldeo Sahai and Lakshmi Chand to make.

Quite apart from this consideration, we are, as we have already said, also of opinion that the contention is well-founded that the document embodied a mutual bargain, supported by legal consideration. Each party gave up the possibility of his surviving his brother, with the consequential financial advantage in that case, in consideration of obtaining for his wife a far more assured monetary position than she would otherwise have had as the widow of a deceased Hindu member of a joint family.

We are, therefore, of opinion that the decision of the learned Subordinate Judge was right. We dismiss the appeal with costs and fees on the higher scale.

Banerji, J.—I have had the advantage of reading the judgment of the learned Chief Justice and fully agree with it.

By the Court.—The order of the Court is that the appeal is dismissed with costs including in this Court-fees on the higher scale.

S. D. *Appeal dismissed.*

(5) 17 Ind. Cas. 760; 17 C. W. N. 509; 13 M. L. T 156; (1913) M. W. N. 122; 17 C. L. J. 299; 15 Bom. L. R. 418; 25 M. L. J. 57 (P. C.).

(6) 5 B. 48 at pp 61, 62; 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L.R. 217; 4 Ind. Jur. 472; 7 C. L.R. 320; 3 Ind. Dec. (N. S.) 34 (P. C.).

(7) 24 I. A. 93; 21 B. 709; 1 C. W. N. 366; 7 Sar. P. C. J. 140; 11 Ind. Dec. (N. S.) 477; (P. C.).

(8) 15 A. 339; 20 I. A. 116; 6 Sar P. C. J. 313; 17 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 934 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 509 OF 1922.

December 5, 1922.

Present:—Mr. Justice Broadway.

SRI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MATWALA RAM, *alias* SUDHU RAM, AND OTHERS—PLAINTIFFS AND WAZIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134, applicability of—Mortgage—Transferee with notice, position of.

A transferee from a mortgagee who claims to be the owner of the property, must, in order to avail himself of Art. 134 of Schedule I to the Limitation Act, show that he neither had knowledge nor reason to believe that his transferor's title in the property transferred was not a full proprietary one. If it can be shown that a transferee from a mortgagee knew that the title of his transferor was not free from doubt and such transferee took no steps to clear up that doubt, Art. 134 would not apply. [p. 580, col. 2; p. 581, col 1]

(Case-law discussed).

Second appeal from a decree of the District Judge, Jhang at Sargodha, dated the 28th November 1921 modifying that of the Subordinate Judge, First Class, Jhang, dated the 24th March 1921.

Lala *Hargopal*, for Dr. *G. C. Narang*, for the Appellants.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—These are four second appeals arising out of two suits for redemption of certain property. The appellants are the defendants in both the said suits, Sri Ram, referred to as defendant No. 2, in the judgment of the lower Appellate Court, being the appellant in Appeals Nos. 509 and 510 of 1922, and Wazir Chand and the other defendants being the appellants in Appeals Nos. 724 and 725 of 1922. Mr. Seho Narain has argued the two latter appeals, and Mr. Hargopal, on behalf of Dr. G. C. Narang, has addressed me on behalf of Sri Ram, Mr Mukand Lal Puri has argued the case for respondents in all the appeals.

The lands in suit form part of a well known as "Sultanwala," in village Tabli in Tahsil and District Jhang. This well was originally owned by various co-sharers, and the plaintiffs, Matwala Ram and others, are the decendants of Harbhagat and Ganesh Das, two of the original co sharers who are said to have mortagaged their

shares in the well sometime between the years 1874 and 1880 for Rs. 100 each to one Thakar Janki Das, the Guru and predecessor of Gowardhan Das, who was impleaded as defendant No. 1 in both the cases. It was said that the mortgage was with possession, the mesne profits of the land being set off against the interest. Gowardhan Das above referred to transferred one-fourth of his mortgagee rights to one Amir Chand, the grandfather of Sri Ram, defendant No. 2, by way of gift, and sold the remaining three-fourths to Wazir Chand and a brother of his who was the father of defendants Nos. 4 and 5. These are the contesting defendants. The defence set up was that the suits were barred by time, firstly, under Art. 148, inasmuch as the mortgages were over 60 years of age and, therefore, no longer subsisting, and, secondly, that, inasmuch as the transfers in favour of Sri Ram, Wazir Chand, etc., by Gowardhan Das were transfers for value of an absolute title, the suits were further barred under Art. 134 of the Limitation Act. Finally, it was contended that improvements had been made which should form a charge on the land. The Trial Court found that both the mortgages had been effected within 60 years of the suits and that the right to redeem was not barred by Art. 148. The transfer of one-fourth by Gowardhan Das in favour of Amir Chand was held to have been a gift to which Art. 134 had no application. The other transfer was found to have been for valuable consideration and Art. 134 was held applicable. The suit relating to the three-fourths share transferred was accordingly dismissed, while the suit for the one-fourth was decreed on payment of a sum of Rs. 624 on account of improvements and Rs. 75 as share of the mortgage-money or a total of Rs. 699.

The learned District Judge, in agreement with the Trial Court, held that the mortgages were subsisting ones, having been effected within 60 years of the suit and that Art. 134 did not apply to the gift in avour of Amir Chand of the one-fourth share.

With regard to the suit relating to the three-fourths share the learned District Judge held that Art. 134 was inapplicable. He held that Art. 134 could only curtail the limitation prescribed by Art. 148 if it could be shown that the transferee not only paid valuable consideration but that he had no notice that his transferor was a mortgagee with only a limited interest .

Before me Mr. Shéo Narain, as well as Mr. Hargopal, have confined their arguments to the question of limitation. It has been urged that Art. 148 barred both the suits, and that, in any event, the said suits were barred under Art. 134 or 144 of the Limitation Act.

The question as to applicability of Art. 148 appears to me to have been definitely settled by the finding of the learned District Judge which is, in my opinion, a finding of fact. Indeed, the learned Counsel for the appellants did not question this position but urged that the findings were assailable in second appeal as they had been arrived at under a misconception of the evidence. Mr. Sheo Narain, whose arguments were adopted by Mr. Hargopal, took me at great length through the documentary evidence on the record as detailed in the judgment of the learned District Judge, and contended that a proper appreciation and construction of this evidence led to the conclusion that the plaintiffs had not proved that the mortgages were subsisting ones at the date when the suits were filed. *Ralia Ram* v. *Radha Ram* (1) and *Ghulam Hassan* v. *Haji Muhammad Khan* (2) were cited as authority for the proposition that the *onus* lay on the plaintiffs who sought to redeem the mortgages to prove when the mortgages had been effected. This proposition has not been contested by Mr. Mukand Lal Puri who has contended that the learned District Judge has examined the entire evidence on the record, both oral and documentary, and has come to the conclusion that the mortgages in the two suits have been shown to have been effected between the years 1874 and 1880.

After a careful consideration of the arguments advanced at the Bar, I am of opinion that there has been no misconception or misappreciation of the evidence by the learned District Judge who has clearly

(1) 38 P. R. 1893.
(2) 53 P. R. 1894.

considered the whole evidence, oral and documentary, on the record and has found that the plaintiffs have discharged the *onus* which was on them to prove that the mortgages were subsisting in 1920.

The next question is, whether Art. 134 assists the appellants. In this connection Mr. Sheo Narain referred me to the following authorities :—*Dal Singh* v. *Gur Prasad* (3), *Monmotho Nath Laha* v. *Annoda Prosad Roy* (4), *Gurdial* v. *Munna-Lal* (5), *Keshav Raghunath Joshi* v. *Gafur-khan Daimkhan* (6), *Bijai Partab Singh* v. *Raghuraj Singh* (7), *Narayanasami Naicker* v. *Periasamy Odayar* (8), *Narain Das* v. *Abdur Rahim* (9), *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (10), *Ram Peari* v. *Budhsain* (11), *Husaini Khanam* v. *Husain Khan* (12), *Baiva Khan* v. *Bhiku Sazha* (13), *Yesu Ramji Kalnath* v. *Balkrishna Lakhshman* (14), *Pandu* v. *Vithu* (15) and *Bagas Umarji* v. *Nathabhai Utamram* (16).

Under Art. 134 a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration is barred after 12 years from the date of the transfer. Mr. Sheo Narain pointed out that in the present appeal all authorities relating to properties held in trust are inapplicable. On this admission *Monmotho Nath Laha* v. *Annoda Prosad Roy* (4) is not applicable.

(3) 2 Ind. Cas. 250 ; 12 O. C. 84.
(4) 44 Ind. Cas. 567 ; 27 C. L. J. 201.
(5) 61 Ind. Cas. 627 ; 2 U. P. L. R. (A) 410.
(6) 67 Ind. Cas. 308 ; 24 Bom. L. R. 319.
(7) 67 Ind. Cas. 572 ; 9 O. L. J. 173 ; 4 U. P. L. R. (J. C.) 33 ; 25 O. C. 115; (1922) A. I. R. (J. C.) 7.
(8) 68 Ind. Cas. 734 ; 14 L. W. 116 ; (1921) M. W. N. 465 ; 41 M. L. J. 163 ; 44 M. 951.
(9) 58 Ind. Cas. 705 ; 24 C. W. N. 690 ; 47 C. 866
(10) 43 Ind. Cas. 31 ; 40 M. 1040 ; 33 M. L. J. 320 ; (1917) M. W. N. 609 ; 22 M. L. T. 236 ; 6 L. W. 464 ; (F. B.).
(11) 61 Ind. Cas. 546 ; 43 A. 164 ; 18 A. L. J 995 ; 2 U. P. L. R. (A) 332.
(12) 29 A. 471 ; A. W. N. (1907) 133 ; 4 A. L.J. 375.
(13) 9 B. 475 ; 5 Ind. Dec. (N. S.) 315.
(14) 15 B. 583 ; 8 Ind Dec. (N. S.) 393.
(15) 19 B. 140 ; 10 Ind. Dec. (N. S.)95.
(16) 12 Ind. Cas. 737 ; 36 B. 146 ; 13 Bom. R. 1057.

In *Dal Singh* v. *Gur Prasad* (3) Tudball, J., held that it was unnecessary to enquire into the question of *bona fides* under Art. 134.

In *Gurdial* v. *Munna Lal* (5) the facts were as follows :—

A mortgaged his property to *B*, who, purporting to be the full owner and in possession, made a simple mortgage of it to *C*. *C* brought a suit for sale of the property and in execution of his decree the property was sold and purchased by him in 1896. In 1906 *C*. sold the property to *D*. *P* who acquired the equity of redemption of the original mortgagor *A*, brought the present suit for redemption under Art. 148 of the Limitation Act. Tudball, J., held that the suit was governed by Art. 134 or Art. 144 and that, as *D* and his predecessors-in-title had been in adverse possession for more than 12 years at the date of the suit, the suit was barred.

In *Keshav Raghunath Joshi* v. *Gafurkhan Daimkhan* (6) a mortgagee had sold the mortgaged property as an ostensible owner for valuable consideration and it was held that the right of the purchaser became unassailable by the mortgagor by the lapse of 12 years from the date of purchase under Art. 134 of the Limitation Act, and the fact that the purchaser came to know of his transferor being only a mortgagee soon after the purchase would not stop the running of time in his favour. At page 572 of the same volume [*Bijai Partab Singh* v. *Raghuraj Singh* (7)] is another case in which it was held that a person who purchased a right which he honestly believed to be a full proprietary right and which was described in the deed of sale, could claim the benefit of Art. 134 of the Limitation Act, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee, mere constructive notice without actual knowledge not being sufficient to deprive the purchaser of the benefit of the Article.

In *Narayanasami Naicker* v. *Periasamy Odayar* (8) it was held by a Division Bench of the Madras High Court that the object of Art. 134 is to cut down the period available to the mortgagor under Art. 148 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer.

Narain Das v. *Abdur Rahim* (9) is a case relating to trusts and, therefore, need not be further considered

In *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (10) the question was whether Art. 134 was applicable to a transfer from a trustee or mortgagee under which possession is not taken by the transferee. It does not afford any assistance.

The facts in *Ram Peari* v. *Budh Sain* (11) were different and Art. 144 was held to apply. This case does not afford any assistance.

In *Husaini Khanam* v. *Husain Khan* (12) the widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A*. The donee *A* mortgaged part of the property so gifted to *P* purporting to mortgage the full proprietary interest in the property. *P* took proceedings for foreclosure against *A* as absolute owner and obtained foreclosure and possession of the property. It was held, on the finding that *P* acted *bona fide* and had no reason to suppose that *A* was not, as he represented himself to be, the full owner of the property mortgaged, that *P* was entitled, as against the representative of the original mortgagor, to the protection afforded by Art. 134.

The remaining cases cited by Mr. Sheo Narain are anterior to *Taramiya Pirsahib* v. *Shibelisaheb Fakirsaheb* (17) which Mr. Sheo Narain admitted was against his view. There, in 1882, certain lands had been mortgaged with possession by the plaintiff's father. In 1883 the mortgagee mortgaged the lands to the predeces or-in-title of the defendants representing himself as absolute owner. In 1916 the plaintiff having sued for redemption, the defendants contended that they were protected by Art. 134 of the Limitation Act. It was held that they were not.

It will be seen from the above cited cases that Art. 134 could be availed of by a transferee from a mortgagee to resist the suit for possession of the property transferred to him. Each of the cases referred to were decided on their own special facts and, as far as I have been able to gather, it has nowhere been laid down that the transfer itself conveyed a valid title to the transferee.

The real question appears to be whether a transfer from a mortgagee, who claims to be the owner of the property, must, in order to avail himself of Art. 134, show that he neither had knowledge nor reason to believe that his transferor's title in the property transferred was not a full proprietary one. It seems to me that if it can be shown that the transferee from a mortgagee knew that the title of his transferor was not free from doubt and such transferee took no steps whatever to clear up that doubt he can hardly claim the benefit of Art. 134.

In the present case it appears that in the deed of transfer of the three-fourths share of the transferor Gowardhan Das, while claiming to be the full proprietor, recited the fact that he had been the original mortgagee and yet, as far as I have been able to ascertain, no steps were taken by the present defendants-appellants to examine this assertion. They, therefore, purchased with the full knowledge that the possession of their transfer was originally that of mortgagee and, therefore, took a risk, and I think that the principles enunciated in *Dirgpal Singh* v. *Kallu* (18) are applicable, where it was held that "the omission of the words 'in good faith' from Art. 134 of the Limitation Act does not entitle a per on who purchases with full knowledge that his vendor's title is merely that of a mortgagee to the benefit of that Article."

In the present case the transferees could have examined the Revenue Records, and had they so done they would have ascertained the true fact. They did not do so and are, therefore, in my opinion not entitled to the benefit of this Article. In coming to this conclusion I have also considered *Husaini Khanam* v. *Husain Khan* (12), *Muhammad Abbas* v. *Nasiban* (19), *Mahbub Ali* v. *Muhammad Husain* (20), *Bhagwan Sahai* v. *Bhagwan Din* (21),

(17) 57 Ind. Cas. 568; 44 B. 614; 22 Bom. L. R. 802.

(18) 39 Ind. Cas. 956; 37 A 660; 13 A. L. J. 945
(19) 53 Ind. Cas. 168; 6 O. L. J. 384.
(20) 57 Ind. Cas. 497; 7 O. L. J. 315; 21 O. C. 125.
(21) 9 A. 97; A. W. N. (1886) 303; 3 Ind. Dec. (N. S.) 496.

Nga Paw v. *Nga Lu Gale* (22) and *Azim* v. *Mahmud* (23) cited by Mr Mukand Lal Puri.

In my opinion, the appellants are not entitled to the benefit of Art 134 as held by the learned District Judge.

In the case of Sri Ram, Art. 134 clearly has no application, inasmuch as it has been found as a fact that it was a case of gift and not of transfer for valuable consideration. Art. 134, therefore, does not apply. Mr. Hargopal contended that since the gift they had been in possession which possession was adverse to the present plaintiffs respondents and that, therefore, Art. 144 barred the suit. Attention was drawn to certain land acquisition proceedings, but those proceedings in my opinion do not bear out Mr. Hargopal's contention. The money, it is true, was paid by the Collector to the persons in possession who claimed to be the owners, but as the rival claimants admitted that the persons in possession were at any rate mortgagees, the payment does not have the effect that Mr. Hargopal seeks to give it. Further, adverse possession was not pleaded in the First Court and did not form a ground of attack in the appeal to the learned District Judge.

Having regard to all the circumstances in these cases, I consider that the appeals should be dismissed and they are accordingly dismissed with costs.

Z. . . *Appeals dismissed.*

(22) 13 Ind. Cas. 375 ; 4 Bur. L. T. 265.
(23) 124 P. R. 1883.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 59 OF 1921.
January 25, 1923.
Present:—M. Simpson, A. J. C., and Mr. Dalal, A. J. C.

RAM RATAN—PLAINTIFF—APPELLANT
versus
Chaudhari GANGA BUKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates—Summary Settlements of 1856 and 1858—Proprietary title—Grant—Absolute estate—Succession—Personal law—Hindu Law—Mitakshara—Alienation—Mortgage by karta without legal necessity—Partition—Mortgage, whether operative against karta's share—Transfer of Property Act (IV of 1882), s. 43, application of.

The first Summary Settlement of estates in Oudh made in 1856 did not finally decide the proprietary title of the persons who had engaged only temporarily to pay a fixed revenue to Government. The proprietary rights were settled by the second Summary Settlement of 1858 and all such rights were grants from the Government and started fresh titles to the property. These titles were not free from the personal law of the grantees as regards succession and title of heirs; and the Sanads issued to emphasize the fact of these grants did not confer any new rights, but only declared the rights already determined in the Summary Settlement of 1858. [p. 583, cols 1 & 2.]

The expression "you and your heirs" in a grant is the usual expression for conferring an absolute estate on the grantee, and where such a grant is made it is subject to the personal law of the grantee as regards succession and title of heirs. [p. 583, col 2.]

Bhoobun Mohini Debia v. *Hurrish Chunde Chowdhry*, 4 C 23; 3 C. L. R. 339; 5 I. A. 138; 3 Sar. P. C. J 815; 3 Suth. P. C. J. 537. 2 Ind. Jur. 430; 1 Shome L. R 241; 2 Ind. Dec (N. S; 16 (P.C), *Lalit Mohun Singh* v. *Chukkun Lal Roy*, 24 C. 834; 24 I. A 76; 1 C. W. N. 387; 7 Sar. P. C. J 155; 12 Ind. Dec (N. S.) 1224 (P. C.), *Radha Prasad Mullick* v. *Rance Mani Dassee*, 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695, *Ranee of Chil-arce* v. *Government of India*, I A. Sup. Vol. 237; 3 Sar P. C. J. 298; 4 I A. 208 (*note*); 3 Suth P.C. J. 12; Rafique & Jackson s P. C. No. 24, *Muhammad Abdus-Samad* v. *Qurban Husain*, 26 A 119; 8 C.W.N 201 6 Bom L. R 238; 7 O. C. 251; 31 I. A. 30; 8 Sar. P. C. J. 593 (P. C.), *Achhaibar Singh* v. *Jang Bahadur Singh*, 48 Ind. Cas 901; 5 O. L. J. 687, referred to.

An absolute grant to a person governed by the Mitakshara Law is self-acquired property in the hands of the grantee, but in the hands of his son it becomes joint ancestral property of the family. [p 585. col 2.]

Rameshar v. *Rukmin*, 12 Ind. Cas. 770, 14 O. C. 244 at p. 255, relied upon.

If the *karta* of a joint Hindu family mortgages the joint family property without legal necessity, the mortgage is void for want of the mortgagor's title. But if during the period of the mortgage the property is partitioned and a certain share comes to the mortgagor, the principle of section 43, Transfer of Property Act, applies and the mortgage operates on that share of the mortgagor. [p 586, col. 2.]

Kamla Prasad v. *Nathuni Narayan*, 66 Ind Cas. 149, (1922) Pat 136; 3 P. L. T. 401; (1922) A. I. R. (Pat.) 347, followed

Gajodhar Bakash v. *Gauri Shankar*, 61 Ind. Cas. 205; 8 O. L. J. 81 and *Amardayal Singh* v. *Har Pershad Sahu*, 58 Ind Cas 72; 5 P L J 605; 1 P. L. T. 511, referred to.

Bhagwati v *Chaoli*, 55 Ind. Cas. 698; 2 L. L. J. 680; 2 U. P. L. R (L.) 79, distinguished

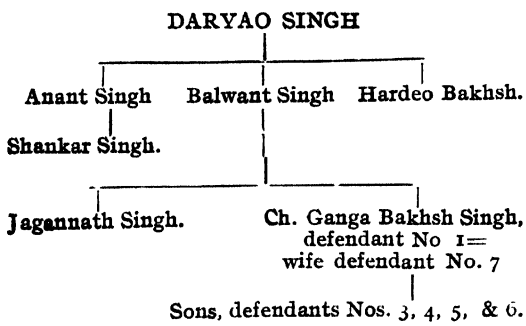
First appeal against a decree of the First Subordinate Judge, Sitapur, dated the 19th August 1921.

Messrs. *A. P. Sen* and *Ishri Pd.*, for the Appellant.

RAM RATAN *v.* GANGA BUKHSH SINGH.

Messrs. *Bishesharnath* and *Chand Narain Harkauli*, for Respondents Nos. 3 to 7.

JUDGMENT.—The following pedigree will elucidate the facts of the case:—



The plaintiff sued in the Court of the Subordinate Judge of Sitapur for possession as mortgagee on foot of a mortgage-bond executed by Chaudhari Ganga Bakhsh Singh on 20th September 1913 for a consideration of Rs. 16,000. The property in suit is the village of Jangal Bilas and Mahal Nasirabad, a portion of village Palia. In paragraphs 5 and 6 of the plaint it is stated that out of the consideration money Rs. 10,000 was borrowed to defray the costs of a suit instituted by Chaudhari Ganga Bakhsh Singh for the benefit of the entire family and the balance of Rs. 6,000 to pay off a debt due to the Allahabad Bank. The sum of Rs. 6,000 was left with the mortgagee with instructions to pay off the instalments due to the Bank as they fell due subsequent to the date of the mortgage. Out of this sum the mortgagee had paid Rs. 1,667 before he was requested by the mortgagor to stop payment. Different rates of interest were to run on the separate sums and on the date of the institution of the suit, on 3rd November 1920, the debt amounted to Rs. 19,800. Besides Chaudhari Ganga Bakhsh Singh, the parties, defendants to the suit, were his wife defendant No. 7, his four sons, defendants Nos. 3 to 6 and three subsequent mortgagees, defendants Nos. 2, 8 and 9. The plaint allegation was that Chaudhari Ganga Bakhsh Singh was Taluqdar of Taluqa Rampur Kalan and so e owner independently of his sons of the property in suit. His wife and sons were made parties because of the fact that, subsequent to the mortgage, there had been a partition on 28th of August 1920 by which one-sixth of the property was allotted separately to the father, mother and four sons. The plaintiff's plea was that this partition was collusive and that a colourable consent-decree of a Civil Court was obtained with a view to defraud him. The various prayers in the alternative were:—

(1) for mortgagee possession over the ent re property in lieu of the money due,

(2) for a decree for sale,

(3) for mortgagee possession of at least two-sixths of the property belonging at present to Chaudhari Ganga Bakhsh Singh and his wife,

(4) for a simple money-decree.

Defendant No. 2 appeared in the lower Court but did not contest the plaintiff's claim ; he was not presented in this Court. Proceedings have been taken *ex parte* in both the Courts against defendant No. 1, Chaudhari Ganga Bakhsh Singh, and the subsequent mortgagees defendants Nos. 8 and 9. The defendants, the wife and sons of Chaudhari Ganga Bakhsh Singh, contested the suit on the ground that Chaudhari Ganga Bakhsh Singh was at the date of the mortgage a manager of joint Hindu family property including the property in suit, that the debt was not contracted for a legal necessity or to pay an antecedent debt and that, therefore, the contesting defendants were not bound thereunder. It may be noted at this stage that in the written statement of these contesting defendants no plea in bar of the plaintiff's claim against Chaudhari Ganga Bakhsh Singh's one-sixth share was taken. The learned Subordinate Judge held that the sum of Rs. 1,667 was borrowed by Chaudhari Ganga Bakhsh Singh to pay an antecedent debt, but that the sum of Rs. 10,000 was not borrowed for the benefit of the family. In the result he granted a decree for mortgag e possession on non-payment of the sum of Rs. 1,667 with interest up to date within a fixed time and a simple money-decree for Rs. 10,000 with interest against Chaudhari Ganga Bakhsh Singh alone.

The plaintiff has appealed to this Court from part dismissal of his claim. Arguments here were confined to two matters:

(1) that Chaudhari Ganga Bakhsh was absolute owner of the property and, therefore, competent to make the mortgage,

(2) that in any case the mortgage is effective against his share and also against the share allotted to his wife at partition.

The discussion of the character of Chaudhari Ganga Bakhsh Singh's rights in the property will involve a discussion of the rights of a proprietor in Oudh under the Sanad granted by Government on 25th October 1859 after the confiscation. The history of this family is given in the judgment of their Lordships of the Privy Council in the case of *Shankar Baksh* v. *Hardeo Baksh* (1), in the suit brought by Hardeo Bakhsh and others of the pedigree given above against Shankar Bakhsh who claimed title to the entire property by right of primogeniture. The family estate is known by the collective name of Rampur Kalan and was subject to the Mitakshara Law. The first Settlement of the estate was made in 1856 at the desire of Daryao Singh with his three sons and a grandson on the assumption of the Government by the British. It was confiscated with other Oudh estates on 15th March 1858 The second Summary Settlement was similarly made with the three sons and grandson of Daryao Singh and it is admitted by both parties that a Sanad was issued in the terms of that Settlement on 25th October 1859. We have to interpret the terms of this Sanad which was in the form given at page 55 of Mr. Chail Behari Lal's Talukdari Law of Oudh, 2nd Edition. It will be convenient to give references to this book because it contains a re-print of the valuable introduction by Mr. Sykes. We need not inquire into the circumstances under which a primogeniture Sanad was subsequently issued to Daryao Singh, because, as pointed out in the Privy Council judgment above, it was not asked for by Daryao Singh and was issued to him by mistake. It has been finally settled by the authority of the Privy Council that a primogeniture Sanad did not take effect in this family. The second Summary Settlement was made on the basis of proprietary right and differed in that respect from the first Summary Settlement which was only a temorary engagement for three years for the payment of revenue. The first Summary Settlement did not finally decide the proprietary title of the person who had engaged to pay the fixed revenue to the British Government. To allay misgivings in the minds of the landholder it was considered necessary to settle proprietary rights after the confiscation. All such proprietary rights were grants from the British Government and started fresh titles to the property, but it does not follow that these titles were free from the personal law of the grantees as regards succession and title of heirs. This Settlement gave finality and perpetuity in respect to the proprietary right in the soil. Subsequently, to emphasize this fact of the grant of a proprietary title Sanads were issued to Taluqdars in accordance with letters of the Governor-General to the Chief Commissioner of Oudh dated 10th October and 19th October 1859 (pp.78 and 82). These letters were subsequently given the force of legislation under Act I of 1869. They declared that every Taluqdar, with whom a Summary Settlement had been made since the re-occupation of the Province, thereby acquired a permanent hereditary and transferable right in the Taluqa for which he had engaged, including the perpetual privilege of engaging with the Government for the revenue of the Taluqa. The Chief Commissioner proposed a form of Sanad (Appendix D-P. 554) and the approved form (page 555) was sent to him by the Governor-General with his letter dated 19th October 1859. The Sanads were given by Lord Canning at a Darbar held on 26th October 1859.

It will be observed that the Sanads conferred no new rights but only declared the rights already determined in the second Summary Settlement of 1859. The learned Counsel for the appellant pointed out that the Sanad conferred rights upon the grantee and his heirs, the words being " the above estate has been conferred upon you and your heirs for ever." In these words he desired to read the meaning that every subsequent heir of the grantee held the property independently of his personal law with full powers of transfer. This interpretation does not commend itself to us. " You and your heirs" is the usual expression for conferring an absolute estate on the grantee. In the illustrations to section 84 of the Succession Act (X of 1865) a bequest to *A* and his heirs is explained as one passing to *A* the whole

(1) 16 C. 397; 16 I. A. 71; 13 Ind. Jur. 93; 5 Sar. P. C. J. 299; Rafique and Jackson's P. C. No 108; 8 Ind. Dec. (N. S.) 261 (P. C.).

interest which the testator had in the property. By analogy, the same words must be interpreted to have the same meaning in a grant. These and similar words have received the interpretation of an absolute estate in Indian cases. In *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2) their Lordships of the Privy Council held that a grant by a Hindu to his daughter in terms "to you and the generations born of your womb successively" imported an absolute estate to the daughter. Lord Davey in delivering the judgment of their Lordships in *Lalit Mohun Singh* v. *Chukkun Lal Roy* (3) made the following observations regarding the construction of technical words in a document:—

"There are two cardinal principles in the construction of Wills, deeds and other documents.....The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is ....that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense."

In *Ritu Pural Mullick* v. *Ranee Mani Dassee* (4) a Full Bench of the Calcutta High Court held a bequest in favour of daughters "to whom and their respective sons" the testator bequeathed property to create an absolute estate in favour of the daughters. The learned Judges were of opinion that the word "sons" was used as a word of limitation. Our attention was drawn to the subsequent correspondence between the Chief Commissioner and the Governor-General which resulted in the grant of primogeniture Sanads to those Taluqdars who desired to receive them in place of the Sanads of 1859. This correspondence has not the authority of a legislative enactment and it must be remembered that they are mainly polemic, each party attempting to enforce his view of the Settlement made with the Taluqdars in 1858. The Chief Commissioner desired an entail to restrict the powers of the holders of the Taluqa for the time being and to conserve the estate in the family, while the Governor-General resisted any such restriction to be placed over an absolute title granted by the second Summary Settlement and the Sanad. One instance will be sufficient to indicate the extreme views which either party was prepared to express to gain his point When succession by primogeniture was suggested by the Chief Commissioner the Governor-General gave it as his opinion that it could not be introduced without the consent of the then existing heirs of the Taluqdars(page 94). This was a view entirely in conflict with the declaration of absolute proprietary interest granted to the Taluqdars. The Chief Commissioner pointed this out in his reply and in a subsequent letter the Governor-General agreed that no such consent was necessary (page 98). It is clear, therefore, that the letters are not to be taken as expressing definite views of the grantor on the character of the grant but only tentative opinions on point of controversy. The learned Counsel for the appellant laid much stress on the opinion of the Governor-General (page 99) that His Excellency in Council would not deprive Taluqdars in all future generations of the power of bequeathing their estates in accordance with their own views. He argued that the grantor desired to give absolute proprietary title independent of the personal law of the holder to every successive heir of the grantee. The grant as it stands does not bear such a meaning. Their Lordships of the Privy Council were of opinion that in 1860 the Taluqdars were given the choice to adopt either the law of primogeniture and take a primogeniture Sanad or the common Mitakshara Law in the case of Hindus. At page 406 of the report [*Shankar Baksh* v. *Hardeo Baksh* (1)] their Lordships observed:—"In December 1860 came the Circular that was issued to the Oudh Taluqdars calling upon them to elect whether they would take their Sanads according to the common law of the Mitakshara or according to the law of primogeniture." We have examined the Circular both of 26th September 1860 (page 104) and of 1st December 1860 (page 59

(2) 4 C. 23; 3 C. L. R 339; 5 I. A 138; 3 Sar. P. C. J 815; 3 Suth P. C. J 537; 2 Ind Jur 430. 1 Shome L. R. 241, 2 Ind. Dec. (N. S.) 16 (P. C.),

(3) 24 C. 834; 24 I. A 76; 1 C W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P C).

(4) 33 C. 947; 3 C. L. J. 502; 10 C. W. N. 695.

(F. B.).

Circular Orders issued by the Chief Commissioner of Oudh, printed, Lucknow, 1861) and have not found any reference therein to Mitakshara Law. Obviously, this was the conclusion which their Lordships drew after a perusal of these two Circulars as a whole.

We have already seen how both the Chief Commissioner and the Governor-General were agreed that no grant was made to the heirs of the grantees by the Sanad under discussion. The only difference between the form of the Sanad proposed by the Chief Commissioner and that adopted finally as amended by the Governor-General was that the Chief Commissioner desired to control the grant even in the hands of the grantee by his personal law, while the Governor General gave the property to the grantee as an absolute estate to which the limitation of his personal law did not attach while in his hands. Such was also the view of their Lordships of the Privy Council in *Ranee of Chillaree* v. *Government of India* (5). Discussing the letter of 10th October 1859 their Lordships observed:—"The letter and the recital contained in it show that the object of the Government was to maintain in possession those Taluqdars who then were in possession under Summary Settlements entered into with them after the re-occupation of the Province. The Taluqdars who were declared to have acquired the right conferred by the letter, were those who had been permitted to engage. Nothing was said as to the heirs of Taluqdars who had been permitted to engage.....It is clear that the letter, which was a mere act of grace, was not intended to operate as an original grant to such heirs." The Sanad of 1859 is based on this letter and we think that the same observations would apply to the Sanad. Another decision of their Lordships of the Privy Council in *Muhammad Abdus-Samad* v. *Qurban Husain* (6) may also prove useful as a guide. The suit was between Muhammadans and did not relate to a Hindu Taluqdar as here and no Sanad was granted to the original Taluqdar. There was, however, a Summary Settlement with a Muhammadan Oudh Taluqdar. The Sanad of 1859 only confined the rights under the second Summary Settlement, and did not alter them. In the case quoted above their Lordships held that when Murtaza Baksh died he had acquired a permanent hereditary and proprietary right recognised by the Indian Government in the estates in question and the succession to them not having been altered by any Sanad was governed by the ordinary Muhammadan Law which was the only law applicable to the case. In the case of *Achhaibar Singh* v. *Jang Bahadur Singh* (7) property was granted to one Sheo Lal. The terms of the grant are not clear but they must be either of the form of the general Sanad or that of the grantees' Sanad (page 555 or 560). In that case a learned Judge of this Court held that property in the hands of an heir of Sheo Lal was governed by the ordinary Hindu Law. It must be conceded that the point at issue was not argued in that case as it has been here. When the grant amounted to the conferment of absolute proprietary title on Balwant Singh, father of defendant No. 1, we see no reason why the personal law of the family, that is, Mitakshara modified by custom, if any, should not attach to the property in the hands of Ganga Bakhsh Singh. To use the terms of the Mitakshara, the property was the self-acquired property of Balwant Singh, so in the hands of his son Ganga Bakhsh Singh it became joint ancestral property of the family: *Rameshar* v. *Rukmin* (8). We hold that the property in suit was the joint family property of the defendant and his sons at the time of the mortgage according to the law of the Mitakshara.

The plea of fraud and collusion in reference to the partition has been withdrawn in this Court, so the shares of the Hindu sons, defendants Nos. 3 to 6, in the property in suit are not liable to pay any portion of the debt of Rs. 10,000. In our opinion, the share of the wife does not stand on a different footing. She was admittedly entitled to a one-sixth share on partition, and when the debt contracted by the manager did not bind the joint family property it is reasonable to

(5) I A. Sup. Vol. 237; 3 Sar. P. C. J. 298; 4 I. A. 208 (*note*); 3 Suth. P. C. J. 12, Rafique and Jackson's P. C. No. 24.
(6) 26 A 119, 8 C. W. N 201; 6 Bom. L. R. 238; 7 O. C. 254; 31 I. A. 30, 8 Sar. P. C. J. 593 (P. C).
(7) 48 Ind. Cas. 901; 5 O. L. J. 687.
(8) 12 Ind. Cas. 770; 14 O. C. 244 at p. 255.

hold that the separated share of the wife in that property cannot be burdened by a contract to which she was not a party. The appeal must fail against defendants-respondents Nos. 3 to 7.

We think that the principles of section 43, Transfer of Property Act, will apply to the share at present in the possession of the defendant Chaudhari Ganga Bakhsh Singh. He erroneously represented to the plaintiff at the time of the mortgage that he was authorized to transfer the property in suit and professed to transfer it for an admitted consideration; when, subsequently, during the period of mortgage he acquired at partition one-sixth share therein, the transfer shall operate on that share. Unfortunately, Ganga Bakhsh Singh is not represented here. The lower Court pointed out that the mortgage was void and that, therefore, its operation cannot be revived at a subsequent date. The reason why the mortgage was void was simply that the mortgagor had no title. Such was the view taken in the case of *Gajodhar Baksh* v. *Gauri Shankar* (9) relied upon by the lower Court. There was no incapacity in the mortgagor, so when, subsequently, during the period of the mortgage the mortgagor acquired title in part, it should have operation to that extent. The appellant's learned Counsel quoted the Patna case of *Amardayal Singh* v. *Har Pershad Sahu* (10) where various authorities were reviewed and the result summed up in two propositions:

1. That a mortgage of the whole or a share of the joint family property of a Mitakshara family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share, and

2. that where the mortgagor's interest has been separated from that of the other member of the family, it may become available as security for the mortgage-debt.

Though the second proposition is *obiter* it appears to us to be sound. A ruling of the Lahore High Court which was also quoted [*Bhagwati* v. *Chaoli* (11)] may not be an appropriate authority, because Courts in the Punjab, though guided by the principles of the Transfer of Property Act, are not bound by its express provisions. Standards of conscience and ordinary honesty will have consideration in the Punjab in determining the principles applicable to a case like the present. There is, however, a decision of a Bench of the Patna High Court which fully covers the point raised in the present appeal. Coutts, J. observed at page 137 of the report *Kamla Prasad* v. *Nathuni Narayan* (12). " Kamla Prasad mortgaged a certain property as having a right to do so; he had in fact, however, no title, but as title to a portion of the property has now come to him he must make good his representation to the extent of the property which has come into his hands." Kamla Prasad, like Ganga Bakhsh Singh here, was *karta* of a joint Hindu family and mortgaged joint family property without legal necessity. There is at the ame time a special point in favour of the appellant that the mortgage in suit was not wholly void at its inception. It has been h ld by the lower Court to be binding with respect to a portion of the consideration and no objection by way of appeal is made to the lower Court's decree of a portion of the plaintiff's claim. We hold that the plaintiff is entitled to mortgagee possession of (one-sixth) share of Ganga Bakhsh Singh for the debt of Rs. 10,000 with interest.

In the result, we dismiss the appeal against the defendants Nos. 3 to 7 with proportionate costs to them all jointly (*i. e.*, 5/6ths). We decree the rest of the appeal against the defendants Nos. 1, 2, 8 and 9 in so far that the money-decree passed by the lower Court shall be discharged and in its place shall be substituted a decree for mortgagee possession of one-sixth share of the property in suit belonging to Chaudhri Ganga Bakhsh Singh with proportionate co ts one-sixth) of both the Courts *ex parte*, if Rs. 10,000 with compound interest from the 26th September 1913 up o date of payment at o annas per cent. per mensem with six monthly rests is not deposit d in the l wer Court within three months of to-day's date. If the money

(9) 61 Ind. Cas. 205; 8 O. L. J. 81.
(10) 58 Ind. Cas. 72; 5 P. L. J. 605; 1 P. L. T 511.
(11) 55 Ind. Cas. 698; 2 L. L. J. 689; 2 U. P. L. R. (L.) 79.
(12) 66 Ind. Cas. 149; (1942) P at 136; 3 P. L. 401; (1922) A. I. R. (Pat.) 347.
* Page of (1922) Pat. [*Ed.*]

is so deposited, the appellant shall be entitled to receive.

S. D. *Decree modified.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1443 OF 1919.

December 2, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

AJUDHIA PARSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

IMAM-UD-DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105 (1), O. XXII, r. 9—Order setting aside abatement—Appeal.

An order under O. XXII, r. 9 of the Civil Procedure Code setting aside an abatement is an order affecting the decision of the case on the merits within the meaning of section 105 of the Civil Procedure Code and can be objected to in appeal from the final decree which may be passed in the case. [p. 589, col. 1.]

Nand Ram v. *Bhopal Singh*, 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130, *Ram Autar Tewari* v. *Deoki Tewari*, 29 Ind. Cas. 411; 37 A. 456; 13 A. L. J. 656, *Gopala Chetti* v. *Subbier*, 26 M. 604; 13 M. L. J. 308 and *Achuthayya* v *Thimmayya*, 31 M. 345; 3 M. L. T. 315; 18 M. L. J. 228, relied upon.

Gulab Kunwar v. *Thakur Das*, 24 A. 464; A.W.N. (1902) 136, *Tasadduq Husain* v *Hyat-un-nissa*, 25 A. 280; A. W. N. (1903) 39 and *Fazal* v. *Hashmat*, 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916, dissented from.

Second appeal from the decree of the District Judge, Hissar, dated the 19th March 1919, reversing that of the Subordinate Judge, Second Class, Hissar, dated the 30th April 1917.

Messrs. *Manohar Lal* and *Shamair Chand*, for the Appellants.

Mr. *Abdul Ghani*, for the Respondents.

JUDGMENT.—The plaintiffs in this case are purchasers of some land from one Mir Khan. The defendants to the suit are the sons of Mir Khan. The sale-deed was executed on the 16th of December 1889. Possession under the sale was not given and the vendees instituted a suit on the 16th of December 1901 claiming possession. On the 13th of August 1902 an *ex parte* decree was passed in their favour. On the 25th of May 1904 possession was delivered in execution of the decree, but, as the land was in possession of joint owners, only a symbolical possession was given by beat of drum. On the 21st of October 1904 mutation was sanctioned. The present suit was instituted on the 18th of August 1915, on the allegation of a subsequent dispossession by the defendants. The suit was resisted on the grounds of limitation, plea of *res judicata*, want of consideration and necessity, etc. The Trial Court overruled the pleas in defence and granted a decree to the plaintiffs.

The defendants preferred an appeal in the lower Appellate Court. During the pendency of the appeal Sheo Dayal, one of the plaintiffs-respondents, was reported to have died—sometime before the 25th of May 1917. An application was made by the appellants on the 9th of January 1918, praying that the names of Sheo Dayal's representatives be brought on the record and stating that they had come to know of his death on the 8th of January 1918, as he was a resident of village Sirsa, situate at a distance of 13 miles from the village Kharian, where the appellants resided. On the 10th of January 1918, Fakir Chand, respondent, put in an application stating that the death of Sheo Dayal had taken place more than six months before the application of the appellants and that the appeal had consequently abated. On the 24th of June 1918 Mr. Sri Ram Poplai, District Judge, made an order directing that the appeal had wholly abated, as the decree in favour of the respondents was a joint decree. After having made the declaration, the learned Judge dismissed the appeal. The appeal having abated, the order of dismissal was meaningless, as there was no appeal in existence to be dismissed. On the 8th of July 1918, Sadra and Imam Din, defendants-appellants, applied under O. XXXII, r. 9, Civil Procedure Code, for the setting aside of

AJUDHIA PARSHAD *v.* IMAM-UD-DIN.

the abatement. The application for abatement was clearly beyond time but the applicants prayed for extension of time for the following reasons stated in their application :—

"The appeal in this case abated on the 24th of June 1918. Sheo Dayal resided in *Mauza* Burak. He never appeared in Court. As the respondents were not in possession of the land they never visited the village. The appellants are illiterate. Some of the respondents reside in Sirsa, situate at a distance of 13 miles. *Mauza* Burak is seventy miles distant from our residence. The suit is of considerable value. It is requested that Ganga Dhar and Dwarka Das, minors, may be appointed legal representatives under the guardianship of Jiwan Ram."

Khwaja Tasadduq Hussain, District Judge, who was then seized of the case, accepted the explanation as to the delay and by an order, dated the 11th of January 1919, set aside the abatement. The appeal was then heard on the merits and allowed, the learned Judge holding that the suit was barred by 12 years' limitation.

Against the decree of the lower Appellate Court the present second appeal has been preferred. Mr. Manohar Lal, Counsel for the appellants, has pressed two contentions before us, namely:—

(1) That the appeal having abated and sufficient cause not having been shown for the delay in making the application under O. XXII, r. 9, Civil Procedure Code, the learned Judge was wrong in setting aside the abatement.

(2) That the decision of the lower Appellate Court on the question of limitation was wrong.

On the first point the learned Counsel has urged the following grounds, namely:—that the order of Mr. Sri Ram Poplai, dated the 24th of June 1918, which was practically an order refusing to set aside the abatement, had become final and that it was not open to Khwaja Tasadduq Hussain to interfere with it and to set it aside. As regards this objection one has only to look to the order. It does not purport to be an order refusing to set aside the abatement. It merely purports to declare that an abatement had taken place. It is, however, contended by Mr. Manohar Lal that the order, in addition to making the declaration of abatement, further purported to dismiss the appeal but this, as we have already remarked, Mr. Sri Ram Poplai could not have done, because the appeal had already abated and there was no room for making an order of dismissal. This contention, therefore, cannot prevail and must be disallowed.

The next ground urged is that sufficient explanation for the delay in the making of the application has not been given. There is force in this contention. Sufficient cause, in our opinion, has not been shown why the application for the setting aside of the abatement was made after such a long delay. Granting that the appellants resided in a different village at some distance from the village where the deceased Sheo Dayal resided, they had in any case come to know of his death on the 9th of January 1918, when the first application relating to the abatement was made. There is practically no explanation as to the delay which had taken place after the 9th of January 1918, to the 8th of July 1918, when the application for the setting aside of the abatement was made. In our opinion Khwaja Tasadduq Hussain was not justified in entertaining the application and in setting aside the abatement. Mr. Abdul Ghani, Counsel for the respondents, however, contended that the order of Khwaja Tasadduq Hussain had become final and could not be questioned at this stage, namely, in second appeal from the decree passed by Khwaja Tasadduq Hussain. The answer to this question is to be found in clause (1) of section 105 of the Civil Procedure Code, which provides that "save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

Mr. Abdul Ghani, however, questioned the applicability of this section on the ground that the order of Khwaja Tasadduq Hussain setting aside the abatement did

not affect the decision of the case on the merits as contemplated by the above provision, and, therefore, it could not be questioned in this appeal. In support of his contention he relied on upon the case of *Tasadduq Husain* v. *Hayat-un-nissa* (1) where it was laid down "that an order under section 108 of the Civil Procedure Code, setting aside a decree passed *ex parte* is not an order 'affecting the decision of the case,' that is, affecting the decision of the case upon the merits. The alleged wrongfulness of such an order cannot, therefore, be urged as a ground of objection in an appeal from the decree in suit, under the provisions of section 591 of the Code." He further relied on the case of *Gulab Kunwar* v. *Thakur Das* (2), where a similar view was expressed in respect of an order restoring an appeal under section 558, Civil Procedure Code.

The Allahabad High Court, however, appears to have changed its view, as appears from two later decisions of that Court reported as *Nand Ram* v. *Bhopal Singh* (3) and *Ram Autar Tewari* v. *Deoki Tewari* (4). In the first of these two cases it was held that an order setting aside an *ex parte* decree could be questioned in an appeal from the final decree in the case. In the second case it was held that an order setting aside an award affecting the decision of the case on the merits could be questioned in an appeal from the decree.

Mr. Abdul Ghani has further relied on a decision of the Chief Court reported as *Fazal* v. *Hashmat* (5), where it was held that an order setting aside an *ex parte* decree could not be objected to under section 105, Civil Procedure Code, as any error in the order could not be said to be an order affecting the decision of the case. This was a decision by a Single Judge and was based on the decision in *Tasadduq Husain* v. *Hayat-un-nissa* (1). As we have already remarked, the Allahabad High Court has changed its view and *Tasadduq Husain* v. *Hyat-un-nissa* (1) is no more an authority on the point. We prefer to follow the decision in the cases reported in *Nand Ram* v. *Bhopal Singh* (3) and *Ram Autar Tewari* v. *Deoki Tewari* (4).

The Madras High Court also appears to have taken the same view of the expression "affecting the merits of the case" in *Gopala Chetti* v. *Subbier* (6) and *Achuthayya* v. *Thimmayya* (7).

In this view, the appeal must succeed on this ground alone, and it is not necessary to express any opinion on the question of limitation raised by Mr. Manohar Lal. We accept the appeal and, setting aside the decree of the lower Appellate Court, restore that of the Court of first instance with costs in all Courts.

Z. K.

Appeal accepted.

(1) 25 A. 280; A. W. N. (1903) 39.
(2) 24 A. 464; A. W. N. (1902) 136.
(3) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.
(4) 29 Ind. Cas. 411; 37 A. 456; 13 A. L. J. 656
(5) 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916
(6) 26 M. 604; 13 M. L. J. 308.
(7) 31 M. 345; 3 M. L. T. 315; 18 M. L. J. 228.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 255 OF 1919.
December 6, 1922.

Present:—Justice Sir Jwala Prasad, Kt., and Mr. Justice Ross.

Musammat WAJIBANNISSA BEGUM—DEFENDANT No. 3—APPELLANT

versus

VALMIKI SAHAY—PLAINTIFF AND *Babu* SHAM NANDAN SAHAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration—Notice—Presumption.

In order to bind the subsequent transferees of a property with prior lien the law

of registration has been enacted so that the subsequent transferees may have an opportunity to ascertain whether the property transferred to them was subject to any prior encumbrance or not; and, once that prior encumbrance is effected by means of a registered document, the subsequent transferees are presumed to have notice of the same and are in law bound by it, [p. 591, col. 2.]

Appeal from a decision of the Subordinate Judge, First Court, Muzaffarpur, dated the 26th April 1919.

Messrs. *Saiyid Nurul Hasan* and *Gangadhar Das*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *Jadubans Sahay*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit to enforce a mortgage. The defendant No. 6, *Musammat* Bibi Wajibannissa, of the second party, is the appellant before us. One of the mortgaged properties was described in the bond as bearing *Tauzi* No. 9907. This was *Mauza* Sherpur, *Chak* Makhan, *alias* Sherpur Ramnath, Chakla Garjaul, *Pargana* Bisra—extent of share 5-annas, Thana Mahua, Registry Office Mahua, Division Hajipur, District Muzaffarpur. The plaintiff stated that the aforesaid *Tauzi* number was inserted in the document by the mistake of the scribe and the correct *Tauzi* number of the village was 6607; that the mortgagors, defendants Nos. 1 and 2 of the first party, had no other property under *Tauzi* No. 9907; and that the defendants Nos. 6 and 7, who subsequently purchased the property, had information of the mortgage of the plaintiffs. The plaintiffs, therefore, claimed that in the decree the correct *Tauzi* No. 6607 should be mentioned.

The defendant No. 6 obtained this property by virtue of a deed of gift, dated the 30th of October 1914, executed by the defendant No. 7, who had purchased it by a sale-deed, dated the 14th of November 1912, from one Mrs. Allan Clement. Mrs. Allan Clement had purchased the property from the defendant No. 2, the owner of the property in question. The defendant No. 6 stated in the written statement that the property mortgaged was described in the bond of the plaintiffs as bearing *Tauzi* No. 9907 and hence the plaintiffs are not entitled to sell the proprietary interest in *Tauzi* No. 6607 which was purchased by her. She also denied any knowlege of the plaintiffs' mortgage before she obtained the property under the deed of gift of 1914. She took other pleas and her case is stated by the learned Subordinate Judge in the following words:—"The defendant No. 6 alleges that the bond is without consideration and contends that it is barred by limitation and she further contends that the claim for interest is unconscionable and her learned Vakil contends that plaintiff No. 2 has purchased for Rs. 3,500 only, so he cannot recover more."

The defence taken by the defendants Nos. 3 to 5 need not be set forth, inasmuch as they do not contest the decree passed by the Court below.

Upon the pleas taken by the two sets of defendants the Court below framed the following issues: "(1) Whether the plaintiff has any cause of action? (2) Whether the suit is barred by limitation? (3) Whether the bond, dated the 19th December 1914 set up by the plaintiff was executed by Mr. R. Brown and for consideration? Is it *bona fide* transaction? (4) Whether the mortgaged properties are liable to be sold? (5) Whether the plaintiff is not owner or purchaser of the bond in suit?"

The Court below decided all the aforesaid issues in favour of the plaintiffs and gave a mortgage-decree directing the sale of the mortgaged properties in suit. It also directed that the *Tauzi* number of the property No. 1, Sherpur Chak Makhan, *alias* Sherpur Ramnath, be corrected and the correct No. 6607 be given in the decree. The appeal by the defendant No. 6 is directed against this part of the decree on the principal ground that the Court below was wrong in directing that the *Tauzi* number of the property in question should be described in the decree as No. 6607 and that the Court below should have released the property No. 1 entirely from the decree.

It has been argued before us that the property purchased by the defendant No. 6 was not subject to the mortgage of the plaintiffs. On behalf of the respondents

it is urged that such a definite plea does not appear to have been expressly taken either in the written statement or in the issues framed by the Court and that issue No. 4, namely, whether the mortgaged properties are liable to be sold, relied upon by the appellant does not cover the plea in question. Assuming for the sake of argument, that the aforesaid issue does cover the contention, it is clear upon the evidence placed before us that the property intended to be mortgaged was that described in *Tauzi* No. 6607. The plaintiffs filed copies of Register D of *Tauzi* Numbers 9907 and 6607 [Exhibits 7 and 7 (A)]. Those documents show that under *Tauzi* No. 9907 there was no village of the name of Sherpur *Chak* Makhan or Sherpur Ramnath and that in that *Tauzi* number Mr. Brown, the mortgagor, was not the proprietor. In that *Tauzi* the estate was known as Raghubar Sahay, and the proprietors were a number of persons other than Mr. Brown. The Register containing *Tauzi* No. 6607 showed that there was an estate known as Sherpur Ramnath Mander, *Parganah* Bisra Thana Muzaffarpur of which Mr Brown was a proprietor. The sale-deed, Exhibit 5, dated the 3rd of July 1918, whereby the plaintiff No. 2 sold the mortgage in question to plaintiff No. 1, described the property as bearing *Tauzi* No. 6607, but this is of a very recent date and may not have much evidentiary value. Plaintiffs' witness No. 3 deposed to the fact that the *Tauzi* number of the property was written by mistake, as No. 9907 in place of 6607 and that 9907 crept into the document by a mistake. There can be no doubt as to the identity of the property in question or that it was mortgaged to the plaintiffs under the deed in question. The property was sold subsequently by Mr. Brown to the predecessor-in-interest of the defendant No. 6 and is now held by her (defendant No. 6). Ordinarily, therefore, this property in the hands of the defendant No. 6 is subject to the mortgage of the plaintiffs.

Now, the question is, whether the misdescription in the mortgage-bond by giving the wrong *Tauzi* number exonerates the property in the hands of the defendant No. 6 from the liability of the plaintiffs' mortgage. There can hardly be any doubt that the mortgagors could not claim any exoneration on the ground of the misdescription of the property in the bond in question. Under sections 95 to 97 of the Evidence Act and the illustrations given thereunder, it was open to the plaintiffs to show what was the property actually mortgaged to them under the bond in their favour. In the present case they have shown that the property in question was that denoted by *Tauzi* No. 6607 and not by 9907 which had by a mere mistake crept in the descriptive portion of the *Mauzah*, and that their mortgagor, Mr. Brown, was the owner of the *Mauzah* in *Tauzi* No. 6607. This is a clear case of *falsa demonstratio*. The defendant No. 6, holding the property under subsequent conveyance executed by Mr. Brown stands in the shoes of the vendor and is bound by the lien created by the mortgage in question.

Now, in order to bind the subsequent transferees with a prior lien the law of registration has been enacted so that the subsequent transferees may have an opportunity to ascertain whether the property transferred to them was subject to any prior encumbrance or not; and, once that prior encumbrance is effected by means of a registered document, the subsequent transferees are presumed to have notice of the same and are in law bound by it. It has not been contended before us that the document in question was not validly registered and the Sub-Registrar or the Registrar who registered the document had no jurisdiction to register it. A mere misdescription of the nature such as is in the present case will not take away the jurisdiction of the Registrar to register the same if he was otherwise empowered to do so under the Act. Therefore, the document in question was validly registered. Even if it was open to the defendant No. 6 in the present case to show that she or her predecessor-in-interest did not and could not know that the property was mortgaged to the plaintiffs on account of the misdescription in the deed, in other words, that she had no notice of the mortgage and that she took all possible care to ascertain and had made reasonable enquiry as to whether the property was already encumbered or not, but that the misdescription of the

property in the plaintiffs' mortgage-bond prevented her from discovering the mortgage in question, the question is one of fact, and should have been proved by the appellant.

However, it was merely suggested in the written statement that the defendant No. 6 had no information: but, apparently, no issue was raised upon this plea and at the trial no evidence was led by the defendant No. 6 on the point. The sole witness examined on behalf of the defendant does not even suggest that the defendant No. 6 was in any way misled by the description of the property in the mortgage-bond and that she was prevented from finding out whether it was mortgaged to the plaintiffs or not; no enquiry is even suggested. In short, there is absence of evidence on behalf of the defendant upon the point in question and the *onus* of proof lay upon her. The documents of title of the defendant No. 6 have not been produced in this case. We do not know whether in the sale-deed executed by Mr. Brown in favour of Mrs. Allan Clement on the 9th of January 1909 it was even suggested that the property in question was free from encumbrance. No doubt, a statement of such a nature would not be a sufficient proof in itself that the defendant No. 6 or her predecessor-in-interest did not know that the property was mortgaged to the plaintiffs. Anyhow, the position is, that it has not been filed in the case. The defendant No. 6 apparently claimed exemption of the property from the liability of the plaintiff's mortgage on the mere ground of the misdescription of the property in the mortgage-bond. Issue No. 4, which has been relied upon by the learned Vakil on behalf of the appellant, was disposed of by the Court below in the following terms: "Property No. 1, Sherpur *Chak* Makhan, is clearly liable for the mortgage-debt, it being the property of Mrs. Robina Brown and being mortgaged by her long before her son transferred it to his wife, from whom defendant No. 6 purchased. The *Tauzi* number is a mere misdescription, there is no other property of the same description belonging to Mrs. or Mr. Brown and *Tauzi* No. 9907 being situated in Sitamarhi Sub-Division, whereas Mrs. Brown's property is in Hajipur Sub-Division. The correct *Tauzi* No. 6607 will be given in the decree." This clearly shows that there was no point raised before the Court below as to the property in question not having been mortgaged at all to the plaintiffs and that the defendant No. 6 or her predecessor-in-interest was not aware of it.

I am, therefore, of opinion that the grounds stated either in the petition of appeal or in the argument in this Court have not been substantiated. The appeal must, therefore, be dismissed with costs.

It may be mentioned that the defendant No. 6 has filed in this Court to-day a sworn petition asking for time to produce her documents to title, and, if necessary, for a remand of the case to the Court below for further investigation into the matter. I do not think that sufficient ground has been made out by her to claim production of her documents of title at this stage, or a remand of the case. We, therefore, reject that petition.

Ross, J.—I agree.

N. H. *Petition rejected.*

LAHORE HIGH COURT.

CRIM NAL APPEAL NO. 694 OF 1922.

N vember 24, 1922.

Present :—Mr. Justice Broadway.

MULA SINGH AND OTHERS—CONVICTS —APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 226—Sessions Court, power of, to frame additional charge—Dying declaration, value of.

It is on the facts disclosed by the Magisterial Inquiry, and on those facts alone, that any action under section 226 of the Criminal Procedure Code can be taken by the Sessions Judge. [p. 594, col. 2.]

Where the facts appearing in the Magisterial enquiry warrant the framing of a charge omitted by the Committing Magistrate, the Sessions Court has the power to add the charge so omitted. [p. 591, col. 2.]

Dodo v. *Emperor*, 30 Ind. Cas. 125; 9 S. L. R. 37; 16 Cr. L. J. 573, relied on.

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar P. C. J 160 (P.C.), *Shah Din* v. *Emperor*, 4 Ind. Cas 993; 20 P. W. R. 1909 Cr.; 11 Cr. L. J. 131, distinguished.

Birendra Lal v. *Emperor*, 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794, dissented from.

A difference between a dying declaration and the First Information report renders it necessary to examine both pieces of evidence with extra care, but such a difference alone does not necessarily render a dying declaration wholly unworthy of credence. [p. 598, col. 1.]

Appeal from an order of the Sessions Judge, Sialkot, dated the 13th June 1922.

Dr. *Nand Lal*, for the Appellants.

Mr. *Muhammad Rafi*, for the Government-Advocate, for the Respondent.

JUDGMENT.—Mula Singh, Wiru, Jagat Singh, Sant Singh and Mohan Lal have been convicted under section 326, Indian Penal Code, and sentenced, the first two, to seven years' rigorous imprisonment, and the last three, to five years' rigorous imprisonment. Each of them has also been sentenced to pay a fine of Rs. 50 or to undergo three months' further rigorous imprisonment in default. They have appealed to this Court through Dr. Nand Lal and I have heard Mr. Rafi on behalf of the Crown.

The facts are detailed in the lengthy judgment of the learned Sessions Judge and I need refer to them very briefly. It is said that on the 21st June 1921 one Hira Singh was watering his fields while his son, Sohan Singh, was working the well known as Bawewala. Wiru and Guran Ditta came there to water their cattle. After having done so they are said to have allowed the animals to trespass into Sohan Singh's sugarcane and cotton fields. This led to an altercation and a tussle. Hira Singh stopped the fight and Wiru and Guran Dit a went away.

Soon after this, according to the prosecution, the five appellants, together with many others, came to the spot in order to take revenge. The deceased, Budh Singh, heard of this and hastened to the spot, with the result that he received injuries to which he ultimately succumbed. The initial report was made at the Police station, which is some six miles away, at 3 A. M. on the 22nd. June 1921 by Mangal Singh who named 13 persons including four out of the five appellants; the one not named by him was Wiru Singh. The Police arrived on the spot in due course and Budh Singh was examined. Subsequently, while in hospital, his statement was recorded by a Magistrate, and in it he named 13 persons including four of the appellants, the one omitted by him being Sant Singh. In the course of the inquiry Mangal Singh stated that some of the persons named by him had been named as they had been there and had not attempted to stop the fight but that they had not actually taken any part in the affair. The Police ultimately sent up for trial nine persons, two of whom were, and apparently are, still absconding. The Magistrate making the inquiry framed charges against the other seven, including the five appellants, under sections 304, 326, 325 and 323, Indian Penal Code. The complainant, however, moved this Court on the revision side urging that the commitment should be under section, 302, Indian Penal Code, and the learned Chief Justice accepting the petition directed accordingly. On the case going back to the inquiring Magistrate the commital was made under section 302, Indian Penal Code, alone *qua* all the seven persons. At the commencement of the trial the learned Sessions Judge added charges under sections 326, 325 and 323, Indain Penal Code, in connection with the injuries inflicted on Mohan Singh, Assa Singh and Sohan

Singh, three of the prosecution witnesses. No objection was taken to this course when the addition was made and it was only at the conclusion of the case when Counsel for the defence was addressing the Court that exception was taken to this. The learned Sessions Judge's attention was drawn to *Shah Din* v. *Emperor* (1) but he found that distinguishable and held that the persons accused had not been prejudiced in any way by the addition. He also held that they had taken part in the affray with one common intention and were, therefore, all equally liable for the death of Budh Singh. He acquitted two of the persons under trial and convicted the five appellants under section 326, Indian Penal Code "for causing grievous hurt to Budh Singh and Asa Singh and Mohan Singh."

Dr. Nand Lal for the appellants has urged that the appellants were entitled to an acquittal, as the learned Sessions Judge acted illegally in adding charges relating to the injuries sustained by Asa Singh, Mohan Singh and Sohan Singh. He referred to *Subrahmania Ayyar* v. *King-Emperor* (2) as an authority for the proposition that an illegality was not curable by section 537, Criminal Procedure Code. With this authority I naturally have no quarrel. I do not, however, consider that it has any bearing on the point before me, as, in my opinion, no illegality has been committed. The learned Counsel referred to *Birendra Lal* v. *Emperor* (3) in which it was held that a Sessions Court was not a Court of original jurisdiction and could only amend or add to a charge with reference to the immediate subject of the prosecution and committal and not with regard to a matter or matters not covered by the indictment. The discussion of the question is not a detailed one and I think that decision must be confined to the facts of that particular case. This decision was followed by a Division Bench of the Chief Court in *Shah Din* v. *Emperor* (1). There the amendment or addition to the charge had not been made at the *commencement* of the trial but as the case developed. The Calcutta decision was referred to and approved of, but here again the question whether the Sessions Judge had power to add a charge at the commencement of the trial was not gone into or discussed. To this extent, therefore, that authority is distinguishable from the case before me.

The addition to the charge in the present case was obviously made under the provisions of section 226, Criminal Procedure Code, which provides that when any person is committed for trial (*a*) without a charge or (*b*) with an imperfect or erroneous charge, the Court may frame a charge or add to or otherwise alter the charge, as the case may be. Now, it is obvious that if the present appellants had been committed for trial without a charge, the learned Sessions Judge would have been competent under section 226, Criminal Procedure Code, to remedy that defect by framing such charge or charges as the facts disclosed by the Magisterial inquiry would warrant. To my mind, this indicates that it is on the facts disclosed by the Magisterial inquiry, and on those facts alone, that any action under section 226, Criminal Procedure Code, can be taken. This being so, it seems to me that, so long as the facts appearing in the Magisterial inquiry warrant the framing of the charge omitted by the Committing Magistrate, the Sessions Court has power to add the charge so omitted. It also seems to me that it is not quite correct to say that the Sessions Court is not a Court of original jurisdiction. It has original jurisdiction which it can exercise on commitment made by a Magistrate. In the above views I am supported by a decision of the Sind Judicial Commissioner's Court reported as *Dodo* v. *Emperor* (4) where the whole question is thoroughly and very carefully discussed, and *Birendra Lal* v. *Emperor* (3) dissented from. Following *Dodo* v. *Emperor* (4) I hold that the learned Sessions Judge acted within his powers in adding the charges relating to the injuries inflicted on Asa Singh, Mohan Singh and Sohan Singh and that no illegality has been committed. It is clear that the appellants have not been prejudiced by the additions made, as from the outset the case for the

(1) 4 Ind. Cas. 993; 20 P. W. R. 1909 Cr.; 11 Cr. L. J. 131
(2) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Wier 271; 8 Sar. P. C. J. 160 (P. C.).
(3) 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794.
(4) 30 Ind. Cas. 125; 9 S. L. R. 37; 16 Cr. L. J. 573.

prosecution has been that, in addition to Budh Singh, Asa Singh, Mohan Singh and Sohan Singh were also injured.

Dr. Nand Lal then urged that the dying declaration of Budh Singh was wholly unreliable, inasmuch as he had named persons not mentioned in the intial report and had omitted the names of those who had been referred to in that report. In this view I am unable to concur. A difference between the dying declaration and the initial report no doubt renders it necessary to examine both pieces of evidence with extra care, but such a difference alone does not necessarily render a dying declaration wholly unworthy of credence. According to this dying declaration, of the appellants, Mula Singh and Wir Singh were the assailants of Budh Singh. This dying declaration is corroborated by the other witnesses in the case, notably P. W. No. 9, Sant Singh ; P. W No. 10, Guran Ditta and P. W. No. 11, Karam Chand. These three witnesses have been regarded by the learned Sessions Judge as impartial persons and of them Sant Singh and Guran Ditta at least have not been shown to be in any way related to the prosecution or biased in their favour. Karam Chand has admitted that he is a distant relation of Hira Singh who in his turn is related to the deceased Budh Singh. Having regard to this mass of evidence corroborating the dying declaration, I see no reason to doubt the correctness of the view taken by the learned Sessions Judge in agreement with the Assessors, that these two appellants actually attacked the deceased with hatchets and inflicted injuries on him which caused his death. Their convictions are, therefore, amply borne out by the record and are maintained.

With regard to the remaining three appellants it was contended that they were entitled to an acquittal on the ground that charges relating to the injuries caused to Asa Singh, Mohan Singh and Sohan Singh had been improperly added and, further, that *qua* the injuries to the deceased Budh Singh section 149 had been not applied and section 34 was inapplicable. The question of the applicability of section 34, Indian Penal Code, no longer arises, as I have held that the adding of the charges was not illegal. There is ample evidence to show that the remaining three appellants took part in the fight. Indeed, Sant Singh and Jagat Singh do not deny their presence, but give another account of what occurred which account is not borne out by the evidence on the record. Mohan Lal has attemted to prove an *alibi*. The evidence produced by him has not been relied on by the learned Sessions Judge and Dr. Nand Lal has not thought fit to refer to it. It is clearly unworthy of credence. I would add that I have also examined the defence evidence produced by Wir Singh and Mula Singh and find that it in no way establishes their defences. Having regard to the serious nature of the assault, I do not think the sentences are excessive and dismiss the appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISION NO. 33 OF 1922.

January 30, 1923.

Present:—Mr. Justice Newbould and Mr Justice Suhrawardy.

JAINUDDIN AND OTHERS—PETITIONERS

versus

KERAMATULLA AND OTHERS—OPPOSITE PARTY.

Sanction to prosecute—Sanction to prosecute granted by Munsif revoked by District Judge—Revision—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Geo. V, Ch. 61), s. 107—Criminal Procedure Code (Act V of 1898), s. 195 (6).

Where a sanction to prosecute granted by a Munsif is revoked by a District Judge under section 195 (6), Criminal Procedure Code, the High Court can only interfere with the order of the District Judge either under section 115 of the Civil Procedure Code, or under section 107 of the Government of India Act, but such interference is not justified on the ground that the District Judge was wrong in revoking the sanction, because, in his opinion, the evidence was not strong enough for a successful criminal prosecution.

Sarat Chandra Mandal v. *Ram Shashi Roy*, 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265; 23 Cr. L. J. 665, followed.

Rule.

Babu *Benode Lal Mukherjee*, for the Petitioners.

Babu *Dasarathi Sanyal* and *M. Syed Md. Saadulla*, for the Opposite Party.

JUDGMENT.—This Rule was granted calling on the District Magistrate and the opposite party to show cause why the order

of the District Judge of Sylhet revoking the order of the Munsif granting sanction for the prosecution of the opposite parties should not be set aside and a re-hearing of the appeal by the District Judge of Sylhet ordered.

The Rule was granted on two grounds. The first of these was that the learned District Judge refused to hear the petitioner's Pleader before passing the order complained of. This ground has not been pressed at the hearing. The next ground was that on the facts and circumstances of the case the Court below ought to have upheld in the interest of the public and of justice the order of the learned Munsif. As the case has been argued the ground that has been pressed is that in revoking the sanction the learned Judge wrongly held that the fact that the evidence was not strong enough for a successful criminal prosecution was sufficient ground for revoking the sanction. It was urged that this was not the proper way to approach the case and that the learned Judge should have considered not whether the prosecution was likely to succeed but whether a *prima facie* case has been made out which was a sufficient justification of removing the bar imposed by the Legislature to a prosecution for perjury. But, as was held in *Sarat Chandra Mandal* v. *Ram Shashi Roy* (1), we can only interfere with the order of the District Judge either under section 115, Civil Procedure Code, or under section 107 of the Government of India Act. It appears to us that the ground now taken is not one which would justify our interference under either of these sections.

That being so, we must discharge the Rule.

Rule discharged.

S. D.

(1) 69 Ind. Cas. 153; 26 C. W. N. 1016; 36 C. L. J. 265; 23 Cr. L. J. 665.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1687 OF 1922.

December 2, 1922.

Present:—Mr. Justice Scott-Smith.

KHAN MUHAMMAD—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—"Court", whether includes successor.

The word "Court" in section 476 of the Criminal Procedure Code includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. [p. 597, col. 1.]

Shaikh Bahadur v. *Eradatullah Mullick*, 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 795; 12 C. L. J. 45; 11 Cr. L. J. 407, *Nanak Singh* v. *Emperor*, 14 Ind. Cas. 760; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302, *Lakshmidas Lalji, In re*, 32 B. 184; 10 Bom. L.R. 28; 7 Cr. L. J. 35; 3 M. L. T. 116, *Runga Ayyar* v. *Emperor*, 29 M. 331; 4 Cr. L. J. 175, relied upon.

Begu Singh v. *Emperor*, 34 C. 551; 5 Cr. L. J. 396; 5 C. L. J. 508; 11 C. W. N. 568; 2 M. L. T. 298 (F. B.) and *Kartik Ram Bhakat* v. *Emperor*, 35 C. 114; 7 Cr. L. J. 134, *Emperor* v. *Dauli*, 2 Ind. Cas. 812; 6 P. R. 1909 Cr.; 12 P. W. R. 1909 Cr., 104 P. L. R. 1909; 10 Cr. L. J. 158, dissented from.

Petition for revision of an order of the Sessions Judge, Jhelum, dated the 21st June 1922, directing under section 476, Criminal Procedure Code, the prosecution of the petitioner for an offence under section 193, Indian Penal Code.

Mr. *Badar-ud-Din Kureshi*, for the Petitioner.

JUDGMENT.—This has been filed as an appeal but has been treated as an application for revision as no appeal lies from the order complained of. The order in question, which was passed by Mr. Malan, Sessions Judge, Jhelum, on the 21st of June last, directed under section 476, Criminal Procedure Code, the prosecution of one Khan Muhammad for an offence under section 193, Indian Penal Code. The facts which gave rise to the order of the learned Sessions Judge are fully stated therein and interference is sought on the ground that the alleged false evidence was given before Mr. Malan's predecessor and that, therefore, he had no jurisdiction to direct the prosecution under section 476, Criminal Procedure Code.

In support of this contention Counsel for the appellant refers to *Emperor* v. *Dauli* (1), in which it was held that it was only the individual Magistrate before whom the offence was committed in Court who can take action under section 476, Criminal Procedure Code. The learned Judge who decided that case followed *Begu Singh* v. *Emperor* (2) and *Kartik Ram Bhakat* v. *Emperor* (3), but those authorities were subsequently rendered of no effect by reason of the Full Bench judgment of seven Judges of the High Court of Calcutta reported as *Shaikh Bahadur* v. *Eradatullah Mullick* (4) wherein it was held that the word "Court" in section 476, Criminal Procedure Code, includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. The same view was taken in the cases reported as *Nawal Singh* v. *Emperor* (5), *Lakshmidas Lalji, In re* (6) and *Runga Ayyar* v. *Emperor* (7). Under these circumstances, I consider that I am not bound to follow the decision reported as *Emperor* v. *Dauli* (1), with which I disagree. I fully agree with the views expressed by the Calcutta High Court in *Shaikh Bahadur* v. *Eradatullah Mullick* (4). The Court to whose notice the commission of the alleged offence was brought in the course of a judicial proceeding was that of Lala Topan Ram, Additional Sessions Judge of Jhelum and, Mr. Malan who passed the order complained of was his successor.

The next objection urged by Counsel is that the order was passed three months after the conclusion of the trial by the Additional Sessions Judge and that this should not have been done having regard to the decision of the Madras High Court reported as *Aiyakannu Pillai* v. *Emperor* (8), wherein it was stated that the power conferred by section 476, Criminal Procedure Code, can be exercised by the Court only in the course of a judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. In the present case Lala Topan Ram called upon Khan Muhammad to show cause against his prosecution on the 27th March 1922, *i.e.*, on day before he decided the case in which Khan Muhammad gave his evidence. Proceedings were subsequently stayed pending the decision of the appeal of the accused persons by the High Court and within a few days of the decision of the appeal Mr. Malan passed the order complained of. I, therefore, see no force in either of Counsel's contentions and I reject the application.

Z. K.

Application rejected.

(1) 2 Ind. Cas. 812; 6 P. R. 1909 Cr.; 12 P. W. R. 1909 Cr.; 104 P. L. R. 1909; 10 Cr. L. J. 158.
(2) 34 C. 551; 5 Cr. L. J. 398; 5 C. L. J. 528; 11 C. W. N. 568; 2 M. L. T. 298 (P. C.).
(3) 35 C. 114; 7 Cr. L. J. 134.
(4) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.
(5) 14 Ind. Cas. 766; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302.
(6) 32 B. 184; 10 Bom L. R. 28; 7 Cr. L. J. 25; 3 M. L. T. 116.
(7) 29 M. 331; 4 Cr. L. J. 175.
(8) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 746 OF 1922.

January 11, 1923.

Present:—Mr. Justice Ross.

DURGA SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367, scope of—Defective judgment.

All that section 367 of the Criminal Prodedure Code requires is, that the point for determination should be stated, the decision thereon and the reasons for the decision. It cannot be assumed that, because a Magistrate has not referred to the oral evidence, but has drawn inferences from documents and from probabilities, therefore, he has not considered the evidence; if he gives strong and legal reasons for his conclusions, it cannot be said that his judgment is defective. [p. 598, col. 2.]

Criminal revision from an order of the District Magistrate, Gaya, dated the 27th of November 1922, maintaining the decision of the Sub-Deputy Magistrate, Second Class, Nawadah, dated the 31st of October 1922.

Messrs. *P. K. Sen* and *P. C. Roy*, for the Petitioners.

DURGA SINGH *v.* EMPEROR.

JUDGMENT.—This is an application by six persons who have been convicted of offences under sections 147, 380 and 448 of the Indian Penal Code and have been sentenced to a fine of Rs. 100 each under section 147 and to two months' rigorous imprisonment and a fine of Rs. 25 each under section 380, Indian Penal Code. The occurrence took place on the 24th of April 1922. A cow was being slaughtered in the house of one Tetar, the son of *Musammat* Kariman, to be used at a marriage feast at the house of Somar Jolaha the next morning.

The case for the prosecution was, that about a hundred Babhans, including the petitioners, came into the house in a threatening manner and removed the carcass of the cow which had been slaughtered and assaulted Kariman and took away some ornaments and clothes. The defence was, that the cow belonged to Durga Singh; that it had been grazing with the other cows and did not return; it was ascertained that it was being killed in the house of Somar and the petitioners went there and found that it had already been slaughtered and so they took away the carcass and the instruments that had been used and produced them before the Court. A *Sanaha* was lodged before the Police at 2 A. M. on the 25th by the Chowkidar of Nawadah which referred to the cow as Somar Jolaha's. On the same date two petitions of complaint were lodged before the Magistrate, one by Somar and the other by Durga Singh. There was no mention of any injury to Kariman nor of any theft of her clothes and ornaments. On the 4th of May 1922 the Magistrate came to the village to enquire into another case and made enquiry into this case also. *Musammat* Kariman then first told him that she had received injury from Durga and that her clothes and ornaments had been taken away. Her statement was that she had gone to the house of one Idan and on her return did not find the articles. On the 10th of May she was examined by a Doctor who found some old marks of injury. It may be observed that the value of the cow, according to Somar, was Rs. 8-4-0. The conviction by the Magistrate was upheld in appeal by the District Magistrate except in the case of one accused who was acquitted. The sentence was also upheld.

The first ground urged in this application is, that the judgment of the Court of Appeal is not according to law, because the learned District Magistrate has not discussed the evidence of the ownership of the cow, although he has stated that this is the chief point in the case; that the accused are entitled to find the evidence of their guilt in the appellate judgment; that it must be taken that the Court did not direct its judicial attention to the evidence; and that the facts which have been relied upon are no foundation for the conviction. The learned District Magistrate has not discussed the evidence but he has relied on certain facts which, in his opinion, conclusively proved Somar's ownership of the cow. These facts are, that Somar's ownership was mentioned in the *Sanaha* lodged within six hours of the occurrence; that in his petition of complaint Somar gave the name of the man he had bought it from, whereas, on the other side, Durga Singh gave no details in his petition of the 25th of April 1922 and did not examine any of the witnesses named in that petition to prove his ownership. Besides these facts, he relied upon the improbability that Jolahas could steal a cow belonging to the Babhans of their own village in order to kill it. All that section 367 requires is that the point for determination should be stated, the decision thereon and the reasons for the decision. It cannot be assumed that because the District Magistrate has not referred to the oral evidence, but has drawn inferences from documents and from probabilities, therefore, he has not considered the evidence. He has given what to my mind are strong and legal reasons for his conclusion and I see no reason to say that his judgment is defective on that point.

In the second place, it is urged that the District Magistrate has said nothing about the hurt to Kariman or about the clothes and ornaments. This is an altogether insignificant part of the case and there is no very clear finding even by the Trying Magistrate with regard to it. The case is essentially a case of taking away a cow from the house where it had been killed. The other details may be exaggeration or may not, but in any case they are quite insignificant.

In the third place, reference is made to the fact that no marriage has actually taken place in Somar's house. This fact has been

found by the learned Magistrate and discussed by him and I see no reason in this for disbelieving the complainant's case. I do not see that the judgment of the Appellate Court is defective because it has not mentioned this fact which has no direct bearing on the occurrence itself.

Finally, it is argued, and I think with much more force, that the sentences are out of all relation to the gravity of the offence. What happened was that a cow of insignificant value had been slaughtered in the house of a Muhammadan and some Babhans whose religious feelings had been offended went and removed the carcass. This was an act of oppression which must be punished with a proper sentence. But the sentence which has been passed is, in my opinion, much too severe, and I would reduce the sentence of imprisonment to the term already undergone and the fine to a sum of Rs. 50, in default fourteen days' rigorous imprisonment, in the case of each of the petitioners. The order of compensation will stand.

W. C. A. *Sentence reduced.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 476 OF 1922.

June 4, 1922.

Present:—Mr. Justice Abdul Qadir.

NIHAL SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), s. 75—Complaint by Police Officer, whether cognizable.

Inasmuch as all Inspectors and Sub-Inspectors of Police have, by a notification under section 2 of the Punjab Excise Act, been invested with the powers of an Excise Officer of the First Class, a Court is competent to take cognizance of a complaint of an offence under that Act made by a Police Inspector.

Emperor v. *Niadar Singh*, 6 Ind. Cas. 717; 13 P. R. 1910 Cr.; 27 P. W. R. 1910 Cr.; 181 P. L. R. 1910; 11 Cr. L. J. 394, distinguished.

Mr. *K. J. Rustomji*, for the Petitioner.

Mr. *D. R Sawhny*, for the Respondent.

JUDGMENT.—Nihal Singh petitioner, was convicted under section 61 (1) (*a*) and 61 (2) (*a*) of the Excise Act and sentenced under the former to six months' rigorous imprisonment and a fine of Rs. 40 and under the latter to three months' rigorous imprisonment, and it was ordered that both the sentences should run concurrently. He appealed to the Sessions Judge, but his appeal was rejected. He has now come up to this Court in revision and I see no reason to disturb the concurrent findings of fact of the Courts below as to his guilt.

The only point of law pressed before me is that the Trial Court could not take cognizance of these offences because there was no complaint before it by an Excise Officer, though there was a complaint made by a Police Inspector. It is contended that this is not enough under section 75 of the Excise Act and in support of this contention reliance is placed on *Emperor* v. *Niadar Singh* (1). This is a ruling under the old Excise Act, XII of 1896, and is relied upon only as laying down the principle that a complaint cannot be brought by a PoliceOfficer whose authority is limited to certain specific acts in matters relating to Excise. It is pointed out, however, by Mr. D. R. Sawhny, on behalf of the Crown, that the present Excise Act differs materially from the old Act in this respect. Now, under section 2 of the new Act the Local Government is empowered to invest a Police Officer with all or any of the powers of an Excise Officer. He draws my attention to Notification No. 1101-S, dated 25th June 1914, by which the Local Government has vested all Inspectors and Sub-Inspectors of Police with powers of an Excise Officer of the First Class. He argues that the powers so conferred not being limited to any specified act or under any specified section, as was the case under the old Act, it must be taken that, by virtue of this notification, the said Police Officers are placed on the same footing as any other Excise Officer. Mr. Sawhny further contends that it is obvious that the Legislature wanted to extend the powers of cognizance in excise cases very materially as compared with the old Act, as shown by the fact that it is open to a Magistrate now to take cognizance of certain offences under the Excise Act on his own information. I think there is considerable force in the point of view put forward by the learned Counsel for the Crown,

(1) 6 Ind. Cas. 717; 13 P. R. 1910 Cr.; 27 P.W.R. 1910 Cr.; 181 P. L. R. 1910; 11 Cr. L. J. 394.

UMRAO KHAN *v.* EMPEROR.

and the present case seems to be, therefore, distinguishable from the case dealt with in *Emperor* v. *Niadar Singh* (1). Thus the legal objection raised cannot help the petitioner.

Mr. Rustomji on behalf of the petitioner next urges that the sentence awarded is too severe, considering that the petitioner is a young man without any previous offence. I think, this plea deserves some consideration. His convictions under both the counts are maintained, but it is ordered that his sentence under count No. 1 be reduced from six months' rigorous imprisonment to three months' rigorous imprisonment, to run concurrently with the sentence of three months' rigorous imprisonment passed under the second count. The sentence of fine of Rs. 40 under count No. 1 is upheld, as also the order that in default of payment of fine the petitioner is to undergo two months' rigorous imprisonment. It may be mentioned that the petitioner seems to have undergone by now imprisonment for three months, and, if that is so, he is to be released at once, provided he has already paid the fine or on payment of fine.

W. C. A. *Sentence reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 650 OF 1922.

January 19, 1923.

Present:—Mr. Justice Ryves.

UMRAO KHAN AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry—Sufficient ground—Notice.

The mere fact that the District Magistrate does not agree with the decision of the Trying Court is not a sufficient ground for ordering a further enquiry under section 437, Criminal Procedure Code, nor should action be taken under this section without giving notice to the accused.

Udai Raj Singh v. *Emperor*, 71 Ind Cas 528; 44 A. 691; (1922) A. I. R. (A.) 429, applied.

Criminal revision against an order of the District Magistrate, Budaun, dated the 15th November 1922.

Mr. *S. A. Haidar*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—It appears that a riot of some sort occurred on the 29th of March 1922. After protracted Police enquiries a number of persons were put on their trial, but the learned Magistrate, eventually, by an order dated 12th October 1922, discharged all the accused. He has written a very full judgment and has given reasons showing that every one of the prosecution witnesses so far contradicted himself and the other evidence in the case in cross-examination that it would be quite unsafe to rely on the prosecution evidence. The learned District Magistrate, by an order of the 15th of November 1922, set aside the order of discharge and directed a re-trial. The main reason he gives is that he took a different view of the evidence from that taken by the Trial Court. It seems to me there are two objections to his order. The first is that no notice was given to the accused before action was taken under section 437. Secondly, the mere fact that the District Magistrate does not agree with the decision of the Trying Court is not sufficient ground for ordering a further enquiry which is what is directed by section 437. This case is very similar to *Udai Raj Singh*, v. *Emperor* (1) to which I would call the attention of the learned Magistrate. The only difference between that case and this is that in this case the Magistrate suggests that the Doctor should have been examined specifically with regard to some of the allegations made by the defence and that another witness should have been called under section 540. In my opinion, there was no ground to order further enquiry in this case, specially having regard to the long period which has elapsed since the riot occurred. I, therefore, set aside the order of the learned District Magistrate dated the 15th of November 1922.

Order set aside.

S. D.

(1) 71 Ind. Cas. 528; 44 A 691; (1922) A. I. R. (A.) 429.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 304 OF 1922.

June 3, 1921.

Present:—Mr. Justice Abdul Qadir.

GOPAL SINGH AND ANOTHER—PETITIONERS

versus

EMPEROR, THROUGH SIKANDAR ALI—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Sanction whether restricted to particular individual.

A sanction for prosecution given by a Court under section 195, Criminal Procedure Code, 1898, is not a personal privilege granted to a petitioner but a decision that the case is one suitable for magisterial investigation, and, therefore, a sanction for prosecution does not lapse on the death of the person who obtained it.

Lakhi v. *Emperor*, 27 P. R. 1902 Cr.; 5 P. L. R. 1903, followed.

Jogendra Nath Mookerjee v. *Sarat Chandra Banerjee*, 32 C. 351; 9 C. W. N. 277; 2 Cr. L. J. 78, *Mallipaddi Gopaya, In re*, 14 Ind. Cas. 206; 13 Cr. L. J. 206, *Thathayya, In re* 12 M. 47; 2 Weir 164; 4 Ind. Dec. (N. S.) 382, *Behari* v. *Kure*, 38 Ind. Cas. 446; 15 A. L. J. 269; 18 Cr. L. J. 334, referred to.

Once a sanction is given by competent authority, there is nothing in section 195, Criminal Procedure Code, to restrict the sanction to the particular individual to whom it is granted.

Revision against the order of the Sessions Judge, Amritsar, dated the 25th October 1921.

Mr. *Gullu Ram*, for the Petitioners.

Lala *Bakshi Ram*, for the Respondent.

JUDGMENT.—A sanction to prosecute Gopal Singh and Santa Singh for perjury was obtained under section 195, Criminal Procedure Code, by one Katha Singh. He instituted a complaint against them of having committed an offence under section 193, Indian Penal Code, but died while the case was still pending. Sikandar Ali, the present respondent, applied to the Court to be allowed to proceed with the case instead of Katha Singh, complainant, and the Court granted permission to him to do so. Gopal Singh and Santa Singh thereupon applied to the learned Sessions Judge, on the revision side, against the order of the Magistrate, but their petition was rejected on 25th October 1921. He held that the death of the original complainant did not cause the sanction to abate and cited *Lakhi* v. *Emperor* (1) in support of his view. The petitioners have filed a revision in this Court against the order of the Sessions Judge. I have heard Mr. Gullu Ram for the petitioners and Lala Bakshi Ram for Sikandar Ali, respondent. Mr. Gullu Ram relies on *Jogendra Nath Mookerjee* v. *Sarat Chandra Banerjee* (2), where it is laid down that a sanction for prosecution expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority. Lala Bakshi Ram points out, in reply, that the view taken in the Calcutta case above referred to, is not only opposed to *Lakhi* v. *Emperor* (1) but to similar views expressed by other High Courts. He refers to *Mallipaddi Gopaya, In re* (3), where a Division Bench of the Madras High Court approved of *Thathayya, In re* (4), which has been relied upon in *Lakhi* v. *Emperor* (1), and held that it was open to a Court to entertain a complaint on a sanction granted to a party other than the complainant. *Jogendra Nath Mookerjee* v. *Sarat Chandra Banerjee* (2) was considered in *Mallipaddi Gopaya, In re* (3), but was not followed. The Vakil for the respondent also refers to a recent Allahabad case, published as *Behari* v. *Kure* (5), which is on all fours with the present case and very clearly lays down the law on the subject as follows:

"A sanction for prosecution given by a Court under section 195, Criminal Procedure Code, 1898, is not a personal privilege granted to a petitioner, but a decision that the case is one suitable for magisterial investigation, and, therefore, a sanction for prosecution does not lapse on the death of the person who obtained it." I fully agree with this view, particularly because it is in consonance with the terms of section 195, Criminal Procedure Code, itself. All that is required in that section is that before a Court takes cognizance of a complaint, there should be a proper sanction for instituting it. Once a sanction is given by a competent authority there is nothing in section 195, Criminal Procedure Code, to restrict the sanction to the particular individual to whom it is granted. If he dies, his death cannot prevent the prosecution of the man against whom the sanction

(1) 27 P. R. 1902 Cr.; 5 P. L. R. 1903.

(2) 32 C. 351; 9 C. W. N. 277; 2 Cr. L. J. 78.

(3) 14 Ind. Cas. 206; 13 Cr. L. J. 206.

(4) 12 M. 47; 2 Weir 164; 4 Ind. Dec. (N.S.) 382.

(5) 38 Ind. Cas. 446; 15 A. L. J. 269; 18 Cr. L. J. 334.

was given. The order of the learned Sessions Judge is, therefore, quite correct and Sikandar Ali has been rightly allowed to proceed against the petitioners. This petition is rejected.

W. C. A. *Petition rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 3 OF 1923.

February 6, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

DR. ZAHIR-UD-DIN, K. S.—PETITIONER

versus

M. NASIR-UD-DIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision against acquittal—Non-compoundable case—Compromise—Acquittal order passed without consideration of evidence—Interference in revision on application of private party.

As a rule an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial. [p. 603, col. 1.]

Therefore, if in a non-compoundable case, instituted on a private complaint, after completion of the prosecution evidence and the framing of the charge, the parties file a compromise stating that they have settled all their differences and have no further dispute left requiring determination, and upon this the Trying Magistrate acquits the accused without an appreciation of the evidence and a consideration of the merits of the case, there is a patent error or irregularity which justifies interference in revision with the order of acquittal. [p. 603, col. 1.]

Emperor v. *Ranchhod Bawla*, 18 Ind. Cas. 413; 37 B. 369; 15 Bom. L. R. 61; 14 Cr. L. J. 77, applied.

Sinnu Gounden, In re, 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236, *Emperor* v. *Madar Bakhsh*, 25 A. 128; A. W. N. (1902) 200, and *Emperor* v. *Ranchhod Bawla*, 18 Ind. Cas. 413; 37 B. 369; 15 Bom. L. R. 61; 14 Cr. L. J. 77, distinguished.

Gur Bakhsh Singh v. *Kashi Ram*, 27 Ind. Cas. 223; 37 A. 110; 13 A. L. J. 53; 16 Cr. L. J. 159, and *Municipal Board, Fyzabad* v. *Vidyadhari*, 53 Ind. Cas. 240; 24 O. C. 157; 22 Cr. L. J. 638; O. L. J. 646, referred to.

Criminal Reference.

The Government Pleader for the Crown.

Mr. *Haider Husain* for Mr. Nasir-ud-din.

ORDER.—In Satrian town there is a plot of land No. 298 *khasra* over which there is said to be a graveyard. A complaint was filed by Nasir-ud-din, stating that his ancestors and his relations were buried in that land and that the accused had ploughed up that land with the object of hurting the religious feelings of the complainant and his relations. After the evidence for the prosecution was completed and a charge framed against the accused under section 297 of the Indian Penal Code, a compromise was filed by the parties, stating that the accused had given up his claim to the land and accepted another land in exhange of it and that the parties had settled all their differences and had no further disputes left requiring determination. The Trying Magistrate thereupon ordered the acquittal of the accused.

During the pendency of the criminal proceeding a civil suit had been filed by the accused, in which the question of the title of the accused to that land was sought to be determined. That suit is still pending. Meanwhile, Dr. Zahir-ud-din, another member of the family to which the complainant, Nasiruddin, belongs, moved the District Magistrate in revision against the order of acquittal. He contended that the order of acquittal was illegal, as the offence charged was not compoundable, and that his own feelings were as much hurt by the action of the accused as those of other members of the family. The District Magistrate thereupon recommended to this Court that the order of acquittal should be set aside and a re-trial of the case directed from the stage at which it was left when the compromise was filed.

It is not disputed that the offence charged was not compoundable. The authority of the District Magistrate to make the reference under section 438 of the Code of Criminal Procedure is, however, questioned. Section 439, clause (5) lays down that where under the Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The party, who could have appealed under section 417, was the Local Government, but the Local Government is not evidently anxious to take any action, because if the allegations made by the complainant are

true the insult is more or less a persona insult, against which each party concerned is entitled to protect himself. The person who moved the District Magistrate is not entitled to file an appeal ; and the only manner in which he could have moved to have the matter re-opened and tried was by an application in revision, challenging the propriety of the order of acquittal, passed at the instance of the complainant and the accused.

On behalf of the accused reliance is placed on the decisions in *Sinnu Gounden, In re* (1) and *Emperor* v. *Madar Bakhsh* (2) and certain other cases. But in those cases the acquittal was based on a consideration of the merits of the trial. Where the acquittal proceeds on a wholly erroneous view of the law different considerations apply. As a rule, an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vit ate the whole trial. In the present case there was a patent error or irregularity in the order passed by the Trying Magistrate, for the offence was not compoundable, and he could not have passed an order of acquittal without considering the case on the merits. As observed in *Emperor* v. *Ranchhod Bawla* (3) in a warrant-case dealing with a non-compoundable offence, it is not competent to a Magistrate on a private complainant's offering to withdraw from the prosecution to enter an order of acquittal. In *Vellayanambalam* v. *Solai Servai* (4) the order of acquittal was passed on an appreciation of evidence. In *Gur Bakhsh Singh* v. *Kashi Ram* (5) and *Municipal Board, Fyzabad* v. *Vidyadhari* (6) an application in revision to interfere with an order of acquittal was entertained on grounds other than those connected with the merits of the trial. The order of the Trying Magistrat is, therefore, set aside and the case sent back to him with a direction to proceed with the trial from the stage at which it was left in the manner required by law.

S. D. *Revision allowed*

(1) 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236.
(2) 25 A. 128; A. W. N. (1902) 200.
(3) 18 Ind. Cas. 413; 37 B. 369; 15 Bom. L. R. 61; 14 Cr. L. J. 77.
(4) 30 Ind. Cas. 152; 39 M. 505; 28 M. L. J. 692; (1915) M. W. N. 540; 16 Cr. L. J. 600.
(5) 27 Ind. Cas. 223; 37 A. 110; 13 A. L. J. 531 16 Cr. L. J. 159
(6) 63 Ind. Cas. 334; 24 O. C. 157; 22 Cr. L. J. 638; 8 O. L. J. 646.

LAHORE HIGH COURT.

CRIMINAL PETITION No. 140 OF 1922.

January 29, 1923.

Present :—Mr. Justice Broadway.

SARDARA AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer by District Magistrate—Notice—Reasons, record of.

Although, strictly speaking, it is not necessary to issue notice before transferring a case under section 528 of the Criminal Procedure Code, the practice is to do so. [p. 604, col. 2,]

The order of a District Magistrate transferring a case under section 528 of the Criminal Procedure Code without recording reasons for the transfer is bad and is liable to be set aside. [p. 605, col. 1.]

Petition, under section 497-526, Criminal Procedure Code, praying that the order of the Officiating District Magistrate, Montgomery, dated the 1st November 1922, be set aside, and in case the High Court decides otherwise, the petition may be considered as a petition under section 528, Criminal Procedure Code, and that the case be transferred to some other District or to some other European or section 30 Magistrate of the District.

Mr. *C. H. Carden Noad* and Lala *Anan Ram Khosla*, for the Petitioners.

Mr. *Des Raj Sawhney*, Public Prosecutor, and Lala *Pindi Das*, for the Complainant.

ORDER.—On the 9th October 1922, a burglary is said to have been committed at Chak Bedi in the Montgomery District. Certain cattle are said to have been stolen

and the matter was reported to the Police by Partab Singh *Zaildar*. An investigation was held and on the 28th October 1922, Sardara, Wallu and Baghri were sent up by the Police for trial under section 379, Indian Penal Code. The Crown was represented by the Court Inspector. All the animals alleged to have been stolen were not present, nor were all the witnesses for the prosecution. The Sub-Divisional Magistrate thereupon adjourned the case to the 31st October 1922 directing that all the animals should be produced and all the witnesses for the prosecution be summoned. An application for bail had been filed on behalf of the persons accused and an order was passed thereon to the effect that it would be disposed of on the next date fixed. On the 31st October 1922 an application was made on behalf of Partab Singh for an adjournment in order that the said Partap Singh might be given time to have the case transferred from the Court of the Sub-Divisional Magistrate. The Court Inspector then made a statement in which he stated that Partap Singh had made this application without his consent and without notice to him, that nearly all the witnesses were present and that the stolen property had been produced On this the Magistrate proceeded to examine four witnesses and then it was found that three witnesses who had been present on the 28th October 1922 and also on the 31st October 1922 at the commencement of the hearing had disappeared. Thereupon the Magistrate recorded an order pointing out these facts and directing bailable warrants to issue for the three witnesses who had run away and admitted the accused persons to bail in the sum of Rs. 1,000 each. He also allowed Partap Singh 15 days within which to get the case transferred if he wished. This order was passed on tou in the Pak Pattan Sub-Division.

On the 1st November 1922, an application was filed by Partap Singh before the District Magistrate at Montgomery asking for a transfer of the case. The reasons for the transfer were that during the investigation Bawa Hara Singh, Honorary Magistrate, had asked (1) that the investigation into this offence should be made under the supervision of the Sub-Divisional Magistrate, (2) that the Sub-Divisional Magistrate had shown an intention to release the accused on bail before recording the prosecution evidence and (3) that the Sub-Divisional Magistrate had refused to adjourn the case as soon as Partap Singh had filed the application asking him to do so.

These allegations were supported by an affidavit and the District Magistrate, Khan Sahib Malik Zaman Mehdi Khan, without sending for the record, and without giving notice to the accused persons, passed an order as follows :- "The order for bail is cancelled and the case transferred to Mr. Phailbus. The accused who are on bail should be put back into the lock-up."

Against this order Sardara and his companions have come up to this Court through Messers. Carden Noad and Anant Ram Khosla. Mr. D. R. Sahwney has represented the Crown, while Mr. Pindi Das has been allowed to address me on behalf of Partap Singh.

Mr. Des Raj was constrained to admit that it was difficult to support the order of the District Magistrate. Mr. Pindi Das contended that, although the District Magistrate had not complied with the provisions of law as laid down in section 528 (3), Criminal Procedure Code, still his order should not be interfered with. He referred me to *Abdu'lah* v. *Emperor* (1). The facts of that case were very different from the facts of this case. On behalf of the petitioners it was contended that the District Magistrate had no power to interfere with the order admitting the accused persons to bail, and reference was made to *Imperatrix* v. *Sadashiv Narayan Joshi* (2). Further, it was contended that it was in order to become siezed of the case so as to be able to cancel the order of bail that the transfer to Mr. Phailbus' Court was ordered. I am not concerned with the motives by which the District Magistrate was actuated and do not propose to discuss them, but it seems to me that his order was wholly unjustified. It has been repeatedly pointed out by this and other High Courts that, although, strictly speaking, it is not necessary to issue notice before transferring a case, nevertheless the prac-

(1) 4 Ind Cas 1025 : 3 P. R 1910 Cr.; 35 P. W. R. 1909 Cr.; 11 Cr. L. J. 150; 164 P. L. R. 1909.
(2) 22 B. 549; 11 Ind. Dec. (N. s.) 947.

tice has been to do so. In the present case although section 528 (3), Criminal Procedure Code, lays down that reasons should be given for transferring a case no reasons were recorded. It is a little difficult to see what reasons could have been given in the absence of the record and merely on the application which was before the learned District Magistrate. When notice was served of these proceedings on the District Magistrate he recorded thereon that there was some more information which was not on the papers and which could be supplied if required and that the case was transferred on that account. I have asked Mr. Des Raj for those reasons and all he was able to say was that Bawa Hara Singh is an Honrary Magistrate in the *Ilaqa* and that the complainant is really Bawa Hardit Singh and that these two persons are not on good terms. As far as I have been able to see from the proceedings, the Sub-Divisional Magistrate's orders were perfectly legal and there was nothing in them which could or should create in the mind of any one any partiality on his part. Further, it is to be noted that the Court-Inspector, who was in charge of the prosecution, definitely stated that he did not want a transfer.

In these circumstances, I set aside the order of the learned District Magistrate, dated 1st November 1922, and return the case to the Sub-Divisional Magistrate, Pak-Pattan, for disposal in accordance with law.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 741 OF 1922.

November 25, 1922.

Present:—Mr. Justice Ryves.

HIRA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 96, 97, 99, 141—Right of private defence of person—Extent of right—Force to be used—Unlawful assembly—Distinction between "enforcing" and "maintaining" right.

The accused, who were in peaceful possession of their land, apprehended from their past experience that at some time or another the complainant's party would make an attempt to seize the land by force. Therefore, when they went to plough their land they took the precaution to take with them their *lathis* to protect themselves as well as their property, and as they were fewer in number than the complainant's party, they also took the precaution to see that the men working in the neighbouring fields were also armed with *lathis*, so that, if necessary, they could come to their assistance. They did not know on what day they might be attacked. One day, when they were engaged in ploughing their land, they were suddenly set upon by the complainant's party, who attacked them with *lathis* causing injuries to all of them, and who, but for their leader being grievously injured, would have persisted in the attack until they had recovered possession of the land. A large number of the complainant's party got hurt in the fight:

Held, that the accused were protected by both clauses of section 97, Indian Penal Code, as they had a right to defend their persons as well as their property against the complainants, who committed or attempted to commit the offence of criminal trespass. [p. 607, col. 1.]

There is a distinction between "enforcing" a right and "maintaining" a right. [p. 607, col. 1.]

Queen-Empress v. *Narsang Vathabhai*, 14 B. 441; 7 Ind. Dec. (N. S.) 755, *Regula Bheemappa* v. *Emperor*, 26 M. 249; 1 Weir 63, *Queen-Empress* v. *Timmal*, 21 A. 122; A. W. N. (1898) 208; 9 Ind. Dec. (N. S.) 787 and *Queen-Empress* v. *Prag Datt*, 20 A. 459; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.), 654, referred to.

If a man is entitled to protect his own life by using a *lathi*, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, in "golden scales," and to adjudicate with great nicety as to the exact amount of force which would be justified; provided always that no undue advantage is taken. [p. 608, col. 1.]

Criminal appeal against an order of the Sessions Judge, Bulandshahr, dated the 18th September 1922.

Messrs. *C. R. Alston* and *G. W. Dillon*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—In this case seven men were convicted by the learned Sessions Judge of Bulandshahr under section 147 and section 304 of the Indian Penal Code and sentenced to rigorous imprisonment for six months. A large number were accused, but as those persons were admittedly in the fight they alone were convicted and the remainder were given the benefit of the doubt. They have appealed.

The learned Sessions Judge has tried the case very carefully and has written a very full judgment. He has found the facts very clearly up to a certain point. They are

as follows :—The complainants were a large body of persons composed chiefly of the adherents of Ali, a Muhammadan, and the adherents of a Hindu who made common cause. These persons, as shown from the judgment, had for a long series of years continued in unlawful possession of some plots of land in the village. The former Zemindar, after protracted litigation up to the Board of Revenue, had established the facts that the complainants were trespassers who had no sort of right to possession of the fields. They were then sued for ejectment in the Revenue Courts and decrees were passed against them, and although execution was taken out and they were ejected in due course of law, they nevertheless continued in possession of the fields. The Zemindar sold the village to a leading Vakil of Aligarh and he found the tenants equally recalcitrant. Failing to evict them by the Civil Courts he brought complaints against them for criminal trespass in the Criminal Court and on conviction they were imprisoned and formal possession was made over to the Zemindars. As soon, however, as they came out of prison they forcibly re-took possession of the land. They were imprisoned again for a similar offence at the beginning of this year. The Zemindar then let out these fields by registered lease to some of the accused, and towards the end of last June the accused, who were lessees of the land and were in peaceful and lawful possession thereof were engaged in ploughing one of the fields. Thereupon the complainants in a large body came up armed with *lathis* and attacked the tenants, who called for assistance to the cultivators from the neighbouring fields who rushed up. They all had *lathis* with them and they resisted the very deliberate and prolonged attack made on them by the complainants. Considerable injury was caused to persons on both sides and Alli, the leader of the complainants' party, ultimately succumbed. Having arrived at this finding, the learned Session Judge does not go on to find in so many words who were the aggressors, because, in his opinion, "It is quite immaterial whether the Zemindar's men were ploughing and were attacked by Alli's supporters or whether Alli's supporters were ploughing and were attacked by the Zemindar's men or whether both parties started off to take poss s ion of the fields and met there and fought it out. It is immaterial who got there first. The point is that both sides intended to make a fight of it." The learned Judge says in another portion of his judgment: "It is impossible to believe that there was that entire absence of organisation and premeditation that the accused suggest," and he thinks it unlikely that the men who were cultivating neighbouring fields or were cutting grass there went out armed with *lathis* without any apprehension of being involved in fighting. He goes on to say :— "That the Zemindars' party had the right to plough the field I do not for a moment dispute, but I say that they collected their supporters, whether seven or ten or sixteen is hardly material, but they collected their supporters armed with *lathis* and intended on fighting it out; that is to say, in the words of the law, they were an assembly of five or more persons with a common object, and that common object was by show of force to enforce their rights. I fear I cannot appreciate the distinction which certain very learned Judges of the Hon'ble the High Court at Calcutta have attempted to make between enforcing a right and maintaining a right."

Before I discuss the law it seems to me necessary to come to a definite conclusion as to what were the facts, because it is only when the facts have been found with certainty that it becomes profitable or indeed possible to see what the law is that is applicable. I hold, and I think the learned Sessions Judge meant to hold, that the accused party, who were tenants of the fields under a lease and were in peaceful possession of those fields as tenants and were engaged in ploughing in the ordinary course of husbandry, had taken the precaution to take with them their *lathis* and had also taken the precaution to see that the men engaged in work on the neighbouring fields were also armed, because they knew from the experience of the past that at some time or another it was very likely that the complainants' party would attempt to seize those fields by force, and this is just what happened. I find that the complaintans' party attacked the accused with *lathis* and

persisted in that attack, injuring all the accused persons, and intended to persist in that attack until they had recovered possession of the field but only desisted when their leader was very grievously injured and a large number of themselves had got hurt. In fact they persisted in the fight until they were beaten off. The learned Sessions Judge says that the accused were an assembly of five or more persons with a common object and that common object was by show of force to enforce their rights. It seems to me that the learned Sessions Judge has overlooked the fact that section 141 of the Penal Code, from which he has quoted, must be read with section 96 and the following sections of the Code. On these facts I think the accused were protected by both clauses of section 97, that is to say, (1) that they had a right to defend their own persons and the persons of others against an offence affecting the human body, and (2) that they had the right to defend the property against the complainants who were committing or attempting to commit at least the offence of criminal trespass. The learned Sessions Judge says that he is unable to appreciate the distinction which the learned Judges of the Calcutta High Court have drawn between enforcing a right and maintaining a right, but this view is not confined to the Calcutta Hight Court. It is, as far as I know, recognized by all the High Courts in India. *Queen-Empress* v. *Narsang Pathabhai* (1) and *Regula Bheemappa* v. *Emperor* (2) and more particularly our own High Court in the case of *Queen Empress* v. *Timmal* (3) to which I call the learned Sessions Judge's special attention, more particularly to the remarks on page 125 of the reports. It is not opposed to the case of *Queen-Empress* v. *Praj Datt* (4), the head-note to which case is misleading*. The head-note says: "When a body of m n are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises." This passage is taken from the judgment but the very next sentence in the judgment has not been quoted. It is to the effect, "Neither side is trying to protect itself but each side is trying to get the better of the other." It sometimes happens that two parties make the possession of a field or a tree the pretext for a fight and then go out armed to see who are the better men. In such cases, as pointed out in *Prag Dat's case* (4), obviously there is no right of private defence. It is a duel between the parties and nothing short of it. There are some cases reported, in which owing to the uncertainty of the facts and sometimes the attempts by Judges to express themselves epigrammatically if I may say so, confusion has arsien and also the head-notes to these cases are often very misleading. It is never safe to accept the law as laid down in a head-note without examining the facts and the reasons given in the judgment, but I think if the cases are examined carefully it will be found that the decision in each case is justified by the actual facts of that case. It is impossible to lay down any general rule other than that laid down in sections 96, 97 and 99 of the Penal Code on this subject. It is interesting to note that when the Commissioners were framing this part of the law in their report, they say "we propose to except from the operation of the penal classes of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions..... In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gangs of robbers and the trespass and mischief committed in the most outrageous manner by bands of ruffians is one of the most remarkable, and at the same time one of the most discouraging, symptoms which the state of society in India presents to us."

In this case the accused were perfectly justified in ploughing the land which they had leased. They did not know for certainty perhaps that they would be attacked but they must have thought that it was so very probable that they would be

(1) 14 B 441; 7 Ind Dec. (N. S.) 755.
(2) 26 M 249; 1 Weir 63.
(3) 21 A 122; A. W N. (1898) 208; 9 Ind Dec. (N. S.) 787.
(4) 20 A 459; A. W. N. (1893) 117; 9 Ind Dec. (N. S.) 654.

*Refers to 20 A. 459.—[*Ed.*]

attacked by Ali and his party sooner or later when opportunity occurred that it seems to me it would have been most foolish of them not to take precautions to protect themselves as well as their property, and I hold that they were perfectly justified under the circumstances in going armed with *lathis* and, also, as they were few in number and the complainants' party was large, they were justified in seeing that their friends and neighbours were armed so that, if necessary, they could come to their assistance. It is not the case that they knew that they were going to be attacked that morning and that they had time to have recourse to the Civil Authorities for protection. They were suddenly set upon by the complainants. If they had a right to protect themselves and their property, as I hold they had, I find that they did not exceed their right. If a man is entitled to protect his own life by using a *lathi* it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, in "golden scales" and to adjudicate with great nicety as to the exact amount of force which would be justified. This, of course, provided that no undue advantage is taken.

In the result, I find that the accused were all of them justified in using force on the assailants in the defence of their property and of their persons and that they did not use more force than was necessary. I, therefore, allow the appeal, acquit the accused and, as they are on bail, they need not surrender.

S. D

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION PETITION NO. 106 OF 1922.

August 15, 1922.

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

In re RAMANATHAN CHETTIAR—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 350 (1)—Proceeding in warrant-case before charge—Enquiry or trial.

A proceeding in a warrant-case before a charge is framed is merely an inquiry and not a trial and section 350 (1) of the Criminal Procedure Code is applicable to such a case.

Narayanaswamy Naidu v. *Emperor*, 1 Ind. Cas. 228, 32 M. 220; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192, *Tanguturi Sriramulu* v. *Nalam Krishna Row*, 25 Ind. Cas. 1001; 38 M. 585; (1914) M. W. N. 646; 16 M. L. T. 303; 27 M. L. J. 589; 15 Cr. L. J. 673, *Telluchuri Venkatachennaya* v. *Emperor*, 56 Ind. Cas. 50; 43 M. 511; 11 L. W. 435; (1920) M. W. N. 280; 38 M. L. J. 370; 21 Cr. L. J. 402; 27 M. L. T. 178, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated the 7th November 1921, of the Court of Madura Division in Calendar Case No. 56 of 1921.

Mr. *A. Narasimha Aiyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The question before us is in effect whether section 350 (1) (*a*), Criminal Procedure Code, can be applied to proceedings in a warrant case before charge has been framed, that is, in effect, whether at that stage the proceeding is not a trial, but merely an enquiry. The authorities, in *Narayanaswamy Naidu* v. *Emperor* (1), *Tanguturi Sriramulu* v. *Nalam Krishna Row* (2) and *Telluchuri Venkatachennaya* v. *Emperor* (3), are in favour of the view that such a proceeding is merely an enquiry; and we see no reason for departure from this series of considered decisions, two of them given by a Full Bench. There is, therefore, no legal objection to the Magistrate's order and the revision petition must be dismissed.

V. N. V. *Revision petition dismissed.*

(1) 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192.

(2) 25 Ind. Cas. 1001; 38 M. 585; (1914) M.W.N. 646; 16 M. L. T. 303; 27 M. L. J 589; 15 Cr. L. J. 673.

(3) 56 Ind. Cas. 50; 43 M. 511; 11 L. W 435; (1920) M. W. N. 280; 38 M. L. J. 370; 21 Cr. L. J 402; 27 M. L. T. 178.

SECRETARY OF STATE FOR INDIA *v.* FIRM JIWAN AND ABDULLA.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 132 OF 1922.

February, 5, 1923.

Present:—Mr. Justice Lindsay.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PETITIONER

versus

FIRM JIWAN AND ABDULLAH—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 72—Risk-Note Form "B"—Word "loss," meaning of.

In section 72 and the following sections of the Railways Act, as also in the Risk-Note Form "B", which is one of the forms drawn up under the provisions of the Act, the word "loss" means "*loss by the Railway*", and cannot mean "*loss to the owner*" in the sense of injury to him arising out of his being deprived of his goods. [p. 610, col. 1.]

Changa Mal v. *Bengal North-Western Railway Company*, 6 P. R. 1897, referred to.

Civil revision from an order of the Judge of the Court of Small Causes at Saharanpur, dated the 26th August 1922.

Mr. *L. M. Banerji*, for the Applicant.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a judgment of the Court of Small Causes at Saharanpur awarding the plaintiff firm damages against the Secretary of State as proprietor of the Oudh and Rohilkhand Railway.

The facts found by the Court below are as follows:—On the 23rd June 1920, the plaintiff firm made over to the Railway 58 parcels containing mangoes. The goods were consigned to Lahore. At the time of sending the goods the plaintiffs executed a Risk-Note in Form B.

The goods were delayed in transit and did not reach Lahore till the 4th July and by that time the fruit had become rotten. Delivery was offered to the consignee on 5th July but was refused by him, and, under the orders of the Station Superintendent, the goods were then destroyed.

The Judge finds that the delay in the transit of the goods and the resulting deterioration of the fruit was due to gross negligence on the part of the Railway's servants.

The present suit was brought by the plaintiff firm to recover the value of part of the value of the consignment. The Railway Company claimed the protection of the Risk-Note, Form B, pleading that, as there was no loss of the goods by them, the plaintiffs could not recover.

The learned Judge overruled this plea holding that the word "loss" in the Risk-Note was not equivalent to loss by the Railway, that is to say, disappearance of the contents of the parcels, but meant the loss to the plaintiff-firm occasioned by the destruction of the fruit while it was in the possession of the Railway. The present application challenges the correctness of the lower Court's interpretation of the word "loss" as set out above, and it is argued that the Railway Company was protected by the Risk-Note, as there was no loss of the goods by the Company.

In my opinion this contention must prevail; the decision of the Court below is erroneous.

Section 72 of the Indian Railways Act (IX of 1890) defines the responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to it for carriage: the responsibility is that of a bailee as laid down in sections 151, 152 and 161 of the Indian Contract Act subject to any special agreement executed by the consignor in a form which has been approved by the Governor-General in Council.

There can be no dispute that the agreement embodied in Risk-Note, Form B, is an agreement of this kind.

Under this agreement which governs the relations of the parties in the present case the Railway Administration in consideration of its charging a lower rate for the goods is indemnified by the consignor against all liability for any loss, destruction, or deterioration of, or damage to the consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, where the loss is due either to the wilful neglect of the Railway Administration, or to theft by, or to the wilful neglect of, its servants or agents. It follows from this that the consignor who has executed a note in this form has no claim fo destruction, or deterioration of or damage to the consignment. He can only claim in the event of loss occasioned in the manner specified in the contract. The word "loss" in this connection clearly

means *loss by* the Railway Administration and cannot mean loss to the owner in the sense of injury to him arising out of his being deprived of his goods.

Section 151 of the Indian Contract Act, referred to in section 72 of the Railways Act, lays down that the bailee of goods is bound to take as much care of the goods bailed as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 of the Contract Act lays down that in the absence of a special contract the bailee is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care prescribed by section 151, and obviously the words "loss, destruction or deterioration" in section 152 refer to something which happens while the goods are still in the possession of the bailee. The word "loss" in this connection must necessarily mean "loss" by the bailee. The word must also have the same signification in section 72 and the following section of the Railways Act and also in the Risk-Note Form B which is one of the forms drawn up under the provisions of the Act.

I hold, therefore, that the word "loss" as used in the Risk-Note must mean loss by the Railway Administration.

In support of this opinion I refer to a case decided by the Chief Court of the Punjab, *Changa Mal* v. *Bengal North-Western Railway Company* (1), where it was held that the word "loss" in section 77 of the Railways Act means "loss by the Railway" and not simply "loss to the owner."

In the case now before me there was no loss by the Railway Administration: the goods were never abstracted from its possession so as to become "loss" in the proper sense of the term, and this being so, the plaintiff firm has no case under the contract embodied in the Risk-Note.

The case is really one of deterioration of goods while in possession of the Railway, and although the deterioration was due to the neglect of the Railway's servants the claim cannot succeed. The contract of indemnity contained in the Risk-Note excludes all claims on account of the deterioration of goods.

I allow this application and, reversing the decree of the Court below, direct that the suit be dismissed with costs to the defendant in both Courts, to include in this Court fees on the higher scale.

S. D. *Application allowed.*

(1) 6 P. R. 1897.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 235 OF 1921.

January 30, 1923.

Present:— Mr. Justice Daniels.

NAND LAL—DEFENDANT—APPELLANT

versus

FIRM GULAB RAI-NARAIN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 63, 83—Hundi *payable on demand—Presentment.*

Sections 63 and 83 of the Negotiable Instruments Act do not apply to a *hundi* payable on demand, inasmuch as the only presentment necessary in the case of a bill payable on demand is presentment for payment and not a presentment for acceptance. [p. 611, col. 2.]

Second appeal against a decree of the Subordinate Judge, Meerut, dated the 16th of November 1920.

Mr. *Brijnath Vyas*, for the Appellant.

Messrs. *K. C. Mital* and *Mangal Prasad Bhargova*, for the Respondents.

JUDGMENT.—The question in dispute in this appeal is as to the liability of the appellant, Nand Lal, on a *hundi*. The appellant was the fourth defendant in the suit. The *hundi* was drawn by the defendant's first party, the firm of Murli Dhar-Bakhshi Ram, through their agents, the second and third defendants, in favour of the plaintiff firm, Ghulab Rai-Narain Das, for Rs. 400. The plaintiffs sent it to Nand Lal with instructions to realise the amount and place it to the plaintiff's credit in the account between him and the plaintiffs. Nand Lal sent it to the defendants fifth party, the firm of Ram Prasad-Ram Gopal, his commission agents, to realise it from the drawees, the sixth party.

The defendants fifth party showed it to the drawees on 22nd June 1917. The drawees kept it for seven days and then wrote "seen" on it and returned it to the defendants fifth party. Possibly owing to delays in the post it did not reach Nand Lal till 5th July (this date is given in the Munsif's judgment which the lower Appellate Court has affirmed). Nand Lal returned it to the plaintiffs the same day. The firm of the drawers, the defendants first party, failed on 4th July, and the plaintiffs were unable to realise their money. They claimed that Nand Lal should be treated as having received the money, though in fact he had not received it, and should be required to credit it to the plaintiffs in his account or, in the alternative, that a decree for the amount with interest should be passed against him. Both the Courts below decreed the suit for the second relief. The ground or decision was that, under section 63 read with section 83 of the Negotiable Instruments Act the drawees should only have been allowed 24 hours within which to accept the *hundi* (the time has since been extended to 48 hours by Act XII of 1921) and that by allowing them to retain it for seven days Nand Lal through his agents, the defendants fifth party, were guilty of negligence, in consequence of which all previous parties to the *hundi* were discharged from liability. The plaintiffs as a result of this negligence were prevented from realising the amount of the *hundi* and are, therefore, entitled to recover it from Nand Lal.

The appellant's case in this Court is that sections 63 and 83 of the Negotiable Instruments Act are not applicable. Under section 61 of the Act it is only a bill payable after sight which requires to be presented to the drawee for acceptance and it is only to such a bill that section 83 applies. This view is, in my opinion, correct. The *hundi* in suit was payable on demand and under the provisions of the Act no presentment for acceptance is necessary in the case of such a bill. The law is stated in Chalmers Negotiable Instruments Act, 4th Edition, page 186 :—

" Ordinarily, there is no necessity for the bill to be presented for acceptance; the drawer is liable on the bill as principal debtor and it is optional with the holder whether he will substitute therefor the liability of the acceptor and constitute the drawer a surety for the acceptor."

Sections 63 and 83 regulate the conditions under which a presentment for acceptance is valid and the consequence of not complying with these conditions, and have no application to a bill which does not require to be presented for acceptance at all. The only presentment necessary in the case of a bill payable on demand is presentment for payment under section 64 of the Act and there are no provisions corresponding to sections 63 and 83 requiring payment to be made within 24 hours on penalty of all previous parties being discharged from liability I am informed that the same view was taken by Lindsay, J., as Judicial Commissioner of Oudh in two unreported cases. I, therefore, allow the appeal and, modifying the decree of the Court below, dismiss the suit as against the appellant Nand Lal. As, however, the plea on which the appeal has succeeded was not taken in either of the Courts below, I allow the appellant no costs in either of those Courts. He will be entitled to his costs of the appeal in this Court from the plaintiffs. There is a deficiency of Rs. 29-8 Court-fees payable by one of the respondents in the lower Appellate Court. In accordance with the practice of this Court, the appellant must pay this amount before he can realise his decree for costs of this Court, and will then be entitled to add it to the costs recoverable from the plaintiffs.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL REVISION CASE NO. 22 OF 1922.
July 26, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

ISHAN CHANDRA SARKAR—PETITIONER

versus

MONMOTHA NATH DUTTA—OPPOSITE PARTY.

Calcutta Rent Act (III B. C. of 1920), s. 20—Calcutta Improvement Tribunal—Summary enquiry—Jurisdiction—Criminal Procedure Code—(Act V of 1898) ss. 5(2), 29 Chap. XXII.

ISHAN CHANDRA SARKAR *v.* MONMOTHA NATH DUTTA.

The President of the Calcutta Improvement Tribunal is competent to hold the summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of Chapter XXII of the Code of Criminal Procedure. [p. 613, col. 2.]

Having regard to the provisions of section 29, read with section 5 (2), Criminal Procedure Code, the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically therein is not excluded. [p. 613, col. 2.]

Rule against the Order of the Calcutta Improvement Tribunal, dated the 26th April 1922.

Babu *Hira Lal Chakravarty*, for the Petitioner.

JUDGMENT.—This is a Rule calling on the President of the Calcutta Improvement Tribunal and the opposite party to show cause why the order of the learned President, dated the 26th April 1922, should not be set aside, or such other and further order made as to this Court may seem fit.

The facts, which have given rise to this application shortly stated, are as follows :— The petitioner before us is a tenant in premises 64 and 64-1 of Garpar Road within the limits of Calcutta as defined in the Calcutta Rent Act. He was let into possession of four rooms and a kitchen sometime in November 1918, the rent payable by him being a sum of Rs. 15 per month. It is stated that in February 1920 this rent was enhanced to Rs. 26 a month, and that in February 1922 a further demand for a further enhancement was made by the landlord but it was refused by the petitioner. The result of the refusal on the part of the petitioner to pay further enhanced rent was that the petitioner's landlord, namely, the opposite party, cut off the connection with the unfiltered water tap and forcibly dispossessed the petitioner from a room on the ground floor situated in 64-1 Garpar Road and prevented the petitioner and his family from the use of a filtered water tap in 64 1 Garpar Road and by cutting off one of the filtered water taps. These things happened on the 4th March 1922. The petitioner being thus put to very serious inconvenience and annoyance applied on the 11th March 1922 to the Controller of Rents in Calcutta for sanction to prosecute the opposite party under section 20 of the Calcutta Rent Act. The application for sanction was under the provisions of section 22 of the Calcutta Rent Act and an enquiry was made by the Controller of Rents in Calcutta. That officer came to the conclusion that the allegations made by the petitioner were substantiated to his satisfaction and he accordingly granted sanction to the petitioner to prosecute the opposite party under section 20 of the Calcutta Rent Act. Thereafter the petitioner preferred a petition of c mplaint before the President of the Improvement Tribunal against the opposite party under the provisions of section 20 of the Calcutta Rent Act. The learned President by his order dated the 26th April 1922 declined to take any action whatsoever on the complaint preferred by the petitioner on the ground that there is no procedure indicated in the Calcutta Rent Act or anywhere provided by law for holding a summary enquiry such as is referred to in section 20 of the Calcutta Rent Act The learned President in the course of his judgment points out that under section 23 of the Calcutta Rent Act the Local Government was charged with the duty of making rules regulating the procedure to be followed in enquiries by the President of the Tribunal and that in the exercise of the powers vested in them under section 23 of the Calcutta Rent Act the Local Government made a rule which rule was to the effect that the President of the Calcutta Improvement Tribunal in the matter of enquiries referred to in the Act should follow the Code of Civil Procedure as nearly as may be. The validity of this rule was discussed by this Court in the case of *Gobordhone Das* v *Doolichand* (1), and it was ruled by this Court that the rule referred to above being r. 4 made by the Local Government under the provisions of section 23 of the Calcutta Rent Act was *ultra vires*. It appears that after the date of this decision by this Court the Local Government has amended the previous rule by adding to it a proviso to the effect that in making a summary enquiry under sections 19 and 20 of the Act the President of the Tribunal shall follow as nearly as may be the procedure for conducting enquiry prescribed by the Code of Criminal Procedure. The learned President for the reasons given by him is, however, of opinion that the amend

(1) 61 Ind. Cas. 210; 25 C. W. N 661; 33 C. L. J. 551; 22 Cr. L. J. 354; 48 C. 955.

ment made in the previous rules by the Local Government does not meet the difficulties to which attention had been previously called. In particular the learned President refers to the question as to whether, having regard to the provisions of section 5 (2) of the Code of Criminal Procedure read with section 29 of that Code, provision has been made by the Local Government in the rules which they have made for regulating the procedure to be followed in the summary enquiry under section 20 of the Calcutta Rent Act.

We have examined the provisions of section 20 of the Calcutta Rent Act as also the provisions of sections 5 (2) and 29 of the Code of Criminal Procedure as also the sections in Chapter XXII of the said Code, and for the reasons mentioned below we are of opinion that the President of the Tribunal is competent to hold summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of Chapter XXII of the Code of Criminal Procedure.

Section 5 of the Code of Criminal Procedure runs as follows:—"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained (2) All offences *under any other law* shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, namely, the provisions hereinafter contained as mentioned in section 5 (1), but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiry into, trying or otherwise dealing with such offences. Section 29 (1) states, subject to the provisions of section 447 any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Courts."

The effect of these two sections, read with section 20 of the Calcutta Rent Act, is, as we understand, this:—A specific offence was created by section 20 of the Calcutta Rent Act. The Court which is to try the person charged with this specific offence is also mentioned in section 20 of the Calcutta Rent Act. Therefore, having regard to the language of section 29 (1), Criminal Procedure Code, it would appear that the offence created under section 20 of the Calcutta Rent Act shall in the events which have happened, namely, the Court which is to try the offence having been mentioned in section 20 of the Calcutta Rent Act, be tried by the President of the Tribunal, which is the Court mentioned in section 20 of the Calcutta Rent Act. Now, let us look at section 5 (2), Criminal Procedure Code. By virtue of section 5 (2), Criminal Procedure Code, an offence created "under any other law" that is, an offence created under section 20 of the Calcutta Rent Act, shall be investigated, inquired, tried or otherwise dealt with according to the provisions of the Code of Criminal Procedure but subject to any enactment for the time being in force. The proviso indicated in section 5 (2), Criminal Procedure Code, need not be taken into consideration because of the fact that in the enactment which created the offence no special procedure is indicated and, therefore, it is clear from the combined operation of sections 29 and 5 (2) of the Code of Criminal Procedure that the enquiry must be held according to the provisions of the Code of Criminal Procedure.

Now, the question arises, according to what particular provisions of the Code of Criminal Procedure is the enquiry to be held. Section 20 of the Calcutta Rent Act prescribes that the enquiry is to be a summary enquiry. Now, if one turns to the provisions of Chapter XXII of the Code of Criminal Procedure, one finds that provision is made there for the holding of summary trials. There cannot be any manner of distinction between a summary enquiry and summary trial, and we think the provisions of Chapter XXII, Criminal Procedure Code, are applicable to cases which have to be enquired into summarily as indicated in section 20 of the Calcutta Rent Act. The learned President has observed in his judgment that Chapter XXII read with Chapter XXIII, Criminal Procedure Code, would appear to be applicable only to the classes of Courts mentioned therein. In this connection it is to be observed that, having regard to the provisions of section 29 read with section 5 (2), Criminal Procedure Code, the possibility of the application of the provisions of the Code or Criminal Procedure to Courts which are not mentioned specifically in the Code of Criminal Procedure is not excluded. For the reasons given above we think the learned President should have followed the provisions of the

Code of Criminal Procedure and should have held a summary enquiry for the purpose of determining the complaint preferred before him under the provisions of section 20 of the Calcutta Rent Act.

The Rule is accordingly made absolute in the terms indicated above. The petition of complaint will be sent back to the learned President of the Tribunal to be disposed of having regard to the observations made above.

Let the records be sent down without delay.

S. D.

Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 766 OF 1920.

January 29, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Daniels.

THE CAWNPORE COTTON MILLS CO., LIMITED—PLAINTIFF—APPELLANT

versus

THE GREAT INDIAN PENINSULAR RAILWAY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), ss. 77, 140—Notice of suit—Service—Subordinate officer—"May" in section 140, meaning of.

The language of section 140 of the Railways Act is imperative and the word "may" in the section must be read as "must." The meaning of the section is that where any notice or document has to be served on a Railway Administration that service must be made in one or other of the ways referred to in clauses (*a*), (*b*) and (*c*) of the section. [p. 616, col. 1.]

Great Indian Peninsula Railway Company v. *Chandra Bai*, 28 A 552; A. W. N (1906) 101; 3 A. L. J 329 and *Great Indian Peninsula Railway* v. *Ganpat Rai*, 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543, followed.

Mahadeva Aiyar v. *South Indian Railway Company*, 69 Ind. Cas. 59; 45 M. 135; 14 L. W. 684; 30 M. L. T. 112; 42 M. L. J. 202; (1922) A. I. R. (M.) 362; (1921) M. W. N. 878, referred to.

A subordinate official entrusted by the Agent of a Railway Company with authority to dispose of claims brought against the Company is not empowered to receive notice of suit such as is required by section 77 of the Railways Act. Therefore, a notice given to such an officer is not good and sufficient within the meaning of the Act. [p. 616, col. 2.]

Second appeal from a decree of the Subordinate Judge, Cawnpore, dated the 28th April 1920.

FACTS of the case appear from the following order passed by the Court (Lindsay and Stuart, JJ.) on 21st March 1922 under O. XLI, r. 27, Civil Procedure Code :—

"This appeal is against the dismissal of a suit brought by the plaintiff Company against the defendant, the Great Indian Peninsular Railway Company, for damages on the allegation of loss of a bale delivered to the defendant Company to be conveyed from Cawnpore to Bombay. The facts appear to be as follows:—

"The laintiff company delivered 26 bales of foot bandages to the E. I. Ry. Coy. at Cawnpore on the 26th of November 1918 for despatch to Bombay over the line of the defendant Company. On the 15th of December 1918 the consignment reached Bombay (it is alleged) one bale short. Correspondence followed between the plaintiff Company and the defendant Company. The plaintiff Company being unable to obtain satisfaction, instituted a suit on the 14th of November 1919 for damages in the Court of the Munsif of Cawnpore. The defendant Company filed a written statement on the 15th of January 1920 in which it was stated that the suit was time-barred On the date of hearing, the 11th of February 1920, the Attorney of the defendant Company put in an objection that no notice of a claim for compensation had been served within six months of the date of delivery for carriage. Upon this objection the Munsif dismissed the suit. The dismissal was upheld by the Subordinate Judge. The plaintiff Company has come up in second appeal here.

"The position taken by the plaintiff Company appellant upon this point is as follows. In the first place, it is alleged that the Agent of the G. I. P. Ry. Coy. had appointed a Deputy Traffic Manager to consider all claims under Rs. 1,000, that, in these circumstances, notice had been duly served as required by section 77 of Act IX of 1890 upon the Railway Administration through this Deputy Traffic Manager, and, further, that the plaintiff Company had been prevented from making a claim of any kind for compensation for

loss within six months of the date of delivery for carriage, inasmuch as the Railway Authorities had refused to give them definite information as to whether there had or had not been a loss until more than six months had expired from the date of delivery for carriage. A third point was also raised, that, as a matter of fact, the Agent had received notice of the plaintiff Company's grievance within less than six months from the date of delivery for carriage through the Deputy Traffic Manager whom he himself had appointed.

"When we examined the appeal on the merits we found that there was practically no material upon which to decide these three points. The plaintiff Company had not produced more than a very small portion of the correspondence. The defendant Railway Company had produced no evidence at all. Ordinarily, the plaintiff Company should have b.en made to suffer for this omission, but on the merits of the case, their omission to produce full evidence is excusable. As has already been noted, the defendant Railway Company did not raise the plea that the suit was bad in the absence of notice until the very day of hearing. The plaintiff Company urges that if that plea had not been raised it would hardly have been necessary to produce the correspondence or the rules under which the Deputy Traffic Manager was appointed to receive these claims. There is weight in that argument. It is absolutely necessary that we should have before us the correspondence and the rule, and we, therefore, pass the f llowing order under O. XLI, r. 27. The plaintiff-appellant shall be permitted to produce the following additional evidence :—

"(1) All letters received from the defendant Company not already filed.

"(2) Proved copies of all letters sent by them to the defendant Company if the ori inals are not produced by the defendant Company after notice.

"The defendant Company will be at liberty to produce :—

"(1) All correspondence received by them from the plaintiff Company.

"(2) Proved copies of all letters sent by them to the plaintiff Company if the originals are not produced by the plaintiff Company after notice.

"It will also be open to the plaintiff Company to produce evidence as to the rules by which the Deputy Traffic Manager is authorised to receive all claims on behalf of the Company and as to communication of their complaint by the Deputy Traffic Manager to the Agent.

"We shall be ready to consider applications from either party for the production of further evidence relating to the question of notice.

"The matter will be put up again before this Bench within a month for further orders."

Dr. *K. N. Katju*, for the Appellant.

Mr. *Ladli Prasad Zutshi*, for the Respondent.

JUDGMENT.—This case has been before a Bench of this Court previously and the facts are all set out in an order of the 21st March last. By the order which was passed on that date it was directed that certain further evidence should be produced before this Court in order to enable us to deal with the particular question which was raised Both parties have filed documentary evidence and the case has now been argued before us.

It is not necessary to re-state the facts which are all set out in the order of the Bench of the 21st March last. The suit was a suit brought by the Cawnpore Cotton Mills, Limited, against the Great Indian Peninsular Railway. That suit has failed in both the Courts below on the ground that no notice as required by section 77 of the Railways Act, Act IX of 1890, was served upon the defendant Company, and the only question which is now before us is whether both the Courts below were right in so holding or whether from the evidence before us it can be taken that there was due and proper service of the notice required by section 77 upon the defendant Railway Administration.

We have been referred to a number o cases which have been decided by the variou High Courts, and Dr. Katju,who has argued the case very ably on behalf of the appellant, has laid particular stress upon a ruling of the Madras High Court which is reported as *Mahadeva Aiyar* v. *South Indian Railway Company* (1).

(1) 69 Ind Cas 59; 45 M 135; 14 L. W 684; 30 M.L.T. 112; 42 M. L. J. 202; (1922) A.I.R. (M.) 362; (1921) M. W. N. 878.

It has been suggested here at one stage of the argument that, as a matter of law, no notice was necessary in this case. We need not refer to this contention any further than to say that the plea on which it is based was not raised in any of the Courts below, and, having regard to the frame of the plaint it does not seem to us to be possible for the learned Counsel for the appellant to withdraw his case from the purview of section 77. It is clear, therefore, that in order to enable a suit for this claim to be maintained the notice which was required by section 77 was necessary.

We next come to the provisions of section 140 of the Railways Act which lay down the manner in which notices or documents required to be served on the Railway Administration may be served. Some argument was addressed to us as to the proper interpretation of the word "may" in this section. There is some authority in support of the argument that the word "may" must not here be read as " must" to be found in the judgment of one of the learned Judges composing the Full Bench which dealt with the case to which we have already referred. So far as this Court is concerned, we are bound by the decisions in *Great Indian Peninsula Railway Company* v. *Chandra Bai* (2) and *Great Indian Peninsula Railway* v. *Ganpat Rai* (3). In both these cases it was held, and we agree, that the language of section 140 is imperative and that the word " may" must be read as "must." What the section lays down is that where any notice or document has to be served on a Railway Administration such service may be had in one or other of the three ways. The meaning of the section clearly is that service must be made in one or other of the ways referred to in clauses (*a*) , (*b*) and (*c*) of the section.

In the present case, therefore, we have to consider, whether the notice of suit in this case was served in one or other of these ways. It is not contended that there was any service of notice in the manner prescribed either by clause (*b*) or clasue (*c*) of the section; it remains to be determined whether there was a service under clause (*a*), that is to say, by delivery of the notice to the Manager or Agent.

(2) 28 A. 552; A.W.N. (1906) 101; 3 A. L. J. 329.
(3) 10 Ind. Cas 122; 33 A 544; 8 A. L. J. 543.

We have been referred to the correspondence which passed between the parties with relation to this claim and the first thing that emerges from a perusal of these documents is that no direct communication was made by the plaintiff to the Agent of the G. I. P. Ry. before the 5th of August 1919. It may be mentioned that this notice, which was sent on the date just mentioned, was sent after the expiry of six months from the date on which the goods were delivered to the Railway for carriage (the 26th November 1918).

It has, however, been argued before us that the corespondence which has been now filed in this case and the evidence of the Agent which was taken upon commision in the shape of interrogatories show, that the authority to deal with claims against the Railway Company had in certain instances been delegated to another official who is described in the correspondence as the Deputy Traffic Manager "Commercial."

It is no doubt proved that notice of the claim of the plaintiff Company was given to this official, for there are on record copies of correspondence which passed between him and the Company. It is argued, therefore, that inasmuch as this official had notice of the claim which the plaintiff Company intended to bring that notice was good notice upon the Agent, inasmuch as the Deputy Traffic Manager "Commercial" had been appointed by the Agent of the Railway for the purpose of disposing of these claims.

It is one thing to say that this subordinate official had been entrusted with authority by the Agent to dispose of claims brought against the Company and another thing to say that there was delegated to him the power to receive a notice of suit such as is required by section 77 of the Indian Railways Act. The two cases are not obviously the same and we, therefore, hold that no notice given to the Deputy Traffic Manager "Commercial" of the G. I. P. Railway, Bombay, was good and sufficient notice within the meaning of the Act.

Dr. Katju has referred to the printed post card which was received by the plaintiff Company in response to the notice given on the 5th August 1919. In this notice it is, indeed, stated that the claim had been referred to the General Traffic Manager who had

full powers to deal with such matters on behalf of the Company and by this post-card the plaintiff Company was invited to send any further communications on the subject of their laim to the General Traffic Manager. We do not think the terms of this document advance the plaintiff's case any further. All that is stated is, that the General Traffic Manager has authority to deal with the claims. That, in our opinion, does not indicate that the General Traffic Manager, or any one who was subordinate to him in his office, had authority to receive the statutory notice which the Act prescribes.

We think, therefore, that the decision of the Courts below on the legal point is a correct one. We are, however, entitled to say that this is a case of distinct hardship and is a case which unfortunately arises on many occasions. There can be no doubt that many, if not all, of the Railway Administrations in India have given the public to understand that claims in respect of losses incurred on the Railway are to be dealt with by one or other subordinate officer of the Administration, and no doubt many people are misled by notices of this kind and fail to consider that, in order to maintain a suit against the Railway Administration, it is imperative that a notice under section 77 should be served upon the Railway Administration and served in one or other of the modes laid down in section 140. It is unfortunate that so many of these cases arise in the Courts, but, as the law stands, we are unable to relieve plaintiffs who find themselves in this unfavourable position. The law is clear and if it has to be observed the plaintiff's suit must fail. We, therefore, hold that this appeal fails and we dismiss it accordingly with costs including in this Court fees on the higher scale.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISIONS NOS. 120, 121, AND 122 of 1922.

February 2, 1923.

Present:—Mr. Justice Lindsay.

RAM NARAIN—APPLICANT

versus

HARBANS SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute refused by Munsif but given by District Judge—Revision.

Where sanction to prosecute has been refused by a Munsif and given by a District Judge under section 195 (6) of the Criminal Procedure Code, an application for revision of the District Judge's order is governed by the provisions of section 115, Civil Procedure Code, and not by the provisions of section 195 (6), Criminal Pocedure Code.

Civil revision from an order of the District Judge, Allahabad, dated the 6th September 1922.

Mr. *Kumuda Prasad*, for the Applicant.

Mr. *Gulzari Lal*, for the Opposite Party.

JUDGMENT.—These three applications are directed against an order of the District Judge of Allahabad granting sanction for the prosecution of the applicants, Ram Narain, Gopi Ram and Badri Prasad, under section 193 of the Indian Penal Code. The proceedings arose out of a civil suit for pre-emption in which Ram Narain was a defendant and in which the other two persons, Gopi Ram and Badri Prasad, appeared as witnesses.

Application was made to the Munsif for sanction to prosecute these three persons. The Munsif refused sanction. An application was then made to the District Judge under section 195 (6) of the Code of Criminal Procedure. The learned District Judge has granted the sanction.

If these applications which are now before me are to be treated as applications in revision they are governed by the provisions of section 115 of the Code of Civil Procedure and on that footing the learned Counsel for the applicants has not been able to satisfy me that the Court below has either exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Independently of this, however, it has been contended that the applicants have a right to come to this Court under the provisions

of section 195 (6) of the Code of Criminal Procedure. On this point there is the authority of a Bench ruling of this Court reported as *Baran Barai* v. *Mata Prasad* (1) that no such application will lie to this Court. The facts in that case were precisely similar to those in the present case. The applications fail and are dismissed with costs to the opposite party.

S. D.

Application dismissed.

(1) 25 Ind. Cas. 528; 36 A. 469; 12 A. L. J. 821; 15 Cr. L. J. 616.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 814 OF 1922.

November 24, 1922.

Present:—Mr. Justice Harrison.

BHAG SINGH—PLAINTIFF—APPELLANT

versus

KHUSHAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Shamilat—*Occupancy tenant—Adverse possession.*

An occupancy tenant who occupies a portion of the *shamilat* land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it is given, but if he diverts the site to other purposes, for instance, to build upon, and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the suit of the proprietors.

Bhani v. *Bhag Mal*, 65 P. R. 1885, followed.

Second appeal from a decree of the District Judge, Jullundur, dated the 20th January 1922, reversing that of the Munsif, First Class, Jullundur, dated the 16th November 1921.

Lala *Badri Das*, R. B., for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—Bhag Singh, an occupancy tenant in village Kandolah, brought this suit against two of the proprietary body, asking for an injunction restraining them from interfering with him or preventing him from building a wall round a vacant site within the *abadi*. The suit was dismissed by the learned District Judge after considering all the evidence produced by the plaintiff on finding that, although he had established long user and although he had shown that he himself had leased the vacant site to others on three occasions, he had not established his title, or, in other words, that the plaintiff had failed to establish any adversity or any overt act against the landlords. He appeals, urging that the uninterrupted user and the rent-deeds prove his title and a totally new point that as an occupancy tenant residing in the village he is entitled by custom to build a wall wherever he chooses. The only point before the lower Appellate Court was whether plaintiff had proved his title to the land in suit and this is the only point which I propose to decide.

The case is precisely similar to *Bhani* v. *Bhag Mal* (1) where it was held that an occupancy tenant who occupied a portion of the *shamilat* land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given; but if he diverts the site to other purposes, as for instance, to build upon, and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the suit of the proprietors.

Here the plaintiff has placed a *belna* on this vacant site and has used it. He has also had three deeds executed by tenants in his favour, but as none of these were registered there is nothing to show that the landlords received any notice of his claim to be entitled to let the site. All that they knew was that he and his father and others made use of this vacant site, the use being very similar in nature to that described in *Framji Cursetji* v. *Goculdas Madhowji* (2), and there was no sort of overt act of adversity until the time when the plaintiff began to build his wall. I find that it is clearly established by the circumstances that the possession from the very start has been permissive, and that there has been no adversity whatsoever.

I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 65 P. R. 1885.
(2) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

SITA RAM *v.* HAR SAHAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1212 OF 1921.

January 18, 1923.

Present:—Mr. Justice Gokul Prasad.

SITA RAM—DEFENDANT—APPELLANT

versus

HAR SAHAI—PLAINTIFF—RESPONDENT.

Partition proceedings—Compromise effected pending proceedings—Compromise given effect to by Revenue Court and acted upon by parties—Registration Act (XVI of 1908), s. 17—Compromise—Registration—"House", meaning of.

An agreement of partition, if acted upon, is admissible and binding, even if it is unstamped and unregistered, and a party to it cannot be allowed to resile from it. [p. 620, col, 1.]

Raghubans Mani Singh v. *Mahabir Singh*, 2 A.L. J. 564; 28 A. 78; A.W. N. (1905) 195, *Baldeo Singh* v. *Udal Singh*, 58 Ind.Cas 732; 18 A. L. J. 877; 2 U. P.L.R. (A) 202; 43 A. 1 and *Parbati* v. *Naunihal Singh*, 3 Ind. Cas. 195; 6 A. L. J. 597; 10 C. L. J. 121; 13 C. W. N 983; 5 M. L. T 427; 11 Bom. L. R 878; 31 A. 412; 36 I. A. 71; 19 M. L. J. 517 (P. C.), referred to.

If, pending an application for partition in a Revenue Court, the parties effect a compromise and the Revenue Court gives effect to that compromise by making it part of the order in mutation and the parties take possession of the divided property in accordance with it, the compromise is admissible in evidence, though it is neither stamped nor registered, inasmuch as such a compromise does not by itself create any title in the parties but is only an information given to the Revenue Court of the compromise at which the parties have arrived out of Court. [p. 620, col. 1.]

In its ordinary acceptance the term "house" is not confined only to the site, excluding the materials. [p. 620; col. 1.]

Second appeal from a decree of the District Judge, Mainpuri, dated the 24th of June 1921.

Messrs. *Haribans Sahai* and *Krishna Behari Lal Nigam*, for the Appellant.

Mr. *Ambika Prasad* for Mr. *Badri Narain*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for an injunction restraining the defendant from demolishing a certain house and removing its materials and for Rs. 385 as damages due to the demolition of a part of the house and the removal of the materials thereof by the defendant. The plaintiff's case was that the parties were members of a joint Hindu family owning a certain number of villages and other properties, that in the year 1920 an application for partition of the Zemindary was made in the Revenue Court. That pending this application there was a private settlement by mutual consent and the village Chatkapur in which the property in dispute is situate came to the plaintiff with shares in certain other villages and the remaining properties were allotted to the defendant, that the compromise was brought to the notice of the Revenue Court by an application dated the 16th of April 1920 and by an order dated the 30th of April 1920 the Collector confirmed the partition made according to this compromise, that by virtue of this compromise the dwelling house of the other side and the other houses in the village came to the plaintiff's share and this partition was to take effect from the 1st of July 1920, the beginning of the next agricultural year. That the defendant dishonestly on the 30th of May 1920 commenced to demolish a part of the dwelling house, called the *baithak*, pulled down certain walls and removed a large quantity of bricks and this gave rise to the present suit. The defence pleaded was that the land only was partitioned under the compromise which did not refer to the house property in the villages and the Revenue Court could not partition them and that by this partition the plaintiff acquired no right in the buildings or the materials. It was further contended that the compromise, dated the 16th of April 1920, was neither stamped nor registered and was consequently inadmissible in evidence The Trial Court came to the conclusion that the partition referred to the land only and the Revenue Court had no jurisdiction to divide buildings or materials. On other points also it came to a conclusion favourable to the defendant and dismissed the suit. On appeal the learned Judge of the lower Appellate Court has come to the conclusion that the compromise did not require either stamp or registration and decreed the claim of the plaintiff with Rs. 208-4-6 as damages. The defendant comes here in second appeal and his first plea is that the Courts below have not decided whether the building in dispute was a residential house or not, (2) that the construction of the compromise by the lower Appellate Court was a wrong one inasmuch as the same did not deal with the buildings and (3) that the unstamped and unregistered compromise was not admissible as evidence of the plaintiff's title. The learned Vakil for the appellant has not been quite able to explain to me how the question

whether the house in dispute was residential house or not affects the case. The compromise dealt with all the houses situated in the village Chatkapur mentioning the residential house first and the other houses afterwards, so that if that compromise is admissible in evidence the title in all the houses whether residential or not passed to the plaintiff. This ground of appeal, therefore, fails. Coming to the question of construction of the compromise it certainly does deal with all the houses residential or otherwise and would not, in the ordinary acceptance of the term 'house', exclude the materials and be confined to the site only. This objection also is untenable. The third objection is that the unstamped and unregistered compromise which was not made part of any order is inadmissible in evidence. This compromise has certainly been made part of the last order in mutation (see the order of the Collector dated the 30th of April 1920). The finding of the lower Appellate Court is, that this compromise has been acted upon, the Revenue Court has given effect to it and the parties have been in possession of the divided property in accordance with the terms of that agreement. This compromise does not by itself create any title in the parties. It is only an information given to the Revenue Court of the compromise at which the parties had arrived out of Court. Under these circumstances the document was admissible in evidence, and the compromise having been acted upon the defendant cannot be allowed to resile from it. [See the cases of *Raghubans Mani Singh* v. *Mahabir Singh* (1) and *Baldeo Singh* v. *Udal Singh* (2)]. Even an oral agreement of partition acted upon by the parties and admitted by them had been held to be binding [see the case of *Parbati* v. *Naunihal Singh* (3).] Under the circumstances of the case the judgment of the lower Appellate Court seems to be a correct one. I, therefore, dismiss this appeal with costs.

S. D. *Appeal dismissed.*

(1) 2 A. L. J 564; 28 A 78; A. W. N (1905) 195.
(2) 58 Ind.Cas. 732; 18 A. L J. 877; 2 U.P. L.R. (A) 202; 43 A. 1.
(3) 3 Ind. Cas. 195; 6 A. L. J 597; 10 C.L. J 121; 13 C. W. N 983; 5 M. L. T 427; 11 Bom. L. R 878; 32 A 412; 36 I. A. 71; 19 M. L. J 517 (P. C).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 1328 OF 1921.
January 23, 1923.
Present:—Mr. Justice Daniels.
HULAS RAI—DEFENDANT—APPELLANT
versus
P. SOHAN LAL,—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 54, ill. (s)—Business requiring use of hammer—Noise—Comfort of next door neighbour interfered with—Injunction.

A person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country. But if in a town a person opens a business in the course of which hammers have to be used and the use of hammers causes noise which materially interferes with the comfort of his next door neighbour, he can be restrained by an injunction from carrying on the business in the process of which hammers are used.

Second appeal against a decree of the Second Additional Judge, Aligarh, dated the 19th of May 1921.

Mr. *Nehal Chand* for Mr. *Panna Lal*, for the Appellant.

Mr. *G. Banerji* for Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for an injunction to restrain the defendant from carrying on business of repairing and manufacturing iron pans in a room adjoining the plaintiffs' residential house. The suit has been decreed by the Court below. The facts found are that the plaintiff and defendant are next-door neighbours with only a partition between their two houses. The defendant has commenced business for making iron pans for the manufacture of sugar in his house. In the course of his business the pans have to be hammered, and hammers weighing two seers and more are used in the process. The learned District Judge has found, and on the facts the finding is incontestably right, that this hammering causes noise which materially interferes with the comfort of the plaintiff in the occupation of his house, and which is sufficient to entitle the plaintiff to an injunction. It is pleaded on behalf of the appellant that the hammering only takes place in certain months of the year, but this does not affect the plaintiff's right to an injunction. The case, as is pointed out by the respondent's learned Pleader, is almost precisely the case which is mentioned in illustration (s) to section 54 of

the Specific Relief Act. My attention has been called to an English case in which it was held that a person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country. This is a perfectly correct principle, but it does not justify a business which involves a violent hammering on iron in a room separated only by a partition wall from the house of the plaintiff. The judgment of the Court below is correct and I dismiss the appeal with costs.

S. D

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 20, 1922.

Present:—Lord Phillimore, Lord Carson, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

Bibi AKHTARI BEGAM—APPELLANT

versus

DILJAN ALI—RESPONDENT.

Muhammadan Law—Shiah (Imamia) sect—Succession—Daughter's descendants and collaterals—Direct heir disqualified—Succession of next heir, whether barred—Construction of document—Deed of wakf—"Heir," meaning of.

Under the Shiah Law daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals; nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar, under the Muhammadan Law, to the succession of the next heir, the heir presumptive. [p. 623, col. 1.]

A *wakfnama* executed by a Mussulman belonging to the Shiah (Imamia) sect, after declaring a certain individual to be the *mutwalli* of the dedicated property proceeded, "In the case of the death or dismissal of the *mutwalli*, if any heir belonging to the Imamia sect and competent enough to administer the *wakf* property be not left to the *mutwalli*, selection shall be made of a competent person from among the heirs of me, the executant." The *mutwalli* died and was succeeded in the office by his widow. The widow too died, survived by a daughter and a grand-daughter. The daughter was found to be *non compos mentis* and the plaintiff, a son of the author of the *wakf*, claimed that, as the direct heir to the widow was insane and incompetent, the governance of the *wakf* had passed to the line of the dedicator:

Held, dismissing the claim, that under the *wakfnama* so long as the deceased *mutwalli* left an heir competent to inherit to him and otherwise qualified to administer the *wakf*, the office of *mutwalli* could not revert to the dedicator's heirs and that the word "heir" used in the *wakfnama* was not confined strictly to a person entitled to take in direct succession to the deceased *mutwalli*. [p. 623, col. 2.]

Appeal from the judgment of the Patna High Court.

Mr. *De Gruyther, K. C.* and Dr. *Majid*, for the Appellant.

Mr. *Hyam* for the Respondent.

JUDGMENT.

Mr. Ameer Ali.—The question for determination in this appeal lies within a very small compass, and turns upon the construction of the word *waris* or "heir" used in a *wakfnama* or deed of dedication, executed by one Mir Imam Bux on the 5th May 1874. It appears that Imam Bux had a step-sister, Bibi Peary Begum, who died in 1873. She left no heir entitled under the Muhammadan Law to her inheritance, excepting the half-brother, Imam Bux. Peary Begum appears to have brought up as foster sons two boys named respectively Mian Mehdi Husain and Mian Tasaduk Husain; and on the death of Peary Begum disputes arose between Imam Bux and these two young men respecting the property left by her. These disputes were compromised, and on the 5th May 1874 Imam Bux, as owner of the property left by Peary Begum, executed the *wakfnama* on which the present suit is brought. The parties are governed by the Shiah (Imamia) Law.

By this document he dedicated a part of the property to various religious purposes, including a mosque and a *khankah*, and appointed Mehdi Husain to be the *mutwalli* or curator thereof. He similarly dedicated another part of the property to identical objects, and appointed Tasaduk Husain to be the *mutwalli* of this *wakf*. He also appointed his own son, Syed Amjad Ali, as *naib* or deputy *mutwalli*. Th provision relating to the management of the two *wakfs* is as follows:—

"The management, including the collection of the entire *wakf* estate, the distribution of the allowances to the persons receiving the same, both in perpetuity and for life, the appointment and dismissal of servants, and the payment of Government revenue, shall be made in consultation

with all the three persons, *viz.*, the two *mutwallis* and the *naib mutwalli* named above. The *mutwalli* Syed Mehdi Husain shall be at liberty to appoint on his own authority, and at any time he pleases, a competent person as his assistant *mutwalli* for the efficient management of the affairs of the *tauliat*."

Regarding the application of the income of the *wakf* Imam Bux made the following provisions :—

"All the three persons together will, from the savings of the *wakf* property, continue to pay the allowance for the maintenance of all persons named herein below, *viz.*, those for whom it is fixed in perpetuity, generation after generation, and those for whom it is fixed for life only —those for whom the allowance is fixed to be paid for ever, shall continue to get it from the above income as long as their lives continue while those for whom it (the allowance) is fixed for life only shall get it until their death. Out of the savings of the income of the *wakf* estate Syed Mehdi Husain, the *mutwalli* of the *masjid* and the *khankah* at Bhagalpur, shall receive an allowance of Rs. 50 per mensem; Syed Tasaduk Husain, the *mutwalli* of the *imambara* at Bhagalpur, the *masjid* at Mohanpur, and the *imambaras* at Pirpainti, etc., mentioned above, an allowance of Rs. 20 per mensem; and Syed Amjad Ali, the *naib mutwalli*, an allowance of Rs. 10 per mensem, for the efficient discharge of their duties as *mutwallis* and *naib mutwalli*, and for management of the endowment properties."

Mehdi Husain died in 1876, and on his death his widow, Umda Begam, succeeded to the *tauliat* or governance of the *wakf* that had been entrusted to him under the *wakfnama*. Umda Begum died on the 15th May 1912 survived by a daughter named Mohamdi Begum and a grand-daughter, the present appellant. In the ordinary course and in accordance with the provisions of the *wakfnama*, the daughter would be entitled to the *tauliat*, but she was found to be *non compos mentis*. The grand-daughter thereupon claimed the office of *mutwalli*. The plaintiff, Diljan, a son of Imam Bux, disputed her title, alleging that as Mohamdi Begum, the direct heir to Umda Begum, was insane and incompetent to be the *mutwalli*, the *tauliat* had passed to the line of the dedicator. The Revenue Court accepted Akhtari Begum's claim, and she obtained possession of the *wakf* estate held by her grandfather.

The present suit to oust the defendant from the governance of the *wakf* was instituted by Diljan on the 13th March 1914 in the Court of the Subordinate Judge of Bhagalpur. The defendant, Akhtari Begum, denied the plaintiff's title, and asserted that as the next in the line of descent, according to the Shiah (Imamia) Law, owing to her mother's incompetency, she was entitled to the *tauliat* under the *wakfnama*.

The Subordinate Judge, after a careful examination of the language and the provisions of the *wakfnama*, held against the plaintiff's claim and dismissed the suit. He summed up his finding in the following words :—

"There cannot be any doubt that the defendant is a competent person to hold the post of a *matwalli*. She is a literate woman, and she can understand accounts. Moreover, when her grandmother, Umda Begum, who was illiterate, could be considered competent for that, the defendant is much more competent. She lives at Bhagalpur for the most part, and she can always have the help of her husband. This issue, *viz.*, the issue as to competency, is found in defendant's favour."

On appeal to the Patna High Court by the plaintiff, the learned Judges took a wholly contrary view. They thought that the word "heir" used in the *wakfnama* applied strictly to the person entitled to take in direct succession to the deceased *mutwalli*. In coming to this conclusion they seem to have placed somewhat undue reliance on the words "*waris sharye*" or "legal heir," used in another part of the document. They thought the expression "legal heir" indicated that the *wakf* meant that the *tauliat* should go to the direct heir of the deceased *mutwalli*, and if such heir was incompetent it was to revert to the dedicator or his heirs. They accordingly held that on the death of Umda Begum, her daughter being of unsound mind, the descent in the line of Mehdi Husain ceased, and the *wakf* reverted to Imam Bux's heirs, and they accordingly reversed the order of the Subordinate Judge and made a decree in favour of the plaintiff, Diljan. In this connection it should be

noted that under the Shiah Law daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals; nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar, under the Muhammadan Law, to the succession of the next heir, the heir presumptive. The grand-daughter is thus as much a "legal heir" under the Shiah Law as the daughter. Their Lordships are of opinion that the learned Judges of the High Court, in coming to the conclusion at which they arrived, overlooked the passage in which Imam Bux laid down the rule providing for the succession to the office of *mutwalli*. That rule is in these terms :—

"In the event of slackness, negligence or discovery of misappropriation on their part, I or my heirs shall be at liberty to dispense with the services of the said *mutwalli*, and in case of death or dismissal of any *mutwalli*, if any heir belonging to the Imamia sect and competent enough to administer the *wakf* property be not left to the *mutwalli*, the *naib mutwalli* shall succeed him as *mutwalli*, and a *naib mutwalli* shall be appointed from among his (*naib mutwalli's*) heirs. In the event of no heir of the *mutwallis* and the naib *mutwalli* being found fit to manage the *wakf* property, selection shall be made of a competent person from among the heirs of me, the executant. If, God forbid, no heir of mine near or remote be found, the authorities for the time being shall be competent to appoint a suitable person belonging to the Imamia sect to administer the *wakf* property mentioned above. But so long as the *mutwallis* and the *naib mutwalli* aforesaid shall manage the affairs of the *wakf* estate faithfully and efficiently, no one shall question (the tenure of the offices by the *mutwallis*) or be competant to complain, (urge their dismissal, nor shall they be dismissed) unless the complaint is substantiated before the authorities for the time being."

It will be seen from the above that, in the event of "slackness, negligence or discovery of misappropriation on the part of the *mutwalli*," power is reserved to Imam Bux and his heirs to dispense with their services. At the same time it is distinctly provided that "in case of death or dismissal" (for causes already recited) of any dismissed *mutwalli*, the succession to the office should go to the heir of the deceased; and that when no heir "belonging to the Imamia sect, and competent enough to administer the *wakf*," is left to the *mutwalli*, that the *naib mutwalli* shall succeed him as *mutwalli*, and a *naib mutwalli* shall be appointed from among his (the *naib mutwalli's*) heirs. It is only in the event of no heir of the *mutwalli* and the *naib mutwalli* being found fit to manage the *wakf* property, that selection is to be made of a competent person from among the heirs to the *wakif*.

In their Lordships' opinion this passage in the *wakfnama* clearly shows that so long as the deceased *mutwalli* leaves a relation competent to inherit to him and otherwise qualified to administer the *wakf*, the office of *mutwalli* cannot revert to the dedicator's heirs.

The English cases referred to by the learned Judges of the High Court have, in their Lordships' opinion, no bearing on the present controversy.

The Subordinate Judge in this case has found clearly on the evidence that the defendant was competent to carry on the administration, and their Lordships do not find anything in the record to suggest to the contrary. They think, therefore, that the judgment and decree of the High Court should be reversed, and that of the Subordinate Judge restored, with costs in the High Court and of this appeal and they will humbly advise His Majesty accordingly.

N. H. *Appeal allowed.*

Solicitor for the Appellant.—Mr. *E. Dalgado.*

Solicitor for the Respondent.—Messrs. *Barrow Rogers* and *Nevil.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 104 OF 1921.

January 12, 1923.

Present :—Sir Grimwood, Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

TULSHI—DEFENDANT—APPELLANT

versus

BISHNATH RAI AND OTHERS—PLAINTIFFS—RESPONDENT.

Hindu Law—Joint family—Manager and adult members made defendants—Minor members not im-

TULSHI *v.* BISHNATH RAI.

pleaded—Compromise-decree, whether binding on minor members—Effect of making adult members parties.

If the whole of a joint Hindu family is represented in a suit by the managing member of the family, the minor members must be taken to have been duly represented. It is not necessary that the managing member should be described as such in the plaint; nor is it necessary that every adult member should be made a party to the suit. It is sufficient if, in reality, the whole of the family is represented by the persons who are named as defendants in the suit. But if, for the sake of precaution, all adult members are made parties, that does not affect the nature of the suit; nor is it necessary to state specifically in the plaint that the members who have been made parties to the suit represent not only themselves but also the minor members of the family.

Hori Lal v. *Nimman Kunwar*, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819, referred to.

A compromise-decree passed against the manager of a joint family and the adult members made parties with the manager, is binding on the minor members of the family not made parties to the suit, if there is nothing to show that the adult members of the family did not properly represent the interest of the minor members.

Letters Patent Appeal from a judgment of Mr. Justice Lindsay, dated the 16th June 1921.

Dr. *K. N. Katju*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The appellant, Tulshi, obtained a decree for redemption of a mortgage against the defendants of the second party, on the 29th of January 1917, in accordance with a compromise entered into by those parties. The present suit was instituted by five plaintiffs for a declaration that the compromise and the decree are not binding on them. These plaintiffs and the defendants of the second party are members of a joint Hindu family. In the suit which was brought by Tulshi for redemption of mortgage he made all the adult members of the family parties to the suit, and all these adult members entered into the compromise, the result of which was that a decree was made in favour of Tulshi for redemption, on payment of Rs. 160 instead of Rs. 60 which in his plaint Tulshi had offered to pay. The Court of first instance decreed the plaintiff's claim but that decree was reversed by the lower Appellate Court which dismissed the suit on the ground that in the previous suit four of the plaintiffs, though not nominally parties to the suit, were in reality represented in it by the adult members of the family, one of whom was the managing member of that family. Upon second appeal to this Court, the learned Judge who heard the appeal decreed the claim practically on the sole ground that the present plaintiffs were not named as defendants to the previous suit. We are unable to agree with that view of the learned Judge. If, as a matter of fact, the whole of the family was represented in the previous suit through the managing member of the family, the present plaintiffs must be taken to have been duly represented in that suit. It was not necessary that he should have been described as manager or that in the plaint it should have been stated specifically that the defendants to the suit represented not only themselves but also the minor members of the family. It was sufficient if, in reality, the whole of the family was represented by the persons who were named as defendants to the suit. As has been stated above, in fact, every adult member of the family was made a defendant to the suit. It is true that it was unnecessary to make every adult member a defendant if they were represented by the managing member, but if, for the sake of precaution, the adult members were made parties to the suit, that did not affect the real nature of the suit. This was the view which was held in the case of *Hori Lal* v. *Nimman Kunwar* (1). The lower Appellate Court found that by reason of the compromise the present appellants were not prejudiced. The compromise was obviously a reasonable one, and nothing was brought forward in this suit to show that the adult members of the family did not properly represent the interest of the plaintiffs in the previous litigation. In these circumstances, we are of opinion that the decree of the lower Appellate Court was right. We allow the appeal, set aside the decree of this Court and restore that of the lower Appellate Court. The appellant will have his costs of both hearings in this Court.

Appeal allowed.

S. D.

(1) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819.

NUR MAHOMED PEERBHOY v. DINSHAW HORMASJI MOTIWALLA.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 21, 1922.

Present:—Lord Dunedin, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.

NUR MAHOMED PEERBHOY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DINSHAW HORMASJI MOTIWALLA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court-sale—Antecedent claim—Notice—Transfer of Property Act (IV of 1882), s. 40.

Where a person purchases at a Court-sale, his title cannot be invalidated by vague references to antecedent contracts. [p. 627, col. 2]

In the case of the Court-sale of certain property belonging to *A.* which he had contracted to sell to one *B.*, a Pleader acting on behalf of the latter arrived at the sale about an hour after it had begun and after reading the agreement between *B* and *A*, which was in English, made a general statement in the vernacular that his client would claim the property, saying further, that his client would himself bid at the sale The question was whether the purchaser had sufficient notice of the contract so that *B.* could enforce his claim against him under section 40 of the Transfer of Property Act:

Held, that the statements made by the pleader fell far short of such unequivocal notice as was required in the case of a Court-sale. [p. 628, col. 1.]

Appeal from the Bombay High Court.

Mr. *Lowndes, K. C.*, and Mr. *Raikes*, for the Appellants.

Mr. *DeGruyther, K.C.*, and Mr. *K. Brown*, for the Respondents.

JUDGMENT.

Lord Dunedin:—The suit in which these two consolidated appeals have arisen was brought in the Court of the First Class Subordinate Judge of Thana on the 11th August 1913 by Dinshaw Hormasji Motiwalla against Adam Haji Jacob, *alias* Adam Abdulla Patel, Nur Mahomed Peerbhai Damji, who is defendant No. 2, and Waman Ganesh Desai, the defendant No. 3, to obtain under the Specific Relief Act, 1877, a decree for the specific performance of a contract of sale of the 17th July 1912 by which it was agreed that Adam Haji Jacob should sell and convey to Motiwalla, and Motiwalla should purchase "all that piece or parcel of land with the bungalow, trees, plants, shrubs, etc., and a wells tanding thereon, situate, lying and being at Hill Road, Bandra, in the Thana District, Sub-District Bandra, admeasuring about 5,000 square yards, bearing Municipal No. 139 and City Survey No. 136, and bearing Collector's Survey No. 17, Pot Nos. 2, 3, 4 and 5, admeasuring 25 Gunthas, and bounded on the East by property of Rustomji Muncherji Jasawala, on the West by property of Burjorji Ghamat, on the South by Government Hill Road, and on the North by the land of Mr. Dias, and which said premises are particularly described in the title-deed now in the possession of the mortgagees Sorabshah and Pirojsha Framji Bandrawala," for the price of Rs. 15,600, of which Rs. 1,000 were, in compliance with the contract, paid as earnest money by Motiwalla to Adam Haji Jacob on the execution of the contract. The purchase was to be completed within two months from the 17th July 1912. The contract was registered by the Sub-Registrar of Bandra on the 22nd July 1912. The only relief prayed for, to which it is necessary to refer, may, in effect, be briefly stated as follows:—That it should be decreed that Adam Haji Jacob, and the defendants Nos. 2 and 3, should execute a deed of sale in favour of Motiwalla, of property described as bearing Municipal No. 139, and that Adam Haji Jacob should execute a deed of sale, in favour of Motiwalla, of the property described as bearing Collector's Survey No. 17, Pot Nos. 2, 3, 4 and 5.

Adam Haji Jacob, by his written statement, admitted that the contract of the 17th July 1912 was made and that he had received as earnest money Rs. 1,000, and pleaded, in effect, that he was ready and willing to convey to Motiwalla the property bearing Collector's No. 17, Pot Nos. 2, 3, 4 and 5, but that he was unable to convey to Motiwalla the property bearing Municipal No. 139, as it had been sold on the 25th April 1913 to the defendant No. 2, in execution of a decree against him, Adam Haji Jacob.

The defendants Nos. 2 and 3, who claimed title under the Court-sale of the 25th April 1913 separately filed written statements, in which they pleaded that the contract of the 17th July, 1912, was void under section 64 of the Code of Civil Procedure, 1908. They also pleaded that all the property, in respect of which specific performance was claimed by Motiwalla, was purchased at the Court-sale of the 25th April 1913 by the defendant No. 2, and they further pleaded several other matters, which, in the view that their

Lordships take of the case, need not be considered by them.

To the allegation that the whole property was included in the Court-sale the plaintiff replied that on the face of the sale only the property bearing Municipal No. 139 was included.

The history of the various executions as regards the lands in question are, as given by the learned Judges of the Court of Appeal, as follows :—

"On the 19th of August 1911 an attachment was levied by a judgment-creditor under Darkhast No. 32 of 1911, and in June 1912 the property was put up for sale after being attached. On the 29th of August 1912 the judgment-debtor, that is, the first defendant, paid in the whole of the decretal amount and costs, and, therefore, the sale was not confirmed, and the Darkhast proceedings were struck off on the 1st of October 1912. Before the payment of the decretal amount, namely, on the 9th of August 1912, another Darkhast was taken out by another decree-holder, being Darkhast No. 120 of 1912, and on the 10th of August the property was attached under that Darkhast. On the 12th of August the new decree-holder applied for rateable distribution of the proceeds of sale of the property. That application was refused on the ground that the money which had then been lodged in Court was not money realised in execution, but paid him in order to avoid the completion of execution, and there were, therefore, no assets rateably distributable. His application having been refused, the second decree-holder applied for sale of the attached property, which was accordingly sold on the 25th of April 1913. It was purchased by the second defendant for a sum of Rs. 11,500. On payment of the purchase-money by the second defendant, it became distributable under the provisions of section 73 of the Code, and would be assets which those entitled to rateable distribution would look to so far as there had been execution under the attachment at that time subsisting."

The description of the property as given in the prohibitory order of the 19th August 1911 was as follows :—

Creditors of Adam Haji Jacob had obtained against him a money-decree, and in execution of that decree they, on the 19th August 1911, obtained from the Court executing that decree a prohibitory order and attachment of the following immoveable property of Adam Haji Jacob :—

"1 One tiled house on the Hill Road at Kasba Bandra in Taluka Salsette, District Thana, having four slopes and walls of earth and stones (together with) the ground and the tenement, the front yard and the rear yard and the out-house and (together with) the room for preparing food and the kitchen and a hut of (*i.e.*, thatched with) palm-leaves for Mali (gardener) and (together with) one other small stable (roofed) with Mangalore tiles and a water-well and a privy and the pipe and (all) the appurtenances thereto. This house bears Municipal No. 139. (The house) including the fruit-bearing and flower-bearing trees and shrubs standing in the compound of this house and together with the fences and hedges. The four boundaries hereof are as follows:—The same is bounded on the east partly by a stone wall and partly by a Mendi hedge and beyond that there is the property of Jehangir Rustomji Jasawala; on the west by the stone wall belonging to the defendant himself, and beyond that there is the property of Burjorji Navroji Ghamat; on the south by the public road and on the north by the following Survey Nos. in the Saja of Kasba Bandra :—

Survey No.	Pot No.	Fa(lni) No.	Land.		Assessment.		
			A.	G.	Rs.	A.	P.
17	2	..	0	4¼	1	0	0
17	3	..	0	4¼	1	0	0
17	4	..	0	12¼	3	0	0
17	5	..	0	4¼	1	0	0."

Now, the schedule of the prohibitory order of the attachment of the 10th August 1912 specifies the property as being Municipal No. 139, and gives first the description of the property as given in the order of the 19th August 1911 without specifying the boundaries. It is clear, therefore, that the sale of the 25th April, 1913, which forms the title of defendants Nos. 2 and 3 cannot include the land described as Survey No. 17, Pot Nos. 2, 3, 4 and 5.

The Subordinate Judge dismissed the suit upon the ground that the contract of which the plaintiff asks specific performance was made unavailable in respect of section

64 of the Code of Civil Procedure, 1908. That section is as follows :—

"Where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

"*Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

With section 64 should be read section 73 of that Code, which, so far as it is material in considering the facts of this case, is as follows :—

"(1).—Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

The Court of Appeal reversed this judgment and gave decree for specific performance.

The difference of opinion lay in this. The learned Subordinate Judge, relying on a judgment reported as *Bibi Miyakhan* v. *Gulabchand Ramchand* (1), held that, as section 64 with its Explanation made any transfer to follow on the contract void in a question with persons having a claim for rateable distribution, and as the executing creditor under the attachment of the 9th August 1912 had applied for rateable distribution under the attachment of the 19th August 1911 before the proceedings under that attachment were finally closed, that kept, so to speak, any transfer in respect of the contract of July 1912 void until it was made finally void against him by the prohibitory order under his own attachment of the 9th August 1912.

The Court of Appeal held that as the contract of July 1912 was only a contract to sell, and not a transfer with delivery of any property or interest, section 64 had no application. They then held that section 40 of the Transfer of Property Act directly applied, and that in the terms of that section the plaintiff was a person entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, and, as such, entitled to enforce it against a transferee with notice and they held that the buyers at the Court-sale had notice of the contract.

The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have to be considered whether what was said in the case of *Mina Kumari Bibi* v. *Bijoy Singh* (2) has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology of section 64 of the Civil Procedure Code of 1908 from section 276 of the Code of Civil Procedure of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the plaintiff's case fails on another ground.

Assuming that section 64 has no effect, and that section 40 of the Transfer of Property Act has full scope, it is only if the purchaser at the judicial sale bought with notice of the contract that it could be enforced against him. Now, on this point the evidence seems to their Lordships quite unsatisfactory. Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. The notice given here is said to have been given by a Mr. Kirtikar, a Pleader, acting on behalf of the plaintiff. But Mr. Kirtikar did not arrive at the sale until 4 P.M., the sale being begun before 3 P. M. He says he read the agreement, which was in English, but that he made a general statement in the vernacular that his client would claim the property; further, that the plaintiff himself would bid

(1) 12 Ind. Cas. 923; 13 Bom. L. R. 1189.

(2) 40 Ind. Cas. 242 44 I A. 72 at p. 78: 1 P L. W. 425. 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424: (1917) M. W. N. 473) 44 C. 662 (P. C.).

at the sale. Kirtikar's statements are denied by the defendants' witnesses. But taking them at their best, they seem to their Lordships far short of such unequivocal notice as ought, they think, to have been given in the case of a Court-sale.

Their Lordships think that the plaintiff fails in his case. The result is that, inasmuch as their Lordships have already held that the appellants have not purchased plots Pot Nos. 2, 3, 4 and 5, and have no *locus standi* to resist the plaintiff's claim in respect of those plots, but that, on the other hand, they have made out their claim to retain plot Municipal No. 139, the decree for specific performance cannot stand, and the appeal must be allowed; but the first respondent should have liberty to apply in the High Court, if so advised, to have a decree for specific performance in respect of plots Pot Nos. 2, 3, 4 and 5, upon such terms as to the Court may seem just. The order of the Subordinate Judge that Adam Haji Jacob should re-pay Motiwalla Rs. 1,000 should stand. The appeal from the decree of the High Court in Adam Haji Jacob's appeal to the High Court should be dismissed. The appellants will have the costs of the consolidated appeals. Their Lordships will humbly advise His Majesty accordingly.

N. H.

Appeal partly allowed.

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents.—Messrs. *Ashurst, Morris, Crisp & Co.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO 104 OF 1922.

January 24, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

Musammat SUKHRANI KUNWAR —OPPOSITE PARTY—APPLICANT

versus

BHUKHAN SINGH AND OTHERS—APPLICANTS—RESPONDENTS.

U. P. Town Improvement Act (VIII of 1919), ss. 56 to 59—Question arising under Act—Reference by Land Acquisition Officer to District Judge—Jurisdiction to make or consider such reference—Improvement Trust Tribunal, decision as to existence of, legality of.

A Land Acquisition Officer has no power to refer a question arising under the Town Improvement Act to a District Judge, nor has a District Judge jurisdiction to consider whether the Improvement Trust Tribunal has ceased to exist or not, and if he decides that it has ceased to exist his decision is in direct breach of the provisions of sections 56 to 59 of the Town Improvement Act.

Civil revision from an order of the District Judge, Cawnpore, dated the 7th July 1922.

Mr. *A. P. Dube*, for the Applicant.

Mr. *Gulzari Lal*, for the Opposite Parties.

JUDGMENT.—This is a plain case. Under the United Provinces Town Improvement Act, No. VIII of 1919, of the Local Legislature, a tribunal has been constituted which, according to section 57 of that Act, has to perform the functions of the Court with reference to the acquisition of land for the Trust under the Land Acquisition Act of 1894. In other words, the new tribunal is substituted for the old Court with which every body is familiar under the 1894 Act. The constitution of that Court is provided for by section 59 which covers all possible contingencies and provides for the appointment of a person to fill a vacancy created by a member of the tribunal who is absent either from illness or other unavoidable cause. For some reason or another which is immaterial for the purpose of this judgment, the Acquisition Officer referred a question arising under the Town Improvement Act to the District Judge, although a question arising in respect of the acquisition of the same land by the Improvement Trust had already been before the Improvement Trust Tribunal. He had no power to do anything of the kind, and the Judge ought to have refused to entertain the matter. However, he did not, but, without the slightest jurisdiction, proceeded to consider whether he had jurisdiction or not. He has decided, on grounds which are quite unintelligible to us, that the Tribunal constituted under the 1919 Act has ceased to exist. He has gone on presumably to hold that he is its natural successor. But this is quite immaterial. It is abundantly clear that it has not ceased to exist, and that the Judge had no jurisdiction to consider whether it had or it had not. A decision by the District Judge of Cawnpore that it had ceased to exist, is equivalent to a sentence of death upon the Tribunal, and

is a decision in direct breach of the provisions of sections 56 to 59 of the Town Improvement Act, and of such serious import as to wreck the whole of the machinery carefully created by Government for the determination of questions under this Act. We have no alternative but to quash the order. The parties must bear their own costs in the Court below. In this Court the applicant is entitled to his costs with fees on the higher scale.

S. D. *Order quashed.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

November 28, 1922.

Present:—Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins, Kt., and Lord Salvesen.

Thakurain HARNATH KUAR—PLAINTIFF—APPELLANT

versus

Thakur INDAR BAHADUR SINGH—DEFENDANT—RESPONDENT.

Oudh Estates Act (I of 1869)—Widow, Succession to—Reversioner, status of—Contract Act (IX of 1872), s. 65—Transfer, void—Transferee, rights of—compensation.

Under the Oudh Estates Act the succession to collaterals of a Hindu deceased male holder opens on the death of his widow just as under the Hindu Law, and inasmuch as a reversioner has no more than an expectancy, he has no interest which he is competent to transfer or bind. [p. 630, col. 1.]

An agreement discovered to be void is one discovered to be not enforceable by law, and, on the language of section 65 of the Contract Act, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. [p. 630, col. 2.]

Where an instrument of transfer is discovered to be void, because its subject-matter is incapable of being bound in the manner stipulated, the transferee is entitled to recover compensation, which should include the sum advanced by him and also interest at 6 per cent from the date of the suit. [p. 630, col. 2.]

Appeal from a decree of the Oudh Judicial Commissioner's Court, Mr. Lindsay, J. C., and Mr. Stuart, A. J. C., dated the 20th March 1918, reported as 47 Ind. Cas. 414, affirming a decree of the Sub-Judge, Bara Banki, dated the 3rd August 1915.

Mr. *Loundes*, *K. C.*, and Mr. *Dube*, for the Appellant.

Mr. *DeGruyther*, *K. C.*, and Mr. *Parekh*, for the Respondent.

JUDGMENT.

Sir Lawrence Jenkins.—This is an appeal from a decree, dated the 20th March 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed a decree, dated the 3rd August 1915, of the Subordinate Judge of Bara Banki.

The suit is for the possession of the villages specified in the plaint with an alternative prayer for the payment of money. Both the lower Courts have decided adversely to the plaintiff on each of the claims, and the suit has been dismissed with costs. From this decision the present appeal has been preferred.

The plaintiff's claim to the villages rests on an instrument which purports to have been a transfer on sale executed on the 2nd January 1880 by the defendant, Indar Bahadur Singh, in favour of Rachpal Singh, the plaintiff's deceased husband.

The villages were part of two Talukas in Oudh, known as Paska and Lilar, and owned by Thakur Naipal Singh, whose name was entered in List II attached to the Oudh Estates Act I of 1869, as estates which, according to the custom of the family, ordinarily devolved upon a single heir.

Thakur Naipal Singh died childless on the 28th October 1873 leaving him surviving his two widows, Thakurain Iklas Kuar and Thakurain Choti. According to Hindu Law, the defendant Indar Singh was the next reversioner. The widows set up a Will as that of their deceased husband, and claimed that it empowered them to adopt. Indar Singh thereupon instituted a suit against them and the Court of Wards, who had taken over the estates, and, by the decree of the Deputy Commissioner of Bara Banki, dated the 22nd October 1878, the alleged Will was declared void and invalid, and Indar Singh was declared "entitled to succeed to Paska and Lilar estates on the death of the last surviving widow of the late Naipal Singh."

It is the plaintiff's case that in 1878 her husband, Rachpal Singh, advanced Rs. 20,000 for this litigation and other expenses to Indar Singh, who was a poor man, and that in 1880, on a further advance of Rs. 5,000, Indar Singh executed the instrument of transfer on which this suit is brought.

Both Courts have held that the transfer was inoperative, as Indar Singh at its date

had no interest capable of transfer but merely an expectancy.

It cannot be disputed that, according to the ordinary Hindu Law, this is the true view, but the plaintiff, to escape from this predicament, contends that the rights of Indar Singh must be determind by reference to the provisions of the Oudh Estates Act and the declaration contained in the Deputy Commissioner's decree.

Whatever the view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and it necessarily follows that in January 1880 Indar Singh had no more than an expectancy, and so had no interest in the villages which he was competent to transfer or bind.

Nor, in their Lordships' opinion, was this position modified by the Deputy Commissioner's decree. As the suit was constituted, the Deputy Commissioner could only have made a declaration binding on the widows and the Court of Wards, and it certainly was not within his competence to make a valid declaration that would create in Indar Singh's favour an interest in the villages that did not otherwise exist. The claim for possession was, therefore, rightly rejected.

And so it becomes necessary to consider the claim for payment of money. The amount demanded is Rs. 1,28,033-4-8, and this is made up of Rs. 25,000 principal and Rs. 1,03,033-4-8 interest at Rs. 1 per cent. per month from the 2nd January 1880 to the 5th May 1914.

The payment of the Rs. 25,000 is established, and the defendant's pleas that the instrument of the 2nd January 1880 was executed under undue influence and was extortionate have failed, but the claim for recovery of the money has been held to be barred by limitation.

Before this Board, the claim has been based on section 65 of the Contract Act. It is there provided that, "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

So framed, the plaintiff's claim to compensation rests, not upon any principle or formula of English Law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (*a*) agreements and (*b*) contracts. The distinction between them is apparent from section 2. By clause (*e*) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (*h*) an agreement enforceable by law is a contract. Section 65, therefore, deals with (*a*) agreements enforceable by law and (*b*) with agreements not so enforceable. By clause (*g*) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of the 2nd January 1880 and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation.

It was thus that the agreement was discovered to be void, and the discovery in their Lordships' view was one within the words and the meaning of section 65 of the Contract Act.

The plaintiff, therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs. 25,000 found by both Courts to have been paid to Indar Singh, and also, in the circumstances of this case, interest, not at the rate

or for the period claimed by the plaintiff, but at 6 per cent. from the date of the institution of this suit. Their Lordships will, therefore, humbly advise His Majesty that the decree under appeal should be varied in accordance with this opinion, and that the respondent should pay the costs of the plaintiff in both the lower Courts. The costs of this appeal must be paid by the respondent.

Appeal allowed; Decree varid.

W. C. A.

Solicitors for the Appellants:—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 83 OF 1922.

January 11, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SHEO RAM KOERI AND OTHERS—PLAINTIFFS—APPLICANTS

versus

Musammat IKRAMUNNISSA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 18—Fraud—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution sale—Sale confirmed—Application to set aside sale—Fraud—Limitation.

Under section 18 of the Limitation Act where irregularities affecting the validity of an execution sale have, by the fraud of the decree-holder or third parties, been kept concealed from the judgment-debtor, the judgment-debtor is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application if any, under O. XXI, r 90, Civil Procedure Code, as he may be entitled to make, and his time for making it will be computed from the time when the fraud first became known to him. The confirmation of the sale cannot be allowed to be used as a shield for the fraud by which the Court has been induced to make the sale itself. [p. 632, col. 2.]

Mohendro Narain Chaturai v. *Gopal Mondul*, 17 C. 769; 8 Ind. Dec. (N S.) 1050, followed.

Gobind Chandra Majumdar v. *Uma Charan Sen*, 14 C. 679; 7 Ind. Dec. (N. S.) 450, dissented from.

Civil revision from an order of the Subordinate Judge, Jaunpur, dated the 3rd April 1922.

Dr. *K. N. Katju*, for the Applicants.

Messrs. *Iqbal Ahmad* and *Mushtaq Ahmad*, for the Opposite Parties.

JUDGMENT.—This is an application in revision which raises a question whether section 18 of the Limitation Act applies when a sale in execution proceedings has already been confirmed. On the 20th August 1912 Sheo Ram obtained a final decree in a suit upon a mortgage for Rs. 685. On the 21st of January 1913, he took steps in execution. The property in question was advertised for sale and on the 21st of April 1913 was sold. The decree-holder had obtained permission to bid and in fact he bought the property on that day. On the 23rd of May 1913 the sale was confirmed. On the 23rd of June 1913, the guardian of the judgment-debtor, who throughout all the proceedings was a lunatic, asked that the sale might be set aside, and he alleged a series of acts and calculated omissions by the decree-holder, and other conduct of the decree-holder and third parties, which pointed to fraud on the part of the decree-holder. It is said that before the Execution Court had time to consider that application on its merits, a suit was filed to set aside the decree on the ground of fraud. That suit was, in fact filed some eighteen months after the filing of the application, namely, in December 1914. In June 1915 that suit was dismissed by the First Court, in May of 1916 by the lower Appellate Court, and in July of 1918 was dismissed by this High Court. Thereupon the application filed on the 23rd of June 1913 was taken up by the Munsif on the 11th of January 1919, and he passed an order setting aside the sale. From that order there was an appeal. The matter was remanded on two occasions for certain findings, but, ultimately, on the 3rd of April 1922, Mr. Ali Ausat confirmed the order of the Munsif and set aside the sale of the 21st of April 1913. The learned Subordinate Judge set out various charges of fraud which he held had been established against the decree-holder. We are sitting here in revision, and even if we disagreed with him, we should nevertheless be bound to accept his find ngs. The po nt taken by the decree-holder is this, that the sale having been confirmed on the 23rd of May 1913 from that day the Execution Court had no power

to make any order varying that confirmation, or setting aside, or in any way dealing with it, it being plainly stated by Dr. Katju that the right view to take of that order of the 23rd of May 1913 is that when it was passed the Execution Court became wholly *functus officio*. On the other side, it is said that whilst in a case in which no fraud was alleged, the 21st of May 1913 would have been the last date upon which the judgment-debtor could have raised objection, nevertheless in a case of fraud an application can be made even after the thirty days provided the judgment-debtor can show circumstances which bring him within the words of section 18 of the Limitation Act of 1908. Omitting the words which are not relevent to this matter, section 18 is as follows:—"Where any person having a right to make an application has by means of fraud been kept from the knowledge of such right, the time limited for making an application against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person injuriously affected thereby". The question as to whether in fact the judgment debtor had been kept from the knowledge of his right to make an application by means of fraud was one of the matters into which the Subordinate Judge enquired, and he was satisfied that the circumstances which would have entitled the guardian of the judgment-debtor to make an application, did not come to the knowledge of the guardian until the 3rd of June 1913, and that, therefore, an application by him could have been made at any time between the 3rd of June and for 30 days thereafter. He did, in fact, make an application on the 23rd of June. The question which we have to decide is whether that application made as it was on the 23rd of June was not, in every way, as legally efficacious as if it had been made within 30 days of the date of the sale. We are of opinion that this is an enabling section which does extend the time, and which when the person aggrieved shows facts which establish a fraud, and shows that by means of that fraud he has been kept from his knowledge of his right to make an application, he can, on the establishment of those matters, if he makes his application within 30 days; he in all respects is in the same position as if he were making it within the 30 days of the sale, and the fact that the sale has been confirmed by the Court in ignorance of the fraud is no bar to his application, and does not stand as a bar in any further order which the Court may make. This matter was considered in the case of *Mohendro Narain Chaturaj* v. *Gopal Monaul* (1) in the year 1890. There the very same point was taken that the sale having been confirmed, section 18 was inapplicable. Mr. Justice Pigot at page 776* dissented from the expression of opinion in the case of *Gobind Chandra Majumdar* v. *Uma Charan Sen* (2) and said as follows:—"I think that under section 18 of the Limitation Act, where irregularities affecting the validity of the sale have been, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application, if any, under section 311 as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. The confirmation of the sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself." As we are in complete agreement with that expression of opinion by the learned Judge, it follows that this application in revision must fail. We accordingly reject it with costs and fees on the higher scale.

S. D. *Application rejected.*

(1) 17 C. 769; 8 Ind. Dec. (N. S.) 1255.
(2) 14 C. 679; 7 Ind. Dec. (N. S.) 450.

*Page of 17 C.—[Ed.].

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 1, 1922.

Present:—Lord Atkinson, Lord Sumner, Lord Carson and Mr. Ameer Ali.

Srimati SARATKUMARI DASI —PLAINTIFF—APPELLANT

versus

AMULLYADHAN KUNDU AND OTHERS DEFENDANTS—RESPONDENTS.

Evidence—Affirmative proposition—Conflicting evidence tendered against proposition—Proposition

whether established—Circumstantial evidence—Pleader—Compromise of case—Pardanashin *lady, transaction by—Protection of law—Evidence, nature of.*

An affirmative proposition is not established by showing that the evidence of witnesses who depose to a contrary negative proposition is not reliable. The proposition that a person consented to a compromise is an affirmative proposition, and if there is a conflict of evidence on the point of consent, some witnesses asserting that he did consent, some to the contrary, it would be perfectly legitimate to take into consideration circumstantial evidence with a view to show that evidence of the first class was true and that of the second class false. [p. 633, col. 2; p. 634, col. 1.]

Where a Vakil is appointed by a power-of-attorney to argue the case of the executant, to inspect records, execute documents and deposit and withdraw monies and do all such other acts, such power-of-attorney does not endow the Vakil with power or authority to compromise the suit he is thus retained to argue. [p. 634, col. 1.]

Owing to the secluded life *parda-nashin* ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them. In the case of deeds and powers, therefore, executed by such ladies it is requisite that those who rely on them should satisfy the Court, by the strongest and most satisfactory evidence, that they have been explained to and understood by those who executed them, and that the transaction was real and *bona fide* and that disinterested and competent persons, with a fair understanding of the whole matter, advised the lady to execute it. [p. 637, col. 2.]

Tacoordeen Tewarry v. *Nawab Syed Ali Hossein Khan*, 1 I. A. 192; 21 W. R. 340; 13 B. L. R. 427; 3 Sar P. C. J. 308 (P. C.), *Shambati Koeri* v. *Jago Bibi*, 29 I. A. 127 at p. 131; 29 C. 749; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304 (P. C.) and *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*, 53 Ind. Cas. 131; 46 I. A. 272; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 821; 22 Bom. L. R. 1; 24 C. W. N. 297; 11 L. W. 227; 47 C. 175; 2 U. P. L. R. (P. C.) 2 (P. C.), relied on.

Appeal from a judgment and decree of the Calcutta High Court, dated the 27th February 1920.

Mr. *De Gruyther, K. C.*, and Mr. *Dube*, for the Appellant.

Dr. *Majid*, for the Respondents.

JUDGMENT.

Lord Atkinson.—This is an appeal from a judgment and decree, dated the 27th February 1920, of the High Court of Judicature at Fort William in Bengal, which reversed a judgment and decree, dated the 17th April 1919, of the Additional Subordinate Judge of Howrah. The main question for determination by the Board is, whether or not the compromise of a certain suit instituted by the appellant to recover possession of certain lands theretofore purchased by her from one Dharma Das Kundu, since deceased, purporting to have been made and entered into on the 7th February 1917, had in fact been so made and entered with her full knowledge and consent or the contrary. The appellant is a *parda-nashin* lady aged about 43 years. She has two sons, Raman and Srish, the latter of whom appears to be competent to some extent to transact business, and two brothers named Satish about 47 years of age and the other, Sailadhar, who is younger. She can write and read in Bengali; can sign her name and from her evidence would appear to be a person of some intelligence. The Trial Judge found on the evidence before him that this compromise was not made and entered into with the knowledge and consent of the appellant. The Appellate Tribunal found on the evidence the affirmative proposition that it was so made, though that proposition was denied by the appellant and not proved directly by any document or by any witness. Their Lordships are not, for the reasons to be stated hereafter, able to take the view of the evidence upon this point which commended itself to the Appellate Court. They think this latter view was erroneous and incline to think that this was due to the fact that the two learned Judges, Richardson and Shamsul Huda, dealt with the case without keeping sufficiently before their minds that an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable. The proposition that the appellant consented to the compromise entered into is an affirmative proposition. She and one of her brothers practically deny that she ever consented to it. No witness gives direct and positive evidence that she did consent to it. Yet these learned Judges consider that, as the circumstantial evidence given in the case would go to show that the evidence of the appellant and her brother on this point was not reliable, they are, therefore, entitled to hold the affirmative proposition that she did give her consent to the compromise was proved. Of course, if there was a conflict of evi-

dence on this point, some witnesses asserting that the appellant did consent to this compromise, some the contrary, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witness was true and that of the second false. But on this case, as will presently be shown, there is no conflict of evidence of this kind. The facts of the case may be shortly stated as follows.

On the 15th November 1913 the appellant bought from the said Dharma Das Kumari certain land for the sum of Rs. 9,500. He died on the 6th of February following. He left three sons and three grandsons him surviving who are all respondents in this appeal. The appellant did not get possession of the land she purchased, and on the 11th July 1914, she instituted against the above mentioned sons and grandsons of Dharma Das Kumari a suit for a declaration of her title to the land purchased and for the recovery of the possession thereof. The eldest son of the deceased. Amullyadhan, and the three grandsons denied her claim and contested the validity of the sale, but the two younger of the vendor's sons filed a written statement admitting that her claim was just and well-founded. The Subordinate Judge of Howrah who tried the case made on the 23rd August 1915, a decree allowing the appellant's claim with mesne profits and costs. From that decree the eldest son Amullyadhan and the three grandsons of the deceased appealed to the High Court at Fort William in Bengal. The appellant executed a power-of-attorney appointing several persons, namely, Babu Probodh Kumar Das, amongst others, her Vakils to argue her case to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the same to be accepted and ratified as acts done by her. It has been well established and is not, as their Lordships understand, questioned in this case, that a Vakil appointed under such a power-of-attorney as this is not endowed with power or authority to compromise the suit he is thus retained to argue. The appeal came on in the High Court before Fletcher and Richardson, JJ., on the 6th February, 1917. One Babu Haradhan Chatterjee appeared as Vakil for the respondents, and the a pellant appears to have been represented, in addition to Vakil Probodh K .mar Das, by a well-known Barrister, Mr. B Chakravarti. After the hearing had proceeded for some time the learned Judges suggested that the appeal might well be compromised. The appellant's Vakil at this juncture desired to consult her Counsel, Mr. Chakravarti, but that gentleman's attendance could not be procured, apparently because he was engaged in another Court. The Vakil then asked for time to consider the suggestion made, and in compliance with that request the terms of the compromise were embodied in the following document written in English, which was on the 7th February 1917 signed by the Vakils of both parties and duly filed in Court. It ran thus :—

"It may be ordered by consent that defendant No. 1, Amullyadhan Kundu, do pay to the plaintiff, Saratkumari Dasi, Rs. 13,500 (thirteen thousand and five hundred only) within 22nd February 1917 On such payment being tendered and deposited in this Honourable High Court to the credit of the said Saratkumari Dasi on the said date, the plaintiff, the said Saratkumari Dasi, do convey to the defendant No. 1, the said Amullyadhan Kundu, at the defendant No. 1's cost, the property in dispute in this appeal, free from all encumbrances, if any, created by the plaintiff since the purchase of the said property by her on the 15th November 1913 and subject to all encumbrances existing before the date of purchase by the plaintiff (*Sm.* Saratkumari Dasi). If such payment be not tendered within 22nd February 1917, the appeal stands dismissed with costs."

It is not pretended that the effect of this document was ever explained to the appellant by her Vakil or by any other person. She never signed it, or a copy of it, or any document which would show that she was acquainted with its existence, contents or effect. It is written in the English language, which neither the lady nor her Vakil understand. She positively swears that she never authorised a compromise of her suit to be entered into, and, as will presently be shown, when she ultimately was informed that this had been done

her conduct and action were much more like that of a woman who felt that her confidence had been betrayed, and her interests sacrificed, than that of one who was struggling to break a bargain made on her behalf of the nature of which she was well aware and of which she at first approved.

Being a *parda-nashin* lady she apparently authorised her brother, Satish Chandra, to attend the Court in which her action was about to be heard and look after the proceedings in the suit, but, as will presently be shown, there is no evidence to establish that she either expressly or impliedly clothed him with plenary authority to compromise, on her behalf, this suit which she had instituted to recover possession of the land she had purchased.

On the 21st February 1917 the principal defendant, the eldest son of the vendor, tendered to the appellant's Vakil, Babu Probodh Kumar Das, the sum mentioned in the document of compromise, Rs. 13,500. He refused to receive it. The matter was brought before the High Court on the following day, the 22nd February 1917, when it was by that Court ordered that the money should be brought into Court. This has been done. On this same day, the 22nd February 1917, she states in her evidence that she first heard of the compromise of her suit. In her evidence in the present suit she gives the following account of the way in which she came to know of it. She says: "My brother Satish not having come to my house for 15 or 16 days I sent for him through my son Srish. He came to see me on the 10 *Falgun*, 1323 (*i. e.*, the 22nd February 1917). I having enquired of him about the case, he said that the case had been compromised. On hearing that news I had a quarrel with my brother. After that I filed through my son a petition to the High Court for setting aside the compromise." She adds, "since the quarrel with my brother he did not come to my house. I would suffer loss if I made the compromise for Rs. 13,500, because Rs. 17,000 or Rs. 18,000 have been spent by me on account of the purchase of the land and litigation expenses."

On the 28th March 1917, one month and six days after she had, as she swears, first heard of the compromise, she took the proceedings indicated in the foregoing passage of her evidence. She had an application made to the High Court to a review of the proceedings in the suit in which the compromise had been entered into, with the view of having the latter set aside on the ground that it had been entered into, without her authority or consent. This application was on the 11th May 1917, for some reason not fully explained, refused. Whereupon the appellant on the 25th July 1917 instituted the present suit. The grounds upon which the High Court apparently based their decree which is appealed from are expressed concisely in the following two passages from their judgments. Mr. Justice Richardson said: "I am satisfied that the respondent's brother Satish acted as her accredited agent throughout, and that the compromise of the 7th February was entered into on her behalf and with her consent. The respondent agreed at the time to a settlement not unjust to her but changed her mind afterwards. The bargain cannot be undone. *Neale* v. *Gordon Lennox* (1);" and Mr. Justice Huda said: "As I have said before, the evidence of Probodh Babu and Haradhan Babu place the fact of her consent to the compromise beyond any doubt. I, therefore, hold that Saratkumari did consent to the compromise and now has come forward to repudiate it falsely." It will be observed that the conclusions at which the learned Judges have arrived do not agree. Mr. Justice Richardson held that the appellant's consent to the compromise was given, not by the appellant directly, but by her brother, her agent, fully authorised on that behalf. In the case of the second learned Judge it is very doubtful whether he comes to the same conclusion as does his brother Judge, or to the conclusion that though, as he admits, there is no direct evidence of consent by the appellant, the circumstantial evidence of it is very strong. He says he rejects the evidence of Satish and Saila the appellant'sbrothers, as wholly unreliable. He then deals with the circumstantial

(1) (1902) A.C. 465; 71 L. J. K.B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757; 18 T. L. R. 791.

evidence upon which he relies in this fashion. He says :—

"Satish, as I have said, was acting in the interest of his sister. On the 6th he and his brother were both present in Court. When the Court suggested a compromise, time was given to enable Satish to consult his sister. They were not living far off. Satish was living at Pataldanga and Saratkumari at Baghbazar. The distance between the two places is only about a mile. It is inconceivable that neither of the two brothers went to Saratkumari to take instructions from her about the compromise. According to Probodh Babu, Satish saw him in the evening and told him his sister would like to get a little more money, that, accordingly, the next day he was able to induce the learned Vakil on the other side to raise his offer to Rs. 13,500. Admittedly, both Satish and Saila were present in Court and I have no doubt they consented to the compromise on behalf of their sister."

This line of reasoning is directed to show that Satish and Saila sought for and obtained from their sister on the 6th February authority to consent to the compromise after they had duly informed her of the suggestion that had been made, while Mr. Justice Richardson held, to use his own words, that "Satish was the accredited agent of his sister throughout" (which their Lordships presume means from the first) and that the compromise of the 7th of February was entered into by him on her behalf and with her consent."

The very fact that time was given to consider the compromise suggested by the Court is the best proof that Satish was not given from the first and not taken to have been so given such dominion and control over the litigation as would have entitled him to compromise the suit without consulting his sister.

Such being the apparently inconsistent conclusions at which the two learned Judges arrived, it is necessary to examine the evidence to endeavour to discover whether there was any evidence before them from which these conclusions as inferences from established facts, not mere conjectures or suspicions, or surmises, could legitimately be drawn. Turning to the evidence of the appellant one finds that in her evidence in-chief she deposes as follows :—

"My name is Saratkumari Dasi. My husband's name is Beni Madhab Dawn. My age is 43 or 44 years. The house in which I have been giving deposition is my own house. I, plaintiff, have instituted suit in the Howrah Court. Amullya filed, in the Honourable High Court, Appeal No. 393 of 1915 against me. Satish Dutt is my eldest uterine brother. He used to look after the said appeal case of mine. I gave no authority to my said uterine brother to compromise the said appeal. I made no *solehnama* in the case at High Court I did not give to my said brother consent to file any *solehnama*, relinquishing the property on taking Rs. 13,500. I did not give to the Vakils, who were engaged on my behalf in High Court, any authority to compromise the said appeal case. My eldest brother Satish or youngest brother Saila or my son Sarish did not show any *solehnama* to me, nor read out the same to me. I did never, through my brother Saila and Satish or my son Srish, apprise my Vakils, at High Court of my consent to make *solehnama*. I did never, through those persons, tell them to make *solehnama* on taking Rs. 16,000 or on taking Rs. 13,500 exclusive of the amount due under the mortgage to Prandhan Babu. My eldest brother Satish never brought and read out the draft of any *solehnama* to me nor showed the same to me. My eldest brother Satish never informed me of the fact that a talk of compromise was going on in High Court. If I had heard of the *solehnama*, I would not have given consent to same."

She was subjected to a long, tedious and mainly irrelevant cross-examination. Nothing discrediting her evidence-in-chief was elicited, while she added that her brother and sons engaged her Vakils; that she had no interviews with any of them and that the quarrel with her brother Satish to which she referred was not "very abusive between brother and sister, but an altercation," that she said to him, "Why did you do this without my consent?" Their Lordships find nothing in any part of her evidence to sustain the suggestion of the second learned Judge that this lady got sorry for having consented to the com-

promise, changed her mind and came forward to repudiate it falsely.

Satish, when examined, proved that he was a trader, accustomed to look after his sister's case upon appeal, and then alleged that the compromise was made without reference to her; that on the morning of the 6th of February Dr. Mitter commenced his argument about noon, that about 2-30 or 3 P. M. Probodh Babu (the appellant's Vakil) spoke to him in the verandah of the Court, saying that the Judges had suggested that the case should be amicably settled, that he was not agreeable to this, and then this Vakil asked him to come to his, the Vakil's, residence at night when he would speak about the matter. The Court was adjourned, but he says he does not know whether that was before or after the conversation. He says that he did not communicate (*i. e.* about the proposal) with his sister, that he went to the Vakil's residence that night and told him (the Babu) he was not willing to compromise; that this Babu then asked him to come to Court on the following day, the 7th, which he did. The appellant's sons, he says, were not present in Court on the 6th of February; that Dr. Mitter resumed his argument on the 7th: that about 1 o'clock this same Vakil asked his brother Saila who was with him to call on Mr. Chakravarti, which his brother went to do. The witness further says that Probodh Babu asked him to come to the verandah of the Court, which he, the witness, then did, when the former told him that if the suit was dismissed by Mr. Justice Fletcher they would be put in a great difficulty, so it would be better to compromise it. That he, the witness, replied he could not say anything about the matter; that he, the Vakil, might do what he thought best; that he, the witness, did not agree to the Vakil compromising the case. When witness's brother had returned he said the Vakil had gone back to the Court-room and talked there with Dr. Mitter and Haradhan Babu when Dr. Mitter took a paper and wrote down something in English, which language the witness does not understand; that Probodh Babu then asked the witness to sign it, which he, the witness, refused to do, saying that before he could sign it, it was necessary his sister should consent to it. That the paper was then signed by the two Vakils and filed by Dr. Mitter. The appellant's sons were not, the witness says, in the Court on the 7th, and then he states that he, the witness, did not go to inform the appellant of the compromise, as he apprehended she would disapprove of what had been done. He is cross-examined, but nothing to shake his evidence-in-chief would appear to their Lordships to have been elicited from him. He adds that he did not enquire what had been written by Dr. Mitter, that the terms of the compromise were not read over or explained to him, but that Probodh Babu told him that on the defendant in the suit paying Rs. 13,500, the case would be compromised. If this witness had from the first plenary authority to compromise this suit, as Mr. Justice Richardson apparently holds, or if during the adjournment he had obtained from his sister authority to consent to the compromise, as apparently Mr. Justice Huda holds, it is difficult, if not impossible, to suggest any rational explanation of his refusal to sign the document. Owing to the secluded life *parda-nashin* ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them.

In the case of *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (2) Sir Montague Smith stated the law upon the point thus. According to the principles which have always guided the Courts in dealing with sales or gifts made by *parda-nashin* ladies 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 was fully understood by the lady whose property is dealt with. In *Shambati Koeri* v. *Jago Bibi* (3) Sir Andrew Scoble said: "It is a well-known rule of this Committee that in the case of deeds and powers executed by *parda-nashin* ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them."

(2) 1 I. A. 192; 21 W. R. 340; 13 B. L. R. 427; 3 Sar. P. C. J. 368 (P. C.).

(3) 29 I. A. 127 at p. 131; 29 C. 749; 6 C. W N 682; 4 Bom. L. R. 444; 8 Sar. P. C. J. 304 (P. C.).

And in *Sunilabala Debi* v. *Dhara Sundari Debi Chowdhurani* (4) this principle was applied to an agreement to compromise litigation, but it was held to be sufficient to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her, and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

Nothing of this kind was shown in this case. There is no proof that the lady knows English. Satish proved that the document filed was written in English. He is not contradicted on this point. The lady's Vakil, it appears to their Lordships, failed in his duty towards her; he never saw her, never spoke to her in reference to this compromise, nor had he any communication with her touching it. Had he acted properly and explained this compromise to her, after which she approved of and consented to it, she would in all probability have signed it, and all this litigation would have been avoided.

The learned Judge also says in his judgment, "the evidence both of Probodh Babu and Haradhan Babus places the fact of the appellant's consent to the compromise, above any doubt." It is essential then to examine the evidence of these witnesses with great care. They were examined by the Court and not by the Vakils of the parties.

The evidence of Babu Haradhan Chatterjee ran as follows:—

"*Q.*—Will you state as shortly as possible your recollection as to what happened on the 6th and what happened on the 7th February?

"*A.*—Dr. Mitter, who was leading me, was arguing and discussing the evidence.

"*Q.*—Were you addressing the Court?

"*A.*—No. Dr. Mitter was addressing. I was present. I was seated by his side. I was instructing him. Then Mr. Justice Fletcher threw out a suggestion, whether my client is willing to purchase the whole property, that is to say, the defendant No. 1. Dr. Mitter asked me whether the client was willing to do so. Previously we thought that if there was a suggestion to purchase the property, we would accept it. Dr. Mitter said 'we are agreeable to purchase the property.' Upon that, Mr. Justice Fletcher asked the other side, Probodh Kumar Das, whether he is agreeable to compromise the suit, and asked Dr. Mitter what the terms will be. Dr. Mitter suggested that we were agreeable to pay the purchase-money with compound interest and that was the suggestion asked by Mr. Justice Fletcher, whether that would be agreeable to the other side. Probodh Babu said, 'I cannot say without asking my clients.' Both the brothers Satish and Saila were standing behind him and they held a consultation amongst themselves. After that they said, 'we cannot say anything to that, we shall speak about this matter to-morrow; unless we consult the client we cannot say anything to it.' On that day it was arranged for Rs.13,000 *plus* the mortgage-money. This matter was adjourned at that time. Satish was standing behind Probodh Babu, and Mr. Justice Fletcher addressing him, told him, 'tell your sister that the compromise will be to her benefit. I have thoroughly understood the case, and in my opinion it is a *benami* transaction.

"*Q.*—We want to know exactly what happened on the 7th?

"*A.*—On the 7th they wanted more. Afterwards it was settled at Rs. 13,500.

"*Q.*—Afterwards—when? On the same day or the next day?

"*A.*—On the 7th, after some consultation with Dr. Mitter, myself on one side and Probodh Babu and Satish and Saila on the other side. Then the draft was made recording the terms. Probably I drew out the draft in consultation with Dr. Mitter and Probodh Babu. This draft was taken away by Satish to show to somebody, but I do not know to whom. He said 'I will show it to some friend of mine.'"

The evidence of Babu Probodh Kumar Das ran as follows:—

"*Q.*—Can you tell us as briefly as possible what took place first on the 6th and then on the 7th?

"*A.*—So far as I remember the arguments were going on when there was a

(4) 53 Ind. Cas. 131; 46 I. A. 272; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N 821; 22 Bom. L. R. 1; 24 C. W. N. 297; 11 L. W. 227; 47 C. 175; 2 U. P. L. R. (P. C.) 2 (P. C.).

suggestion made by the Court, *viz.*, Mr. Justice Fletcher, to Dr. Mitter, whether he was willing to purchase the whole property. Dr. Mitter said that he would accept that and that he would pay compound interest. On that, Mr. Justice Fletcher asked me whether my client would be agreeable to that. I asked my client Satish and his brother Saila whether they agreed to it. They had a consultation among themselves as to whether that would be profitable to them and that did not take more than two or three minutes. After that Satish asked me to take time to consider the matter and that was also necessary because I was appearing for a *pardanashin* lady and had to take her instructions in the matter. I said to him, 'You had better go and consult about the matter and come to me at night at my house.' So he went away and came at night on that very day at my house and told me that his sister would like to have a little more than was offered. I said that I would ask Dr. Mitter whether his client is agreeable to that. The next morning when the case was called on at 11 A. M., then I told Dr. Mitter that my client would require something more, because the amount which was offered was barely sufficient to cover expenses. Then Dr. Mitter consulted or did something and then within a few minutes Dr. Mitter said 'we can offer so much.' I told my client that that was the utmost that he could get. He could do what he liked. Then Dr. Mitter asked for some time from the Court. Time was given. I went away on another case which was called on at that time.

"*Q.*—That was on the 6th?

"*A.*—That was the next day, the 7th.

"*Q.*—On the 6th night your clients came and told you that they required something more?

"*A.*—Yes, on the 7th when I came to Court they told me to try and get something more. I said to Dr. Mitter that unless something more was offered my client was not agreeable to the compromise.

"*Q.*—And Rs. 500 more was offered.

"*A.*—Yes.

"*Q.*—Did you ask your client to go and fetch Mr. Chakravarti?

"*A.*—I do not remember if I did

"*Q.*—No occasion arose for any argument?

"*A.*—So far as I remember no occasion arose for argument on the 7th.

"*Q.*—Were you present at 2-30 when the petition was put in?

"*A.*—Yes. Dr. Mitter handed something to Haradhan Babu. He read it out and I handed it over to my client who took it away and went away.

"*Q.*—You distinctly remember you never sent for Mr. Chakravarti?

"*A.*—I cannot be positive about it, it is so old."

Nothing of importance beyond this was elicited.

The Appellate Court insisted quite properly upon the examination of these two Vakils. They treat their evidence as so much in conflict with the evidence not only of the two brothers of the appellant but of the appellant herself as to utterly discredit her and them as witnesses, and yet it never apparently occurred to the learned Judges that it would have been well if the brothers of the appellant had had an opportunity of cross-examining these Vakils on the portion of their evidence in conflict with their own. No such opportunity was given. Again, the evidence of these Vakils deals only with what occurred in the Court. It may show that they, the appellant's brothers, had an opportunity of informing her of the fact that a compromise was proposed and of obtaining her consent to it. It may even go so far as to raise a suspicion that she was informed of it and did consent to it. It may tend to discredit the evidence of the brothers which was in conflict with it. It is, however, inconsistent with the assumption that Satish had from the first plenary authority from his sister to compromise the suit in any way that seemed good to him. In that case asking for her consent to the compromise proposed would have been quite unnecessary. But in their Lordships' view it is quite insufficient in face of the distinct denial of the appellant to establish the affirmative proposition that she did in fact consent to this compromise, the

burden of proving which rests upon the respondents. In their Lordships' view they have failed to discharge that burden.

There is one matter that may account for the unbusinesslike manner in which this compromise was arranged and carried out. The appellant was cross-examined at length apparently to show either that the money she paid for the lands she purchased was not her own or that she gave or lent money to her brother Satish to purchase them for himself. Mr. Justice Fletcher suggested from the Bench that the purchase might have been a *benami* transaction, and Babu Probodh Kumar Das in his evidence calls Satish his client. At one part of his evidence he uses the words "My client Satish", at another, "I handed it (the compromise paper) to my client, who took it away with him." It may possibly be that he believed that the property was purchased for Satish, that he was the real owner of it, and that he, therefore, thought it was unnecessary to take the precautions which he probably would have taken if he had believed this *purdanashin* lady, the appellant, was the real owner.

The case of *Neale* v. *Gordon Lennox* (1) (*supra*) referred to, has no application to the present case.

The respondents rely upon another point. It is this. The appellant, after having obtained leave to appeal to His Majesty in Council, applied to the Court for, and on the 2nd of September 1920 obtained, an order that Rs. 4,000 (portion of the Rs. 13,500 paid into Court) should be held as security for the costs of the respondents in the appeal to this Board. It was contended that this transaction amounted to an adoption by the appellant of the decree while at the same time she was impeaching it, and was, therefore, estopped from doing so. If the appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will be returned to the respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. In their Lordships' view the point is entirely unsustainable. On the whole, therefore, their Lordships are of opinion that the appeal succeeds, that the judgment and decree appealed from were erroneous and should be reversed, that the judgment and decree of the Additional Subordinate Judge was right and should be restored, and that the respondents should pay to the appellant her costs of the appeal to the High Court and of this appeal, and they will humbly advise His Majesty accordingly.

W. C. A. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Barrow Rogers & Nevile.*

Solicitor for the Respondent.—Mr. *John Tucker.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No.35 OF 1921.

January 19 1923

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji.

HAFIZ ABDULLAH—DEFENDANT—APPELLANT

versus

ALLI AND ANOTHER—PLAINTIFFS—RESPONDENT.

Adverse possession—Joint owners—Proof—Ouster actual or by conduct—Denial or repudiation of title—Mixed question of law and fact.

To constitute adverse possession against a joint owner his ouster may be actual or there might be conduct which would amount to his ouster. [p. 641, col. 1.]

The mere possession of a house by some of its joint owners or by a mortgagee from them, if the mortgage was effected without the knowledge of the joint owner not in actual possession, cannot amount to adverse possession against him unless there was what may be deemed to be his ouster, that is, actual ouster or some act to his knowedge by which his title was denied or repudiated. [p. 641, col. 1.]

The question of adverse possession is a mixed question of law and fact. [p. 641, col. 1.]

Letters Patent Appeal from a judgment of Mr. Justice Stuart, dated the 27th April 1921.

Messrs. *D. C. Banerji* and *Iqbal Ahmad*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—Three brothers Ghazi, Rawa and Maula Bakhsh obtained a decree

in 1870, declaring their title to the house in dispute. Maula Bakhsh did not live in the house after the decree but allowed his two brothers to remain in possession. This they did until the year 1889 when they mortgaged the house to a third party and that third party remained in possession. This mortgage has now been redeemed, and upon this being done, the plaintiffs, who are the representatives of Maula Bakhsh, brought the present suit for their one-third share of the house. That they had a third share in the house is not disputed but it is urged that their right to the third share was extinguished by lapse of time, by reason of the two brothers having ousted them and been in adverse possession of the house. The mere possession of the house by the brothers or the possession of a mortgagee from them would not amount to adverse possession, unless there was what may be deemed to be an ouster of the plaintiffs or their predecessor Maula Bakhsh. There might be actual ouster or there might be conduct which would amount to ouster. In the present case what was found was that the two brothers mortgaged the whole house to the mortgagee who remained in possession. From this fact alone it could not be concluded that the plaintiffs or Maula Bakhsh had been ousted from the house. It was not found by the lower Appellate Court that the plaintiffs or Maula Bakhsh had any information as to the nature of the mortgage effected by the brothers of Maula Bakhsh. If two-thirds only had been mortgaged the mortgagee would have been in possession of the house. The mere fact, therefore, of the mortgagee being in possession was not sufficient to constitute ouster from the property. The question of adverse possession is a mixed question of law and fact. Unless there was some act to the knowledge of the plaintiffs by which their title was denied or repudiated, the mere fact of the plaintiffs not being in actual possession would not amount to ouster such as would extinguish their right. This is the case with the property now in dispute and there is nothing to show that the plaintiffs had knowledge of the mortgage, and there is no finding on the point. The single fact that the brothers of Maula Bakhsh remained in possession and that a mortgagee from them was also in possession is not sufficient to constitute ouster and the learned Judge of this Court in so holding was, we think, right. We accordingly dismiss the appeal with costs.

S. D. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

October 31, 1922.

Present:—Lord Buckmaster, Sir John Edge, Sir Lawrence Jenkins and Lord Salvesen.

PIRTHIPAL SINGH—APPELLANT

versus

GANESH DIN SINGH AND ANOTHER—RESPONDENTS.

Title—Long possession.

In 1868 a decree was passed which declared that the rights of certain persons in an estate were *thekadari* and not proprietary or under-proprietary, but in all subsequent proceedings and in every subsequent public document relating to the estate those persons were regarded as under-proprietors In a suit for a declaration against them that they had no proprietary or under-proprietary rights:

Held, that, in spite of the decree, a title so long recognised could not now be overthrown. [p. 642, col. 2.]

Appeal from the judgment of the Court of the Judicial Commissioner, Oudh.

Mr. *DeGruyther, K. C.*, and Mr. *Dube*, for the Appellant.

JUDGMENT.

Lord Buckmaster.—The appellant in this case is the Taluqdar of the Surajpur Estate, and in this capacity he sued to obtain a declaration against the respondents that they had no proprietary or under-proprietary rights in a village known as Mauza Kusehti, which forms part of the estate. The Subordinate Judge, before whom the matter first came for hearing, decided in his favour; the Judicial Commissioners have reversed that decree and from the Judicial Commissioners this appeal is brought.

The difficulty arises in this way: In the Settlement that was made in 1867 there is no doubt that the Taluqdar of this estate was clothed with rights which excluded the predecessors of the defendants from claiming

to have any greater interest in the village than that of *thekadars*; in other words, it excluded them from proprietary or under-proprietary rights. A dispute having arisen early with regard to their claims, a decree was passed on the 7th April 1868 which declared that the rights possessed were *thekadari* and not *pukhtadari* rights.

It must be remembered that it was not that decree that created or affected the rights; it was a decree which declared what they were, but it was undoubtedly binding between the parties and but for subsequent events would have been the clearest possible proof of the appellant's title. The subsequent events are very interesting. From that time until shortly before the institution of these proceedings everything that has taken place has been upon the footing that the defendants really possessed the rights which the appellant now says that they cannot enjoy. The *Wajib-ul-arz*, the *khewat* and every public document relating to this estate to which the attention of their Lordships has been directed proceed upon that footing. Further, it is found that in 1887 proceedings of rather a remarkable character were taken, in which this right once more came in dispute: What the exact character of those proceedings was it is not easy to determine, but it appears that a decree-holder was seeking to issue execution against the Rani Chhibraj Kuar, who is described as the wife of the Taluqdar of Surajpur, the defendant judgment-debtor. At any rate, this makes plain that the Taluqdar of Surajpur, the person who then held the exact estate that is now held by the appellant was himself the subject of proceedings from which the execution proceeded. The Rani, who may have succeeded to the estate in some capacity or other, appeared before the Court for the purpose of determining what her interests were, and in those proceedings the occupants claimed once more that they had under-proprietary rights and that claim was allowed.

It has been urged in both the Courts that there is nothing to show that the Rajah or Rani was in fact the predecessor of the present appellant, and that is true. This case is singularly destitute of any verbal evidence at all, but at least it is impossible to overlook the fact that the decree, which is in evidence, is one in which the character of the person attacked has the exact character of the person who is the present appellant. Their Lordships merely mention this because they think it may be that in both the Courts insufficient weight has been attached to those proceedings; but it is not upon those proceedings that they base the opinion that they have formed, and the advice that they will tender to His Majesty. Their view is this: That in spite of the decree, from 1869 down to the institution of these proceedings, there has never been any occasion on which the rights now claimed by the defendants have not been upheld. One of the most critical of these occasions was when the original Settlement came to an end. It appears from the judgment of the Subordinate Judge that that must have happened somewhere about 1897, or possibly in 1898, but when that Settlement ended, once more the question as to the determination of what were to be the rights of the parties arose; the proceedings were public, and another Settlement was effected upon the footing that the defendants' predecessors were under-proprietors. Further, following upon the Settlement, proceedings were taken on behalf of the Court of Wards, on behalf of the then Taluqdar, against these under-proprietors on the 2nd June 1899, for the purpose of obtaining rent, and they are definitely sued there as *pukhtadars*. In other words, it is plain that whatever may have been the original effect of the decree, from that time down till now this estate has been regulated upon the footing that the defendants possessed the rights that they claimed to enjoy.

Their Lordships think it unnecessary to examine more closely in detail the circumstances of the evidence furnished by the documents. They have been set out with great care and accuracy by the judgments of all the learned Judges before whom the case has been heard, and there is nothing which they desire to add. They think that a title so long recognised cannot now be overthrown, and for this reason they think that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

W. C. A. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs *Borrow, Rogers & Nevil.*

KAMULAMMAL *v.* VISVANATHASWAMI NAICKER.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 20, 1922.

Present:—Lord Buckmaster, and Lord Phillimore, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

KAMULAMMAL, SINCE DECEASED (NOW REPRESENTED BY KATTARI NAGAYA KAMARAJENDRA RAMASAMI PANDIYA NAICKER)—APPELLANT

versus

T. B. K. VISVANATHASWAMI NAICKER, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara—Succession — Sudras — Illegitimate son and widow.

Under the Hindu Law, an illegitimate son of a Sudra is entitled to share equally with the widow. [p. 645, col. 2.]

Gangabai Pirappa v. *Bandu Pirappa*, 32 Ind. Cas. 986: 40 B. 369: 18 Bom. L. R. 70, referred to.

Appeal from the judgment of the Madras High Court, (Sir John Wallis, KT., Chief Justice, and Mr. Justice Srinivasa Aiyanger) dated the 26th October 1915, reported as 31 Ind. Cas. 833, varying the decree of the Sub Judge, Madura, dated the 14th October 1905.

Mr. *DeGruyther*, *K. C.*, and Mr. *Dube*, for the Appellant.

Mr. *J. B. Mathew*, *K. C.*, and Messrs. *Ingram* and *K. Brown*, for the Respondents.

JUDGMENT.

Sir Lawrence Jenkins.—This is an appeal from a decree, dated the 26th October 1915, of the High Court of Judicature at Madras, which varied a decree, dated the 14th October 1905, of the Court of the Subordinate Judge of Madura.

The case started as far back as the 25th April 1902 and is one of much detail in which numerous issues have been raised; but the points now in contest have been reduced to two, and it will only be necessary to set forth so much of the complicated story as relates to them.

In December 1888 Kamaraja Pandiya Naicker, the Zemindar of Bodinaickenur, a Sudra by caste, died, and there survived him (among others) his illegitimate son the original plaintiff in the suit, his wife the original first defendant, his daughter the second defendant, and certain collateral agnates who are parties to the suit. He left no legitimate male issue. The appellant set up a paper-writing as her husband's last Will. Both Courts have held it not proved. Though this finding has been questioned in the appellant's case, its propriety is, in their Lordships' opinion, concluded by the concurrent findings of the Courts in India. And so the only point left for decision is, whether the plaintiff, as the sole illegitimate son of the late Zemindar, was entitled as against the appellant, the lawfully-married widow, to a one-third or a one-half share in the personal or self-acquired properties of the Zemindar.

The Subordinate Judge decreed only one-third in his favour; the High Court held him entitled to one-half. From this decision the widow has appealed. Both the widow and the illegitimate son have died during the litigation, and representatives have been substituted in their place. The rights of the illegitimate son of a Sudra in the Madras Presidency rest principally on a text of Yajnavalkya as explained and developed in the Mitakshara and other authoritative commentaries.

In the concluding section of Chapter I of the Mitakshara the rights of a son by a female slave in the case of a Sudra's estate are considered. It is conceded that the plaintiff comes within the scope of the section. In paragraph 1 the text of Yajnavalkya is quoted, and in the second paragraph it is interpreted. According to Colebrook's translation they run as follows:—

"1. The author next delivers a special rule concerning the partition of a Sudra's wealth. 'Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughters' sons.'"

"2. The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife the son of a female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, if there be such, the son

of the female slave participates for half a share only."

The words enclosed in brackets are a gloss by Balambhatta or Subodhini.

Here the contest is between the illegitimate son and the widow, and though the widow is not named in the text it is well-settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the text. But the measure of the respective shares still has to be determined. The text and the commentary speak of the illegitimate son being made partaker of a moiety of a share or participating for half a share, but there is no explicit statement as to the unit in which he is to take his half-share. There are two possible views—either that he is to take one-half of the other participant's share, or one-half of what the illegitimate son would have taken had he been legitimate.

Mr. J. R. Gharpure, an able Sanskritist and a Vakil of the Bombay High Court, in his recent translation of the Mitakshara, renders the text of Yajnavalkya as providing that the brothers should make the illegitimate son "a half-sharer;" and his translation of Vijnaneswara's commentary on this text is, "these brothers should make that son of the female slave a half-sharer, *i.e.*, they should give him a half from their own allotment." He appends a foot-note in which he says this is made clearer by Balambhatta and Subodhini, and gives what purports to be a quotation from Balambhatta and Subodhini in these words :—"From the entire estate a half of what would be regarded as his share, *i. e.*, one-half of the amount allotted to a legitimate issue." Their Lordships have unfortunately had no opportunity of examining these authorities. This rendering "half-sharer," which is not without significance, is also to be found in Rao Saheb Mandlik's translation of Yajnavalkya's text.

In the Savasvati Vilasa this text is cited, and the comment on it is in these terms, "The meaning is that even when there is a daughter's son, the son of the female slave takes only a half" (paragraph 396).

The Dattaka-Chandrika, Chapter V, 31, deals with the text as follows, "Therefore, if any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but only shares equally with such heir." Though the Dayabhaga is not a governing authority in Madras, it is worthy of notice that, in commenting on this text, Jimuta Vahana lays down that if there be a daughter's son the illegitimate son shall share equally with him, adding the explanation that as no special provision occurs it is fit that the allotment should be equal (Chapter IX, 31).

The Daya-Krama-Sangraha, another Bengal authority, is to the same effect (VI, 1-35). In Colebrook's Digest the rule is further elaborated, and it is there said that, "after the death of the father, if no such Will had been declared, the brethren born of a wife legally married shall allot him half a share—that is, half of such share as would have been assigned had his mother been legally married. Consequently, a son by a female slave not superior in class to her Sudra master shall obtain the moiety of a full share."

These last cited commentaries, while not of governing authority in Madras, at any rate show the sense in which the text has been understood elsewhere.

Though in Chapter I, section XII, of the Mitakshara there is no explanation of how the half-share is to be computed, still in another part of the treatise there are directions which indicate the method of computation approved by its author in the ascertainment of fractional shares. Thus, in Chapter I, section VII, paragraph 5, it is provided that "sisters should be disposed of in marriage, giving them as an allotment the fourth part of a brother's own share." In paragraph 6 it is said that the meaning is that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. This is worked out in paragraph 7 as follows :—

"For example, if a person had only a Brahman wife and leaves one son and one daughter the whole paternal estate should be divided into two parts and one such part be sub-divided into four; and the quarter being given to the girl, the remainder shall be taken by the son. Or, if there be two sons and one daughter, the whole of the father's estate should be divided into three parts; and one such part be sub-divided

into four; and the quarter having been given to the girl, the remainder shall be shared by the sons. But if there be one son and two daughters, the father's property should be divided into thirds, and two shares be severally sub-divided into quarters; then, having given two quarter shares to the girls, the son shall take the whole of the residue. It must be similarly understood in any case of an equal or unequal number of brothers and sisters alike in rank."

In the second volume of Norton's Leading Cases, page 499, reference is made to a case of *Annasamy Moodelly* v. *Tandavaraya*, Madras S. R. for 1860, page 11, and the ruling is stated in these terms, "Where plaintiff (illegitimate) and defendant (legitimate) were two brothers the property was divided one-quarter to the plaintiff, three-quarters to the defendant." This would be in conformity with the rule of division that would give an illegitimate son one-half of the share to which he would have been entitled had he been legitimate.

Reference, however, has been made to *Gangabai Pirappa* v. *Bandu Pirappa* (1), where it was decided by the Bombay High Court that in a competition between the widow and an illegitimate son the son took only one-third. But from the judgment delivered, it is apparent that this conclusion was not in accordance with the view that the learned Judges took of the text and the commentaries, but was founded on what they understood to be the case-law of the Bombay Presidency.

If the true method of computation be to allot to the illegitimate son one-half of what he would have taken had he been legitimate, then, where the competition is between the illegitimate son and the widow, the allotment of the respective shares presents no difficulty. Such a son if born of a lawfully-wedded wife would have taken the whole; by reason of his illegitimacy this would be reduced to one-half; and so he and the lawfully-married widow would take in equal shares.

In Madras this result, according to the judgment of the High Court now under appeal, has the support of the case-law of that Presidency, and it was definitely stated in the course of the present argument, without being controverted, that as between an illegitimate son and a lawfully-wedded widow there has been no departure in Madras from the rule of equal shares.

The learned Judges of the High Court, after a reference to the decisions, say, "In this state of things we are not prepared to depart from the course of decisions in this Court, which hold that the plaintiff is entitled to share equally with the widow." This, in their Lordships' opinion, was the right conclusion at which to arrive, and they will accordingly humbly advise His Majesty that this appeal be dismissed with costs. There will be only one set of costs.

N. K. *Appeal dismissed.*

Solicitor for the Appellant.—Mr. *Polak.*

Solicitors for the Respondents.—Messrs. *Graham Pole* and *Douglas Grant.*

(1) 32 Ind. Cas. 986; 40 B. 369; 18 Bom. L. R. 70.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 133 OF 1922.

February 2, 1923.

Present:—Mr. Justice Lindsay.

KUNWAR PAL AND ANOTHER—DEFENDANTS—APPLICANTS

versus

Bakhshi MADAN MOHAN—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25, Sch. II, Art. 35 (ii)—Plea of want of jurisdiction not taken in lower Court—High Court, whether bound to entertain—Suit for damages for trees wrongfully cut—Defendant claiming trees as his own—Application of Art. 35 (ii).

If a plea of want of jurisdiction is not taken during the trial of a suit in the Small Cause Court, the High Court is not bound to entertain it in the exercise of its powers under section 25 of the Provincial Small Cause Courts Act.

Where in a suit for damages for trees wrongfully cut, the defendant pleads that the trees are his own property and not the property of the plaintiff, the case is not covered by the Exception mentioned in Art. 35 (*ii*) of the Second Schedule to the Small Cause Courts Act.

Civil revision from an order of the Judge, Small Cause Court at Hathras, dated the 21st July 1922.

Mr. *A. Sanyal*, for the Applicants.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—This is a defendants application under section 25 of the Small Cause Courts Act. The suit was a suit by the Zemindar to recover Rs 10 on the allegation that the defendants who were his tenants had wrongfully cut and carried off a *babul* tree belonging to him, the plaintiff.

ABDUR RAHIM v. NARYAN DAS AURORA.

The defence set up was that the tree had been planted by the defendants, was their own property and that they had done no injury to the plaintiff whatever.

After a lengthy trial in the Court below, which was a Court of Small Causes, the claim of the plaintiff was decreed.

The defendants now come up and argue that the case was not within the cognizance of the Small Cause Court, and this plea is based upon the provisions of Art. 35 (*ii*) of the Second Schedule to the Provincial Small Cause Courts Act. This clause provides that a suit for an act which is, or save for the provisions of Chapter IV of the Indian Penal Code would be, an offence punishable under Chapter XVII of the said Code is a suit which a Small Cause Court cannot take cognizance of. The learned Counsel for the applicants has admitted that this plea was not taken in the Court below but he contends that as it goes to the root of the lower Court's jurisdiction it ought to be entertained here and allowed.

In the first place, I would observe that, even if the plea taken is a good one, I should not be disposed to interfere in this matter. I am not obliged to interfere under the provisions of section 25 of the Small Cause Courts Act and it is obvious here that there was a long trial in the Court below in which all the witnesses put forward by the defendants-applicants were examined. I do not consider that this is a case in which the defendants should be entitled to another trial.

I am not disposed to accept this contention that the case falls within Art. 35 (*ii*) of the Second Schedule to the Small Cause Courts Act. Bearing in mind the defence which the applicants here set up it does not lie in their mouths to say that the act in respect of which the suit was brought was an act amounting to an offence. The defendants' whole case was that the tree was theirs and that they had cut it in exercise of their own rights. A person who cuts trees which he says to be his own cannot be said to be committing the offence either of theft or of mischief as defined in Chapter XVII of the Indian Penal Code. The plea, therefore, in my opinion has no force. I dismiss this application with costs.

S. D. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 20, 1922.

Present:—Lord Sumner, Lord Carson and Mr. Ameer Ali.

Haji ABDUR RAHIM—APPELLANT

versus

NARAYAN DAS AURORA, SINCE DECEASED AND OTHERS—RESPONDENTS.

Muhammadan Law—Wakf, *incidents of—Provision for benefit of settlor's family, effect of—Mortgage for purposes foreign to* wakf—*Mortgagee, claim by, nature of—Limitation Act (IX of* 1908), *Sch. I, Art.* 134, *applicability of.*

Under the Muhammadan Law the moment a *wakf* is created all rights of property pass out of the *wakif* and vest in God Almighty. The curator, whether called *mutwalli* or *sajjadanshin*, or by any other name, is merely a manager. [p. 648, col. 2.]

Vidya Varuthi Thirtha Swamigal v. *Balusami Ayyar*, 65 Ind. Cas. 101; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 340; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A.L.J. 497; (1922) A.I.R. (P.C.) 123 (P.C.), referred to.

Where a valid *wakf* is created, the whole property dedicated passes out of the ownership of the settlor for the purposes he has declared and not merely such portion of it as will suffice to produce the part of the income which he has expressly dedicated to pious and charitable purposes. [p. 648, col 2.]

Therefore, in the case of a *wakf* containing a provision for the benefit of the family of the settlor, where the *wakf* property is mortgaged for purposes foreign to the *wakf*, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. Nor is the property itself to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole. [p. 648, col. 2; p. 649, col. 1.]

For an advance of money, otherwise than to satisfy the legitimate needs and purposes of the *wakf*, no part of the property held in *wakf* is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the *wakf* property itself. [p. 648, col. 2; p. 649, col. 1.]

The period of limitation prescribed by Art. 134 of Schedule I to the Limitation Act does not apply to a *wakf*. [p. 647, col. 1.]

Appeal from the Judgment of the Calcutta High Court, Mr. Justice Richardson and Mr. Justice Shamsul Huda.

Mr. *De Gruyther, K. C.*, and Mr. *K. Brown*, for the Appellant.

Mr. *Dunne, K. C.*, and Mr. *Raikes*, for the Respondents.

ABDUR RAHIM *v.* NARYAN DAS AURORA.

JUDGMENT.

Lord Sumner.—This was a suit brought by the *mutwalli* of a mosque to recover possession of property, alleged to have been settled as a valid *wakf*, from the defendants, whose title arose under incumbrances created by his predecessors in that office.

The principal issue tried in India was whether or not the claim was Statute-barred, and, relying on Art. 134 of the First Schedule of Act No. IX of 1908, the High Court gave judgment in favour of the defendants. This was before the decision of their Lordships' Board in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1), which held that Art. 134 does not apply to a *wakf* and, accordingly, their conclusion is admitted to be no longer sustainable. There has further been much discussion on the present appeal whether the case is governed by Art. 142 or by Art. 144, since Art. 134 is inapplicable; but again it is common ground that, if the plaintiff's evidence established that his predecessor-in-office remained in possession of the property in question until after the year 1901, then his claim is not Statute-barred. As to this, oral evidence, relating to the receipt of the rents and profits, was called on both sides. The learned Trial Judge, after criticising adversely the evidence given on this point by the defendants' witnesses, accepted the plaintiff's case, and held that the mortgagors had remained in possession until less than twelve years before the present suit was begun. With this finding of fact one of the learned Judges in the High Court, Richardson, J., agreed. His colleague, Syed Shamsul Huda, J., dissenting, drew attention to the burden of proof, which he said rested on the plaintiff and had not been discharged, the probabilities being in favour of the defendants. If the learned Judge meant, as his reference to the *onus* of proof seems to indicate, that the plaintiff had given no evidence, that the mortgagee had not received possession at the time when the mortgage was executed and in accordance with its terms, he overlooked the fact that several of his witnesses gave positive and precise evidence on the subject, and, so far as the burden of proof goes, there was enough to call for an answer. If, on the other hand, as his allusion to the probabilities of the case seems to show, he only meant that, weighing the plaintiff's evidence against that of the defendants, he rejected the former and accepted the latter, his opinion is not fortified by any detailed examination or comparison of the evidence which the respective witnesses gave. Their Lordships do not think that under these circumstances the opinion of Syed Shamsul Huda, J. ought to prevail against the concurrent opinions of Richardson, J., and of the learned Trial Judge; nor does their own examination of the evidence, which need not be set out in detail, lead them to discredit the plaintiff's case in this respect.

The affirmation of the finding that the mortgagors retained possession down to a date which defeats the plea of the Statute of Limitations, would dispose of this appeal but for the following point. The original settlement was undoubtedly a valid creation of a *wakf*, for the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means illusory or unsubstantial; but, equally undoubtedly, the two provisions —that for the upkeep of the mosque and celebration of worship there on the one hand, and that for the benefit of the settlor's family on the other— are, as a matter of drafting, separate and severable dispositions. Indeed, it could not have been otherwise. The new contention for the respondents was that a mortgagee, who had parted with his money to the persons, members of the plaintiff's and of the settlor's family, who were then in the position of *mutwalli*, ought not to lose his money altogether and that too at the plaintiff's instance, but was at least entitled to have a charge declared, in his favour over the portion of the property, which was settled for the benefit of the settlor's family.

This point was not taken below, or even in the respondents' case, unless it can be brought within the third reason, "because the trusts created were not those of a valid *wakf*—at any rate as to the half of the property settled on the founder's heirs." Their Lordships would not in any event have declared that the respondents were

(1) 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 24 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

entitled to the suggested charge, for they are by no means sure that all necessary parties are before them or that all neceessary matters have been proved, and the case would have to be remitted to India, even if the contention be sound.

In the present case there is a dedication, which has already taken effect, and it is so substantial that one half of the net income has to be devoted to specified pious purposes. It is impossible to say that this gift is only a veil to cover arrangements for the aggrandisement of the settlor's family and a device to make the property inalienable. There is nothing illusory about it. The most that can be said is that the provision for the settlor's family is considerable, for the mere provision itself is clearly permissible, as is the provision that the settlor's heirs shall be the *mutwallis* of the *wakf* in their order. In delivering the judgment of their Lordships' Board in *Mujib-un-nissa* v. *Abdur Rahim* (2), Lord Robertson says, at page 23*: "It will be so" (that is, it will be a valid deed of *wakf*) "if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the testator's family." In view of the fact that this deed has been taken as creating a valid *wakf* in both Courts in India, and that effect has been given to it as creating a valid *wakf* in separate proceedings by the decree appointing the appellant to be *mutwalli*, their Lordships think it needless to discuss further the genuine character of the *wakf*. Its dominating purpose is to make adequate provision for the pious uses mentioned.

In *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1), it was explained that the idea conveyed by the word "trust" is foreign to the religious conception involved in the word *wakf*:—

"'When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf* . . . the right of the *wakif* is extinguished and the ownership is transferred to the Almighty,' says Mr. Ameer Ali in delivering judgment. 'The manager of the *wakf* is the *mutwalli*, the governor, superintendent, or curator.' In the case of *khankhas* the head is called a *sajjadanishin*. 'But neither the *sajjadanishin* nor the *mutwalli* has any right in the property belonging to the *wakf*; the property is not vested in him, and he is not a trustee in the technical sense. . . . The *wakfnama* does not transfer property to trustees. . . .' Under the Muhammadan Law the moment a *wakf* is created all rights of property pass out of the *wakif* and vest in God Almighty. 'The curator, whether called *mutwalli* or *sajjadanishin*, or by any other name, is merely a manager.'"

The principle of the respondents' contention, accordingly, appears to their Lordships to be fallacious. The property, in respect of which a *wakf* is created by the settlor, is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed "God's acre," and this is the basis of the settled rule that such property as is held in *wakf* is inalienable, except for the purposes of the *wakf*. A similar view forms the basis of the inalienability of a Hindu *math* and, if the settlor declares himself, as he is entitled to do, to be the first *mutwalli* or the first *shebait*, that does not affect the fundamental principle, that the whole property is considered as having passed from him for the purposes which he has declared, and not merely such portion of it as will suffice to produce the part of the income which he has expressly dedicated to pious and charitable uses. From this it follows that where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *wakf*, which is, therefore, as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole. The contention now advanced is inconsistent with the character of a *wakf*, as fully explained in the above-mentioned and many other decisions of their Lordships' Board. Their Lordships are of opinion that, for an advance of money,

(2) 28 I. A. 15; 23 A. 233; 5 C. W. N. 177; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

* Page of 28 I. A.—[Ed.]

otherwise than to satisfy the legitimate needs and purposes of the *wakf*, no part of the property held in *wakf* is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances the money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the *wakf* property itself. For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgment of the High Court set aside and that of the Trial Judge restored with costs here and below.

N. H. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Pugh & Co.*

Solicitors for the Respondents.—Messrs. *Watkins & Hunter.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1344 OF 1921.

January 23, 1923.

Present :—Mr. Justice Daniels.

RAM HARAKH PANDEY—DEFENDANT—APPELLANT

versus

Babu CHUNI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Joint land—One co-sharer in exclusive possession—Ouster by another co-sharer—Exclusive possession whether can be restored—Damages

No co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained. If ousted, he is entitled to be restored to the actual possession which he had before and not merely to joint possession with the co-sharer ousting him. He is also entitled to a decree for damages.

Sarbjit Singh v. *Raj Kumar Rai*, 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A) 146; 44 A. 5 (1922) A. I. R. (A) 162, followed.

Jagar Nath Ojha v. *Ramphal*, 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312 and *Bisheshar Singh* v. *Hanuman Singh*, 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A) 143; 44 A. 1; (1922) A. I. R. (A) 314, distinguished.

Second appeal against a decree of the Additional District Judge, Gorakhpore, dated the 28th of June 1921.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *K. N. Laghate* for Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of plot No. 96 according to the old numbering and 130 according to the new numbering in the village of Senuapur in the Gorakhpur District. The facts found by the Court below are that the land was occupied up to 1308 Fasli by a tenant. In that year the tenant left the land, and the plaintiff's father, and after him the plaintiff took actual possession of it as *khud-kasht* and remained in possession till 1316 Fasli. In 1317 Fasli the plaintiff handed over possession to the defendant in lieu of the interest on a loan advanced by the defendant to the plaintiff. In Fasli 1321 the plaintiffs re-paid the loan and got back actual possession of the plot from the defendant. In 1322 the defendant ousted the plaintiff again and took possession of the plot. The suit was contested in the Courts below on grounds of fact which have been found against the defendant. In this Court the defence put forward is based on the fact that in the year 1322 Fasli the defendant acquired a share in the village. It is said, therefore, that the most the plaintiff can obtain is a decree for joint possession. I have been referred to three rulings. The first is the well-known ruling in *Jagar Nath Ojha* v. *Ramphal* (1) which first established the principle that a co-sharer deprived of possession could get a decree for joint possession and not merely a decree declaring his right. The plaintiff laid stress on the words in the head-note " whether the plaintiff was originally in joint possession or whether he had never been in possession." These words must be read with the facts of the case. There the plaintiff had become entitled to joint possession by operation of law as a reversioner. The fact that he had never actually taken possession did not deprive him of his right to obtain joint possession.

The second case referred to is that of *Bisheshar Singh* v. *Hanuman Singh* (2) which merely reiterated the same principle in a case in which the parties had been jointly in actual cultivatory possession of certain joint land.

The third case, that of *Sarbjit Singh* v. *Raj Kumar Rai* (3), is actually against the appellant. It lays down that no co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained.

(1) 13 Ind Cas. 79; 34 A. 150; 8 A L J. 1312.
(2) 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A.) 143; 44 A. 1; (1922) A. I. R. (A) 314.
(3) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A. 5; (1922) A. I. R. (A) 162.

This is exactly what the Court below has found here. The plaintiff was in sole actual physical possession of the plot in suit. He has been ousted therefrom by the defendant. He is certainly entitled to be restored to the actual possession which he had before and not merely to joint possession with the defendant.

It is further argued on the basis of the last mentioned case that no decree for damages should have been given. The facts of the case were, however, distinguishable in that in the ruling in *Sarbjit Singh* v. *Raj Kumar Rai* (3) the land was the joint *khud-kasht* of the parties. In this case the finding is that it was the sole *khud-kasht* of the plaintiff who has been deprived of the enjoyment of the land by his dispossession The appeal, therefore, fails and I dismiss it with costs including fees on the higher scale.

S. D. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

December 20, 1922.

Present:—Lord Atkinson, Lord Sumner, Lord Parmoor, Lord Carson and Mr Ameer Ali.

M. SUBRAMONIAN AND ANOTHER—APPELLANTS

versus

M. L. R. M. LUTCHMAN AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Evidence Act (I of 1872), s. 92—Registration—Equitable mortgage, document creating—Oral evidence inadmissible—Receiver mortgaging without authority—Mortgage, whether valid.

Where a deposit of title-deeds is accompanied by a document containing the terms of the mortgage, the document being the only repository and appropriate evidence of the agreement of the parties, constitutes an instrument by which the equitable mortgage is created, and comes within section 17 of the Registration Act. [p. 652, col. 1]

Kedarnath Dutt v. *Shamlall Khettry*, 11 B. L. R. 405; 20 W. R. 150, relied on.

The general rule that a deposit of a document of title, without writing or word of mouth, will create in equity a charge upon the property, does not apply where the deposit is accompanied by an actual written charge. In such a case oral evidence is not admissible and the terms of the document must be referred to. [p. 652, col. 2.]

Pranjivandas Jagjivandas Mehta v. *Chan Mah Phee*, 35 Ind. Cas. 190; 43 I. A. 122; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 24 C. L. J. 314; 8 L. B. R. 458 (P. C.) and *Shaw* v *Fostir*, (1872) 5 H L. 321 at p. 341; 42 L. J. Ch. 40; 27 L. T. 281; 20 W. R 907 relied on.

Where a Receiver mortgages certain property, when the order appointing him does not authorise him to do so, the mortgage is *ultra vires*. [p. 651 col. 2.]

Appeal from the Lower Burma Chief Court.

Mr. *Powell, K. C.*, Messrs. *Preez* and *Dube*, for the Appellant.

Mr. *Dunne K. C.*, and Mr. *Kyffin*, for the Respondents.

JUDGMENT.

Lord Carson.—On the 15th July 1908 the firms of Chettys owed to the original plaintiff, Mallady Sathalingum, whose executors the present appellants are, a considerable sum of money, and as security for the same deposited with him by way of equitable mortgage title-deeds relating to certain properties of the defendant Seedat and which had been deposited with the said firm by the said Seedat. On the occasion of such deposit a memorandum was signed and delivered to the said plaintiff in the following terms:—

"From M. L. R. M. A. Soliappa Chetty and A. L. A. S. R. M. Chetty, Rangoon.

"To Mallady Sathalingum, Rangoon.

dated Rangoon, the 15th July, 1908.

"DEAR SIR,

"We hand you herewith title-deeds relating to fifth class Lot Nos. 78, 79 and 80, Block E, each measuring 25 by 50 with building thereon belonging to Saleman Ahmed Seedat, also his promissory-note for rupees sixty-three thousand (Rs 63,000) due us, this please hold as security against advances made to us; we also hand you second mortgage executed in our favour by C. Ranga Sawny Moodaliar on 1st class Lot No. 6 in Block F1. On this we had advanced Rs. 32,000. Please also hold this as further security against advances made to us. We promise not to deal with same till your amount due you is fully paid and satisfied.

"*Witness*:—

"(Signed) C. E. SOLOMAN.

Yours faithfully,

"(Signed) M. L. R. M. A. Soliappa Chetty,

"A. L. A. S. R. M. Alagappa Chetty."

This document was not registered, and the effect of such non-registration will

have to be considered later. On the 17th December 1909 the said plaintiff sent to the said firms of Chetty and the respondent Seedat notices demanding re-payment of the moneys due and interest. In the year 1910 a suit was brought for the dissolution of the said Chetty firms, and on the 5th April 1910 Ramanathan Chetty was appointed Receiver by an order of the Court in the suit in the following terms :—

" It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed Receiver on a monthly remuneration of Rs. 300 (three hundred only) to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership, with power to collect outstandings and do all things necessary for the realisation and preservation of the assets of the said firm. "

The Receiver so appointed and the members of the Chetty firms being anxious to realise the debt due to them by Seedat, wrote to the plaintiff for the promissory-note and the title-deeds deposited with the plaintiff on the 15th July 1908 in order to enable them to carry on proceedings against Seedat, and the plaintiff handed them over on condition that he received payment from the fruits of the decree. No suit, however, was brought, but Seedat gave the Chetty firms a legal mortgage dated the 26th August 1910 over the properties included in the original equitable mortgage and also other properties which were not so included. The plaintiff agreed to this compromise upon condition that the mortgage of the 26th August 1910 was deposited with the plaintiff and also the title-deeds relating to the properties included in it as collateral security for the monies owing by the Chetty firms to the plaintiff. This deposit was carried out, and on this occasion a memorandum setting forth such deposit was signed by the Receiver, and is dated the 4th September 1910. The present action was brought by the plaintiff as equitable mortgagee to enforce payment of the debt due to him by sale of the properties mortgaged by the said mortgage of the 26th August 1910.

At the trial of the action before Mr. Justice Young, it was contended that the original sub-mortgage of 1908 was void, inasmuch as it was effected by an instrument in writing which was admittedly not registered and that it was inadmissible in evidence on the same ground.

The learned Judge, however, held that it was admissible as being a record of an already completed transaction.

It was also contended that the old equitable mortgage had been surrendered and that the plaintiff was suing on a new mortgage which was *ultra vires* the Receiver, who had not obtained the leave of the Court.

The learned Judge held, however, that, so far as the new legal mortgage so deposited related to the property included in the former equitable mortgage, " there was not an iota of difference between the return of the title-deeds and the return of them accompanied by the deposit of the legal mortgage," and he, accordingly, gave a decree for the usual accounts and for sale in default of payment of the properties included in the original memorandum of deposit. There was an appeal by the plaintiff to the Chief Court of Lower Burma from this judgment so far as it disallowed his claim to an equitable sub-mortgage on the new and additional properties included in the mortgage of the 26th August, 1910 and there was also an appeal from this judgment by the first defendant in so far as it allowed the claim of the plaintiff to an equitable sub-mortgage of the properties originally pledged.

The Appellate Court on the 24th January 1916 set aside the decree of the original Court and dismissed the plaintiff's claim, holding that by the events which had happened the original mortgage by deposit was extinguished and no deposit of deeds by the Receiver of the Chetty firms was authorised by the order appointing him.

The Chief Judge, Sir Charles Fox, who gave the judgment of the Court, stated that it was unnecessary to deal with the vexed question as to whether the memorandum of the 15th July 1908 required registration. From this judgment and the decrees made under it the present appeal has been brought

It was not seriously contended before their Lordships that the Receiver had any authority under the order of the 5th April 1910 to mortgage property of the firms, and on this point their Lordships are in agreement with the decree of the Appellate

Court. The plaintiffs' chief effort before this Board was directed to supporting the order of Mr. Justice Young, basing their claim upon the original sub-mortgage of the 15th July 1908. The respondents' Counsel, on the other hand, raised the objections which had also been made at the trial of the action, (1) that the original sub-mortgage was void, inasmuch as it was effected by an instrument in writing which was admittedly not registered and relied upon sections 17 and 49 of the Registration Act, 1908; and (2) that oral evidence was not admissible, as the memorandum of the 15th July 1908 constituted the contract between the parties (S. 91, Law of Evidence, Act I of 1872). The appellants, however, contended that though the terms of the deposit were embodied in a written document that document was a mere memorandum of and did not constitute the contract and, therefore, did not require to be registered, and that on the same ground oral evidence was admissible to prove and explain the deposit.

As already stated, the Trial Judge acceded to this argument.

This Board, however, cannot agree with the view taken by the Trial Judge. The law upon the subject admits of no doubt. In the case of *Kedarnath Dutt* v. *Sham Lall Khettry* (1), Couch, C. J., says:—

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within section 17 of the Registration Act."

This Board in *Pranjivandas Jagjivandas Mehta* v. *Chan Ma i Phee* (2), laid down the law as follows:—

(1) 11 B. L. R. 405; 20 W. R. 150.
(2) 35 Ind. Cas. 190; 43 I. A. 122; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 24 C. L. J. 314; 8 L. B. R. 458 (P. C.).

"The law upon this subject is beyond any doubt: (1) Where titles....are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of security.

"In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (3), 'although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that the general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed.'"

Applying the principles thus laid down to the present case, what this Board has to determine is did the document of the 15th July 1908 constitute the bargain between the parties, or was it merely the record of an already completed transaction?

The only evidence upon this subject in their Lordships' opinion is conclusive that the memorandum of the 15th July 1908 constituted the bargain between the parties. The plaintiffs' agent swore, "The arrangement to deposit their title-deeds was made in the presence of the eldest son of E. Solomon," and when we turn to S. Solomon's evidence, he says, "The document was drafted and typed in my office after they had come to an agreement. The document was drawn up at the time they came together;" and upon cross-examination he says:

"The agreement was signed and handed over in my presence. Unless the title-deeds had been handed over he would not have accepted Exhibit. I. (the memorandum of 15th July 1908). The transaction was completed in my office at the same time."

(3) (1872) 5 H. L. 321 at p. 341; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907.

Turning to the document itself, one is led to the same conclusion.

"We hand you *herewith* title-deeds, etc.....This please hold as security, etc.....Please also *hold this* as further security." Their Lordships have no doubt, therefore that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

It has already been stated that the Receiver was not under the order appointing him authorised to create any mortgages of the partnership property, and, therefore, the claim of the plaintiff fails both in respect of the original equitable deposit and the subsequent deposit in August 1910.

For these reasons their Lordships will humbly advise His Majesty that the appeal of the plaintiff should be dismissed with costs.

N. K. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Ittoneham & Son.*

Solicitors for the Respondents.—Messrs. *Sanderson & Orr Dignam.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1337 OF 1921.

January 23 1923.

Present —Mr. Justice Daniels.

SHAKUR—DEFENDANT—APPELLANT

versus

HUSAINI BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Adverse possession—Brother in possession on behalf of himself and sister—Gift by brother without knowledge of sister, effect of—Registration—Notice.

The sole possession by one of two or more joint owners is not adverse to the others until the owner in possession has done some act to the knowledge of the others which amounts to a denial of the latter's right.

Chandbhai Mahamadbhai v. *Hasanbhai Rahimtula* 64 Ind. Cas. 205; 46 B. 213; 23 Bom L. R. 1033; (1922) A. I. R. (B.) 150 and *Ahmad Raza Khan* v. *Ram Lal*, 26 Ind. Cas. 922; 37 A. 203; 13 A. L. J. 204, relied upon.

Registration is not notice.

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.), followed.

If a brother in possession on behalf of himself and his sisters executes a deed of gift in favour of his sons without the knowledge of his sisters and there is nothing to put the sisters on enquiry, the possession of the brother does not become adverse to the sisters.

Second appeal against a decree of the District Judge, Benares, dated the 27th July 1921.

Mr. *G. Banerji*, for Mr. *P. L. Banerji*, for the Appellant.

Mr. *Mukhtar Ahmad* (with him Dr. *S. M. Sulaiman*), for the Respondents.

JUDGMENT.—The only question in this appeal is one of adverse possession. The plaintiffs are two sisters. The original defendant was their brother. He has died and his sons, Chhedi and Shakur, have been substituted in his place. The plaintiffs claimed their share in three houses which originally belonged to the father of the parties. The suit is governed by Art. 144 of the Limitation Act. It is admitted that the plaintiffs have never been in actual possession of the house, but the Courts below have accepted the principle that the possession of the brother was on behalf of himself and his sisters and, therefore, was not adverse. This principle is not disputed by the defendants-appellants. They claim that the case is taken out of the principle by virtue of the fact that the brother, Karim Bakhsh, executed two deeds of gift in favour of his sons in the year 1908. One of these was just within the twelve years' period of limitation, but the other was just before it, and it is this gift which is specially pleaded as making the possession adverse. The learned Judge of the Court below has found that there is no proof that the plaintiffs had any knowledge of this gift and he declined to regard registration of the gift as constituting notice in view of the ruling of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (1). In this case there was

(1) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.)

nothing to put the plaintiffs on enquiry or to cause them to search the register. There is a very recent ruling of the Bombay High Court, *Chandbhai Mahamadbhai* v. *Hasanbhai Rahimtula* (2), that sole possession by one of two or more joint owners is not adverse to the others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right. The rulings of this Court are to the same effect [*e. g., Ahmad Raza Khan* v. *Ram Lal* (3)]. I come to this decision with some reluctance, because where parties have not put forward a claim to their legal share for a period of some thirty years, as has happened in this case, it very often, if not usually, is the fact that they have all along intended to allow the brother to take the whole, but on the authorities the decision of the learned District Judge is the only possible decision on the fact found by him. I, therefore, dismiss the appeal with costs including in this Court-fees on the higher scale.

S. D. *Appeal dismissed.*

(2) 64 Ind. Cas. 205; 46 B. 213; 23 Bom. L. R. 1033; (1922) A. I. R. [B.) 150.
(3) 26 Ind. Cas. 922; 37 A 203; 13 A. L. J. 204.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1295 OF 1921.
January 25, 1923.
Present:—Mr. Justice Daniels.
RAMJI DAS AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MIHIN LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 63 (5), 114 ill. (g)—Secondary evidence of contents of document—Person unable to read document, whether can give evidence—Non-production of document—Old document—Presumption.

It is settled law that in a suit for redemption the plaintiff must prove the mortgage which he sets up. [p. 654, col. 2.]

Sheo Prasad v. *Lalit Kuar*, 18 A 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975, followed.

Under clause (5) of section 63 of the Evidence Act secondary evidence as to the contents of a document, written in Persian characters, cannot be give by a witness who is unable to read Persian. [p. 654, col. 2.]

Ghure v. *Chatrapal Singh*, 23 Ind. Cas. 11; 12 A. L. J. 239, followed.

Unless it is established that a document is in the possession of a party and has been wilfully suppressed, a Court is not entitled to presume that the contents of the document, if produced, would have been unfavourable. [p. 655, col. 1.]

In the case of a very old document the possibility of its having been lost and being no longer in existence is naturally much greater than in the case of a document of recent date. [p. 655, col. 1.]

Second appeal against a decree of the Second Additional District Judge, Aligarh, dated the 25th of May 1921.

Dr. *K. N. Katju*, for the Appellants.

Dr. *S. N. Sen*, for the Respondent.

JUDGMENT.—This is a second appeal in a suit for redemption of a mortgage alleged to have been executed in 1865. The defendants-appellants denied the existence of the mortgage. No notice was served on them to produce it, but it is not seriously disputed that if it was in their possession the nature of the suit was sufficient to give them notice that they must produce it and that the plaintiffs were entitled to produce secondary evidence. It is settled law that the plaintiff must prove the mortgage which he sets up [*Sheo Prasad* v. *Lalit Kuar* (1)]. The lower Appellate Court has found on the basis of various items of documentary evidence that the property was originally mortgaged to the defendants. The documentary evidence gives no assistance as to the date of the mortgage nor does it in any way show that it was the mortgage in suit. To supply this defect two witnesses were produced. The learned Judge of the Court below has rejected one of these witnesses as false, but has accepted the evidence of the other Anandi Lal. The first and main plea taken in this Court is that Anandi Lal's evidence, even if believed in full, is not such secondary evidence as is recognised by section 63 of the Evidence Act. Under subsection (5) of that section only a witness who has himself seen a document is entitled to give oral evidence of it. This clearly implies that it must be a witness who could read the document and this view was taken in *Ghure* v. *Chatrapal Singh* (2), where it was held that a person who was unable to read a document could not give secondary evidence of its contents. The evidence of Anandi Lal has been laid before me. It shows that the document was written in Persian characters which the witness was unable to read. A plea was taken by the respondent

(1) 18 A. 403.; A. W. N. (1896) 132; 8 Ind. Dec. (N. S) 975.
(2) 23 Ind. Cas. 11; 12 A. L. J. 239.

to the effect that the Court should presume under section 114 of the Evidence Act that the original mortgage is in possession of the appellant and that, if produced, it would have proved to be the mortgage in suit. The respondents would be in a stronger position for raising this plea if they had given notice to the defendants to produce the original deed. The defendants deny that the deed is in their possession and there is nothing to establish that this denial is false. It is only if the deed is in their possession and has been wilfully suppressed that the Court is entitled to presume that the contents of the document, if produced, would have been unfavourable. In the case of a very old mortgage the possibility of its having been lost and being no longer in existence is naturally much greater than in the case of a mortgage of recent date. Under the circumstances of this case I am not prepared to draw the inference which the learned Counsel asks me to draw.

A plea of limitation under Art. 134 of the Limitation Act is also urged by the appellant in respect of one of the shops, but in view of my decision in the first issue it has not been necessary to decide this.

I, therefore, accept the appellants' contention and allow the appeal. I accordingly allow the appeal and setting aside the decree of the Court below restore the decree of the Munsif with costs in all Courts.

S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 681 OF 1921.

January 19, 1923.

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

KUNDAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SOBHAN RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *construction of*—Qarib ekjaddi, *meaning of—Person alienating share bound to offer same to* qarib ekjaddi *co-sharer—Share, whether must be offered to nearest* qarib ekjaddi—*Pre-emption, right of, proof of.*

A great-grandfather's descendant is not a distant but a near descendant of the same common ancestor, and, therefore, can be fairly described as a *qarib ekjaddi*, that is, a near descendant of the same common ancestor.

Where by a custom recorded in the *Wajib-ul-arz* of a village a co-sharer wishing to alienate his share is bound to offer the share in the first instance to a *qarib ekjaddi* co-sharer, he is not obliged to offer the option of purchase in the first instance to the descendant of a nearer common ancestor or a near descendant of the same common ancestor, but is entitled to choose any co-sharer from amongst the whole body of persons who can fairly be described as descendants of the same common ancestor with himself.

Lok Singh v. *Balwant Singh*, 1 A. L. J. 705, referred to.

Obiter.—A plaintiff claiming pre-emption on the basis of a particular custom must satisfy the Court not merely as to the existing custom of pre-emption binding on the parties, but as to the particular custom on the strength of which he claims preference over the vendee.

Quaere.—Whether the words *qarib ekjaddi* ought to be interpreted as meaning the nearest male agnate for the time being, *i. e.*, in existence at the time of the sale.

Second appeal against a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Agra, dated the 24th January 1921.

The Hon'ble Mr. *N. P. Asthana*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a second appeal by a plaintiff pre-emptor and it raises a very simple and definite point. Both parties in the Courts below admitted themselves to be bound by a certain custom in the matter of pre-emption which was recorded in the *Wajib-ul-arz* of the village. Where they differed was as to the nature of the custom evidenced by that record. The *Wajib-ul-arz* specifies certain classes of persons who are to have the first offer in the event of a co-sharer wishing to alienate his share. The first class is described as the *qarib ekjadi* of the vendors who are also co-sharers. We may translate the phrase *qarib ekjaddi* as a near descendant of a common ancestor with the vendor, but this is not sufficient to determine the particular point raised by the appeal. The vendor, Ghure, was the grandson of one Akhi Ram and the plaintiffs

who claim pre-emption are the sons of another son of Akhi Ram, and, therefore, first cousins of the vendor. The vendee-defendant is also a descendant of the same common ancestor as the vendor. But to find that common ancestor it is necessary to carry the pedigree one degree further. Aki Ram's father's name was Narhatia and the vendee Sobha Ram is the grandson of Lalu Ram, a grandson of Narhatia. The Courts below have concurred in taking the same view of the custom put forward by the plaintiff. They say that both the vendee-defendant and the plaintiffs fall within the category of *qarib ekjaddi*, or near descendants of a common ancestor with the vendor. It is admitted that both parties are co-sharers. Therefore, according to the view taken by both the Courts below, both the plaintiffs and the vendees fall in one and the same category and the custom recorded in the *Wajib-ul-arz* does not give any preference to one member of that category over another. In substance that the Courts below have held is that, according to the custom evidenced by this *Wajib-ul-arz*, a co-sharer in the position of the defendant Ghure, desiring to part with a portion of his property, was entitled to choose amongst the whole body of persons who could fairly be described as descendants of the same common ancestor with himself, but was not obliged to offer the option of purchase in the first instance to the descendant of a nearer common ancestor, or a nearer descendant of the same common ancestor rather than a more distant one.

In appeal it is contended that the Courts below have come to an erroneous finding because they have misinterpreted the terms of the *Wajib-ul-arz*. The contention takes two distinct forms. On the one hand, it is suggested that the vendee, Sobha Ram, is such a distant relation of the vendor, Ghure, that he could not fairly be described as "*qarib ekjaddi*" at all. On this point we think it sufficient to say that the descendant of a common ancestor no further removed than Narhatia in the pedigree now before us might fairly be described as a near descendant of the same common ancestor and may be treated as falling within the category of persons so described in the record of the custom found in the *Wajib-ul-arz*. In the second place, it is contended that the words *qarib ekjaddi* ought to be interpreted as meaning the nearest male agnates for the time being *i. e.* in existence at the time of the sale. This is certainly an ingenious argument and by no means without force. We have to remember that the case comes before us in second appeal, that it is an appeal by a plaintiff who in claiming to pre-empt a sale in favour of a vendee who is both a co-sharer and a descendant of the same common ancestor as the vendor and is bound to satisfy the Court that he has in fact a preferential claim. We have been referred to one or two authorities which lay down after all nothing more than the reasonable principle that a plaintiff claiming pre-emption on the basis of particular custom must satisfy the Court, not merely as to the existence of a custom of pre-emption binding on the parties, but of the particular custom on the strength of which he claims preference over the vendee. A case more directly in point is that of *Lok Singh* v. *Balwant Singh* (1). The learned Judges who decided that case held that a clause in the *Wajib-ul-arz* giving in certain circumstances a pre-emptive right to persons described as *pattidar qaribis* of the vendor did not operate so as to give a nearer relation a preferential right over a more distant one. They regarded the whole body of persons who can fairly be described as *pattidar qaribi* of the vendor as forming a class by themselves, possessing equal rights, amongst whom the intending vendor was at liberty to make his own choice when he came to part with his own property. We think it sufficient to say that in the present case we are at any rate not so satisfied that the Courts below were wrong in the interpretation which they have put on the somewhat doubtfully worded clause as to warrant our interference with the decision of the lower Appellate Court We dismiss this appeal, therefore, with costs.

Appeal dismissed.

S. D. & N. H.

(1) 1 A. L. J. 705.

CALCUTTA HIGH COURT.

JURY REFERENCE NO. 65 OF 1922.
October 13, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Pearson.

EMPEROR - - PROSECUTOR
versus
SATYENDRA KUMAR DUTT CHOWDHURY *alias* SATU BABU—ACCUSED.

Evidence Act (I of 1872), s 154—Hostile witness, reasons for declaring—Evidence of hostile witness, whether can be believed in part and disbelieved in part—Criminal Procedure Code (Act V of 1898), s. 540—Court witnesses—Prosecution witnesses examined on initiative of Court—Statements of witnesses to be accepted or rejected in entirety.

That a prosecution witness is a tenant of a relative of the accused is no reason at all for treating him as a hostile witness. [p. 658, col. 2; p. 659, col. 1.]

That the statement of a prosecution witness before the Committing Magistrate differs from the statement recorded by the Police shortly after the occurrence and that the cross-examination of the witness would help the Court to assess the exact value of the different parts of his testimony is not a sufficient reason for allowing the cross-examination of the witness by the Public Prosecutor as an hostile witness. [p. 658, col. 2; p. 569, col. 1.]

Kalachand v. *Queen-Empress*, 13 C. 53, 6 Ind. Dec. (N. S.) 532 and *Surendra Krishna Mondal* v. *Ranee Dassi*, 59 Ind. Cas. 814; 24 C. W. N. 800 at p. 809; 33 C. L. J. 34; 47 C. 1043, referred to.

If a Counsel is given permission to cross-examine his own witness it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony, because if that which is suggested shall be elicited, it will show that he is not trustworthy at all. Therefore, his whole evidence must be rejected and it cannot be believed in part and disbelieved in part. [p. 659, col. 1.]

Faulkner v. *Brine*, (1858) 1 F. & F. 254, followed.

A witness whom the prosecution declines to examine and who is examined by the Court on its own initiative is a witness called by the Court within the meaning of section 540, Criminal Procedure Code. [p. 659, col. 1.]

Where a prosecution witness is, on the application of the Public Prosecutor, called as witness by the Court, so that both parties may cross-examine him he is not a Court witness properly so-called and his evidence stands on the same footing as that of a hostile witness and should be accepted or rejected *in toto*. [p. 659, cols. 1 & 2.]

Reference.

Babus *Dasarathi Sanyal, Manmatha Nath Mukherjee, Hemendra Kumar Das, Birendra Chandra Das* and *Priya Nath Dutt*, for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Walmsley, J.—The accused Satyendra Kumar Dutt Choudhuri was placed on his trial upon a charge of murder. The Jury was unanimous in finding him not guilty of murder, and by a majority of four to one it found him not guilty of the lesser offence of culpable homicide. The learned Judge felt himself unable to accept this verdict, and, consequently, made a reference to this Court under the provisions of section 307, Criminal Procedure Code.

The case has some remarkable features, not only in the bold facts of the occurrence as told by the prosecution but also in the conduct of the proceedings in the Court of Session.

The accused belongs to the village of Richi and he and his co-sharers are Zemindars of the village. The Zemindars are divided into two hostile groups, Nagendra and Dwijendra forming one group, and the accused and Khirod the other group. These two groups are frequently quarrelling, but they share the same *bari*. Immediately adjoining this *bari* is a *bari* occupied by Amar Kinkar Bhattacharjee and his brothers Prakash and Hara Kinkar.

Natabar Tarsa, the deceased, used to be employed as a servant by Satyendra, the accused, but on account of some difference he left his service and entered the service of Amar Kinkar and Prakash about six months before the occurrence.

The relations between the Bhattacharjee and the Dutts seem to have varied. Amar Kinkar says that he and Prakash have always been on friendly terms with Satyendra, in fact Amar Kinkar acted as his priest and his Pleader until just before the occurrence; Hara Kinkar, on the other hand, has been employed at different times by both Nagendra and Satyendra but Satyendra is said to have regarded him as a declared enemy.

On the day of occurrence the Bhattacharjee brothers were celebrating their mother's Sradh, and Satyendra wanted Amar Kinkar to keep up the old feud between himself (Amar Kinkar) and Hara Kinkar, and it is said that he tried to enforce his wishes by refusing to lend utensils for the ceremony, and by causing notice of execution proceedings in regard to a decree obtained by his aunt against Amar Kinkar

and Prakash to be served when the courtyard was crowded with guests. These measures were useless and Amar Kinkar and Hara Kinkar did for a time at any rate patch up their quarrel. It does not seem to be suggested that Satyendra bore Amar Kinkar any grudge for taking Natabar into his service, but it is said that relations between Natabar and Satyendra continued to be strained.

To return to the occurrence, by the afternoon the hosts were entertaining their humbler guests, and there were sitting in the courtyard two lines of Naths and Dhobis, and at the North end of the line that ran North-South was Natabar, the deceased : all were partaking of *chira* and *dahi* when suddenly the accused entered the courtyard and thrust a spear into Natabar's left side with such force as almost to transfix him. The accused then disappeared, and no one tried to stay him.

Amar Kinkar shortly afterwards went to the *Thana*, three miles away: he told his story about 4-30 P. M. and it was recorded by the Senior Sub-Inspector, Satish Chandra Maitra, who sent the junior officer Purna Chandra Dutta to investigate. Purna Chandra found a considerable number of people present, and the first thing he did was to record the dying declaration of Natabar, and a few minutes after he had finished Natabar died. Before dawn he left the village with the dead body and then examined some witnesses at the *Thana* on the morning of the 21th. After that he was engaged on other work and nothing more was done until the 29th when the Senior Sub-Inspector went to the place accompanied by two superior officers. The accused was not found by either Sub-Inspector, and it was not until April 26th that he gave himself up to the Magistrate.

As to the time, place and cause of death, I do not think there can be any doubt. Amar Kinkar's evidence as to the time is preferable to that of another witness who is probably less familiar with time as measured by the clock. As to place, questions have been asked about the presence of blood stains but none of them amount to a suggestion even that the deed took place somewhere else. The cause of death is fully described by the Doctor who made the *post mortem*, and it is worth mentioning that he found undigested *chira* and *dahi* in the stomach.

The all important question is, whether it is proved that it was the accused who dealt the blow, closely connected is the subsidiary question of why a man of ordinary intelligence should have chosen such an occasion, time and place for the crime.

It is this second point which has caused so much trouble in the case. The Police appear to have submitted the case as one in which the accused attacked Natabar without any quarrel immediately preceding the incident, that is to say, with nothing more fresh than a quarrel at the tank on the previous day. In the Magistrate's Court, however, several witnesses gave quite a different version; instead of a stealthy entrance to deal a premeditated blow, they described a violent quarrel in which Natabar used filthy language, and threatened Satyendra with a peice of wood, and Satyendra, happening to find a spear, flung it at Natabar. In consequence of this variation before the Court of Session, the Public Prosecutor obtained permission to cross-examine one of the prosecution witnesses as hostile, while others were called as Court witnesses and tendered to both sides for cross-examination. The witness who was declared hostile is Padma Lochan (P. W. No. 3), while the witnesses called as Court witnesses and cross-examined or offered for cross-examination by both sides were Rameshawar Dhupi, Mukunda Nath, Bipin Namasut, Mathur Chandra De, Girija Mojun Deb, and Satish Chandra Maitra, the Senior Sub-Inspector. I have omitted Amar Kinkar's name because his case stands on a different footing.

It is urged on behalf of the accused that, in the circumstances stated, the whole of the evidence given by these witnesses must be rejected.

Padma Lochan is the only witness who was cross-examined by the Public Prosecutor under the provisions of section 154 of the Evidence Act. The learned Judge gave two reasons for granting permission, namely, that the witness was a tenant of Khirod, cousin of the accused, and that his statement differed from the statement recorded by the Sub-Inspector shortly after the occurrence, and he expressed the hope that cross-examination would "help the Court to

assess the exact value of different parts of the witness' testimony." The learned Judge's charge proceeds on the same footing, and the argument for the accused is that the Judge was wrong in thinking that the evidence as to identity might be accepted and the evidence as to a quarrel be rejected.

It appears to me that the learned Judge was wrong in allowing the Public Prosecutor's request. The first reason which he gives has no force at all, and the second has been held to be inadequate in the cases of *Kalachand* v. *Queen-Empress* (1), *Surendra Krishna Mondal* v. *Ranee Dassi* (2). The fact remains, however, that the witness was cross-examined by the prosecution and the question is whether the whole of his evidence must be rejected, or the Court can believe it in part and disbelieve it in part. In the case of *Faulkner* v. *Brine* (3) defendants' Counsel asked for permission to question his own witness as to the statement which he had made to defendant's Attorney because it was much more favourable to the defendant than the version given in Court: and Lord Campbell, C. J., in allowing the question to be put, said: "It must be understood that it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony. If that which is suggested shall be elicited it will show that he is not trustworthy at all." [See also the case of *Surendra Krishna Mondal* v. *Ranee Dassi* (2)]. That is the principle to be applied to the evidence of a witness who has been cross-examined by the party which called him. The result is that Padma Lochan's evidence must be excluded altogether. Then there are the so-called Court witnesses. I say so-called, because I do not think that they are really Court witness. The provisions of section 540, Criminal Procedure Code, are very wide, and the learned Judge might have summoned these witnesses to the box, and if the position were that the Public Prosecutor declined to examine the witnesses and the Judge thereupon acting on his own initiative caused them to be produced, I should regard them as called under that section. But the order recorded on June 26th which covers all the witnesses except the Sub-Inspector, shows that the position was quite different: "The Public Prosecutor puts in a petition requesting the Court to examine witness Rameshwar as a Court witness, so that both parties may cross-examine him." The reason for the request appears to have been just the same as in the case of Padma Lochan that these witnesses had not mentioned any quarrel to the Sub-Inspector. The Public Prosecutor was, therefore, seeking to treat them in the same way as Padma Lochan without any preliminary questioning. That being so, I think their evidence should share the same fate as Padma Lochan. The case of the Sub-Inspector was dealt with in a separate order dated July 13. The Public Prosecutor urged that he was trying to shield the accused and was not worthy of confidence the Pleader for the accused made an objection to the proposal, but his suggestion that as a Court witness the Sub-Inspector should be cross-examined only by the accused was not helpful. I think that, in view of the order passed by the Judge, the evidence of the Sub-Inspector Satish must also be shut out.

The remaining evidence as to the identity of the assailant is to be found in the dying declaration recorded by Sub-Inspector Purna, and in the depositions of Amar Kinkar and Mahendra.

The dying declaration was discussed before us at considerable length with reference to the language in which it is couched, the capacity of the dying man to make such a statement, the possibility that the answers were prompted and so forth. As for the language it is difficult to know what to expect when an Assamese Officer records an Uriya Coolie's statement in Bengali. The medical evidence is indefinite and cannot override positive evidence that Natabar did make a statement. Hara Kinkar did undoubtedly help the Sub-Inspector but he is blind, and I cannot accept that contemptible witness, Uma Charan, as sufficient to show that it was Hara Kinkar and not Natabar who gave the name Satya Babu. The really important point about the declaration, however, is independent of these criticisms. Uma Charan says that the statement was recorded

(1) 3 C. 53; 6 Ind. Dec. (N. S.) 532.
(2) 59 Ind. Cas. 814, 24 C. W. N. 860 at p. 869; 33 C. L. J. 34; 47 C. 1043.
(3) (1858) 1 F. & F. 254.

in the presence of 25 or 30 persons, that on completion it was read out to them before they dispersed. Not a question was asked to suggest that any one protested. It seems incredible that if, as a fact, Natabar made no statement, or mentioned no name, or mentioned a name that was not Satya, such gross dishonesty could have passed unchallenged. I accept it, therefore, as proved that Natabar did tell the Sub-Inpector that the accused was his assailant. With regard to the evidence of Amar Kinkar it is urged that it should be excluded altogether on the same principle as Padma Lochan's. The position, however, is quite different. Amar Kinkar went to the *Thana* and gave an extremely succinct account of what had happened. In the Magistrate's Court his statement about the actual occurrence was very brief. On neither occasion did he say that he actually saw the blow being struck. In fact, before the Magistrate he clearly suggested that what he first saw was Satya holding one end of the spear and Padma the other. The Police and the Public Prosecutor, however, assumed that Amar Kinkar had seen everything in spite of the suggestion just mentioned, and in spite of the distinction which the witness drew in examination-in-chief between sight and inference. When the defence afterwards elicited that the witness had not seen accused give the spear-thrust but had inferred from circumstances that it was the accused who must have done so, the Public Prosecutor jumped to the conclusion that the witness was trying to aid the accused and after a few questions in re-examination he sought and obtained permission to cross-examine the witness. This was an egregious blunder. The question is, what result follows. One possible of way of looking at the matter is to say that the examination of the witness was complete when this cross-examination began, and, therefore, the outcome of the Public Prosecutor's cross-examination could be expunged. Another way, and a more satisfactory one, is to say that this cross-examination did not shake the credit of the witness, and that, say all the facts are before us, we are in quite as good a position as the Public Prosecutor to decide whether the apparent divergence in the statements shows carelessness of the truth. If either at the *Thana* or in the Magistrate's Court Amar Kinkar had used language which could only mean that he had seen with his eyes certain things take place, and had afterwards said that he had only drawn inferences from other things, then I should think that he was shuffling and not reliable. But that is not the case, as I have shown. His case is very different, therefore, from Padma Lochan's ; different too from the circumstances in *Faulkner* v. *Brine* (3). My conclusion is that the principle laid down in the last mentioned authority has no application here, and that we may accept Amar Kinkar's evidence for what it is worth. As to its value, I regard it as the evidence of a man who is doing his best to give a faithful account of what happened in distressing circumstances. The inauspicious ending to the ceremony, and the duty of denouncing his next door neighbour cast upon him a burden which was very irksome : he went to the *Thana* at once, but after that left the Police to work without his help, and did nothing but answer the questions put to him.

The remaining witness is Mahendra : his account confirms Amar Kinkar's story. The main objection to his evidence is this. In examination-in-chief he said that he saw accused spear Natabar and that he raised an outcry. In cross-examination he said, apparently without any evasion, that he was in the Kacheri house, that the western door on to the courtyard was shut, and, therefore, the place where Natabar was eating was not visible. A little later he said that when he shouted he shouted loud enough for the others in the house to hear him. If the last sentence did not imply that he had gone out, I should at any rate have expected the defence Pleader to try and ascertain what the witness meant by saving first that he had seen something happen and then that he was in a position where he could not see. Instead of doing so, he left the explanation to be obtained in re-examination and deprived himself of the right to probe into the explanation. It is said now that the explanation is absurd, but I do not understand why. Unwise tactics have left it unchallenged and I think we should accept it. My conclusion is that Mahendra's evidence may be regarded

as reliable. In addition to criticisms upon the whole evidence of the witnesses severally, the learned Vakil has urged that there are discrepancies in small details, such as whether Natabar was standing or sitting, facing North or facing South when he was struck, who it was that pulled out the spear and so forth. It does not appear to me that such discrepancies are of any moment in the circumstances.

Further, the ownership of the spear has been discussed, and it is asked how it could have come to be in the hands of the accused. The evidence available does not disclose an answer. But to this argument as to the argument based on the wild improbability of the story, the same reply may be given that the undoubted facts are that some one chose that time and place to spear the deceased.

In addition to the direct evidence or in corroboration of it, we may take into consideration the fact that if Satya's name has been falsely substituted for another name, such substitution must have been made to the knowledge of perhaps three hundred people without a protest from any one.

My conclusion is that the evidence of Amar Kinkar and Mahendra, supplemented by the naming of the accused by the deceased, do prove beyond reasonable doubt that it was the accused Satayendra who speared Natabar.

On the evidence given by Amar Kinkar and Mohendra the offence must have been murder and nothing less: but neither of them saw anything until the last moment and I think the accused ought to have the benefit of what is said by the other witnesses about a quarrel and provocation. That is the view apparently taken by the dissentient Juror, and although it may be straining the evidence, I think we should hold that the case falls within the first exception to section 300, Indian Penal Code, and, accordingly, I find the accused guilty under section 304, Indian Penal Code, and sentence him to transporation for life.

Before parting with the case I should like to add that, although I think the conduct of the case in the Sessions Court does credit to nobody, I quite recognize that the circumstances were very difficult.

Pearson, J.—I agree.

S. D. *Sentence of transportation passed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 656 OF 1922.

January 30, 1923.

Present:—Mr. Justice Ryves.

ABDUL WAHID KHAN—APPLICANT

versus

ABDULLAH KHAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Direction for prosecution under s. 199, Penal Code—Assignments of perjury, whether necessary—Sanction to prosecute—Revision—High Court's power to set aside sanction.

An order directing, under section 476, Criminal Procedure Code, the prosecution of a person under section 199, Indian Penal Code, is bad if it does not contain the assignments of perjury, inasmuch as the accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of the charge under section 199, Indian Penal Code.

If on the facts of a case the High Court is of opinion that a prosecution for perjury shall be infructuous, it may, in exercise of its revisional jurisdiction, set aside the order sanctioning or directing prosecution.

Chadha v. *Emperor*, 30 Ind. Cas. 878; 14 A. L. J. 851; 18 Cr. L. J. 40, *Mathura Prasad* v. *Emperor*, 41 Ind. Cas. 995; 15 A. L. J. 517; 18 Cr. L. J. 883 and *Ram Sahai* v. *Emperor*, 55 Ind. Cas. 1008; 18 A. L. J. 381; 2 U. P. L. R. (A) 145; 21 Cr. L. J 400, relied upon.

Criminal Revision from an order of the District Magistrate, Azamgarh, dated the 17th November 1922.

Mr. *G. P. Boys*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Abdul Wahid Khan was involved in an enquiry under section 135 of the Criminal Procedure Code in the Court of a Magistrate, Chaudhri Girwar Singh. Owing to that Magistrate going on short leave the case was transferred to another Magistrate who took it up on the 10th November 1922. On the 13th November Abdul Wahid Khan applied to the District Magistrate to transfer the case to some other Magistrate or back again to the original Magistrate as he was returning very shortly, for reasons stated in the affidavit attached to the petition. On the same date the District Magistrate passed the order:—

"The case is sent back to Chaudhri Girwar Singh for trial."

It appears that on the 15th November the Magistrate concerned sent to the District Magistrate his explanation of the affidavit filed by Abdul Wahid Khan. On

the 17th November the District Magistrate after asking petitioner why he should not be prosecuted for making a false statement in an affidavit passed the following order:—

"Abdul Wahid Khan has made a number of allegations against Mr. Zahir Uddin which appear from the explanation of the Magistrate to be entirely false. This sort of allegation against the impartiality of Magistrates is unfortunately all too common and I am of opinion *prima facie* that this is a particularly blatant case in which allegations have been made recklessly and falsely. I, therefore, sanction the prosecution of Abdul Wahid Khan under section 199 of the Indian Penal Code. The case will go to Babu Gopi Behari Sahai for trial."

It seems to me obvious that this order was meant to be one under section 476. As such it is bad in law, inasmuch as there are no assignments of perjury. The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of the charge under section 199. I might and ordinarily would have simply set the order aside leaving it open to the Magistrate to rectify his order if so advised, but in the exceptional circumstances of this case, in order to save public time and money, I have examined both the affidavit and the Magistrate's explanation. These were the materials on which presumably the District Magistrate acted, and I have come to the conclusion that a prosecution for perjury under the circumstances of this case must be infructuous. That I have power to do so is clear from *Chadha* v. *Emperor* (1) and the case therein relied on. See also *Mathura Prasad* v. *Emperor* (2) and *Ram Sahai* v. *Emperor* (3). I think the District Magistrate would have been well-advised not to have accepted so vaguely worded and argumentative an affidavit. I am inclined to think that he has really acted not so much on the affidavit but on the petition which accompanied it.

The only statement of pure fact in the affidavit was that contained in the first paragraph but that is not denied by the Magistrate. The second paragraph runs as follows:—

"So far as I have come to know the aforesaid Deputy Magistrate takes for trail very few of the cases out of the file of the cases sent from the Court of Chaudhri GirwarSingh and generally postpones the cases, but this case was taken up for trial on the first date, I think simply to show partiality to the complainant."

The Magistrate's explanation of this paragraph is based on an inaccuracy. He says it is untrue to say that this was the only case which was taken up for trial and that this was done in order to show partiality to the complainant. The affidavit does not say that this was the only case and in any event it would be impossible to prove that the paragraph as sworn to in the affidavit was false to the knowledge of the petitioner. The remainder of the affidavit refers to the procedure adopted by the Magistrate which is alleged to be wrong in the opinion of the petitioner. It seems to me quite impossible to bring home a charge of perjury against the petitioner on the affidavit I therefore, set aside the order and quash further proceedings in the case. Let the record be returned.

S. D. *Order set aside.*

(1) 36 Ind. Cas. 878; 14 A. L. J. 851; 18 Cr. L. J. 46.
(2) 41 Ind. Cas. 995; 15 A. L. J. 517; 18 Cr. L. J. 883.
(3) 55 Ind. Cas. 1008; 18 A. L. J. 381; 2 U. P. L. R. (A) 145; 21 Cr. L. J. 400.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 562 OF 1922.
August 1, 1922.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.
MAZAHAR ALI—ACCUSED—PETITIONER
versus
EMPEROR, ON THE COMPLAINT OF HULI DAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (1)—Examination of accused—Provisions, whether mandatory.

The provisions of section 342 (1) of the Code of Criminal Procedure are mandatory and the time at which the Court shall question the accused generally on the case is after the witnesses for the prosecution have been examined, cross-examined and re-examined, that is, after the prosecution case is completed and before the accused is called on for his defence. [p. 664, col. 2; p. 665, col. 1.]

Obiter dicta.—To take the depositions in one case and have them copied and used in another case, is, generally speaking, not a course which should be adopted in trials of criminal cases. [p. 664, col. 1.]

MAZAHAR ALI v. EMPEROR.

A Magistrate who undertakes the trial of a criminal case, and who also hears the witnesses give their evidence should, if possible, finish the case himself. [p. 664, col. 2.]

Criminal revision against an order of the Sessions Judge, Rungpur, dated the 17th June 1922, affirming that of the Deputy Magistrate, Rungpur, dated the 4th March 1922.

Babu *Dasarathi Sanyal* (with him Babu *Debendra Narain Bhattacharjee* and *Radhikaranjan Guha*), for the Petitioners.—The facts of the case shortly are these:—The petitioner was a collecting *panchaye* and had one Banizuddin as his assistant. One Huli Das charged the petitioner and his assistant under sections 417, 420, Indian Penal Code, on 21st August 1920 before the Sub-Divisional Officer of Kurigram. On the same date two other similar complaints were laid before the same Magistrate on the same charges against these two persons. Then an enquiry was held and the three cases were amalgamated for purposes of a joint trial under section 417, Indian Penal Code, and the cases were transferred on 25th February 1921 to the Court of an Honorary Magistrate, Mr. Roy Choudhari, who proceeded with the trial and examined 13 witnesses for the prosecution. Then, on the 8th March, the proceedings were stayed by the District Magistrate, Rangpur, who transferred the case to his own file on 10th April 1921. On that date the Magistrate decided to try the cases separately and proceeded with the trial of the three cases *de novo* in a novel manner. "The common witnesses were examined and their depositions were recorded by a type writer and a set of three depositions were recorded by one process by means of carbon papers and such deposition was made part of the record in each case. The separate witnesses were separately examined in each case." Then, on 12th April 1921, charges under sections 420 and 120-B 420 Indian Penal Code, were framed against the petitioner and his assistant. Both the accused pleaded not guilty. Then, on 2nd June 1921, before all the prosecution witnesses were examined, the petitioner was examined and his assistant was examined in one case only. Thereafter the examination of the rest of the prosecution witnesses was finished and some of them were cross-examined. Then, on 2nd August 1921, before the cross-examination of the other prosecution witnesses was finished, the accused-petitioner was further examined only with respect to certain documents exhibited in the case. This was neither certified by the Magistrate nor signed by the petitioner as required under section 364, Criminal Procedure Code. Thereafter, on 19th September 1921, the cases were again transferred to the file of Mr. J. C. Sen, Deputy Magistrate, for trial who finished recording the cross-examination and prepared the records of the cases in the same way as the District Magistrate had done. Then the defence witnesses were examined and the three cases were disposed of by one judgment. The petitioner was not examined before Mr. Sen at all as required by section 342, Criminal Procedure Code. The petitioner was convicted and sentenced to four months' rigorous imprisonment in each case under section 420, Indian Penal Code, and acquitted of the charge under section 120-B, Indian Penal Code. Three appeals were filed and the learned Sessions Judge affirmed the conviction and sentence of the petitioner in one case only and acquitted him in the other two cases. His assistant was acquitted in all the three cases. My points in this revision are these. There having been in reality a joint trial the conviction and sentence are liable to be quashed. There having been no examination of the accused, as prescribed by section 342, Criminal Procedure Code, the conviction ought to be set aside. The whole trial was vitiated by these illegalities and irregularities which would vitiate the trial. The facts found and proved do not warrant a conviction under section 420, Indian Penal Code. The conviction has been vitiated by improper reception of inadmissible evidence. I submit on these grounds the conviction ought to be quashed.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.—I submit the provisions of section 342, Criminal Procedure Code, have been sufficiently complied with. They were twice examined by the District Magistrate. Then before Mr. Sen they put in a written statement and then there was the conviction. They had, therefore, said all they had to say and they cannot now complain on a mere technical ground. As

regards the question of joint trial I submit there was no joint trial at all. The three cases were separately tried. The facts found and proved sufficiently prove offence under section 420, Indian Penal Code. There was no improper reception of inadmissible evidence. I submit a mere technical objection as to the compliance of the provisions of section 342, Criminal Procedure Code, should not be given effect to. You should look to the substance of the grievance and the record shows that there could have been no cause of grievance.

Babu *Dasarathi Sanyal*, replied in brief.

JUDGMENT.

Sanderson, C. J.—This is a Rule calling upon the District Magistrate to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside.

The learned Sessions Judge who heard the appeal commented upon the procedure which had been adopted at the trial and said that "the three sets of cases had a checkered life," and it is impossible for this Court to view the procedure adopted at the trial with approval. The matter, however, has been simplified by reason of the judgment of the lower Appellate Court, and it is not now necessary for me to deal with the question of the joint trial or whether it was proper to take the depositions in one case and have them copied and used in another case. Speaking generally, in my judgment, that is not a course which should be adopted in trials of criminal cases. The learned Judge in the Appeal Court acquitted one of the accused of all the charges and he acquitted the accused Mazahar Ali of two of the charges against him. He upheld the conviction of Mazahar Ali in one case only; that is the case in which Huli Das was the complainant. In that case there is now only one matter which it is necessary for this Court to consider, *viz.*, whether the provisions of section 342 (1) of the Code of Criminal Procedure were complied with in the Trial Court.

The first part of the proceedings was heard by the District Magistrate, and when the case was before him the witnesses for the prosecution were examined, and some of them were cross-examined.

The accused was examined twice by the District Magistrate, once before all the prosecution witnesses had been examined, and again after all the prosecution witnesses had been examined but before all the witnesses had been cross-examined.

The case was then made over to another Magistrate, Mr. J. C. Sen, some of the witnesses for the prosecution were cross-examined before him, the accused put in a written statement of defence and Mr. Sen finished the trial and convicted the petitioner. This in itself was, in my judgment, an undesirable proceeding. The Magistrate who undertakes the trial of a criminal case, and who also hears the witnesses give their evidence should, if possible, finish it.

It appears that although, as already stated, some of the prosecution witnesses were cross-examined before Mr. Sen, the accused was not examined generally on the case by Mr. Sen in accordance with the provisions of section 342 (1) of the Code of Criminal Procedure. In my judgment, under these circumstances, the provisions of section 342 (1) of the Code of Criminal Procedure were not complied with.

The object of the examination referred to in the section is to enable the accused to explain any circumstances appearing in the evidence against him and the last part of that section runs as follows:—"The Court shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence". In my judgment it is clearly indicated in that part of the section that the time at which the Court shall question the accused generally on the case, is, after the prosecution case is completed and before the accused person is called on for his defence.

In this case I have not the least doubt that the accused person was able to put before the Court everything that he wanted to say about his case. He was examined on two occasions by the District Magistrate. The accused said that he would put in a written statement and he did put in a written statement. On the merits, as far I as can see, there is nothing to be said in support of this application, but there are the words of the section which, in my judgment, expressly provide that the Magistrate shall question the accused generally on the case

at a certain stage in the proceedings. That stage is "after the witnesses for the prosecution have been examined and before he is called on for the defence." That must mean after the witnesses for the prosecution have been examined, and after the cross-examination and re-examination, if any, of such witnesses, for ordinarily the accused is not called on for his defence until the case for the prosecution is closed.

I am not now considering exceptional cases, where it may be necessary for the prosecution, with the sanction of the Court to re-call witnesses, or to give rebutting evidence.

The above-mentioned provision in the section is mandatory and it has not been complied with in this case.

The result is that we are compelled to make this Rule absolute.

It remains to be considered whether the case should be remitted in order that it may be re-tried. It appears from the learned Sessions Judge's judgment that the proceedings were started so long ago as August, 1920. There were partial trials before three Magistrates, the petitioner was in Jail for two weeks. Having regard to these matters, we do not consider it right that the petitioner should be again put on his trial and the result is that the conviction and sentence will be set aside, and the bail-bond will be cancelled.

I hope that in future the Courts will observe the provisions of section 342 (1) of the Code of Criminal Procedure. If they will do so, they will save the High Court an immense amount of time, because, in my experience, the point herein considered is frequently arising, and rules have to be issued by reason of the fact that the Trial Court has not observed the provisions of the section.

Chotzner, J.—I agree.

N. K. & B. N.

Rule made absolute.

LAHORE HIGH COURT

CRIMINAL REVISION NO. 1587 OF 1921.

February 11, 1922.

Present:—Mr. Justice Abdul Qadir

KHANUN AND OTHERS—CONVICTS —PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 333—Constable firing upon rioters in flight—Injury caused to constable by rioters in snatching gun away—Self-defence, plea of.

A constable, pursuing a number of rioters in order to arrest them after the riot was over, fired upon them whereupon some of them turned round and caused him serious injury in order to snatch away his gun. These were charged with an offence under section 333 of the Penal Code:

Held, that, as the constable exceeded his lawful rights in firing upon the men, the accused exercised only their right of self-defence in snatching away the gun from him and were not guilty of the offence with which they were charged. [p. 666, cols. 1 & 2]

Criminal Revision.

Mr. *Anant Ram*, for the Petitioners.

Mr. *Miran Baksh*, for the Respondent.

JUDGMENT.—The three petitioners, Khanun, Ahmad and Ata Muhammad, were convicted of an offence under section 333, Indian Penal Code, for assaulting a public servant Ala Din, constable, when he was engaged in the discharge of his duties, and were sentenced to rigorous imprisonment for two years each. They appealed to the Sessions Judge, who maintained their convictions but reduced their sentences to rigorous imprisonment for six months each. Against this last order they have filed a petition for revision to this Court through Mr. Anant Ram, whom I have heard. I have also heard Mr. Miran Baksh on behalf of the Crown.

It is stated by Mr. Anant Ram that Ata Muhammad has died in Jail since this petition was filed.

The facts of the case, in brief, are that Khanun's wife had been enticed away by one Sardara, against whom a case under section 498, Indian Penal Code, was pending in the Court of a Magistrate at Sargodha. On the 24th February 1921, when the enticed woman and some other members of the party of Sardara, accused, got down at the Railway station, Bhalwal, after their return from Sargodha they were met at the Railway station by Khanun and a

large number of his supporters, numbering 30 or 40 men who had come to take away the woman, and a riot took place in the course of which a number of men on the side of Sardara were injured. On information reaching the *Thana* a number of Police constables were sent to the scene of the riot. They were armed with guns. They found that the riot was over and the rioters were running away and they pursued them. In the course of the pursuit the rioters are said to have once turned round to attack the Policemen, but they were frightened by Sher Muhammad, constable (P. W. No. 2), firing into the air and they resumed their flight. It is said that Ala Din, constable (P. W. No. 1), got ahead of his other companions in order to overtake some of the offenders, and when he came near Ata Muhammad the latter turned round and hit him with a stick. Thereupon he fired his gun. On this point there is nothing but the word of Ala Din and it is quite possible he may have fired to frighten the men and to arrest some of them. The result was that he seriously injured Ata Muhammad. On that the petitioners are said to have assaulted the constable and snatched away the gun and thrown it at some distance and to have caused injuries to the constable in so doing. Upon these facts they have been charged of an offence under section 333, Indian Penal Code, and convicted.

It is argued on their behalf that; in the first place, the constable Ala Din was not acting in the discharge of his lawful duty, as he had no right to arrest the men he was pursuing. Counsel relies on the words of the first part of section 54 (1), Criminal Procedure Code, and says that no credible information had been received by Ala Din, nor could he be said to have a reasonable suspicion that the very men whom he was pursuing had taken part in the riot. I cannot attach any weight to this argument in a case where Policemen are pursuing a number of rioters, who have just left the scene of a riot and are trying to escape. But I think that there is a considerable force in the other argument which has been advanced on behalf of the petitioners, when it is said that, even granting Ala Din was acting in the discharge of his duty, when he was pursuing the rioters in order to arrest them, what happened, according to the prosecution story itself, was that Khanun and Ahmad assaulted him and beat him only after he had fired at Ata Muhammad and caused him serious injury and that their object was to snatch away the gun from him before he could do any further harm and that in doing so they were exercising the right of self-defence. It has been found that these people did snatch the gun and presumably that was the only object with which they roughly handled the constable. The constable, I think, exceeded his lawful rights in firing upon the men and causing such serious injuries to Ata Muhammad as he did, and Khanun and Ahmad were not bound to stand by and allow the constable to use his gun once more. I am, therefore, of opinion that the act of Khanun and Ahmad did not constitute an offence under section 333, Indian Penal Code, on the facts disclosed by the witnesses for the prosecution and they must be acquitted. They have by now undergone a considerable part of the sentences that had been finally passed against them in appeal, and they have also been punished as persons concerned in the riot and their petitions for revision against their convictions in riot case have been rejected by this Court. They will now be released forthwith, if the separate sentences which had been passed against them under section 147, Indian Penal Code, have been completed, as I presume is the case.

N. H.

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE NO. 22 OF 1921.

September 29, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Ghose.

GIRIJA NANDA KALI MITTER—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 476, application of—"Committed before it," meaning of.

SURYABHAN *v.* EMPEROR.

The words "committed before it" in section 476 of the Code of Criminal Procedure are qualified by the words "in the course of a judicial proceeding."

Where an application for the return of a document is made after the suit in which the document was filed has been finally disposed of and there is nothing pending before the Court, the latter has no jurisdiction to take action under section 476 of the Criminal Procedure Code, if the signatures on the application turn out to be forged.

Rule against an order of the Munsif, First Court, Basirhat.

Babus *Bir Bhushan Dutt* and *Hetlal Guha*, for the Petitioner.

Babu *Satindra Nath Mukherjee* for Mr. *Orr*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the Munsif of Basirhat, First Court, passed under section 476 of the Code of Criminal Procedure, sending the case against the petitioner to the Sub-Divisional Officer for enquiry or trial for committing offences punishable under sections 463 and 471 Indian Penal Code. The facts, so far as they are necessary for the decision of this Rule, are as follows:—The petitioner is alleged to have presented two petitions before the Moharrir in charge of rent-suits in the Munsif's Court asking for the return of the documents filed by one Bhiku Gagi in two rent-suits. These two petitions purported to have been signed by Babu Probodh Chunder Ghose, who was the Pleader of Bhiku Gagi in those rent-suits. These signatures of the Pleader have been held by the Munsif to be forgeries. The only point for our consideration is a purely technical one and that is, whether the Munsif had jurisdiction to take action under section 476, Criminal Procedure Code. Under that section, a Civil Court can only send for enquiry or trial cases of offences referred to in section 195, Criminal Procedure Code, and committed before it or brought under its notice in the course of a judicial proceeding. We think we must read this section to mean that the words "committed before it" are qualified by the words "in the course of a judicial proceeding." Taking this view, it appears to us that it cannot be held that these petitions were filed in the course of a judicial proceeding. The rent-suits in which the documents were filed had been finally disposed of and there was nothing pending before the Munsif, neither the original suits nor subsequent proceedings in execution. The definition of judicial proceeding is given in clause (*m*) of section 4 of the Code as including any proceeding in the course of which evidence is or may be legally taken on oath. Having regard to the provisions of O. XIII of the Code of Civil Procedure, it appears that no question can arise on an application for return of documents which would necessitate the taking of evidence on oath. On an application being made by a party, the documents are necessarily returned if the application is in the proper form and the act is purely ministerial. As we have said, in the present case the petitions were filed not before the Munsif but before the Moharrir. Had the Moharrir reported that the applications were in proper form, orders would have been passed by the Court as a matter of course. Taking this view, we hold that there were no judicial proceedings before the Munsif at the time these petitions alleged to be forged were filed and that, consequently, the Munsif had no jurisdiction to take action under section 476, Criminal Procedure Code. We accordingly set aside the order of the Munsif dated the 28th of July 1921 and quash any proceedings that may have been taken on the strength of that order.

N. K.

Order set aside.

NAGPUR JUDICIAL COMMISSIONNER'S COURT.

CRIMINAL REVISION NO. 164-B OF 1922.

November 3, 1922.

Present:—Mr. Prideaux, A. J. C.

SURYABHAN—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Revision, criminal—Questions of fact, findings on—High Courts, practice of—Interference, when permissible.

Inasmuch as a criminal revision is not a second appeal on questions of fact, it is the practice of the High Courts to accept facts as found unless there is any thing on face of the record against

that course being adopted or the accused have been prejudiced by the action and procedure of the Courts below.

Revision from an order of the Sessions Judge, Akola, dated the 26th July 1922, in Criminal Appeal No. 10 of 1922.

Mr. *D. T. Mangalmurti*, for the Applicant.

JUDGMENT.—This order also disposes of Criminal Revisions Nos. 165-B to 177-B of 922. The applicants are Suryabhan, Amrit, Tukaram, Chandrabhan, Sakharam, Udebhan and Ganpat. The facts found against these persons in the joint trial in the Courts below are as follows They were charged with the offence of rioting committed on the afternoon of the 11th January last by going together to the field of the complainant with the common object of assaulting him. Suryabhan was further charged under section 506, as he threatened the complainant saying, "You escaped to-day, but we won't leave you alive". The judgment of the Sub-Divisional Magistrate was a judgment which no Magistrate in his position should write. He did not discuss the prosecution evidence in any way. As a matter of fact, the judgment itself did not state the offences of which the accused were found guilty. The Court found that there was a dispute regarding a right of way through the field of the complainant Bapu and that he had obstructed the wife and the mother-in-law of the applicant Chandrabhan from passing through the field along with other females. This led to the show of force against the complainant. I have read the record and heard the Pleader for the applicants, and there is nothing to vitiate the findings of the Courts below. The Sessions Judge, Akola, has written a careful judgment and discussed the evidence while dealing with all known facts of the case. Criminal revision is not a second appeal on questions of fact. It is the custom in these cases to accept facts as found unless there is anything on the face of the record against that course being adopted or that the accused have been prejudiced by the action and procedure of the Courts below. These reasons do not apply here. There is evidence to warrant the convictions under section 147 of all the applicants and under section 506 of Suryabhan. Under these circumstances, I am not disposed to interfere and decline to do so, dismissing the seven applications for revision.

W. C. A. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 637 OF 1922.

January 11, 1923.

Present:—Mr. Justice Daniels.

RAM DIN SINGH—APPLICANT

versus

NAUJADAK SINGH AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 125—Application under section whether appeal—Bond to keep the peace—District Magistrate's power to cancel.

An application under section 125, Criminal Procedure Code, is not an appeal and does not give power to the District Magistrate to review an order passed by a Deputy Magistrate on the ground that it was improperly passed.

Banarsi Das v. *Partab Singh*, 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63, *Sita Ram* v. *Emperor* ,39 Ind. Cas. 998; 39 A. 466; 15 A.L. J. 469; 18 Cr. L. J. 630 and *Shanker Lal* v. *Emperor*, 51 Ind. Cas. 473; 41 A. 651; 17 A. L. J. 830; 1 U. P. L. R. (A.) 125; 20 Cr. L. J. 489, followed.

It is open to a District Magistrate to set aside, under section 125, Criminal Procedure Code, a bond to keep the peace if, on such evidence as may be laid before him, he finds that the danger of a breach of the peace no longer exists.

Criminal revision from an order of the District Magistrate, Ballia, dated the 25th October 1922.

Mr. *K. Verma*, for the Applicant.

Dr. *M. L. Agarwala* and Mr. *A.P. Pandiya*, for the Opposite Parties.

JUDGMENT.—This is an application for revision of an order of the District Magistrate setting aside an order directing the seventeen accused persons to file bonds to keep the peace under section 107 of the Criminal Procedure Code. The District Magistrate purported to act under section 125. He had previously sent up the case in revision to this Court on the ground that the order of the Deputy Magistrate was wrong and should be set aside. A learned Judge of this Court passed the following order:—

"I see no reason to interfere in this matter. The Magistrate has authority, if he so wishes,

to cancel the bonds under the provisions of section 126 (this is clearly a mis print for 125) of the Code of Criminal Procedure."

The learned District Magistrate has interpreted this order as authority for dealing with the application under section 125 as an appeal. In this he is clearly wrong. There is a series of rulings of this Court which lay down definitely that an application under section 125 is not an appeal and does not give power to the District Magistrate to review an order passed by a Deputy Magistrate on the ground that it was improperly passed. I may refer to the following cases in which this rule is laid down :—

Banarsi Das v. *Partab Singh* (1), *Sita Ram* v. *Emperor* (2), *Shanker Lal* v. *Emperor* (3), *Nizam-ud-din Khan* v. *Muhammad Zia-ul-Nabi Khan* (4). I, therefore, set aside the order of the District Magistrate. The case will be laid before the District Magistrate again and it will be open to him, if he, on such evidence as may be laid before him, finds that the danger of a breach of the peace no longer exists, to set aside the bonds on this ground.

S. D. *Order set aside.*

(1) 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 63.

(2) 39 Ind. Cas. 998; 39 A. 466; 15 A. L. J. 469; 18 Cr. L. J. 630.

(3) 51 Ind. Cas. 473; 41 A. 651; 17 A. L. J. 830; 1 U. P. L. R. (A) 125; 20 Cr. L. J. 489.

(4) 67 Ind. Cas. 350; 44 A. 614; 20 A. L. J. 521; 23 Cr. L. J. 398; (1922) A. I. R. (A.) 191; 4 U. P. L. R. (A.) 142.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 309 OF 1922.

December 5, 1922.

Present:—Mr. Batten, J. C.

EMPEROR—COMPLAINANT—APPLICANT

versus

JANGUSINGH—ACCUSED—NON-APPLICANT.

***Criminal Procedure Code** (Act V of 1898), s. 247—Case fixed for judgment—Complainant not directed to be present—Absence of complainant—Order of acquittal, whether legal.*

Where on the conclusion of a trial the case is adjourned to a subsequent date for delivery of judgment, without any express direction to the complainant to appear on the adjourned date, and the complainant fails to appear, the Magistrate is not justified in acquitting the accused under section 247 of the Criminal Procedure Code, as that section is not applicable after the hearing of a case is concluded.

Reference made by the District Magistrate Nimar, against an order, dated the 28th September 1922, in Criminal Case No. 22 of 1922, on the file of the Second Class Magistrate, Harsud, District Nimar.

JUDGMENT.—This is a case reported by the District Magistrate, Nimar, under section 438, Criminal Procedure Code. The offence was taken cognizance of on complaint, and was treated as an offence under section 352, Indian Penal Code. On the 26th September the defence witnesses were examined, and the case was closed for judgment to be delivered on the next day. On the 27th September the complainant and accused were present, but as the judgment was not ready the case was adjourned to the 28th September. The accused, who was on bail, was ordered to attend but no express direction was given either on the 26th or 27th September to the complainant that he should attend to hear the delivery of the judgment. On the 28th September the Second Class Magistrate passed the following order: "This complaint was proceeded with under section 352, Indian Penal Code. The case was fixed for order for to-day. Complainant absented himself but the accused was present. The accused is, therefore, acquitted under section 247, Criminal Procedure Code." Under section 247 "if the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

In *Girish Chandra Das* v. *Bhusan Das* (1) a Bench of the Calcutta High Court held in precisely similar circumstances that the case does not fall within the provisions of section 247, Criminal Procedure Code, because the hearing of the case had already been concluded and all that the Magistrate had to do was to deliver his judgment, and the attendance of the complainant had not been specially directed. In this view of the law I respectfully concur.

(1) 51 Ind. Cas. 476; 46 C. 867; 29 C. L. J. 387; 20 Cr. L. J. 492; 23 C. W. N. 959.

The order acquitting the accused was erroneous and I set it aside and direct the Magistrate to dispose of the case according to law.

W. C. A. *Order set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 494 OF 1922.

July 27, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

ASUTOSH DAS GUPTA—COMPLAINANT PETITIONER

versus

PURNA CHANDRA GHOSE AND ANOTHER—ACCUSED—OPPOSITE PARTY.

Acquittal—Revision—Private complainant—Locus standi *to be heard by High Court.*

A private complainant, in a proper case, may well be heard by the High Court when it is called upon to exercise its powers of revision against an order of acquittal. [p. 672, col. 1.]

Faujdar Thakar v. *Kasi Choudhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122, followed.

Rule against the order of the District Magistrate, Dacca.

Babu *Manmathanath Mukherjee* (with him Babu *Prakash Chandra Pakrashi*), for the Petitioner.—The complainant is the petitioner. The accused opposite parties were charged under sections 500, 501, Indian Penal Code. The Trial Court convicted accused No. 1 under section 500 and sentenced to three months' simple imprisonment and also a fine for Rs. 500. Accused No. 2 was sentenced to pay a fine of Rs. 200. On appeal to the Sessions Judge it was held that the accused could not be legally tried together and ordered re-trial of accused No. 1 under section 500, Indian Penal Code and of accused No 2 under section 501, Indian Penal Code. The learned Judge passed the order under section 423, Criminal Procedure Code. My submission is that the learned Judge ought to have given me an opportunity to support the conviction of the First Court. My next submission is that the learned Judge was wrong in holding that the two accused could not be tried together. I submit the two offences under sections 500 and 501, Indian Penal Code, formed part of one and the same transaction, *viz.*, publication of defamatory matter. Refers to section 239, Criminal Procedure Code.

Babu *Dasarathi Sanyal* (with him Babu *Asita Ranjan Ghose*), for the Opposite Parties.—I submit, first of all, that my friend on the other side has no *locus standi* at all. The petitioner is the complainant. The order of the learned Judge virtually amounts to an order of acquittal. Then, as to the merits, my submission is that the offences under sections 500 and 501, Indian Penal Code, were distinct and separate offences. They did not form part of the same transaction. The learned Judge finds that there is no evidence of conspiracy between the two accused. In fact according to the judgment of the Judge accused No. 1 is to be tried under section 500 while accused No. 2 is to be tried under section 501, Indian Penal Code. The learned Judge holds that no joint trial is possible. Refers to section 230 (*b*), Criminal Procedure Code. Refers to *Birendra Lal Bhaduri* v. *Emperor* (1), *Emperor* v. *Jethalal* (2), *Jogendra Kumar Nag* v. *Emperor* (3), *Emperor* v. *Sherufalli* (4), *Emperor* v. *Datto Hanmant Shahapurkar* (5), *Parmeshwar Lal* v. *Emperor* (6), *Tilakdhari Mahton* v. *Lali Singh* (7), *Gul Mahomed Sircar* v. *Cheharu Mandal* (8), *Johan Subarna* v *King-Emperor* (9), *Hrishi Kesh Mandal* v. *Abadhaul Mandal* (10), *Abdul Salim* v. *Emperor* (11), *Binga Chandra De* v. *Annoda Churan Chowdhury* (12) and *Raman Behary Das* v. *Emperor* (13).

(1) 30 C. 822; 7 C. W. N. 633.
(2) 23 B. 419; 7 Bom. L. R. 527; 2 Cr. L. J. 480.
(3) 61 Ind. Cas. 233; 25 C. W. N. 334; 22 Cr. L. J. 377.
(4) 27 B. 135; 4 Bom. L. R. 930.
(5) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.
(6) 4 Ind. Cas. 28; 13 C. W. N. 1089; 10 Cr. L. J. 476.
(7) 1 Ind. Cas. 63; 13 C. W. N. 804; 9 Cr. L. J. 147.
(8) 10 C. W. N. 53; 3 Cr. L. J. 141.
(9) 10 C. W. N. 529; 2 C. L. J. 618; 3 Cr. L. J. 111.
(10) 38 Ind. Cas. 421; 44 C. 703; 21 C. W. N. 250; 18 Cr. L. J. 309.
(11) 69 Ind. Cas. 145; 35 C. L. J. 279; 26 C. W. N. 680; 49 C. 573; (1922) A. I. R. (C.) 107.
(12) 69 Ind. Cas. 269; 35 C. L. J. 527, (1922) A. I. R. (C.) 76; 23 Cr. L. J. 684.
(13) 22 Ind. Cas. 729; 41 C. 722; 18 C. W. N. 1152; 15 Cr. L. J. 153.

As regards the other point that the Judge should have heard the complainant, I submit the Judge could proceed only in accordance with section 423, Criminal Procedure Code.

Babu *Mamnathanath Mukherjee* in reply.—As regards the objection as to *locus standi*. I submit I have got sufficient *locus standi* to move this Court. See *Faujdar Thakur* v. *Kasi Choudhuri* (14).

JUDGMENT.—This Rule was issued on the application of one Asutosh Das Gupta calling on the District Magistrate of Dacca and on the opposite parties to show cause why the order of the learned Sessions Judge setting aside the convictions and sentences of the opposite parties and directing a re-trial should not be set aside, or why such other and further order should not be made as to this Court may seem fit and proper.

The facts which have given rise to this application are as follows:—It appears that on the complaint of the petitioner, the opposite parties, namely, one Purna Chandra Ghose, and Satis Chandra Roy, were put upon their trial before the Deputy Magistrate at Dacca on charges under sections 500 and 501, Indian Penal Code, respectively. The trial took a very long time and at the expiration of nearly seven months, the learned Deputy Magistrate, by his judgment dated the 26th April, 1922, convicted the opposite party No. 1 under section 500, Indian Penal Code, and sentenced him to simple imprisonment for three months and also to pay a fine of Rs. 500 in default, to undergo simple imprisonment for six months more, and he convicted the opposite party No. 2 under sections 500 and 501, Indian Penal Code, and sentenced him to pay a fine of Rs. 200, in default, to undergo simple imprisonment for three months under section 501 and passed no separate sentence under section 500, Indian Penal Code. The opposite parties thereupon preferred an appeal to the learned Sessions Judge of Dacca. The latter by his judgment, dated the 20th May 1922, held that there was no evidence to support a charge under section 500, Indian Penal Code, so far as the opposite party No. 2 was concerned, and he further held that the opposite parties could not be tried together legally, and he, therefore, ordered a re-trial of the opposite parties separately, that is to say, of the opposite party No. 1 under section 500, Indian Penal Code, and of the opposite party No. 2 under section 501, Indian Penal Code.

The orders referred to above were made by the learned Sessions Judge under the provisions of section 423, Criminal Procedure Code. That section enacts that the Appellate Court shall peruse the record of the appeal, and after hearing the appellant or his Pleader, if he appears, and the Public Prosecutor, if he appears, and in the case of an appeal under section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may, in an appeal from an order of acquittal, reverse such order and direct further enquiry, or, in an appeal from a conviction, reverse the finding and sentence, acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction, subordinate to such Appellate Court. It is not necessary for us to quote the remaining words of the section.

The order of the re-trial which was made by the learned Sessions Judge on the 20th May 1922 has been attacked before us on two grounds, one, that such an order of re-trial should not have been made without giving the complainant, who had complained of having been defamed by the printing and publication of a certain defamatory matter, an opportunity of stating what he had to say in support of the order of conviction by the Deputy Magistrate. In the second place, the order has been attacked on the ground that the learned Sessions Judge was wrong in holding that the opposite parties could not be tried together legally and in ordering a re-trial.

Before us a preliminary objection has been taken by Mr. Sanyal who appeared on behalf of the opposite parties to the effect that the order of the Sessions Judge being an order of acquittal, a private complainant has no *locus standi* whatever and ought not to be heard by us. To that a sufficient answer is to be found in the judgment of Sir Lawrence Jenkins, C. J., in the case of *Faujdar Thakur* v. *Kasi Choudhuri* (14). We think that in a case of this description and on the facts such as have been brought

(14). 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

to our notice in this case a private complainant may well be heard by the High Court, when it is called upon to exercise its powers of revision. The preliminary objection, therefore, fails, and we now proceed to consider the points which have been urged before us.

Of the two points mentioned, the second is the real point involved in the case, but before the second point is discussed, we may observe in passing that before the learned Sessions Judge the only question for decision was whether the conviction of the appellants was right or not, and in this view of the matter, he could only hear the parties who are mentioned in section 423, Criminal Procedure Code. Be that as it may, as has been observed above, the second point is the real point which is involved in the case. We are indebted to Mr. Mukherjee and to Mr. Sanyal for the very exhaustive arguments addressed to us on the question whether there should or should not have been a joint trial of the two opposite parties under section 239, Criminal Procedure Code, on the charges which were brought against them.

Mr. Mukherjee has argued that the two offences, namely, the offence under section 500 and the offence under section 501, really form parts of one transaction, the transaction being the publication of a matter which was defamatory, and if they form parts of one transaction and if the two acts, namely, the act referred to in section 500 and the act referred to in section 501 form a series of acts leading to one transaction, the joint trial of the two opposite parties is entirely in order and the learned Sessions Judge had no power whatsoever to set aside the conviction and sentence passed on the opposite parties and to order a re-trial of the opposite parties; in other words, if Mr. Mukherjee is right in his contention that the accused started together for the same goal and that in the process a series of acts, although separated by intervals of time, were committed, they could legitimately have been jointly tried for those offences. For the purpose of finding out whether in this case the opposite parties could have been jointly tried, it is necessary to look into what has been found by the learned Sessions Judge. Both the opposite parties, as we have said, were charged under section 500, Indian Penal Code, and the opposite party No. 2 was charged under section 501. Now, so far as the charge under section 500 is concerned, we have the findings of the learned Sessions Judge that there is really no evidence of conspiracy between the two opposite parties: in other words, this finding amounts to a statement that, so far as the charge of publication of the defamatory matter is concerned, the two petitioners could not have been charged together. Therefore, the position is that, according to the learned Sessions Judge, there could have been one charge under section 500 against the opposite party No. 1, and another under section 501 against the opposite party No. 2. But that, for the reasons given by the Sessions Judge, no joint trial was possible. For the purpose of finding out, whether the learned Sessions Judge is right in his contention, we must examine the terms of section 239, Criminal Procedure Code, and the illustrations to that section in order to test the soundness of the reasonings adopted by the learned Sessions Judge. Having regard to the finding of the learned Sessions Judge, we are of opinion that it is difficult to say that there is any common act with which both the opposite parties could have been linked together. There is no common factor so far as the offences alleged to have been committed by the two opposite parties are concerned. Illustration (*b*) of section 239 affords, on the facts of this case, and on the findings arrived at by the learned Sessions Judge to be conclusive answer to the question of the legality of the joint trial of the two opposite parties. We must proceed on the basis that, so far as the opposite party No. 1 is concerned, he is innocent of the charge of the publication of the defamatory matter. That being so, and although this case is one on the border line, taking into consideration the peculiar facts of this case, we are unable to say that the joint trial of the two opposite parties was validly held; in other words, we have come to the conclusion on a very careful consideration of the arguments that have been addressed to us that the order made by the learned Sessions Judge must be allowed to stand.

The result is that this Rule must be discharged.

B. N. *Rule discharged.*

MOHENDRA LAL ROY, *In the matter of.*

CALCUTTA HIGH COURT.

REFERENCE (UNDER THE LEGAL PRACTITIONERS ACT) No. 6 OF 1922.

August 16, 1922.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

In the matter of Babu MOHENDRA LAL ROY AND OTHERS.

Legal Practitioners Act (XVIII of 1879), ss. 13 (b), (f), 14 (c)—*Court subordinate to High Court—Additional District Magistrate—Report of misconduct through Sessions Judge, legality of.*

The Court of an Additional District Magistrate is a Court subordinate to the High Court within the meaning of section 14 of the Legal Practitioners Act. Where an Additional District Magistrate is invested with all the powers of a District Magistrate under the Criminal Procedure Code he is competent to draw up a charge against a Legal Practitioner alleging misconduct within the terms of sections 13 (*b*) and 13 (*f*) of the Act, and to forward his report under section 14 (*c*) to the High Court. It is not essential, however, that the report should be submitted to the High Court direct, it can be properly submitted through the Sessions Judge. [p. 675, col 1]

Case reported by the Additional District Magistrate, Dacca, under section 14, Legal Practitioners Act, 1879.

Babu *Dasarathi Sanyal* (with him Babus *Upendra Lal Roy* and *Jitendra Kumar Sen Gupta*), for the Pleader, Babu Mohendra Lal Roy, took a preliminary point that the reference was invalid by reason of the procedure adopted. The Additional District Magistrate has no power under the Legal Practitioners Act to make the reference. An Additional District Magistrate is inferior to the District Magistrate in respect of the powers conferred upon the latter: See *Emperor* v. *Abdul Karim* (1). See also *Mohendra Bhumij* v. *Emperor* (2). For the purposes of the Code of Criminal Procedure the Local Government may invest an Additional District Magistrate with all the powers of a District Magistrate under the Code. But the Local Government cannot confer upon him the powers of a District Magistrate under the Legal Practitioners Act. The expression "Magistrate in charge" is a very loose expression. For example, a Sub-Divisional Magistrate is sometimes called "in charge Magistrate," *i.e.*, a Magistrate in charge of criminal matter. Thus, the reference should have been made by the District Magistrate, and not by the Additional District Magistrate. The Additional District Magistrate had no jurisdiction to institute these proceedings. Reads section 14 of the Legal Practitioners Act. There is no mention of an Additional District Magistrate in the section.

Mr. *B. L. Mitter*, Counsel for the Crown.—This reference comes within sub-clause (*c*) and not (*b*) of the Legal Practitioners Act. If it does not strictly come within sub-clause (*b*) because the Additional District Magistrate was not known to the Legislature in 1879, it comes within sub-clause (*c*). The Court is to look not to the mere form but to the substance of a matter: Refers to *Emperor* v. *Rajani Kanta Bose* (3). Can there be any real grievance because the charge was enquired into not by the District Magistrate but by the Additional District Magistrate? Even if the preliminary point of Mr. Sanyal be assumed to be not a mere technical one but having some merit in it, it must be established before the argument finds favour with your Lordships that the Additional District Magistrate was subordinate to the District Magistrate. Mr. Sanyal submitted that the Additional District Magistrate was a Magistrate other than the District Magistrate but he was very careful not to submit that he was subordinate to the District Magistrate. There is no procedure laid down as to how in matters like the present the Additional District Magistrate is to approach your Lordships: Refers to *Rasik Lal Nag, In the matter of* (4).

If it be held that the Additional District Magistrate is subordinate to the District Magistrate, then, of course, your Lordships may call for the opinion of the District Magistrate. If he is subordinate to the District Magistrate, then, no doubt, he should have come through the District Magistrate and the Sessions Judge.

On the merits, there can be no doubt that the conduct of the Legal Practitioners concerned was highly reprehensible. The im-

(1) 25 P. R. 1908 Cr. 9 Cr. L. J. 104.
(2) 66 Ind. Cas. 69; 25 C. W. N. 383; 48 C. 74; 23 Cr. L. J. 229.
(3) 71 Ind. Cas. 81; 35 C. L. J. 356 at p. 391; 26 C. W. N. 589; 49 C. 732; (1922) A. I. R. (C.) 515.
(4) 38 Ind. Cas. 980; 44 C. 639 at p. 647; 24 C. L. J. 190; 20 C. W. N. 1284; 18 Cr. L. J. 420.

putations against the fairness and impartiality of the Court were gratuitous, unfounded and absolutely unnecessary. What really happened was that, being annoyed at a judicial ruling of the Court which was apparently against the interest of their clients, they gave the Magistrate a 'bit of their mind'. But such absence of self-control of men of the legal profession which is highly detrimental to the administration of justice, cannot but be characterised as grossly improper and amounts to misconduct within the meaning of the Legal Practitioners Act.

Babu *Dasarathi Sanyal*, in reply.—The incident, if true, was, at best, a contempt of Court. It was the duty of the Court, before whom the incident took place, to take action. But the Deputy Magistrate did not do anything of the kind. No action was taken under section 228 of the Penal Code. No body would ever have heard of these proceedings but for the interference of the Additional District Magistrate in the matter.

We have heard much of the prestige of the Bench but little of the independence of the Bar. If the Legal Practitioners Act is thus used as a machinery to keep down the independence of the Bar, its prestige would be nowhere in no time.

Babu *Manmathanath Mukherji* (with him Babus *Debendra Narayan Bhattacharjee*, *Asitaranjan Ghose* and *Lalit Mohan Sanyal*), for the other Pleaders and the Mukhtear.—There was no evidence as to the exact Bengali words used. The retirement was under instructions from the client. There is evidence that there was some pre-arrangement with the clients in pursuance of which the Pleaders retired. The clients were thus not taken by surprise. It was not a case of desertion. There is nothing to show that what was said by Mahendra Babu was part of the arrangement to retire. There is thus nothing incriminating against my clients.

JUDGMENT.

Sanderson, C. J.—This is a report under section 14 of the Legal Practitioners Act by the Additional District Magistrate of Dacca with respect to charges of misconduct under sections 13 (*b*) and 13 (*f*) against three Pleaders and one Mukhtear practising in the Courts of and subordinate to the District Magistrate of Dacca. The report has been forwarded through the learned Sessions Judge of Dacca.

There were two other Pleaders against whom charges were framed, but the Additional District Magistrate came to the conclusion that there was no ground for reporting against these two Pleaders.

At the beginning of the hearing in this Court, a preliminary point was taken by the learned Vakil, appearing for Mohendra Lal Roy, that the reference was invalid by reason of the procedure adopted.

It was contended that the proceedings, if any, should have been instituted by the Deputy Magistrate who was trying the case during the hearing of which the incident which is the basis of these proceedings, occurred; that his report, if any, should have been submitted through the District Magistrate and the learned Sessions Judge as provided by section 14 (*b*) of the Legal Practitioners Act. It was further contended that the Additional District Magistrate had no jurisdiction to institute the proceedings.

The facts, which it is necessary to state for the consideration of this point, are as follows:—It appears from the *Gazette*, that Mr. Gurner was appointed on the 15th October 1921 as Additional District Magistrate at Dacca with all the powers of a District Magistrate under the Criminal Procedure Code.

It appears from the report of the Additional District Magistrate, that at the time in question he was in charge of the criminal work of the district, hearing criminal appeals and reporting the progress of criminal work to the High Court.

The incident, which is the basis of these proceedings, occurred on the 4th February 1922 in the Court of the Deputy Magistrate, Mr. S. P. Ghose, who was trying the case *Asutosh Das Gupta* v. *Purna Chandra Ghose* (5) and another, in which the accused were charged with offences under sections 500 and 501, Indian Penal Code.

It seems that an account of the incident appeared in a newspaper, on the 5th February 1922. The Additional District Magistrate on that day wrote to the Deputy Magistrate, calling for a report of the circumstances relating to that incident. The Deputy Magistrate made a report on the 6th Feb-

(5) 71 Ind. Cas. 670; 24 Cr. L. J. 206.

ruary 1922 and a further one on the 7th February 1922.

The result was that on the 9th February 1922 the Additional District Magistrate drew up a charge under the Legal Practitioners Act alleging misconduct within the terms of sections 13 (*b*) and 13 (*f*). Notice was duly given to the Pleaders and the Mukhtear concerned, and cause was shown before the Additional District Magistrate by them on the 6th March 1922.

The report of the Additional District Magistrate, dated 6th May 1922, was forwarded by him to the High Court through the learned Sessions Judge of Dacca.

The learned Judge heard learned Counsel on behalf of those concerned in the report, drew up his opinion on the matter, and sent it together with the report of the Additional District Magistrate to the High Court

The Additional District Magistrate's Court was a Court subordinate to the High Court within the meaning of section 14 of the Legal Practitioners Act and, in my judgment, the Additional District Magistrate was competent to draw up the charge. He was the Presiding Officer of the Court in which the Pleaders and the Mukhtear were charged with the alleged misconduct and he was competent to report the matter to the High Court.

There is no mention of an Additional District Magistrate in section 14 of the Legal Practitioners Act. This is explained by the fact that the power to appoint Additional District Magistrates was not vested in the Local Government until after the passing of the Legal Practitioners Act.

It was argued by the learned Standing Counsel that the Additional District Magistrate, being a Court subordinate to the High Court, might have reported direct to the High Court. In my judgment, however, the Additional District Magistrate very properly followed the procedure laid down in section 14 (*c*) with reference to a report by a District Magistrate and forwarded the report through the learned Sessions Judge.

In my judgment, therefore, the preliminary point has no substance in it and must fail.

But even if the Court had felt constrained to adopt the argument of the learned Vakil for Mohendra Lal Roy, his client would not have been benefited thereby.

In *Rasik Lal Nag, In the matter of* (4) it was held by the learned Judges as follows:—

"It cannot be disputed that this Court is competent to take action under section 13, clause (*f*), after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court; the enquiry may well be made by a Subordinate Court under the direction of the High Court. The only essential is, as pointed out by the Full Bench in *Ganapathy Sastry, In re* (6), that notice must be given to the Legal Practitioner concerned to show cause against suspension or dismissal, and the notice must formulate the charges, with great particularity and precision, so as to enable the practitioner to know the charges he is called upon to meet. That condition has been amply fulfilled in this case. There is, thus, no reason, why the enquiry by the Munsif, though not conducted under the orders of this Court, should not be adopted for the purpose of a proceeding under section 13, if we took the view that this Court could proceed only under section 13 and not on a report by the Subordinate Court under section 14."

In this case there was due notice, the charge was framed with particularity and precision, there was a full enquiry in which those concerned showed cause, and appeared by Counsel or Pleaders, and this Court has the opinion, not only of the Additional District Magistrate but also of the Sessions Judge. Even if this Court considered that the preliminary objection should be sustained, there could be no possible reason for directing a further enquiry, and the Court would adopt the enquiry and reports already made.

As regards the merits of the case, it appears that the three Pleaders concerned in the report, Mohendra Lal Roy, Peari Mohan Ghose, Surendra Mohan Mukherjee and two other Pleaders, and Parbati Kumar Bose, Mukhtear, were representing the accused in the case hereinbefore mentioned, which was in the Court of the Deputy Magistrate. It appears from the judgment of Walmsley, J., in connection with a Rule, to which I

(6) 3 Ind. Cas. 344; 19 M. L. J. 504; 6 M. L. T. 253; 11 Cr. L. J. 274 (F. B.).

will refer presently, that, on the 25th October 1921, the accused persons filed a petition in the Court of the Trying Magistrate intimating that for special reasons it was not proper that the case should be tried by him and that they intended to apply to the High Court for a transfer. The Trying Magistrate gave them six weeks' time to make the application to the High Court but no steps were taken. The case accordingly proceeded before the Deputy Magistrate and evidence was taken.

A charge was framed and the complainant was cross-examined for three days, 25th to 27th January 1922. The cross-examination lasted from 12 to 5 on the first two days and from 12 to about 2-30 on the third.

On the 27th January 1922 the Deputy Magistrate disallowed certain questions. This in the exercise of his judicial discretion he was entitled to do, and, if he regarded the questions irrelevant, as the Deputy Magistrate said he did, he was bound to disallow them. After this decision the cross-examination of the complainant went on for sometime, it was then closed and the case was adjourned until the 4th February. On that day the Pleaders on both sides, and the other witnesses who still had to be cross-examined, were present.

The learned Pleader, Mohendra Lal Roy then presented and read a petition, Exhibit 4, on behalf of the accused.

The petition set out reasons, which were alleged to show that the above-mentioned questions were relevant, and should not have been disallowed: and the Deputy Magistrate was therein asked to re-consider the matter and allow the further cross-examination of the complainant in this respect.

The Pleader for the complainant was then heard upon this matter, and, after hearing the Pleader for the accused, the Deputy Magistrate made the following order:—

"I consider these questions to be irrelevant and I, therefore, refuse to allow further cross-examination on that point."

Thereupon, the Pleader for the accused, Mohendra Lal Roy, presented another petition which was already prepared, asking for adjournment of three weeks in order that an application might be made to the High Court for a transfer of the case from the file of the Deputy Magistrate to some other Court of competent jurisdiction. The petition alleged as the ground of the application "that your petitioners now apprehend for reasons not necessary to disclose here that they cannot expect to have a fair and impartial trial in this Court".

The Deputy Magistrate refused the application, making the following order: "An adjournment under section 526, Criminal Procedure Code, was allowed before, this petition which is filed again under section 526, Criminal Procedure Code, at a late stage of the trial is rejected". The Deputy Magistrate, no doubt, was referring in that order to the adjournment which had been previously granted in October 1921. He might have added, what was the fact, that no steps had been taken by the accused to apply to the High Court for a transfer of the case to another Court.

Then occurred the incident which is the basis of the proceedings under the Legal Practitioners Act.

The account given by the Deputy Magistrate is as follows:—"Then Babu Mohendra Lal Roy said that they would retire from the case, because they could not expect a fair and impartial trial in this Court As far as I remember I told them that I did not know what they would do, but their clients could not retire from the case. After this, Mohendra Babu addressed the accused persons in Bengali. He told them to sit quietly and not to cross-examine the witnesses, and added that they could not expect a fair and impartial trial from this Court. Saying this, they went away. As far as I remember, when they left, the Rai Bahadur said 'It seems that the Pleaders are non-co-operating with the Court'. After the Pleaders left I asked the accused if they would cross-examine the witnesses. They said, they could not, as their Pleaders had gone away. Neither Mohendra Babu nor any other of the Pleaders told me that they were retiring as the accused had previously agreed on their doing so. The Pleaders did not, before retiring, take the permission of the accused in Court, nor did the accused in my presence tell them to retire. Mohendra Babu did not ask or receive my permission to retire. The statement that Mohendra Babu asked the accused whether they wished them to cross-examine,

to which the accused answered in the negative, is untrue."

The explanation given by Mohendra Lal Roy is that, in consequence of the ruling given on the 27th January by the Deputy Magistrate disallowing the questions, a consultation was held sometime before the date of the next hearing."

Paragraphs 15 and 16 of the explanation are as follows:—

"That, in consequence of the attitude taken up by the learned Magistrate a consultation was held some time before the date for the next hearing amongst the defence Pleaders in which both the accused were present. After a most careful consideration of the matter the defence Pleaders, including your petitioner, were of opinion, that, with all respect to the Trying Magistrate, the points on which the cross-examination was not allowed were not only relevant but most material and essential and went to the very root of the defence and if cross-examination on these points was not allowed, it would seriously hamper the defence and in fact no proper defence of the accused would be possible and would amount to a virtual denial of the right of the accused to prove their defence and that it would be useless for the Pleaders to further appear in the case as they would not be able to render any effective service to the accused.

"That it was then decided in consultation with both the accused:—

"That on the next date of hearing, *i.e.*, on 4th February 1922, a petition should be put in fully explaining the relevancy of the questions which had been disallowed and praying that at the complainant might be re-called for further cross-examination on these points and other relevant points.

"That if the said petition be rejected then a petition for adjournment should be submitted to enable the accused to move the Hon'ble High Court, for the transfer of the case to some other Court as it was apprehended by the accused that they would not get a fair and impartial trial in that Court.

"That if the latter petition, too, were rejected the accused would not defend themselves in the said Court and the services of their lawyers would no longer be necessary for the purpose of the defence in the case in that Court and the accused would move the Hon'ble High Court for a transfer of the case whether an adjournment were granted for the purpose or not; your petitioner further submits that both the accused fully agreed to this."

The learned Pleader's account of what took place in Court, after the petition for adjournment was rejected on the 4th February, is contained in paragraphs 20, 21 and 22 of the explanation, which are as follows:—

"That thereupon your petitioners submitted to the Court that as, in their humble opinion, the trial would, under the circumstances, be void and illegal and as the accused did not expect a fair and impartial trial in that case in that Court they thought they might retire to which the Court observed that they might retire but their clients could not.

"That the petitioner and the lawyers for the defence, including your petitioner, who were present there at the time, were then about to retire from the Court when Babu Parbati Charan Bose, Mukhtear for the defence, suggested that, under the circumstances, the accused should be questioned as to whether they would stick to the course they had already decided upon.

"That your petitioner told the accused in Bengali that as they (the accused) did not expect a fair and impartial trial in that Court and as, under the circumstances, no useful purpose could be served by cross-examining the other witnesses and your petitioner advised both accused not to cross-examine the remaining witnesses and asked them if they desired him to cross-examine them to which they answered in the negative".

The Additional District Magistrate came to the following conclusions:—

"Between these two accounts one has to accept one or the other and on that decision rests the answer to the question whether Babu Mohendra Lal Roy, as spokesman of the Pleaders, was engaged in the necessary and legitimate consultation with the accused or, under cover of remarks to the accused, unnecessarily impairing public confidence in the Court. After carefully weighing the two accounts, I cannot believe that the Magistrate and two Pleaders called for the proceedings are so completely

wrong in their recollection as one must believe of accepting the truth of the opposite account. I find it the more difficult to believe this when the general circumstances already noticed are so far ou of keeping with a *bona fide* consultation between the Pleaders and their clients.

"My conclusion is that the words used by Babu Mohendra Lal Roy to his client did no amount to a *bona fide* consultation, but that cover was taken of an address to the client for a parting fling at the fairness of the Court. In making this second and quite gratuitous sally to impair confidence in the Court it seems to me that Babu Mohendra Lal Roy was guilty of grossly improper conduct as a Pleader, and that those who associated themselves with him in retiring in these circumstances participated in the impropriety.

"The conclusions I have come to on the four main issues stated are, then, that the Pleaders retired probably by previous arrangement with the leading accused on the Court giving a judicial ruling rejecting the application under section 526 and that Babu Mohendra Lal Roy marked that retirement by words addressed first to the Court, and then to the accused accentuating the idea that this retirement took place as justice was not to be obtained in the Court."

The Additional District Magistrate concluded:—

"In fact, the whole affair takes, in my opinion, the appearence of a forensic manœuvre designed to accentuate the difficulties of the Court in the event of its rejecting the petition under section 526, Criminal Procedure Code, and to make the most in the Court-room of the idea that justice was not to be had in this Court."

The learned Sessions Judge in giving his opinion said: "If it be a fact that the Pleaders had previously arranged with their clients that they should retire from the case in the event of the Magistrate refusing their application for an adjournment under section 526 of the Criminal Procedure Code, the moment chosen by them for the retirement and the manner in which it was effected showed great disrespect for the Court. They retired immediately after the Magistrate refused their application for an adjournment, and they effected it in such a manner that it amounted to a demonstration against the order made by the Court in the exercise of its judicial discretion."

In my judgment, there can be no doubt that the learned Pleaders had arranged with their clients that they should retire from the case in the event of the Deputy Magistrate refusing the two petitions above referred to. I am not, however, satisfied that it had been previously arranged among the Pleaders that their retirement should be marked by the statements in open Court making imputations against the fairness and impartiality of the Deputy Magistrate.

I am satisfied that the findings of the Additional District Magistrate and the learned Sessions Judge, as to what took place after the petition for adjournment was refused, are justified by the evidence that the learned Pleader Mohendra Lal Roy made two statements, the first addressed to the Deputy Magistrate and the second to the accused in such a way that they were heard by those in Court and that both such statements involved imputations upon the fairness and impartiality of the Deputy Magistrate

In my judgment, both these statements were gratuitous and unjustifiable These statements were not made in the course of argument or in support of the application for adjournment. The application for adjournment, so that the High Court could be moved, had been discussed and rejected. There was no reason why the learned Pleader should have done anything more than retire from the case, in accordance with the instructions of his clients which he alleged he had already received, without making any imputation against the Court. The High Court could have been moved for an order of transfer. It is to be noted that on the 13th February 1922 an application for transfer of the case to some other competent Court was in fact made to the High Court on the ground tha the accused reasonably apprehended that they would not get a fair and impartial trial before the Deputy Magistrate and a Rule was obtained. When, however the Rule was heard by the High Court it was discharged, and it must, therefore, be assumed, for the purpose of these proceedings that there was no substantial reason, if any for the alleged apprehension of the accused.

Similarly, there was no reason or necessity for the learned Pleader to address the accused in such a way that all could hear and advise them that "as they did not expect a fair and impartial trial in that Court" they should take a certain course.

The course which was to be taken, apparently, had been agreed beforehand, but even if it was necessary for the learned Pleader to communicate with his clients again upon the matter, that should have been done in the usual way and not by addressing the accused from one side of the Court to the other, as described in the opinion of the learned Sessions Judge.

It is not necessary for me to deal with the evidence in detail. I agree with the Additional District Magistrate that the evidence of Purna Chandra Ghose, one of the accused, who was the first witness for the Pleader, was obviously unreliable, and as regards the evidence of the only other witness who gave evidence on behalf of the learned Pleader, it was stated by him that he had told no one what he knew about the case until he went into the witness-box and that he had no note of what occurred. The incident occurred on the 4th February and he was giving his evidence on the 10th March—two months after the event. It is quite possible to conclude that the witness had not remembered all that occurred, without making any reflection upon his veracity. The evidence, on the other hand, against the learned Pleader which has been adopted by the Additional District Magistrate, is confirmed by documents which came into existence on or about the time of the incident. I refer to the petition filed on behalf of Asutosh Das Gupta, the complainant, and the reports of the Deputy Magistrate dated 6th February and 7th February.

I have no doubt that the petition of the complainant was drawn up on the 4th February 1922, the very day of the occurrence, though there is a dispute as to the date of filing. The Pleader who drafted the petition was called as a witness, and proved that he attached his signature to it and made it over to Jadu Babu about 4-30 P. M. on the 4th February for the purpose of filing.

It was argued on behalf of the learned Pleader that nothing would have been heard of this matter but for the action of the Additional District Magistrate in calling for a report from the Deputy Magistrate. In my judgment that is not correct. The Deputy Magistrate said in his evidence that "on the 6th I went to see the District Magistrate on my own account to report the incident to him. My idea at that time was to report to the Additional District Magistrate what had happened. My intention at that time was to see what remedy could be taken and wanted to consult the District Magistrate about it. He asked to report to the Additional District Magistrate and on coming to my room to do so I found a note from the Additional District Magistrate enquiring about the incident as reported in the *Dacca Herald.*"

He further said that the Court was crowded when the incident took place and he considered himself much humiliated.

It is clear, therefore, from the above passage that the Deputy Magistrate went of his own accord to the District Magistrate to report the incident to him and to consult him as to what should be done, before he received the letter from the Additional District Magistrate enquiring about the incident.

In any event, the final determination in these cases rests with the High Court alone, as was pointed out by the learned Judges in *Rasik Lal Nag, In the matter of* (4) and even if the alleged misconduct had been brought to the notice of the High Court, without the intervention of the subordinate Court, this Court is competent and ought, in a proper case, to take the necessary action.

Having carefully considered the matter I regret that I am bound to come to the conclusion that the learned Pleader Mohendra Lal Roy, gratuitously and unnecessarily made in open Court statements which contained imputations against the fairness and impartiality of the Deputy Magistrate imputations, which, as already mentioned, we must assume, for the purpose of this case, were without any foundation Such statements, impugning the fairness and impartiality of a Judicial Tribunal would be, in any event, a grave matter, but when they emanate from a learned Pleader, such as Mohendra Lal Roy, occupying a leading position at the Bar, they assume a still more serious character and are calculated to

have an effect, which is far reaching and detrimental to the due administration of justice.

During the argument reference was made by the learned Vakil appearing for the learned Pleader to the independence of the Bar.

I yield to none in my desire to see the independence of the Bar maintained. It is necessary, however, to note that, in the case before us, the Deputy Magistrate had in no way interfered with the independence of the Bar. He merely gave a judicial ruling as to the relevancy of certain questions, in consequence of which the Pleaders chose to take the action which has been referred to. Further, I am glad to think that the independence of the Bar has been in the past, and I hope will be in the future, maintained, without making gratuitous and unfounded imputations upon the fairness and impartiality of the Tribunals.

In my judgment the learned Pleader, Mohendra Lal Roy, in making such statements was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of section 13 (*b*) and of such misconduct as would come within section 13 (*f*) of the Legal Practitioners Act.

As regards the case of the other Pleaders and the Mukhtear, there is no suggestion that any of them made any such statements as those to which I have referred.

By leaving the Court in company with their leader, Mohendra Lal Roy, after he had made the above-mentioned statements, they, in a case, associated themselves with his misconduct.

I am not satisfied, however, that the statements of Mohendra Lal Roy were made in pursuance of any previous arrangement with the other Pleaders or the Mukhtear, although, no doubt, it was arranged that they should retire from the case in the event of the petition for the adjournment being rejected.

It was also argued on their behalf that they may not at the time have realised the serious nature of the statements made by their leader Mohendra Lal Roy, and that they went out of Court with him merely because of the previous arrangement to take no further part in the case.

I am not prepared to hold that, from their conduct and by the sequence of events, they must be taken to have associated themselves with their leader's statements, and I am willing to accept the view of this case put before the Court by the learned Vakil who appeared for them, *viz.*, that they may not have realised the nature of the statements made by Mohendra Lal Roy and the serious position which must naturally arise in consequence of such statements being made by a learned Pleader. I, therefore, come to the conclusion that this Court should not hold that the learned Pleaders, Peari Mohan Ghose, Surendra Mohan Mukherjee and Mukhtear Parbati Kumar Bose were guilty of such misconduct as is contemplated by section 13 (*b*) and (*f*) of the Legal Practitioners Act.

We have carefully considered what course should be adopted in the case of the learned Pleader Mohendra Lal Roy

The Deputy Magistrate said that he was on intimate terms with the learned Pleader and that out of Court he is an amiable gentleman.

He stated, however, that the learned Pleader was very impulsive, that he had recently insulted a Pleader in his Court but that he had apologized a few days after in open Court. It appears also that the learned Pleader is the Secretary of the Local Bar Association and, therefore, I assume that he enjoys the confidence of his brother Pleaders, and that he is a man of position at the Bar at Dacca. These considerations are in one sense in his favour.

On the other hand, the very fact that the learned Pleader occupies such a leading position, in my judgment, makes his misconduct all the more serious and inexcusable. Further, it is to be noted that there has been no sign of any apology or expression of regret for his conduct, although it must have been obvious to him, shortly after the incident of February 4th 1922, that what he had done inflicted humiliation on the Deputy Magistrate and was calculated to bring the administration of justice into disrepute.

It is to be remembered that Pleaders have a duty not only towards their clients but also towards the Court of which they are Pleaders, and it is part of their duty to

co-operate with the Court in the orderly and pure administration of justice.

The learned Sessions Judge in his report referred to an occasion when the learned Pleader is alleged to have made an offensive remark with regard to a learned Subordinate Judge. We refer to this, only for the purpose of making it clear that we have not taken this matter into consideration and we have not been influenced by it in any way. We confine our judgment to the reports and evidence relating to the incident of February 4th, 1922.

We regard this case as a serious one, and we cannot help regretting that the learned Pleader has not seen fit to express his regret.

Under these circumstances, it is impossible, in our judgment, to dispose of the case merely by passing censure on the conduct of the learned Pleader and we consider it our unpleasant duty to direct that the learned Pleader, Mohendra Lal Roy, be suspended for the period of one month.

Mohendra Lal Roy, therefore, is suspended for the period of one month from to-day.

Richardson, J.—There is really nothing for me to add to my Lord's exhaustive judgment which I have had the opportunity of reading and with which I agree throughout. I desire, however, to associate myself especially with what my Lord has said as to the independence of the Bar. I wish that gentlemen belonging to the learned profession of the law would get it out of their heads that any one desires to curtail the privileges of the Bar or interfere with its independence. I take it that independence in this connection means freedom to do one's individual duty without fear of or favour to any man. The independence of the Bar is recognised as a valuable asset in the Civil life of the community and is, as I regard the matter, a corollary of that independence which appertains in the same sense to the Bench. I know of no quarter from which the independence of the Bar in that sense is in any way menaced, unless there be a hint of danger arising from associations formed by members of the Bar themselves. There may be a tendency on the part of such Associations unduly to restrict the liberty of individuals in matters not strictly pertaining to professional practice. But if there be such a danger, or such a tendency the members of the profession have the remedy in their own hands. Incidents will, of course, occur from time to time which had better not have occurred. After all, men are human, whether on the Bench or at the Bar, and in the heat of the moment or on the impulse of the moment expressions may be used on one side or the other which are not within the bounds of propriety. But in the great majority of such cases an apology or an expression of regret for overhastiness in speech, tendered and accepted in the right spirit would be sufficient to terminate the incident. Relations between the Bench and the Bar can be adjusted only on a basis of mutual anxiety that justice should be duly administered.

With these few observations, I concur in the judgment which has just been delivered.

W. C. A. *Suspension ordered.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATIONS NOS. 12, 13 AND 17 TO 20 OF 1922.

February 28, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

BRIJ KUMAR—APPLICANT

versus

MANNA LAL MISRA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 439—Order revoking sanction to prosecute—Revision—Sanction, grant of Principles underlying

An order revoking a sanction to prosecute might be treated, in effect, as an order refusing to grant the sanction and, whether section 195 (6) or section 439 of the Criminal Procedure Code is applied, the propriety of the order revoking the sanction or refusing to grant it can be considered by a High Court in revision. [p. 682, col. 2; p. 683, col. 1]

Bapu v. *Bapu*, 14 Ind Cas. 305: 39 M. 750; 11 M L. T. 367; (1912) M. W. N. 499; 24 M. L. J. 419; 13 Cr. L. J. 09, *Padarath Singh* v. *Ratan Singh*, 54 Ind Cas. 673; 5 P. L. J. 23; (1920) Pat. 140; 1 P L. T. 458; 21 Cr. L. J. 145, *Ramnandan Prasad Narayan Singh* v. *Public Prosecutor*, 61 Ind. Cas. 995; 22 Cr. L. J. 467 and *Girija Sankar Roy* v.

BRIJ KUMAR *v.* MANNA LAL MISRA.

Binode Sheikh, 5 C. L. J. 222; 5 Cr. L. J. 188, followed.

Choti v. *Khecheru*, 58 Ind. Cas. 250; 42 A. 640; 18 A. L. J. 758; 2 U. P. L. R. (A.) 353; 21 Cr. L. J. 746 and *Debi Sahai* v. *Raghunath Sahai*, 61 Ind Cas. 173; 19 A. L. J. 399; 22 Cr. L. J. 349, not followed.

Nawab Ali Khan v. *Emperor*, 63 Ind Cas. 409; 24 O. C. 165; 22 Cr. L. J. 649, distinguished.

The power to grant sanction under section 195 of the Criminal Procedure Code is included among the powers which can be exercised in revision under section 439 of the Code; and if this power can be exercised in a proceeding arising out of a trial in any of the lower Courts, it can also be exercised for discharging an order made by a subordinate Court revoking the sanction granted by a Trying Magistrate. [p 683, cols 1 & 2.]

No one should be permitted to use the penal law to satisfy his own private ends or personal spite, and if there is a *prima facie* ground for thinking that a charge is prompted by improper motives and is false and vexatious, the necessary elements to justify the grant of a sanction to prosecute are made out. [p. 683, col. 2.]

A sanction to prosecute granted by the Trial Court aganist a person instituting Criminal proceedings ought not to be lightly set aside because of the mere existence of a possibility of the charge and the evidence adduced in support of it being true. [p. 683, col 2]

Application against an order of the Sessions Judge, Lucknow, dated the 6th December 1921, setting aside the order of he District Magistrate, Unao, dated the 23rd September 1921

Messrs. *R. F. Bahadurji* and *Bikramajit Singh*, for the Applicant.

Dr. *J. N. Misra*, fo the Opposite Party.

JUDGMENT.—Manna Lal Misra, a resident of Cawnpore, filed a complaint against Brij Kumar and three other persons, charging them with robbery. His story was that, while he was going from his home in the District of Cawnpore to Bangermau in the District of Unao to attend a *katha* or religious recitation, he was waylaid by the accused persons and robbed of the jewellery he was wearing and some cash which he had then in his possession. The charge was tried and found by the District Magistrate to be false and vexatious. An application for revision was subsequently filed in the Court of the Sessions Judge and was rejected. Brij Kumar had meanwhile filed an application for sanction to prosecute the complainant, Manna Lal Misra, on charges under sections 193 and 211 of the Indian Penal Code and four other applications for sanction to prosecute Panthadin, Bhagwat Das, Hanoman and Ram Chandra, who had been examined during the trial as witnesses for the prosecution, under section 193 of the Code. A similar application had been made against four other persons, Ambika Prasad, Balgobind, Jamna Prasad, and Manna Lal Bajpayi for sanction to prosecute them on a charge of abetment under section 109, read with section 211, of the Indian Penal Code. The Trying Magistrate recorded some evidence bearing on the alleged abetment and granted sanction for prosecution without the issue of any notice against all the nine persons. The sanction granted was revoked in each of these cases by the learned Sessions Judge.

The learned District Magistrate observed in the course of his judgment in the original trial that the story told by the prosecution was improbable and the evidence produced in support of it unworthy of credit. He further said that he could not for one moment think of even framing a charge against the accused on the evidence produced before him and that it would be grossly unjustifiable to call upon for any defence against such a preposterous, baseless and vexatious charge as had been brought by the complainant. The learned Sessions Judge contented himself with saying that it was unsafe to believe Manna Lal Misra and his witnesses for various reasons and that the order of discharge was justified. He did not consider it impossible that the evidence might be true, and taking that view he revoked the sanction granted to Brij Kumar for the prosecution of the complainant and his witnesses and the persons who are alleged to have abetted the former. Brij Kumar has moved this Court to have the order revoking the sanction set aside.

Section 195, clause (6), of the Code of Criminal Procedure lays down that any sanction given or refused under that section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate and clause (7) declares that, for the purpose of that section, every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. An order revoking a sanction might, however, be treated in effect as an order

refusing to grant the sanction; and whether section 195, clause (6), or section 439 of the Code of Criminal Procedure is applied, the propriety of the order revoking the sanction or refusing to grant the sanction, can be considered by this Court in revision. In *Bapu* v. *Bapu* (1) it was held by a Full Bench of the Madras High Court that an order refusing to revoke a sanction granted by a lower Court was one granting a sanction, the propriety of which could be challenged in a superior Court under section 195, clause (6), of the Code of Criminal Procedure. In *Padarath Singh* v. *Ratan Singh* (2) and *Ramnandan Prasad Narayan Singh* v. *Public Prosecutor* (3) a similar view was taken. In *Habibur Rahman* v. *Munshi Khodabux* (4) and *Girija Sankar Roy* v. *Binode Sheikh* (5) applications under similar circumstances have been entertained.

The learned Counsel for the opposite parties relies on the decision in *Choti* v. *Khecheru* (6) which was followed in *Debi Sahai* v. *Raghunath Sahai* (7), but there is no decision of this Court in which the view there taken has been adopted. In *Nawab Ali Khan* v. *Emperor* (8) the question was of a different character and what was said there was that the remedy provided by section 195, clause (6) of the Code of Criminal Procedure was not in the nature of an appeal. The power to grant sanction under section 195 is included among the powers which can be exercised in revision under section 439 of the Code: and if this power can be exercised in a proceeding arising out of a trial in any of the Courts below, it can also be exercised for discharging an order made by a subordinate Court revoking the sanction granted by the Trying Magistrate.

The grounds on which the learned Sessions Judge has proceeded, no doubt, do not exclude the possibility of the complaint and the evidence adduced in support of it being true; but on the mere existence of such a possibility the order passed by the Trying Magistrate granting sanction, ought not to be lightly set aside. The Trying Magistrate was definitely of opinion that the charge was false and vexatious and the story told by the complainant and his witnesses was improbable. He referred to the fact that there was some ill-feeling between the complainant and the accused and considered that the charge was prompted by that ill-feeling. The main accused, Brij Kumar, is described by the complainant in his evidence as a person owning along with his brothers 4 or 6 villages and carrying on money-lending business. A charge of robbery against such a person deserves further enquiry. It is essential that no one should be permitted to use the penal law to satisfy his own private ends or personal spite; and if there is a *prima facie* ground for thinking, as the learned Trying Magistrate apparently thought, that the charge was prompted by improper motives and was false and vaxatious, the necessary elements to justify the grant of the sanction would be made out.

There is no such case, however, against the persons who are charged with abetments. The learned District Magistrate did not discuss the evidence which was adduced in support of that charge. The learned Sessions Judge points out that much of that evidence related to a conversation which was alleged to have taken place after the alleged offence was committed and the rest was vague and insufficient.

The applications are, therefore, allowed, in so far that the applicant, Brij Kumar, will be granted sanction to prosecute Manna Lal Misra, under section 211 of the Indian Penal Code in regard to the charge of robbery brought by him against Brij Kumar and three other persons in the Court of the Sub-Divisional Magistrate of Unao on the 28th July 1921 and under section 193 of the Indian Penal Code in regard to the evidence given by him during the enquiry

(1) 14 Ind. Cas. 305; 39 M. 750; 11 M. L. T. 367; (1914) M. W. N. 499; 2 M. L. J. 19; 13 Cr. L. J. 209.
(2) 54 Ind. Cas 673; 5 Pat. L. J. 23; 21 Cr. L. J. 145; (1 20) Pat. 140, 1 P. L T 458
(3) 61 Ind. Cas. 995. 22 Cr. L. J. 467.
(4) 11 C. W. N 195, 5 C. L. J. 219; 5 Cr. L J. 29.
(5) 5 C. L. J. 222; 5 Cr. L. J. 188
(6) 58 Ind. Cas 250, 42 A. 649. 18 A. L. J. 758; 2 U. P. L. R. (A.) 353; 21 Cr L. J. 746.
(7) 61 Ind. Cas 173; 19 A. L. J. 399, 22 Cr. L. J. 349,
(8) 63 Ind. Cas. 409; 24 O. C. 165; 22 Cr. L. J. 649.

into the said charge before the District Magistrate of Unao on the 5th September 1921 and to prosecute Panthadin, Bhagwat Das, Hanoman, and Ram Chandra under section 193 of the Indian Penal Code in regard to the evidence given by them during the same enquiry before the District Magistrate on the dates mentioned by the applicant. The applications are disallowed so far as they relate to the other opposite parties, Ambika Prasad, Balgobind, Jamna Prasad, and Manna Lal Bajpayi.

N. K. & N. H. *Applications allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 380 OF 1922.
August 8, 1922.
Present:—Mr. Justice Stuart.
RAM BILAS—APPLICANT
versus
LACHMI NARAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (b), offences under—Sanction to prosecute—Abetment of offence—General sanction to prosecute, whether sufficient.

A Court taking cognizance of any of the offences mentioned in section 195 (*b*) of the Criminal Procedure Code, when that offence has been committed in, or in relation to, any proceeding in in any Court, or a Court taking cognizance of a conspiracy to commit such an offence, or of abetment, or attempt to commit such an offence, cannot do so unless sanction has been given not only to the *factum* but to cover the case of each person who is charged with having committed it.

Revision.

Messrs. *G.P. Boys* and *M.A. Aziz*, for the Applicant.

Messrs. *G. W. Dillon* and *Saila Nath Mukerji*, for the Opposite Party.

JUDGMENT.—The point raised in this application is as follows:—

A certain Rameshar Das swore to the contents of an affidavit in the Court of the District Judge of Cawnpore in support of an application for transfer of a civil suit.

The other side applied for sanction to prosecute Rameshar Das for having sworn false allegations in that affidavit. The District Judge refused this sanction but the High Court granted it.

Rameshar Das is under trial in respect of the matter. In connection with that trial Lachmi Narain has instituted criminal proceedings against Ram Bilas, the employer of Rameshar Das, on the ground that Ram Bilas abetted the commission of the offence committed by Rameshar Das.

The Joint Magistrate has taken cognizance of the case as against Ram Bilas holding that section 195 of the Criminal Procedure Code has no application to the case.

It has been held by this Court, amongst others, that when an offence described in section 463, or sections 471, 475 and 476 of the Indian Penal Code, has been committed by a person who is not a party to any proceedings or given evidence in such proceeding, the provisions of section 195 have no operation, and it was upon the authority of these views that the Joint Magistrate, apparently, took the course which he has taken. But the provisions of section 195, clause (*b*), differ materially from the provisions of the same section, clause (*c*).

It is true that section 195 (3) applies to both, but as I read the authorities on section 195 (*c*), no question of abetment ever arose in the recorded cases when the accused person was not a party to the proceedings in the Court. It was not in those cases necessary to discuss whether the offence charged was a substantive offence or the abetment of a substantive offence. If the person accused was not a party to the proceedings in Court, the provisions of section 195 (*c*) would certainly not be applicable, as those provisions refer only to charges against the parties to the proceedings and no sanction would be necessary. But in the case of offences to which reference is made in section 195 clause *b*) I consider that a Court taking cognizance of such an offence when that offence has been committed in, or in relation to, any proceedings in any Court, or a Court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit such an offence, cannot do so unless sanction has been given not only to the *factum* but to cover the case of each person who is charged with having committed it.

The accused person, it is true, need not be bound but he must be indicted. For the above reasons, I am of opinion that the Joint Magistrate's Court cannot take cognizance of the offence charged against Ram Bilas without the sanction of the District Judge or of the High Court.

I, therefore, direct the Joint Magistrate to refrain from taking proceedings against Ram Bilas and I quash the said proceedings.

W. C. A. *Proceedings quashed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 28 OF 1921.

June 23, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

EMPEROR—PROSECUTOR

versus

BALARAM DAS—ACCUSED.

Dying declaration—Record made in absence of accused—Proof, method of.

Where a dying declaration is recorded, in the absence of the accused, by a Magistrate who has since died the writing made by the latter cannot be admitted to prove the declaration; it must be proved in the ordinary way by a person who heard it made, and if he swears that the written statement correctly reproduces the words used by the deceased, and was read over to the deceased who admitted its correctness, this is sufficient to prove that the deceased did use the words contained in that statement. [p. 686, col. 2.]

Empress v. *Samiruddin*, 8 C 211; 10 C. L. R. 11; 4 Ind. Dec (N. S.) 135 and *Gouridas Namasudra* v. *Emperor*, 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186, referred to.

Criminal reference by the Sessions Judge, Jessore, dated the 2nd May 1921.

Babu *Harendra Nath Mukerjee* (with him Babu *Amulya Chandra Chatterjee*), for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This case comes before us on reference under section 307 of the Code of Criminal Procedure from the Officiating Sessions Judge of Jessore. The accused, Balaram Das, was charged with having committed culpable homicide not amounting to murder by causing the death of one Surendra Nath Das. The Jury unanimously found the accused not guilty. The learned Sessions Judge is clearly of opinion that to accept the verdict of the Jury would cause a failure of justice, and that the accused has committed the offence punishable under the first part of section 304, Indian Penal Code. We have considered the entire evidence and have given due weight to the opinions of the learned Sessions Judge and the Jury, and we hold that on the evidence the accused's guilt has been clearly proved.

Before referring to the evidence, it is necessary to consider the point of law which arises with respect to an important part of it, the statement made by the deceased as to the cause of his death. The date of the alleged occurrence was the 28th November 1917. This statement by Surendra was recorded on the 29th November 1917 at 10 P. M. by Babu Surendra Nath Ghosh, a Magistrate, who has since died. When it was recorded the Assistant Surgeon, P. W. No. 6, was present, and with reference to this statement he has given the following evidence:—"Before the deceased died I wrote to the Magistrate to have his dying declaration recorded. The Sub-Deputy Collector, Surendra Nath Ghosh, came and recorded his dying declaration on the 29th night. He recorded the declaration in my presence. Surendra Babu is dead. This was over two years ago. Exhibit 2 is the dying declaration as recorded by Surendra Babu in my presence. I know Surendra Babu's handwriting and signature. He read it over to the deceased in my presence. The declarant Surendra admitted it to be correct. Exhibit 2 read over." It is contended on behalf of the accused that this evidence is insufficient to render the recorded statement, Exhibit 2, evidence in the case. Our attention has been drawn to several decisions on this point, but it is not necessary to refer to them all in detail. The main point on which they turn is that if the statement of a deceased person as to the cause of his death is recorded by a Magistrate, the mere signature of the Magistrate to that statement is not sufficient to make that statement

admissible in evidence, but there must be direct proof that such statement was made. Some of these decisions go on to say that in order to prove the statement it is necessary that the Magistrate should be called and that he should refresh his memory by reference to the statement recorded by him. But, so far as these decisions direct how the statement is to be proved, the remarks in the judgments are mere *obiter dicta*.

In all the cases cited, except one, to which we will refer, the only point that is actually decided was that the recorded statement was not admissible in evidence because no proof had been given that the deceased person made that statement. The only reported case of those that have been cited in which it appears that the person who recorded the statement was examined as a witness is the case of *King-Emperor* v. *Daulat Kunjra* (1). In that case the statement of the deceased was wrongly treated as the First Information. It was held that it was not admissible as First Information, and then the prosecution wished to make it admissible under section 32 of the Evidence Act. It was held that it could not be regarded as evidence, because the course indicated in the case of *Empress* v. *Samiruddin* (2) had not been followed. But the report, though it indicates that the Police Sub-Inspector who recorded the statement was examined as a witness, does not show what evidence he gave as to this statement. The case of *Empress* v. *Samiruddin* (2) has been treated as the leading case and is referred to in all, or nearly all, the cases cited. What was held there as regards the statement which was sought to be proved was, that the writing made by the Magistrate who recorded the statement could not be admitted to prove the statement made by the deceased. This statement must be proved in the ordinary way by a person who heard it made. In our opinion in the present case the evidence of the Assistant Surgeon fulfils that direction. The statement made by the deceased has been proved by a person who heard it made. An objection has been taken that, as the Assistant Surgeon neither himself recorded the statement nor read it at the time when it was made, he could not refresh his memory by reference to that statement under section 159 of the Evidence Act. But we hold that the evidence that the deceased used the words contained in the statement given by the witness who can speak to these words by refreshing his memory is not the only way in which the statement of the deceased person can be proved. If the witness who heard that statement made swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. Here, the important part of the evidence is that the dying declaration was recorded in the presence of a witness, that it was read over to the deceased in the presence of the witness and was admitted by the deceased to be correct. This, we think is sufficient. Our view is supported by the case of *Gouridas Namasudra* v. *Emperor* (3). There, the written petition of complaint which contained the statement made by the deceased person as to the cause of his death, was admitted in evidence on being proved by the *Mukhtear's Mohurrir*, who had prepared it under personal instructions, and who deposed that the deceased made the statement to him which was correctly recorded in the petition.

The case for the prosecution is, that the deceased, Surendra Nath Das, belonged to a village which was six miles from the place of occurrence which was village Thoura, Police-station Bongong. A fortnight before the occurrence the deceased, who was on friendly terms with one Rasik who lived in Thoura borrowed a plough and cattle from him. On the day of occurrence he returned the plough and cattle and was accompanied on his return by Gour Hari, P. W. No. 2, the son of Rasik, who was then a boy aged about 14. Rasik had gone to a different village and there was no one in Rasik's *bari* when they returned. Gour Hari gave the deceased a smoke, and after smoking Surendra took up a jug of water and set out for the field to attend nature's call. On his way he passed through the courtyard of the accused Balaram. Balaram was sitting in front of one of the houses

(1) 6 C. W. N. 921.
(2) 8 C. 211; 10 C. L. R. 11; 4 Ind. Dec. (N. S.) 135.
(3) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186.

of his *bari*. He suddenly attacked Surendra with a *dao* and gave him four cuts on the back of his head and neck in quick succession. Balaram ran off with the *dao*. A number of persons assembled and information was sent to the Police station by the Choukidar and Nitai, P. W No. 1, brother of Gour Hari, and the First Information was laid the same night at 3-30 A. M. Surendra was sent to the Hospital the following evening where he made the statement to which reference has been made. This story is, firstly, supported by the evidence of Gour Hari, the only witness who says that he actually saw the occurrence. Jogendra, the brother of Rasik, came on the scene immediately afterwards, and found Surendra lying wounded, and heard from him and Gour Hari that Balaram had caused these injuries. Amongst these persons were two boys, Amulya and Dukhiram. Dukhiram died between the occurrence and the trial, and it is on his evidence, recorded under section 512 of the Criminal Procedure Code, that very great reliance is placed on behalf of the accused. His statement is, that he came on hearing the cries of murder and rushed to the courtyard and saw Surendra lying wounded. He did not see Balaram there. He could not understand what Surendra said. Later on, he said that some one had seized him from behind whom he could not see. Amulya was examined at the trial and only desposes that he found Surendra lying wounded. He neither states nor denies that Balaram was named as the person who had wounded Surendra. The evidence is that after the occurrence Balaram absconded and was not seen for 3½ years till he surrendered to the Court.

As regards the motive, according to the case of the prosecution, there had been no previous quarrel between the accused and Surendra After the occurrence Surendra himself said, " what have I done to Balaram *dada* that he cuts me." By the time the First Information was laid it had occurred to the informant that the only possible cause of this incident was that Balaram had recently lost his son and might have suspected that Surendra, who was both a Kaviraj and a magician, might have caused the death of his son, because after Surendra's medical treatment failed Balaram called another Doctor. This also is the motive suggested by Surendra in his statement at the Hospital, and he states that he suggested his motive on information given to him by other people.

We have gone carefully through the evidence and our attention has been drawn to such discrepancies as there are in the statements of different witnesses. The only discrepancy to our minds of any importance is that contained in the evidence of Dukhiram that Surendra at one time said that he did not know who struck him. But we do not think that this statement of Dukhiram, which is proved by his bare deposition, is sufficient to rebut the abundant evidence that, from the time of the occurrence until his death, Surendra named Balaram and no other person as the person who injured him; and even if the statement of Dukhiram be believed it does not disprove that, prior to that, Surendra had named Balaram, and there can be no doubt that he named him at the Hospital. If Surendra really had been in ignorance as to who caused these injuries no reasonable suggestion has been made why he should name the accused. Further, no satisfactory reason has been suggested why Gour Hari should be disbelieved. The defence set up before us is that Surendra was injured by some person unknown, and that his injury was inflicted because Surendra was misbehaving himself with the widowed sister of Gour Hari. This widowed sister, according to the evidence, was not more than 12 years old, and beyond the fact of her existence we cannot find an atom of evidence to justify any suggestion against either her character or that of the deceased; nor can we believe on the undoubted facts that the injury to the deceased could have been inflicted without any body knowing who had done it.

It is suggested that the wounds described in the medical evidence could not have been inflicted in the manner described by Gour Hari. That suggestion we cannot accept. Gour Hari says Balaram caught hold of Surendra's back hair and wounded him on the neck. We cannot see any reason why Balaram could not have inflicted at any rate the second and fourth wounds which are on the back of the neck while he was holding Surendra's back hair.

EMPEROR *v.* BALARAM DAS.

Another point urged is that, had the injuries been inflicted in the manner described, Balaram would not have been allowed to escape. That suggestion is based on the statement of Nitai that the Choukidar was at Balaram's house when Nitai arrived and also that Balaram was there. But the statement that Balaram was there is so recorded that it is not clear that at the time Nitai made that statement he was thinking of the point of time when he arrived at the spot. Having regard to the other evidence we think there can be no doubt that Balaram went off immediately after inflicting the wounds.

Reference has been made to the omission to examine other witnesses. The evidence of Dukhiram and Amulya shows that the inmates of the accused's *bari* were not inclined to assist the prosecution, and the prosecution were justified in believing that the other inmates, if examined, would not speak the truth and that is sufficient cause for omitting to call them. Apart from the inmates of the accused's *bari*, other persons had been named who might have been called, but it is not shown that they could have given any further information than had been already furnished; for instance, it is said that Panchu who informed Nitai should have been examined. But there is nothing to show that Panchu knew anything except what he had heard from others when he was sent to call Nitai.

Another point made is that there is some discrepancy between the evidence of the witnesses and the rough sketch or plan prepared by the Investigating Police Officer as to the actual place of occurrence. The plan and also the evidence of one of the witnesses shows that the hut occupied by Balaram was the north hut of those in Balaram's *bari*. According to the evidence the occurrence was at the door of Balaram's house. The map shows that it took place at the door of the room occupied by his sister Kumudini. The witnesses were not cross-examined on this point, and it is not quite clear what they meant by Balaram's house. It may be that they were speaking of the *bari* as a whole, and referred to all he huts as being in Balaram's *bari* and not specifying any particular hut, or it may be that the officer who prepared the map was misinformed as to the actual place of occurrence. However that may be, we do not think that the discrepancies are of sufficient importance to detract from the value of the prosecution evidence as a whole,

In a case like the persent, which depends on the belief or disbelief of witnesses, we hesitate to reverse the decision of a unanimous Jury, but in the present case the verdict of the Jury appears to us so incomprehensible that we are unable to accept it. It may be that they were misled because the evidence of motive was not clear. But that is no reason for disbelieving the plain straightforward case told by the principal prosecution witnesses. We think that the motive suggested is probably the true one. The accused, owing to the death of his son, might have been in such a state of mind that he conceived a grudge against he deceased and in a fit of passion attacked him in the way he had done. The accused, as already stated, was on his trial on the charge of culpable homicide not amounting to murder. On the facts which we hold to be found he undoubtedly committed that, unless he committed the more serious offence of murder. As that offence was not charged we could not convict him of the more serious charge. We find him guilty of the offence charged, namely, having committed culpable homicide not amounting to murder by causing the death of Surendra Nath Das, and we sentence the accused to ten years' rigorous imprisonment.

Accused sentenced.

W. C. A.

ANANDI *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No 964 OF 1922.

January 24, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

Musammat ANANDI—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Evidence Act (I of 1872), s. 105, Exceptions—Burden of proof—Presumption—Criminal Procedure Code (Act V of 1898), ss. 470, 471 (1)—Acquittal on ground of lunacy—Duty of Court—Proper order—Subsequent sanity of accused, whether concern of Court.

Under section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case of an accused person within any of the general Exceptions in the Penal Code, is on the accused, and the Court shall presume the absence of such circumstances. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general Exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the Exception. [p. 689, col. 2; p. 690, col. 1.]

When an accused person is acquitted on the ground of lunacy, it is the duty of the Court to decide whether or not, at the time the act constituting the offence was committed, the accused was capable of understanding the nature of his act, and if the Court is satisfied that he was not, an absolute duty is imposed on it to make an order to declare him to be a criminal lunatic within the meaning of Act IV of 1912, and direct him to be kept in safe custody, even if he is not of unsound mind on the date of his acquittal, this fact as the fact that he has become comparatively well or sane is not a matter which concerns the Court. [p. 690, col. 2.]

Criminal appeal against an order of the Sessions Judge, Muttra, dated the 22nd November 1922.

Mr. *Ram Nama Prasad*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Ryves, J.—*Musammat* Anandi was convicted by the learned Sessions Judge of Muttra of the murder of a boy Hira Charan and sentenced to transportation for life. She has appealed. There is no doubt whatever that the child, Hira Charan, was left alone in the house with *Musammat* Anandi on the morning of the 19th of October 1921 while the other women inmates of the house had gone to the village well. The male members of the family were already out at work in the fields. When the women returned from the well they found the outer door chained from the inside. It was opened by the accused and they noticed blood about and on the cot on which the child had been sleeping when they left the house; they found the dead body of the child with its throat cut. The accused apparently was in the same room. They asked the accused what she had done and she said that she had destroyed Poorna's issue. A report was made and the accused was taken into custody that same day. It is in evidence that she attempted to run out of the house either with the intention of escaping or of jumping down a well. She was caught, however, and tied up by the *Chaukidar*. After being taken to the Police Station it appears that she was sent to the jail at Muttra, and we find that on the 14th of November 1921 a letter was sent by the Joint Magistrate to the Civil Surgeon of Muttra asking whether *Musammat* Anandi was capable of standing her trial. This shows that before that the Police must have had doubts about the matter. On the 6th of December the Civil Surgeon replied that she was unable to plead or stand her trial, and on the 6th of December the District Magistrate ordered her trial to be postponed until she was fit. On the 2nd of February the Civil Surgeon of Muttra reported that she was insane, with the result that she was removed from the Jail at Muttra to the Lunatic Asylum at Agra and she remained there until the 23rd of August. Subsequently, it was certified that she had recovered her senses and could stand her trial. The main facts of the case are not disputed and they are all recorded in the judgment of the learned Sessions Judge. The only question is, whether *Musammat* Anandi who undoubtedly killed the child was guilty of murder or whether she was protected by the provisions of section 84 of the Indian Penal Code. There is no doubt that the law requires, as laid down in section 105 of the Indian Evidence Act, that the *onus* of proving circumstances which give the benefit of the general Exception to an accused

person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that the general Exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the Exception. Now, here it is established by the evidence of two qualified expert medical witnesses that at any rate from shortly after the 19th of October 1921 until the 23rd of August 1922 the woman was not in her senses. There is evidence that her father and some evidence that her grand-father had been at one time or another insane. There is also evidence that before the murder she occasionally went out of her mind. In other words, it is proved that she was subject to occasional fits of insanity. Now, the Court has to consider whether it is established by the evidence that the murder was committed at a time when she was in this state or not. The learned Judge comes to the conclusion that she has not proved that she was, and that the *onus* lay on her to do so. He draws an adverse inference against her from the circumstance that after killing the child she closed the main door of the house, that she then changed the shirt which she had been wearing when she killed the child and washed it in an attempt to remove blood stains and when discovered she attempted to run out of the house in order to throw herself into a well. He says that her washing the shirt and running out of the house to throw herself into a well are evidence of the concealment of her guilt and to escape punishment. We draw quite a different inference from these acts of hers. It was at the most a half-witted attempt at concealment while all the time the body of the child was lying in the room with its throat cut for any one to see who entered. The most important circumstance against the woman appears to be that the *Darogha*, when he questioned her that day, received what he considered rational answers, and that at that time her relations did not tell him that she had suffered from unsoundness of mind on occasions. It seems to us that from the previous history of the accused before the murder and from her family history followed by the proof that very shortly after the murder and for several months subsequently she was insane, and from the want of real motive for the murder itself and the woman's conduct immediately after it, there is sufficient evidence in our opinion that the woman was not accountable for her actions when she killed the child. In our opinion, therefore, when she killed the child she was of unsound mind and cannot be convicted of murder. We, therefore, acquit her of the offence of murder, but under section 471 of the Criminal Procedure Code we declare her to be a criminal lunatic within the meaning of Act IV of 1912 and direct her to be kept in safe custody in the jail at Muttra, or if the Superintendent of such jail thinks better, in the Lunatic Asylum at Agra until the Local Government makes further orders in the case.

Walsh, J.—In consequence of what has fallen from the Assistant-Government Advocate, namely, that this person is said now to be sane, it is necessary to remove any misconception which may be created by that observation. It is the duty of the Appellate Court when the Trial Court falls into an error in the performance of its duty, to decide whether or not at the time the act was committed, the accused was capable of understanding the nature of her act. We are satisfied that she was not. We have, therefore, an absolute duty imposed upon us to make an order in accordance with the statutory provisions of the law. We have no alternative and we are not concerned with the consequence. We are dealing with an alleged murder committed thirteen or fourteen months ago. If the result of proper treatment, first, in jail and, second, in a Lunatic Asylum provided with expert assistance and intended for the purpose of applying remedies to demented persons, is that the person becomes comparatively well again, that is not a matter which concerns us. The future orders for the disposition of this person rest, not with us, but with the authorities who have charge of persons who are mentallp unfit. I would just add that although it would be wrong to say that the Judge

has not taken sufficient care, because he has indeed written a very long and apparently careful judgment, he has unfortunately utterly failed to get to close quarters with the essential and fundamental facts of the case. It is idle to talk about a person attempting to conceal a crime by changing a shirt, when all the evidence of the crime including her proximity to the corpse, were evident for all the world to see. There was no attempt at concealment, and changing a shirt seems to me merely the feeble attempt of a half-witted person to do that which a deliberate criminal might do as part of a real effort at concealment. Further, I would observe that Judges should be a little more careful on questions of scientific evidence and be guided by the opinion of trained experts. The result of the first Civil Surgeon's observation was brought about by a special request made to him by the Magisterial authorities to keep an observation upon this person, and two experienced Civil Surgeons, trained from their youth to observe and form opinions upon matters upon which the learned Judge has probably no adequate training or information of his own, expressed a very strong opinion that this person was mentally unfit for some thing like nine or ten months. How, under these circumstances, a learned Judge could persuade himself that the medical evidence did not help the defence, I am at a loss to understand. I agree with the order proposed.

Appeal allowed:
Conviction set aside.

S. D.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 85 OF 1920.
July 6, 1920.
Present:—Mr. Lindsay, J. C.
DUBRI—ACCUSED—APPLICANT
versus
EMPEROR—PROSECUTOR—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106—Assault—Penal Code (Act XLV of 1860), ss. 325, 351, 352—Grievous hurt, voluntarily causing, whether assault—"Breach of the peace," meaning of.

An offence under section 325 of the Penal Code involves the use of criminal force and is, in that sense, an assault, but the word "assault," as used in section 106 of the Criminal Procedure Code, refers to the offence of assault as defined in section 351 of the Penal Code and made punishable by section 352. [p. 691, col. 2.]

The expression "breach of the peace," used in the accepted meaning which it bears in England, implies some offence against the public. [p. 692, col. 1.]

Application against an order of the Sessions Judge, Fyzabad, dated the 2nd June 1920, upholding that of the Magistrate, First Class, Fyzabad, dated the 27th May 1920.

Mr. *S. N. Sinha*, for the Applicant,

The Government Pleader, for the Respondent.

JUDGMENT.—The question which is argued here is whether the applicant, Dubri, who was convicted by a Magistrate under section 325 of the Indian Penal Code, could be legally bound over to keep the peace under the provisions of section 106 of the Code of Criminal Procedure.

The objection to the validity of this order under section 106 was raised in the Court below but I am uot sure whether the objection to it was taken on legal grounds or whether the objection was on the merits. After hearing the arguments in the case I think it extremely doubtful whether the order under section 106 is legally justifiable. That section lays down that whenever any person accused of rioting, assault, or other offence involving a breach of the peace, or of abetting the same, or of assembling armed men or taking other unlawful measures with the evident intention of committing the same, or any person accused of committing criminal intimidation is convicted, an order requiring him to execute a bond to keep the peace may be made against him. The question is whether an offence punishable under section 325 is one of the offences specified in this section, conviction for which renders the accused liable to be bound over to keep the peace. An offence under section 325, of course, involves the use of criminal force and is, in that sense, an assault, but I think the word "assault" as used in the section refers to the offence of assault as defined in section 351 of the Indian Penal Code and is made punishable by section 352.

RAM BADAN SINGH *v.* JANKI.

The next question is whether an offence punishable under section 325 is an offence "involving a breach of the peace." Without attempting to put any narrow construction on the word "involving" I think it may well be doubted whether an offence under section 325 committed in the circumstances in which this particular offence was committed was an offence which, in any way "involved a breach of the peace."

The interpretation of this section has been discussed in a number of cases and is not free from difficulty. There is no definition in the Penal Code or in the Criminal Procedure Code of the expression "breach of the peace.' But using that phrase in the accepted meaning which it bears in England, it implies some offence against the public. Here I do not think it can be said that there was any likelihood of any offence being committed which would amount to a breach of the peace in the sense just mentioned. I do not mean to say that an offence under section 325 does not in certain conditions involve a breach of the peace. It is sufficient for the purposes of this case to say that on the facts as found by the Court below this offence of which the applicant was convicted does not appear to have been an offence involving a breach of the peace. I, therefore, direct that the order for taking security from the accused, Dubri, be discharged.

N. K. *Revision accepted*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 5 OF 1923.

January 31, 1923.

Present:—Mr. Justice Daniels.

RAM BADAN SINGH—APPLICANT

versus

JANKI AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 250 107—Application to take security rejected—Order for compensation, whether can be made.

A person whose application for security for keeping the peace, under section 107, Criminal Procedure Code, is rejected, cannot be ordered to pay compensation under section 250 of the Code.

Ram Sukh Rai v. *Mahadeo Rai*, 7 Ind. Cas. 290; 7 A. L. J. 743; 11 Cr L. J. 446 and *Bindhachal Prasad Rai* v. *Lal Bihari Rai*, 25 Ind. Cas. 330; 12 A. L. J. 506; 36 A. 382; 15 Cr. L. J 578, followed.

Criminal Reference made by the Sessions Judge, Ghazipur, dated the 19th December 1922.

REFERRING ORDER.—The applicant made an application that Janki Singh and others should be bound down to keep the peace under section 107 of the Code of Criminal Procedure. His application was rejected and he was ordered to pay compensation under section 250 of the Code of Criminal Procedure for making a vexatious complaint. I agree with the lower Court that there was no sufficient reason for binding over the persons against whom the complaint was made. That part of the order should not be interfered with. It has, however, been repeatedly held that section 250 does not apply to complaints under section 107 of the Code of Criminal Procedure, because there is no accusation of the commission of an offence. The case is, therefore, recommended to the Hon'ble High Court with a recommendation that the order for compensation should be set aside. I may refer to the cases reported as *Ram Sukh Rai* v. *Mahadeo Rai* (1) and *Bindhachal Prasad Rai* v. *Lal Bihari Rai* (2).

JUDGMENT.—This is a Reference by the learned Sessions Judge of Ghazipur recommending the cancellation of an order of compensation passed under section 250 of the Code of Criminal Procedure by a First Class Magistrate of Ghazipur. The order was passed in proceedings under section 107 of the Code of Criminal Procedure. Section 250 by its terms applies only to a case where a person is accused before a Magistrate of an offence and not to proceedings the object of which is to require him to give security to keep the peace. This has been held in the cases referred to by the learned Sessions Judge. I, therefore, accept the Reference and set aside the order of compensation. The amount, if paid, will be refunded.

S D. *Reference accepted.*

(1) 7 Ind. Cas. 290; 7 A.L. J 743; 11 Cr L J. 446.
(2) 25 Ind. Cas. 330; 12 A.L.J. 506; 36 A. 382; 15 Cr. L. J. 578.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 122 OF 1921
April 8, 1922.

Present:—Mr. Justice Teunon and
Mr. Justice Ghose.

JAGAT CHANDRA ROY—COMPLAINANT—PETITIONER

versus

KALIMUDDI SARDAR AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 494 (a)—Application by Public Prosecutor for withdrawal from prosecution—Duty of Court.

In according or withholding sanction to an application for withdrawal made by the Public Prosecutor under the provisions of section 494 (*a*) of the Code of Criminal Procedure, the Court acts in a judicial capacity, and for such order so judicially made the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised.

Umesh Chunder Roy v. *Satis Chandra Roy*, 41 Ind. Cas. 998; 22 C. W. N. 69; 26 C. L. J. 208; 18 Cr. L. J. 886, relied on.

Rule.

Babu *Hemendra Kumar Das*, for the Petitioner.

Babu *Atindra Nath Mukherjee*, for Mr. *M. A. K. Fuzlal Huq*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order discharging nine accused persons, opposite parties, in a case brought against them under the provisions of section 147, Indian Penal Code. The order of discharge followed upon an application made by the Public Prosecutor for permission to withdraw from the prosecution of these accused persons and upon the consent of the Court given to that application. In the case reported as *Umesh Chunder Roy* v. *Satis Chandra Roy* (1) it has been held that in according or withholding sanction to an application for withdrawal made by the Public Prosecutor under the provisions of section 494 (*a*) the Court acts in a judicial capacity, and for such order, so judicially made the Court must give and record its reasons, so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. In the present case for the order giving sanction to the Public Prosecutor's application for permission to withdraw no reasons have been given. But from the subsequent proceedings we are enabled to gather that the main reason, or indeed the only reason, for the withdrawal from this prosecution was that on a previous trial in connection with the riot in question six persons had already been convicted and punished, being sentenced to various terms of imprisonment. It appears that the riot was of a somewhat serious nature resulting in some 28 injuries upon seven persons, the riot again, it being said, having arisen out of the opposition of certain persons to what were thought to be innovations in connection with certain religious ceremonies celebrated by the complainant. At the time of the trial of the persons previously convicted it is stated that the present nine accused were absconding. The conviction of the first six persons was had on the 7th August 1920, while the present accused, opposite parties, surrendered or were arrested on various dates extending from 7th July 1920 to the 15th October of that year. Whether these nine accused were or were not absconding it is not for us to say, but it is obviously not advisable that a premium should be placed upon absconding and it can not be held that the imprisonment of the first six is to be regarded as a vicarious atonement for the sins, if any, committed by the present accused, opposite parties.

We set aside the order of consent made by the Trying Magistrate under the provisions of section 494 of the Code of Criminal Procedure and the discharge consequent thereupon, and we direct that the present accused, opposite parties, be re-placed upon their trial and that the case be dealt with and disposed of in accordance with law.

B. N. *Order set aside.*

(1) 41 Ind. Cas. 998; 22 C. W. N. 69; 26 C. L. J. 208; 18 Cr. L. J. 886.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 565 OF 1920.
July 16, 1920.
Present:—Mr. Justice Chatterjee and Mr. Justice Cuming.
AINUDDIN AND OTHERS—2ND PARTY—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107, proceedings under—Mere apprehension of breach of peace sufficient—Information required for starting proceedings, nature of.

Where a dispute exists between two rival Zemindars, although no riot or unlawful assembly has taken place, an apprehension of a breach of peace is sufficient for drawing up proceedings under section 107 of the Code of Criminal Procedure, but it must also be shown that the particular persons, against whom proceedings are drawn up, were likely to commit a breach of peace. The mere fact that certain persons are interested in a dispute does not by itself afford a ground for taking proceedings against them. [p. 695, col. 2.]

Information of the kind mentioned in section 107 of the Code must be of a clear and definite kind directly affecting the person against whom process is issued and it should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet. Where persons belonging to the same party are acting in concert with a common object in view, it may not be necessary to specify particular acts against them, still it is essential that the information upon which the process is issued, should disclose "tangible facts and details." [p. 695, col. 2; p. 696, col. 1.]

Jaiprakash Lal, In the matter of the petition of, 6 A. 26; A. W. N. (1883) 208; 3 Ind. Dec. (N. S.) 641, followed.

Criminal Revision from an order of the Additional District Magistrate, Mymensingh.

Babus *M. N. Mukerjee, U. K. Roy* and *B. K. De*, for the Petitioners.

JUDGMENT.—The question raised in this Rule is whether the proceedings instituted against the petitioners under section 107 of the Criminal Procedure Code are without jurisdiction.

It appears that there is a dispute between one Jnanada Sundari Choudhurani and her adopted son, Promode Chandra Roy Chaudhuri, with respect to a Mouza, Nowapara, which is claimed by the former as her personal property, while the latter claims it as part of his adoptive father's estate. On the 26th February 1920 one Akhoy Kumar Dutt, the *naib* of the lady, put in a petition before the Additional District Magistrate of Mymensingh to the effect that he had gone to the village Nowapara to collect rents from the tenants, that the opposite party, Promode Chandra, deputed his manager and other officers to obstruct him in realizing rents and drive him from the village, that with the said object the men of the opposite party, about 100 to 125, armed with *lathis* were hovering in the village and terrorizing the tenants if they paid rents to the lady and preventing them from paying rents to her. Some specific acts of oppression were alleged to have been committed by the men of opposite party. It was further stated that there was apprehension of a serious breach of the peace, and it was prayed that proceedings under section 107, Criminal Procedure Code, might be drawn up against Promode Chandra and several other persons (named in the petition). The Magistrate directed the Deputy Superintendent of Police to enquire into the matter and report. The latter thereupon made the enquiry and submitted a report to the effect that "there was a dispute between Jnanada Sundari and her adopted son, Promode Chandra Roy Choudhuri, with respect to Mouza Nowapara, and that on the 24th February 1920 some *peadas* and *barakandazes* of the second party had gone to village Nowapara and threatened the tenants and asked them not to pay rent to the first party. They also threatened the *naib* (complainant) and Abdul Sheikh, mentioned above. It has also been proved that the complainant first party, Akhoy Kumar Dutt, called one Lochan Ramdas, *barkandaz* of Char Pubail, to his *cutchery* and abused and threatened him for his not paying the rent. Up to date there has been no riot and unlawful assembly, but there is every likelihood of it in the near future, as the first party will try to realize rent from the tenants and the second party will prevent them from doing so. There is, therefore, every likelihood of a breach of the peace between the parties unless they settle the matter amicably. There is no chance of an amicable settlement at present, that the proceeding may be drawn up against both the parties and their officers and other servants whose names are given in column 4 of the report who are all interested in the affair under sum noted against each

for a year to keep the peace. I have already issued warning notices under section 154, Indian Penal Code, to the parties concerned."

On the 22nd March 1920 proceedings under section 107, Criminal Procedure Code were ordered to be drawn up in accordance with the said report. The second party on the 3rd June 1920 put in a written statement, and prayed that if any preventive action was considered to be at all necessary, proceedings under section 145 might be instituted. The Magistrate thereupon made the following orders: "I shall not convert the case into one under section 145, Criminal Procedure Code."

The second party thereupon moved this Court and obtained this Rule on the second ground mentioned in the petition which runs as follows:—"For that, there being no allegation of any wrongful act likely to be done by any of your petitioners which may probably occasion a breach of the peace, the proceedings under section, 107, Criminal Procedure Code, against your petitioners are wholly without jurisdiction and are fit to be qua hed."

There is no doubt that a person cannot be bound down under section 107 unless it is shown that such person is likely to commit a breach of the peace or disturb the public tranquillity or do any wrongful act that may occasion a breach of the peace or disturb the public tranquillity. That question, however, will be considered when evidence is gone into. But what is contended is that before the Court can institute any proceeding under section 107, there must be some materials on the record to show the person called upon to show cause (why he should not be bound down) was likely to do any of the things mentioned in the section and that there were no such materials in the present case

In the present case the Police report did not state that any of the petitioners was likely to commit any breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. It stated that there was a dispute between the Zemindars and that, although no riot or unlawful assembly had taken place there was an apprehension of a breach of the peace. That would be sufficient justification for drawing up proceedings under section 107, Criminal Procedure Code, but it must appear from the Police report that the particular persons against whom the proceedings are drawn up were likely to commit a breach of the peace or anything likely to cause a breach of the peace. In the present case it appears that proceedings have been taken against the Zemindar Promode Chandra, his manager, and other officers and several other persons, but it does not appear from the Police report that any of them had anything or even had instigated others to do anything to cause a breach of the peace or disturb the public tranquillity. They may be persons interested but that by itself would be no ground for proceeding against them. We do not think that the mere fact that a dispute exists between two rival Zemindars would justify proceedings being taken against all their officers and servants unless there are materials to show that they are likely to commit any breach of the peace. As pointed out by Straight, Officiating Chief Justice, in the case of *Jaiprakash Lal, In the matter of the petition of* (1), "Information of the kind mentioned in section 107 must be of a clear and definite kind, directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet," and referring to the facts of that case it was observed, "the Sub-Inspector's report upon which he appears to have issued process was of the vaguest and most inadequate description, and that, so far as the Diwan was concerned, it did not contain a particle of information directly justifying the inference that he personally contemplated committing or had instigated others to commit a breach of the peace." We think that these observations apply to the present case. It may be that some of the persons mentioned in the Police report are likely to commit a breach of the peace, while others are not likely to do so, but all of them have been lumped up together because they are all interested in the dispute In one sense, all the members of

(1) 6 A. 26; A. W. N. (1883) 208; 3 Ind. Dec, (N. S.) 641.

Zemindar's family are interested in a dispute relating to a property comprised in the Zemindari, but that by itself would be no ground for taking proceedings against them all. It may not be necessary to specify particular acts against each in the cases where the persons belonging to the same party are acting in concert with a common object in view, but we think it is essential that the information upon which process is issued should disclose "tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet." The petition filed by Akhoy Kumar Dutt does contain some tangible facts though the persons charged are not specifically named. The Magistrate, however, did not proceed upon that petition; he referred it to the Deputy Superintendent of Police and the report submitted by the latter, as stated above, did not mention that the persons, against whom process was applied for were likely to do any of the acts mentioned in the section.

The present proceedings must accordingly be set aside.

The Rule is made absolute.

It will, however, be open to the Magistrate to take fresh proceedings upon proper materials.

N. K.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 10 OF 1923.

February 2, 1923.

Present:—Mr Justice Lindsay.

JASUA AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR, THROUGH JALDHARI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Notice of proceedings cancelled owing to complainant's absence—Discharge—Magistrate's authority to re-institute enquiry—Institution of second case after discharge, whether barred.

An order cancelling a notice of proceedings under section 107, Criminal Procedure Code, owing to the absence of the complainant on the date fixed for the hearing of the case, amounts to an order of discharge and not to an order of acquittal.

A Court which has passed an order of discharge cannot re-open the same case, but there is no bar to a second case being instituted.

Therefore if, after the cancellation of notice and the discharge of the accused, owing to complainant's absence in proceedings under section 107, Criminal Procedure Code, a fresh complaint is filed there is no bar to the complaint being entertained.

Criminal Revision from an order of the District Magistrate, Agra, dated the 4th December 1922.

Mr. *J. M. Banerji*, for the Applicants.

Mr. *A. P. Dube*, for the Opposite Party.

JUDGMENT.—I have heard the learned Counsel in support of this application in revision and I am of opinion that it cannot succeed. It appears that the applicants were the accused in a case which was being prosecuted under section 107 of the Code of Criminal Procedure. On one of the dates which was fixed for the hearing of the case the complainant was absent and the Magistrate recorded an order discharging the notice which had been issued upon the accused persons to show cause.

The next day the complainant put in a fresh application to the Magistrate The complainant's statement was recorded by the Magistrate and thereafter notice was issued to the accused persons calling upon them to show cause why they should not be bound over to keep the peace.

The accused applied to the District Magistrate saying that no fresh proceedings could be instituted against them after the order of the Magistrate cancelling the notice which was issued in the first instance. It seems and was argued in the Court below that this order of cancellation amounted to an order of acquittal which was a bar to fresh proceedings. The learned District Magistrate, however, was right in holding that in such cases there is no acquittal but merely a discharge which does not prevent another case being instituted.

I do not agree, however, with the Magistrate that the First Court had any authority in law to re-institute an enquiry. A Court which has passed an order of discharge cannot re-open the same case, but, as I have said, there is no bar to a second case being instituted, the order of discharge does not stand in the way of such proceedings being taken What has really happened in this case is that on the day after the notices

were cancelled and the accused were discharged the complainant filed a fresh complaint upon which the Deputy Magistrate recorded the statement of the complainant and then passed orders for process to issue to the accused. The case is one in which a second complaint has been instituted and there was no bar to that being entertained. This is the only matter which has been argued before me. On the face of them, the proceedings of the Deputy Magistrate do not appear to me in any way irregular and I dismiss the application accordingly.

S. D.

Application dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS NOS. 112 AND 122 OF 1920.
January 25, 1923.
Present:—Mr. Justice Newbould and Mr. Justice Surhawardy.

IN MISCELLANEOUS NO. 112 OF 1922.
RAJENDRA NATH GHOSH AND OTHERS—ACCUSED—PETITIONERS
versus
AMRITA LAL CHAKARVARTI—OPPOSITE PARTY

IN MISCELLANEOUS NO 120 OF 1922.
KESHAB CHANDRA GHOSH—COMPLAINANT—PETITOINER
versus
KANAI LAL BOIRAGI AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Two counter-cases of rioting—Stay of proceedings in one before disposal of other, whether proper.

Proceedings in one of two counter-cases of rioting arising out of the same occurrence cannot be stayed merely on the ground that the prosecution witnesses in one case if examined as witnesses before the trial of the other case, in which they are the accused, will be seriously prejudiced in their defence, nor can proceedings in one of such cases be stayed on the ground that after the disposal of that case it may not be necessary to try the counter-case.

Rules.

Sir *A. Chowdhury*, Babu *Manmatha Nath Mukerjee*, for the Petitioner, in No. 112 of 1922.

Babus *Dasarathi Sanyal* and *Bir Bhusan Dutt*, for the Opposite Party.

Babus *Dasarathi Sanayal*, and *Bir Bhusan Dutt*, for the Petitioner, in No. 120 of 1922.

Babu *Manmatha Nath Mukerjee*, for the Opposite Party.

Mr. Syed *Mohd. Saadulla*, for the Crown.

JUDGMENT.—These two Rules have been obtained by persons who were informants in two rioting cases which apparently arose out of the same occurrence. The Rule obtained by Keshab Chandra Ghosh is not pressed. That obtained by Rajendra Nath Ghosh was granted on two grounds. The first of these is based on the allegation that the petitioner and four of his accused are prosecution witnesses in the counter-case and will be seriously prejudiced in their defence if they are required to give evidence in that case before the trial of the case in which they are the accused. We are unable to hold that this is a sufficient reason for staying the proceedings in the case in which they are witnesses. As is urged before us on behalf of the Crown and as has been pointed out by the District Magistrate in his explanation, the recognition of this principle will create a deadlock in the trial of cases where both parties have brought counter charges.

The second ground on which this Rule has been granted is, that after the disposal of the case against the petitioner it may not be necessary to try the counter-case. The petitioner is not the prosecutor in the counter-case but the Crown, and it will not rest on him to decide whether the counter-case will proceed or not. The Crown, who is interested in both the cases, has opposed these Rules, and we think no sufficient cause is shown which would justify us in interfering with the discretion of the Trying Magistrate as to the order in which the cases should be taken up.

We accordingly discharge both these Rules.

S. D.

Rules discharged.

ATHAR HUSSAIN *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 94 OF 1920.
April 8, 1920.

Present:—Mr. Justice Jawala Prasad.

ATHAR HUSSAIN AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Procedure—Inspection by Magistrate—Note of inspection, record of—Prejudice to accused.

Though there is no provision in the Code of Criminal Procedure for making a local inspection, or for keeping a note of such inspection, if made, a Magistrate must invariably put on record a note of his inspection.

Babbon Shaikh v. *Emperor*, 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J. 121, referred to.

An accused is prejudiced in his trial, if the Magistrate uses knowledge derived from a local inspection, without putting a note of such inspection on the record. In such a case the conviction of the accused must be set aside.

Application for revision of the order of the Honorary Magistrate, Dinapore, dated the 27th January 1920.

Messrs. *Akbari*, *K. Husnain* and *Ragho Prasad* for the Petitioners.

Mr. *N. K. Prasad II*, for the Opposite Party.

JUDGMENT.—The petitioners have been convicted and sentenced to one month's rigorous imprisonment each by the Honorary Magistrate of Dinapore under section 323, Indian Penal Code. The petitioner No. 1 is the father of petitioner No. 2. The complainant, Asghar Hussain, is the brother of petitioner No. 1. Between the two brothers there is no love lost. The complainant had on previous occasions brought cases of theft and assault against the petitioner No. 1 which were, however, dismissed. The present case was brought by the complainant on the allegation that on the 27th September last, at 7 A. M. the petitioners waylaid the complainant while he was going on an *ekka* to Manair Thana to lodge an information against the petitioners of having committed theft in his house on the night previous, in order to prevent him from going to the Thana. The complainant received 9 injuries on his person. The Magistrate held that the complainant proved his case of assault against both the petitioners and, accordingly, convicted them.

The petitioners contend that the order of the Magistrate is vitiated by the fact that he did not keep on record any note of the result of the local inspection which he held. It appears that after the close of the case for the prosecution and the defence, and at the request of the prosecution, the Magistrate inspected the place of occurrence and has referred to it in his judgment after discussing the evidence of the prosecution in the following words:—"I inspected the scene of occurrence and I am convinced that Asghar was first beaten near the *Imambara* and then down the lane." In his explanation the Magistrate says that he did not import anything in the judgment which is not in the evidence and, therefore, did not think it necessary to write an inspection report and that there is no provision in the Code of Criminal Procedure making it obligatory on a Magistrate to do so.

In the evidence of the prosecution witnesses it was stated that the place of occurrence is west of the inhabited portion of the village, particularly the houses of the complainant and the petitioners, and that there is a ditch to the west of it. It is contended on behalf of the petitioners that the complainant's case, that he was going towards the west from the place of occurrence to Thana, is impossible, inasmuch as the *ekka* could not possibly cross the ditch and that there was no wheel track for an *ekka* towards the west to the Thana but to the west of the village, the way by which the Sub-Inspector himself is said to have come to the village on an *ekka* after the information was lodged. The petitioners in paragraph 7 of the petition to this Court say that they showed this to the Magistrate when he was inspecting the locality. The Magistrate disposed of it by his observation in the judgment in the passage quoted above. Though there is no provision in the Code of Criminal Procedure for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection, *vide Babbon Shaikh* v. *Emperor* (1). The passage quoted above clearly

(1) 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J. 121.

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

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

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

N. K. *Order accordingly.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 945 OF 1922.

January 30, 1923.

Present :—Mr. Justice Newbould and Mr. Justice Suhrawardy.

SAJANI KANTA ROY *alias* SAJANI ROY AND OTHERS—PETITIONERS

versus

SHAMSHER ALI SHEIKH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Different plots of land—Possession with different person—Single proceeding—Jurisdiction.

One proceeding, taken under section 145, Criminal Procedure Code, in respect of different plots of land in the possession of different persons is not without jurisdiction.

Krishna Kamini v. *Abdul Jubbar*, 30 C. 155; 6 C. W. N. 737 (F. B.), followed.

Rule.

Mr. *K. N. Chowdhury*, Babus *Manmatha Nath Mukerjee* and *Panna Lal Chatterjee*, for the Petitioners.

Mr. *Ashrafali* and Babu *Apurba Charan Mukherjee*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order passed under section 146, Criminal Procedure Code, attaching the lands of a certain *chur*, the possession of which is disputed between the parties. The objection taken to the order is based on the fact that the Magistrate has found that both parties have erected huts on the *chur* and both parties have grown paddy on the *chur* for some length of time and cut fodder grass grown there. It is contended that on these findings the learned Magistrate ought not to have held that the disputed *chur* was not in possession of any of the parties. It is contended that he ought to have drawn up separate proceedings in respect of each plot of land and come to a definite finding as regards each of these plots.

It appears to us that on the materials before him it was impossible for the Magistrate to have taken such a course. Our attention has been drawn to a map prepared by the Sub-Inspector. But this map is not drawn to scale and it would be impossible on that information to draw up proceedings which would describe the plots said to be in the possession of different persons with any attempt at accuracy. In the Full Bench case of *Krishna Kamini* v. *Abdul Jubbar* (1) it was held that proceedings under section 145, Criminal Procedure Code, are not without jurisdiction, because some of the parties are concerned only with possession of a portion of the lands in dispute. At page 185 of that ruling it was held that "to require a Magistrate to hold separate proceedings in respect of each plot of land claimed by each of the *raiyats*, would be to require him to undertake what would

(1) 30 C. 155; 6 C. W. N. 737 (F. B.).

be almost impossible from the intricate charac er of such proce dings. The jurisdic'ion of the Magistrate would depend upon the nature of the information, on which he has acted. If the dispute so brought to his notice is one likely to cause a breach of the peace, it would be impossible to characterize his proceedings as without jurisdiction, because in the course of the judicial enquiry subsequently held the claim of some of the parties related only to particular plots of land out of the entire area in question. His findings should naturally be directed to possession of particular plots, but that he did not take separate proceedings in respect to each plot would not invalidate his entire proceedings." We are asked to hold that the whole proceedings were without jurisdiction because the Magistrate instituted one proceeding covering these different plots. This decision is sufficient to show that there was no substance in the first ground on which the Rule was issued.

As regards the second and third grounds which relate to the duty of the Magistrate to come to a definite finding, we hold, for the reasons already stated, that on the materials before him it was impossible for him to come to a definite finding. If the parties wished him to come to such a finding it was their duty to supply him with proper materials to enable him to do so.

The Rule is discharged.

S. D.

Rule discharged.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 658 OF 1922.

November 7, 1922.

Present:—Mr. Justice Abdul Raoof.

BISHAN DAS, *alias* PARMESHRA NAND —CONVICT—APPELLANT

versus

EMPEROR —RESPONDENT.

Penal Code (Act XLV of 1860), ss. 232, 235—Counterfeiting coin—Possession of implements for counterfeiting—Separate sentences.

Where a person is convicted of counterfeiting coin and also of having in his possession implements and materials for the purpose of using them for counterfeiting, separate sentences under sections 232 and 235 of the Penal Code cannot be passed upon him, inasmuch as the possession of the implements and materials is part and parcel of the transaction of counterfeiting. [p. 701, col. 2.]

Ilayat v. *Emperor*, 14 P. R. 1904 Cr.; 111 P. L. R. 1904; 1 Cr. L. J. 946, followed.

Appeal from an order of the Magistrate, First Class, Gurdaspur, exercising enhanced powers under section 30, Criminal Procedure Code, dated the 12th June 1922.

Mr. *Beni Parshad Khosla*, for the Appellant.

Lala *Jai Lal*, R.B., Government Advocate, for the Respondent.

JUDGMENT.—Darsha Nand, Bishen Das and Bhagat Singh were charged under sections 235 and 232, Indian Penal Code, with being in possession of implements and materials for counterfeiting King's coins and with actually counterfeiting King's coins. They have been found guilty under both the sections. Darsha Nand has been sentenced to seven years' rigorous imprisonment under each of the charges and the sentences have been ordered to run separately and consecutively. Bhagat Singh has been sentenced to five years' rigorous imprisonment on each count and in his case the sentences are made to run concurrently. Bishen Singh has also been sentenced to two years' rigorous imprisonment on each count and in his case also the sentences are made to run concurrently. Two of the convicted persons, namely, Bhagat Singh and Bishen Das have filed separate appeals. Darsha Nand has not appealed.

The case for the prosecution was that in the village of Shahpur Kaudi there is a *Dharamsala* belonging to one Kanshi Ram (P W. No. 11). The *Dharamsala* is in a dilapidated condition and is situated at some distance from the city. It is surrounded by a thick cactus hedge. All the three accused lived in the *Dharamsala*. The accused are said to be *Sadhus*. They were seen loitering about in the city making purchases but were not seen begging. This aroused the suspicion of the Police. The Head Constable in charge of the Police *Chowki* at ShahpurKaudi sent Constable Arjan Singh (P. W. No. 12) to the *Dharamsala* to make enquiries about the three men. Arjan Singh after making

enquiries reported at the Thana that the so-called *Sadhus* were apparently persons who were counterfeiting coins as he had seen moulds, etc., for counterfeiting coins. Thereupon the Head Constable called the Lambardars, the *chaukidar* and a respectable shopkeeper and taking Arjan Singh and some other Police Constables with him went to the *Dharamsala*. There the three accused were found seated under the cover of some bushes and trees at a short distance from the *Dharamsala*. Numerous articles suitable for counterfeiting coins were found there, such as moulds, a sieve, some wet clay and earthen pitchers, etc. A long list of the articles found was prepared and it is on the record as Exhibit P-C. Two boxes, one wooden and another made of tin, were found in the *Dharamsala*, one of which belonged toBhagat Singh and the other to Bishen Das. On a search being made of the persons of the accused a purse was found in the possession of Bishen Das. This contained two keys and a counterfeit four-anna piece. The wooden box belonging to Bishen Das was opened with one of the keys and in addition to other articles one eight-anna piece and three two-anna pieces were found in it. The evidence of Bhai Indar Singh, Treasurer, Gurdaspur, shows that all these coins were counterfeit. An examination of the list, Exhibit P-C, clearly shows that all the articles mentioned therein were used for the purpose of counterfeiting coins. This list was carefully prepared and was signed by respectable witnesses. Subsequently, enquiries were made in the bazar and a number of witnesses came forward to prove that *Sadhus* had made purchases from them and produced certain coins which had been given to them by the accused as the price of the articles purchased. These coins, also according to the evidence, were found to be counterfeit. Bishen Das accused pointed out the spot from which 18 eight-anna pieces were dug out. They were all counterfeit coins.

On the evidence there can be no possible doubt as to the fact that all the three accused were in possession of the articles for counterfeiting coins and that they had actually counterfeited coins. Having regard to the facts disclosed in the evidence the conclusion is irresistable that they were all in joint possession of these articles.

The accused admitted that all the articles recovered were found as disclosed in the evidence, but they stated that they had no knowledge of them and had no connection with them. The only defence put forward was that of good character, some respectable persons came forward to swear to the good character of Bishen Das. The learned Magistrate has taken into consideration the good character of the appellant Bishen Das in awarding sentence in his case, but the evidence of good character does not in any way throw any doubt on the evidence as to the discovery of the articles found in the joint possession of the three accused. Their guilt is clearly established.

The only question which arises for consideration is whether the sentences passed under both counts are sustainable. In the case of *Hayat* v. *Emperor* (1), the prisoner was convicted of and sentenced for an offence under section 232, Indian Penal Code, *i. e.*, for performing a part in the process of counterfeiting King's coins and on a second count under section 235, Indian Penal Code, for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coins and it was held that the possession of such implements and materials being part and parcel of the transaction of counterfeiting coin the sentence for the second offence was illegal.

Following this ruling I must hold that the sentences passed on the appellants under section 235, Indian Penal Code, were illegal. I accordingly set aside the sentences passed under that section.

As regards the amount of sentence passed on Bhagat Singh I see no reason why a heavier sentence should have been passed on him than that passed on Bishen Das. They both occupied the same position and apparently the part they took in the process of counterfeiting coins was a minor one. The principal part must have been taken by Darsha Nand. I, therefore, reduce the sentence passed on Bhagat Singh from five years' rigorous imprisonment to one of two years' rigorous imprisonment. So far

(1) 14 P. R. 1904 Cr.; 111 P. L. R. 1904; 1 Cr. L. J. 946.

Bhagat Singh's appeal is allowed. In other respects it is dismissed.

The appeal of Bishen Das is so far allowed that the sentence passed on him under section 235 is set aside; otherwise, his appeal is dismissed.

As already stated, Darsha Nand has not appealed, but I took up his case under section 439, Criminal Procedure Code, and gave notice to the Government Advocate to show cause why the sentence passed on him under section 235 should not be set aside. Mr. Jai Lal, the learned Government Advocate, at once admitted the illegality of the sentence. I accordingly set aside the sentence passed on him (Darsha Nand) under section 235. The sentence passed under section 232, Indian Penal Code, will stand.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1130 OF 1922.

February 2, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

GOUR MOHAN DALUI—PETITIONER

versus

BANSIDHAR BYAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 517—Goods, pawned, stolen by pawnor from pawnee—Transfer to third person for consideration—Conviction for theft—Restoration of goods to pawnee—Further enquiry—Discretion of Court.

If a pawnor removes from the possession of the pawnee the articles pawned by him and passes them on to a third person for good consideration, on pawnor's conviction of theft the Trial Court is justified to direct, in the exercise of its discretion under section 517, Criminal Procedure Code, that the stolen articles be returned to the pawnee, who was the proper person to recover their possession because he had a lien on them. [p. 703, col. 1.]

Newbould, J.—Barring exceptional cases only where an enquiry may be necessary, as a general rule a Magistrate acting under section 517, Criminal Procedure Code, should pass orders according to his discretion without making any further enquiry. [p. 703, col. 1.]

Suhrawardy, J.—An order for the disposal of property under section 517, Criminal Procedure Code, is in the discretion of the Court, but that discretion is to be used judicially, and unless the High Court is satisfied that it has not been so used it has no right to interfere with it in revision. [p. 703, col. 1.]

Rule against an order of the Fourth Presidency Magistrate, Calcutta.

Babu *Manmatha Nath Mukherjee* and *Panna Lal Chatterjee*, for the Petitioner.

Babu *Satindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.

Newbould, J.—This Rule has been obtained against an order passed by the Fourth Presidency Magistrate, Calcutta. directing certain property to be returned to the opposite party. The order is recorded as having been passed under section 519, Criminal Procedure Code, but it was evidently passed by the Magistrate in the exercise of his powers under section 517, Criminal Procedure Code.

The facts, so far as they are necessary for the point now under consideration, are as follows:—Certain moveable property was hypothecated to the opposite party as security for a loan by one Kartikeswar Roy. Kartikeswar removed some of this property from the possession of the opposite party and has been convicted of theft for removing this property. After removing this property he parted with it to the petitioner for, as the petitioner alleged, good consideration and the petitioner claimed as purchaser in good faith. At the conclusion of the trial the Magistrate directed this property to be returned to the complainant, opposite party, and against this order the Rule has been obtained.

I think the order passed by the Magistrate was a proper order which he was justified in passing in the exercise of his discretion under section 517, Criminal Procedure Code. It is true, as contended by the petitioner, that the case is not a simple case of stolen property being found in the possession of a third party who necessarily has no title. If the petitioner is an honest purchaser he would obtain by his purchase such right to the goods as subsisted after the opposite party's claim had been satisfied. It is urged that the Magistrate has based his order on the finding that the petitioner was not acting honestly since he had at the trial disbelieved the petitioner's evidence. On reading the Magistrate's judgment we do not think it can be held that the Magistrate actually found that the petitioner was not

a purchaser for value, and even if he had so found, such a finding would not be binding between the present parties in any subsequent litigation that may arise. But we think on the clear facts of the case the opposite party complainant is the proper person to recover possession of the property. He was in possession of the property with a lien on it for his debt. It will be restored to his possession but that will not give him a better right to the property than he had before it was taken from him. The restoration of the property to the complainant will not deprive the petitioner of such rights as he may be able to establish to recover his purchase money against such property of Kartikeswar Roy, if any, as may be left after the complainant's claim is satisfied. We do not know whether the property in the complainant's possession will or will not be sufficient to satisfy his claim. If it is insufficient, obviously the petitioner loses nothing by the property being taken from him, since by his purchase he got nothing. If it is sufficient he will be able to recover the whole or part of his purchase money in due course after the complainant's claim is satisfied. It is further urged that this order should not have been passed affecting the rights of the petitioner without the petitioner being heard. I think that, as a general rule, the Magistrate acting under section 517, Criminal Procedure Code, should pass orders according to his discretion without making further enquiry and that this case is not one of those exceptional cases in which an enquiry was necessary.

We discharge this Rule.

Let the records be sent down at once.

Suhrawady, J.—I desire to base my decision on the view taken of section 517, Criminal Procedure Code, namely, that it gives discretion to the Magistrate to pass such order as he thinks fit for the disposal of any property, the subject of the criminal charge. That discretion is to be used judicially. Unless I am satisfied that it has not been so used I am of opinion that sitting in revision I have no right to interfere with it. In this case if the goods remained with the complainant who has a lien upon them the right of the purchaser petitioner before us is not affected: whereas if the goods are delivered over to the petitioner the complainant will lose the lien he has got over them for the amount advanced by him. In this state of things I cannot say that the Magistrate has exercised his jurisdiction arbitrarily or improperly.

S. D. *Rule dischaeged.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE NO. 122 OF 1922.

December 18, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, Justice Sir B. K. Mullick, KT. and Mr. Justice Kulwant Sahay.

MANAZIR-UL-HUQ, MUKHTAR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 14, inquiry under—Court, jurisdiction of.

The inquiry contemplated by section 14 of the Legal Practitioners Act can only be made by the Court in which the misconduct is alleged. A Court superior to that Court has no jurisdiction to hold such an inquiry.

Messrs. *N. C. Sinha, N. C. Ghose* and *N. C. R[illegible]*, for the Petitioner.

HAR NARAIN PRASAD *v.* EMPEROR.

JUDGMENT.—The petitioner in this case is a Mukhtar practising in the District of Bhagalpur. He was charged by the Sessions Judge with certain offences under the Legal Practitioners Act. The offences were of such a nature that they came within clause (*a*) or (*b*) of section 13 of that Act. The offences, if they were committed at all, were committed in the Court of the Sub-Divisional Officer during the course of a criminal prosecution. The criminal case was eventually committed for trial to the Court of the Sessions Judge. The Sessions Judge afterwards drew up a charge under section 14 of the Legal Practitioners Act against the Mukhtar. The nature of the charge, speaking generally, was that the Mukhtar had in the course of the criminal proceedings before the Sub-Divisional Officer filed certain documents on behalf of the complainant in that case without having proper instructions and without being engaged as a Mukhtar in the case. It is unnecessary to go into the facts in connection with the charges against the Mukhtar and we have purposely refrained from doing so, but it seems to us that the point raised on his behalf in the present proceedings, namely, that the Sessions Judge had no jurisdiction to take action under section 14 of the Legal Practitioners Act must succeed. The offences with which the Mukhtar is charged were not committed in the Court of the Sessions Judge at all. They were committed in the Magistrate's Court, and it seems to us that the case is governed entirely by the decision in *Emperor* v. *Satyendra Nath Roy* (1). That was a case where the enquiry contemplated by section 14 of the Legal Practitioners Act was made not by the Presiding Officer of the Court in which the misconduct was alleged but by the Presiding Officer of a superior Court, and in that case the High Court, when the matter was referred to it, refused to take action upon that account. In these circumstances, it seems to us that, according to the ruling of this Court, the learned Sessions Judge had no jurisdiction to hold the enquiry and the proceedings ought to be set aside.

W. C. A. *Proceedings set aside.*

(1) 57 Ind. Cas. 277; (1920) Pat. 225; 1 P. L. T. 379; 21 Cr. L. J. 613.

ALLAHABAD HIGH COURT

CRIMINAL REVISION NO. 659 OF 1922.

February 2, 1923.

Present:—Mr. Justice Lindsay.

HAR NARAIN PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 440—Applicant released on bail—Disappearance of applicant—Right to be heard.

A person who applies for revision to the High Court and on being released on bail disappears and is not to be found, is not entitled to be heard through his Pleader, and the High Court may refuse to proceed with his application.

Criminal revision from an order of the Sessions Judge, Moradabad, dated the 27th November 1922.

Messrs. *C. Ross Alston* and *A. Sanyal*, for the Applicant.

The Assistant Government-Advocate, for the Crown.

JUDGMENT.—This is an application for revision on behalf of one Har Narain Prasad who has been convicted on charges under sections 417 and 420. This application was admitted by a learned Judge of this Court who allowed the applicant out on bail to the satisfaction of the District Magistrate of Allahabad. It appears that at the time this order was made the applicant was said to be in the Allahabad District Jail.

It now appears that, having been released on bail, he has disappeared and is not to be found. This being so, I refuse to proceed with this application. A person who applies to this Court and is allowed out on bail and afterwards breaks his bail is not entitled to be heard. I, therefore, dismiss the application.

S. D.

Application dismissed.

SATDEO NARAIN *v.* RAMAYAN TEWARI.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 59 OF 1919.

January 3, 1923.

Present:—Mr. Justice Das and Mr. Justice Adami.

Pande SATDEO NARAIN—PLAINTIFF—APPELLANT

versus

RAMAYAN TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction of Courts—Jurisdiction, meaning and divisions of Jurisdiction as to person, how conferred—Judgment passed in disobedience of statutory provision, whether necessarily without jurisdiction—Defect in procedure—Merits of case not affected—Judgment, interference with, in appeal—Void and voidable judgments—Judgment, setting aside of, on ground of fraud General allegations, value of—Suit to set aside judgment as passed without jurisdiction—Court, whether competent to go behind record of proceedings—External evidence, examination of—Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3 (4), 4 (3)—Failure to serve notice on minor and guardian—Guardian appointed without express consent—Judgment passed against minor, whether null and void.

Jurisdiction is the authority of the Court to hear and determine a cause and is territorial, pecuniary, personal and of the subject-matter. Jurisdiction as to person is conferred on the Court by suing the person in a Court competent to try the cause as against that person, not by the mode which the Court adopts in bringing the person before the Court. Where the condition for the assumption of jurisdiction as against a person exists, the authority of the Court to try and determine the cause as against him is complete and the mode which the Court adopts to bring that person before the Court, affects the exercise of jurisdiction and not its existence. [p. 710, cols. 1 & 2.]

The mere fact that the Court has disobeyed any particular provision of the Statute is not sufficient to establish that there was no jurisdiction in the Court to render judgment in the case. But where as a consequence of the disobedience, there is no proper party to the suit, the case is different. The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. [p. 712, col. 2.]

Haridyanath Roy v. *Ram Chandra Barua Sarma*, 58 Ind. Cas. 806; 31 C. L. J. 482; 24 C. W. N. 723; 48 C. 138 (F. B.), *Tasadduk Rasul Khan* v. *Ahmad Husain*, 21 C. 66; 20 I. A. 176 17 Ind. Jur. 534; 6 Sar. P. C. J. 324 Rafique & Jackson's P. C. No. 131; 10 Ind. Dec. (N. S.) 676 (P. C.) and *Malkarjun* v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.), referred to

In order to establish that a judgment is a nullity, it must be established that there was a total lack of jurisdiction in the Court to render the judgment [p. 710, col. 1.]

When the question is not one affecting the jurisdiction of the Court, but one affecting the regularity of the proceedings, the Appellate Court will not interfere, unless there is a defect on the merits. [p. 712, col. 2.]

There is a clear distinction between a judgment which is void and a judgment which is voidable. An erroneous judgment is one which, though regularly rendered, is contrary to law or facts and is, therefore, liable to be reversed by an Appellate Tribunal. An irregular judgment is also a voidable judgment, but the distinction between an erroneous judgment and a voidable judgment is this that, whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there is a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside and it can be completely disregarded whenever it is pleaded, either in support of a claim or in answer to a claim. [p. 709, col. 2; p. 710, col. 1.]

Though a suit does not lie to set aside a decree and a sale in execution of such decree, on the ground that none of the processes in the suit or in execution was served on the plaintiff, such a suit is maintainable, if the allegations in the plaint amount to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit, in which the *ex parte* decree was obtained, as being a fraud from beginning to end. [p. 707, col. 2.]

Khagendra Nath Mahata v. *Pran Nath Roy*, 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 206 (P. C.), relied on.

It is a well settled principle as regards fraud that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. A fair test is to strike out from the plaint such words, as "fraud," "deceit," "illegal" and "fraudulent acts" and so forth and see whether a case of fraud can be founded on what remains. [p. 707, col. 2.]

Wallingford v. *Mutual Society*, (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W.R. 81 and *Gunga Narain Gupta* v. *Tiluckram Chowdhry*, 15 C. 533; 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec. (N. S.) 939 (P. C.), relied on.

Allegations in a plaint by a minor that none of the processes, in a suit or in the execution, was served on the plaintiff or on his guardian and that he was not properly represented in the action, do not, standing by themselves, amount to an averment of fraud, but where there are allegations in the plaint which suggest that there was no foundation at all in the suit or that there was a fair defence to the suit, such allegations are sufficient to raise the presumption that the failure to serve processes on the defendant or to take steps to have a guardian assigned to the minor, was deliberate and part of

a carefully planned campaign to snatch a decree in the absence of the defendant. [p. 708, col. 1.]

On a question of jurisdiction, the actual record or proceedings of the suit should in each case be decisive. Where on the face of the record a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power, in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under O. XXXII, r. 3(4) were in fact served or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case. But where the record, on the face of it, shows that the minor was not represented by a guardian for the suit or was represented by a guardian disqualified from acting as guardian, the position is the same as if the minor were not a party to the suit and the judgment rendered by the Court is without jurisdiction and null and void. [p. 721, col. 2; p. 722, col. 1.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021 at p. 1031; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), relied on.

Khiarajmal v. *Daim*, 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.), referred to.

Rashid-un-nisa v. *Muhammad Ismail Khan*, 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.) and *Partab Singh* v. *Bhabuti Singh*, 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1105; 40 I. A. 182; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001 (P. C.), distinguished.

The service of summons on a defendant and the service of notice under O. XXXII, r. 3 (4) of the Civil Procedure Code are but modes of exercise of jurisdiction and the mere fact, that summons is not served on the defendant, does not make the judgment null and void. [p. 710, col. 2.]

There is nothing in O. XXXII, r. 4 (3) of the Civil Procedure Code which requires the Court to record the consent of the guardian in the proceedings of the suit. [p. 709, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Saran, dated the 14th September 1918.

Messrs. *Susil Madhab Mullick* and *N. N. Sen*, for the Appellant.

Sir *Ali Imam* and Messrs. *Sambhu Saran*, *H. Prasad* and *S. N. Bose*, for the Respondents.

JUDGMENT.

Das, J.—One Bissesswar Prasad Pande died some time in *Jeth* 1293, leaving behind him a widow, Khikhinda Koer, and two daughters, Radho Koer and Lalta Koer. The plaintiff is the son of Lalta Koer, and the suit out of which this appeal arises was instituted by him to set aside a decree, dated the 23rd December 1909, and the sale of certain properties held in pursuance of the decree.

The material facts are these. On the 27th November 1896, Khikhinda Koer executed a mortgage-deed in favour of Polak Tewari, the father of Deonagar, defendant No. 1, to secure an advance of Rs. 1,900, made by the latter to the former. On the 2nd May 1897, Khikhinda Koer divided the estate of her husband between her two daughters by a deed, which is referred to as the deed of partition, and expressly provided that all the existing debts shall be paid by her two daughters in equal shares. On the 19th April 1909 Deonagar, the son of the original mortgagee, sued upon his mortgage and cited various persons as defendants to the action including Khikhindra Koer, Radha Koer and the plaintiff, his mother Lalta Koer having died shortly after the execution of the deed of partition. The plaintiff was cited as the third defendant and was described in the cause title as "the minor son of *Srimati* Lalta Koer, daughter of Babu Bissesswar Prasad Singh, through his father and guardian Hardeo Narain." The order sheet of the mortgage suit shows that on the 20th April, the Court directed notice to issue for the appointment of guardian, and that on the 12th May 1909, the Court appointed Hardeo Narain as the guardian *ad litem* for the minor defendant, the plaintiff in this action. There was, however, no appearance on behalf of the minor defendant, and on the 23rd December 1909 the Court passed a mortgage-decree in favour of the plaintiff to that suit. On the 6th December 1910, the properties were put up for sale, and were purchased by the decree-holder, Deonagar (defendant No. 1) conveyed the properties to Baldeo Sahay (defendant No. 2) and Baldeo Sahay has granted a *zarpeshgi* in respect of some of the properties so conveyed to defendants Nos. 3 to 5. On the 1st November 1913, the plaintiff, through his father as guardian, applied for setting aside the *ex parte* decree. That application was refused by the Trial Court on two grounds, first, on the ground that the summons had been duly served on the applicant,

and, secondly, on the ground that the application was barred by limitation. The plaintiff preferred an appeal from the order of the Court of first instance, and the Appellate Court, on the 8th February 1913, dismissed the appeal on the ground that the application was barred by limitation. The present suit was then instituted on the 10th July 1916 for setting aside the *ex parte* decree, dated the 23rd December 1909, and the sale held in pursuance of that decree and for consequential reliefs.

The material allegations in the plaint are, first, that none of the processes in the suit or in execution were served on the plaintiff or on his guardian; secondly, that he was not properly represented in the mortgage action, and no legal steps were taken for the appointment of a guardian *ad litem*; thirdly, that the proceedings were fraudulent from start to finish; fourthly, that there was no legal necessity in respect of the mortgage-bond executed by Khikhinda Koer, and, lastly, that his mother Lalta Koer, paid her portion of the mortgage-debt together with interest thereon and that, in spite of such re-payment, the mortgagee "prayed for the sale of the properties of Lalta Koer and made the plaintiff-defendant No. 3 in that suit."

The learned Subordinate Judge found the issue as to legal necessity in favour of the plaintiff, but he thought that the order of the Appellate Court, dated the 8th February 1913, operated as *res judicata*, so as to prevent him from giving the appropriate relief to the plaintiff. In the result, he declined to consider whether summons had in fact been served on the plaintiff in the mortgage action, and he dismissed the plaintiff's suit. The view taken by the learned Subordinate Judge was obviously wrong, or, it is settled law that, though a suit does not lie to set aside a decree and a sale in execution of such decree on the ground that none of the processes in the suit or in execution was served upon the plaintiff, such a suit is maintainable if the allegations in the plaint am unt to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end. *Khagendra Nath Mahata* v. *Pran Nath Roy* (1).

This Court, in appeal, remanded the case to the Court of first instance, for trial of the issue whether notice under O. XXXII, r. 3, was in fact served on the plaintiff and on his proposed guardian. The learned Subordinate Judge has taken further evidence, and his finding is, that processes were not served on the plaintiff and on his guardian in accordance with law.

The first question that arises for our consideration is, whether on the allegations made in the plaint the plaintiff is entitled to have the decree of the 23rd December 1909 and the sale held in pursuance of the decree set aside. I have said that a suit is clearly maintainable if the allegations made in the plaint amount to an attack on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end. But the question still arises, whether we have those necessary allegations in the plaint. The word "fraud" does, indeed, occur in the plaint. As a matter of fact, as is usual in this class of cases, there is an excessive use of that word; but, as has been pointed out, "with regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice"—*Wallingford* v. *Mutual Society* (2). A fair test which was applied with great success by the Judicial Committee in *Ganga Narain Gupta* v. *Tiluckram Chowdhry* (3) is to strike out from the plaint such words as "fraud," "deceit" "illegal and fraudulent acts" and so forth, of which there is always a great superfluity, and to see whether a case of fraud can be founded on what remains. If, after the process of ruthlessly striking out those words, we have nothing but an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character, it is plainly impossible to investigate a case of fraud.

(1) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).
(2) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.
(3) 15 C. 533; 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec., (N. S.) 939 (P. C.)

Now, what are the facts alleged in the plaint? First, that none of the processes in the suit or in the execution was served on the plaintiff or on his guardian, and, secondly, that he was not properly represented in the mortgage action. I shall come to the rest of the allegations presently, but the allegations which I am for the moment considering do not, standing by themselves amount to an averment of fraud. There is nothing necessarily fraudulent in the failure to serve processes on a party to a suit or to take steps to have a guardian *ad litem* assigned to a minor; and, if the allegation does not necessarily raise a case of fraud, there is, in my opinion, no case of fraud to be tried between the parties. But, although the Court will not regard an allegation that there was a failure on the part of the plaintiff to serve processes on the defendant as an allegation of fraud, the case will assume a different aspect if there are allegations in the plaint which suggest that there was no foundation at all for the suit or that there was a fair defence to the suit. Such allegations, if established, will instantly raise the presumption that the failure on the part of the plaintiff to serve processes on the defendant or to take steps to have a guardian assigned to the minor, was deliberate, and was part of a carefully planned campaign to snatch a decree in the absence of the defendant. It is necessary, then, to see whether there are allegations in the plaint which suggest that there was no foundation for the suit which resulted in the *ex parte* decree or that the defendant (the plaintiff in the present action) had a fair defence to the suit.

The plaintiff asserts that there was no legal necessity in respect of the bond executed by Khikhinda Koer; but clearly the defence was not available to the plaintiff. The plaintiff claims, not as the reversionary heir of Bissesswar Prasad, but, under the deed of partition executed by Khikhinda Koer, and, as the heir of his mother, Lalta Koer. It will be remembered that Khikhinda Koer partitioned the estate of her husband between her daughters, Radha Koer and Lalta Koer. Both Radha Koer and Lalta Koer are parties to the deed of partition, Exhibit Y, and are bound by the terms of the deed. The deed assumed that the executants had absolute interest in the properties which formed the subject-matter of the partition, and it proceeded to give to the executants an absolute interest in the properties allotted to each of them. The 16th clause of the deed provided as follows:—"That all the debts existing up to this time shall immediately after the execution of this deed be paid up by the second and third parties", (that is to say, by Radha Koer and Lalta Koer) "in equal halves, or they shall execute fresh deeds in favour of the *Mahajans* in their own names." There can be no room for doubt or controversy that Lalta Koer, the plaintiff's mother, took upon herself half the liability in respect of all the debts that were existing at the time of the partition. The plaintiff, claiming, as he does, under the deed of partition and as the heir of Lalta Koer, cannot repudiate the debt; and it is worthy of note that it is not his case that the mortgage was not executed by Khikhinda Koer, or that she did not receive the full consideration in respect of the mortgage. In my opinion, the plea of "no legal necessity" was not available to the plaintiff as a defence to the mortgage action.

It was then asserted that his mother Lalta Koer paid her portion of the mortgage-debt to the mortgagee together with interest thereon; and that, in spite of such payment, the mortgagee "prayed for the sale of the properties of Lalta Koer and made plaintiff defendant No. 3 in that suit." It will be noticed that there is no allegation that the mortgagee accepted the payment from Lalta Koer in full satisfaction of his claim against her, and released the properties which, subsequent to the mortgage, were, by the deed of partition, allotted to Lalta Koer. Such an allegation was, in my opinion, essential, if the plaintiff desired to raise a case of fraud against the mortgagee. The fact that Lalta Koer paid half the mortgage-debt to the mortgagee was admitted by him in his plaint; but it by no means follows that, because the mortgagee received half the mortgage debt from one in whom one-half of the equity of redemption became vested subsequent to the mortgage, he necessarily consented to the integrity of the mortgage being broken up. He was entitled to look to every portion of the mortgaged properties for satisfaction, so long as any portion of the debt remained

outstanding; and the fact that Lalta Koer paid her full share of the mortgage-debt would be no defence to the mortgage action, unless it was alleged and proved that the mortgagee consented to the integrity of the mortgage being broken up and agreed not to pursue his remedy as against the properties which fell to the share of Lalta Koer.

There is one further point in the plaint filed in this suit which requires notice. It is alleged that there was collusion between the mortgagee on the one hand and Khikhinda Koer and Radha Kuer on the other hand, and the suggestion is that Khikhinda Koer and Radha Koer "are secret partners" in the purchase of the properties. No case of collusion was argued in the Court below, and none has been found in favour of the plaintiff. The grounds of appeal do not raise such a case, and in the arguments before us it was not suggested that there was a case of collusion to be tried between the parties. For the purpose of our decision, we may entirely ignore those allegations in the plaint which raise a case of collusion between the mortgagee and Khikhinda Koer and Radha Koer.

In my opinion, there was no defence to the mortgage action; and, even assuming that processes were not served on the plaintiff and on his guardian, and that the plaintiff was not properly represented in the action, it cannot be said that there was fraud from start to finish or that the decree obtained by the mortgagee was obtained by fraud.

It was then argued that the decree obtained by Deonagar Tewari is a nullity so far as the minors are concerned, and that we ought to disregard it in these proceedings. The argument is based upon two facts, each of which the appellant claims to have established in this suit. These facts are, first, that notice of the appointment of a guardian for the suit was not served on the minor and upon the guardian of the minor in terms of O. XXXII, r. 3 (4) of the Code; and, secondly, that there was a distinct violation of the statutory provision contained in O. XXXII, r. 4 (3) of the Code, in so far as Hardeo Narain was appointed guardian for the suit without his consent. On the evidence, it is impossible to say that the notices were, or could have been, served upon the minor and upon the guardian for the minor in terms of O. XXXII, r. 3 (4) of the Code. The learned Subordinate Judge has given good reasons for accepting the case of the plaintiff on this point; and I entirely agree with the conclusion at which he arrived. Nor am I prepared to say that there was not a violation of the provision of O. XXXII, r. 4 (3) of the Code. That rule provides that no person shall without his consent be appointed guardian for the suit; but there is nothing in the rule which requires the Court to record the consent of the guardian in the proceedings of the suit. The order, dated the 12th May 1909 appointing Hardeo Narain as the guardian for the suit runs as follows:— "Notice for appointment of a guardian *ad litem* served. No objection filed. Hardeo Narain is appointed guardian *ad litem* for the minor defendant." The order as drawn up by the Court does not show that Hardeo Narain consented to act as the guardian; but neither does it show that he did not consent; although the form of the order suggests the inference that he was appointed guardian because he did not file any objection. I have myself little doubt in my mind that the Court proceeded on the assumption that it was competent to it to appoint Hardeo Narain as the guardian, if there was no objection by him. But such a conclusion must be more or less speculative in the absence of any provision in the Code requiring the Court to record the consent in the proceedings of the suit. But does it follow that, because there were defects in the proceedings of the suit, that the decree rendered by the Court ought to be regarded as null and void? The solution of the question has been rendered difficult by reason of the conflicting decisions of our Courts, and it is necessary to deal with the subject with care.

I think that a clear distinction exists between a judgment which is void and a judgment which is voidable. An erroneous judgment is a voidable judgment, for the argument, that a judgment is erroneous, assumes both the regularity of the procedure and the jurisdiction of the Court to render it. An erroneous judgment is one which, though regularly rendered, is contrary to law or facts, and is, therefore, liable to be reversed by an Appellate Tribunal. An irregular judgment is also a voidable judgment, but the distinction between an erroneous judgment and an irregular judgment

is this, that whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded, either in support of a claim or in answer to a claim.

In order, then, to establish that the judgment in the mortgage action is a mere nullity, it must be established that there was total lack of jurisdiction in the Court to render the judgment. But it is exactly in the conception of jurisdiction that there is unfortunately a great deal of confusion of thought. As was pointed out in *Sukh Lal* v. *Tara Chand* (4) and emphasised in *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (5), we must be careful to distinguish between the existence of jurisdiction and the exercise of jurisdiction. Where there does not exist any jurisdiction to try and determine the cause, the judgment is void, and it can be impeached collaterally. But where there does exist such a jurisdiction, but, in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or, under our Code, by the Appellate Court, either in appeal or in revision. As was said in the cases cited, jurisdiction is the authority of the Court to hear and determine a cause. Now jurisdiction had been classified under different heads by different Judges; but I think that we may take it that it falls under four different heads; (1) territorial jurisdiction, (2) pecuniary jurisdiction, (3) jurisdiction of the subject-matter, and (4) jurisdiction of the person.

Now, there is no doubt that, in the particular case, the Court had territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter But it was argued that it had no jurisdiction over the appellant, as he was not regularly brought before it. It was contended that a Court acquires jurisdiction over a minor, if appropriate proceedings are taken under O. XXXII of the Code and that, in so far as the Court neglected to take those proceedings, there was a total lack of jurisdiction in the Court to try and determine the cause as against the appellant.

I am wholly unable to accept the contention. Jurisdiction as to person is conferred on the Court by suing the person in a Court competent to try the cause as against that person, not by the mode which the Court adopts in bringing the person before the Court. The Court has authority to try a cause as against a person, if that person is sued, and in cases coming within section 19, section 20 and within the proviso to section 16 of the Civil Procedure Code, if that person, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, within the local limits of its jurisdiction. Where the condition for the assumption of jurisdiction as against a person exists, the authority of the Court to try and determine the cause as against him is complete, and the mode which the Court adopts to bring that person before the Court affects the exercise of jurisdiction, and not its existence. I think this is clear from the numerous decisions which establish that the mere fact that summons is not served on the defendant does not render the judgment null and void. I cannot distinguish a case where summons is not served on the defendant from a case where notice under O. XXXII, r. 3 (4) is not served on the minor and on the guardian of the minor. The service of summons in one case and the service of notice in the other are but modes of exercise of jurisdiction when the Court has already acquired the authority to hear and determine the cause. Nor does the contravention of the express provision of O. XXXII, r. 4 (3) deprive the Court of the jurisdiction which it has already acquired over the cause. There are numerous decisions in the books which establish that a judgment will not be regarded as a nullity, although it has been rendered in direct contravention of a statutory provision. It was held in *Tasadduk*

(4) 2 C. L. J. 241; 33 C. 68; 9 C. W. N. 1046; 2 Cr. L. J. 618 (F. B.).
(5) 58 Ind. Cas. 806; 31 C. L. J. 482; 24 C. W. N. 723; 48 C. 138 (F. B.).

Rasul Khan v. *Ahmad Husain* (6), that the non-compliance with the requirement of section 290 of the Code which provided that no sale shall take place "until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale is a material irregularity, but that its effect is not to make the sale a nullity without proof of substantial injury to the judgment-debtor. In *Malkarjun* v. *Narhari* (7) the question which the Court had to decide was whether a sale which took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate, could be considered a nullity. What happened was that after the death of Nagappa, the judgment-debtor, the decree-holder applied for execution of the decree "against defendant Nagappa, deceased, by his heir and nephew Ramalinga." As it happened, Ramalinga was not the heir of Nagappa, and he came and informed the Court that he was not the heir of Nagappa, that the daughters of Nagappa were the heirs, and that he was not in possession of the estate of Nagappa. The Court informed him that the application was not against his property, but against the estate of the deceased, and that, if his property should be attached, he would have his remedy after attachment. And so the sale took place, and the property was purchased by the defendants, who happened to have a mortgage on the property. The suit in which the question arose was by the heirs of Nagappa, and it was a suit for redemption in which they ignored the fact that a sale had taken place and that, at that sale, the decree-holders had purchased the property. In order to succeed, it was necessary for them to establish that the sale was a nullity; and the defendants contended that, however erroneous the order of the Court might have been in directing the sale of the property in a proceeding, not against the heirs of Nagappa, but against strangers, the Court acted with jurisdiction, and it could not be said that the sale was a nullity. The argument advanced on behalf of the defendants was upheld by the Judicial Committee. "It is not disputed" said Lord Hobhouse in delivering the judgment of the Board, "that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the learned Judges below go the whole length of affirming that the Execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court. If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against 'the estate of Nagappa', and in another column Ramlingapa is named as his heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceedings. If Ramlingappa had actually been successor-in-title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards? The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has

(6) 21 C. 66; 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar P. C. J. 324; Rafique and Jackson's P. C. No. 131; 10 Ind. Dec. (N. S.) 676 (P. C.).

(7) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 923; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P.C.).

jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the Execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do". In *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (5) the question for the consideration of the Court was whether an order for withdrawal of a suit with leave to institute a fresh suit under O. XXIII, r. 1 of the Code where there is nothing to indicate that the Court was satisfied that the suit must fail by reason of some formal defect, could be regarded as an order without jurisdiction, and therefore, null and void. Mookerji, A. C. J., in delivering the unanimous opinion of the Full Bench, pointed out that what was done in the exercise of jurisdiction could not be regarded as having been done without jurisdiction. It is needless to pursue the subject any further; for, though a discordant note has been struck here and there, the Indian Courts have recognized the principle that disobedience of any particular provision of the Statute does not necessarily affect the jurisdiction of the Court to try and determine a suit.

In England, a judgment against a minor in which the minor did not appear, and no guardian was appointed, is regarded as a judgment irregularly obtained, and the Court which rendered the judgment has power to set it aside and all subsequent proceedings for irregularity without going into the question whether there was a defence on the merits. See *Jarman* v. *Lucas* (8), *Lushington* v. *Sewell* (9), *Hall* v. *Scotson* (10). But, under the Civil Procedure Code, "no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any .....error., defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court." I am not overlooking the fact that section 99, Civil Procedure Code, deals with the power of the Court in appeal when any error defect, or irregularity in the proceedings is brought to its notice; but I think that our Code has adopted the principle that, where the question is not one affecting the jurisdiction of the Court, but one affecting the regularity of the proceedings, the Court will not interfere unless there is a defect on the merits.

I have said that the mere fact that the Court has disobeyed any particular provision of the Statute is not sufficient to establish that there was no jurisdiction in the Court to render judgment in the case. But where the disobedience leads to this result that, as a consequence of the disobedience, there is no proper party to the suit, the case is different. It is one thing to say that the Court has not adopted the appropriate procedure to require the attendance of a party before it; it is another and a different thing to say that, as a result of the disobedience of any particular provision of the Statute, there is no proper party to a suit. The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit, but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court; the other affects the exercise of it. To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor

(8) (1863) 15 C. B. (N. S.) 474; 33 L. J. C. P. 108; 12 W. R. 202; 143 E. R. 870; 137 R. R. 612.
(9) (1821) 6 Madd. 28; 56 E. R. 999.
(10) (1853) 23 L. J. Ex. 85; 9 Ex. 238; 2 W. R. 103; 156 E. R. 102; 96 R. R. 688.

is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such guardian under the express provision of the Statute, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit, and he is properly a party if he is represented in the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. In my opinion, it is the record of the suit that must decide the question of jurisdiction ; and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity ; though it may be set aside if it is shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties.

I think, this was the view of the Judicial Committee in the case of *Walian* v. *Banke Behari Pershad Singh* (11) which, in my opinion, is decisive of the case before us. The facts were these. In 1873 a mortgage was executed by one Tilakdhari Singh in favour of Wahid Ali to secure Rs. 8,000 advanced by the latter to the former. Tilakdhari died in 1880 and in 1881, Muhammad Zahurul Haq, the son of Wahid Ali brought a suit upon the mortgage against the sons of Tilakdhari of whom the plaintiffs were minors. As a question was raised whether the minors were in fact sued, it is material to set out how the defendants were cited in the cause title. They were cited as follows: " Babu Gajadhar Pershad Singh, major son, and *Musammat* Moti Rani Koer, mother and guardian of Babu Sidhesser Pershad Singh, Babu Banke Behari Singh, Babu Awadh Behari Singh and Babu Birj Behari Singh, minor sons, heirs of Babu Tilakdhari Singh." Section 443 of the Code provided that " where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence of such minor, and generally to act on his behalf in the conduct of the case. ' No formal order appointing Moti Rani Koer as the guardian for the minors was drawn up by the Court, and there was no appearance in the suit itself by Moti Rani Koer on behalf of the minors. On the 29th October 1881 Muhammad Zahurul Haq obtained a mortgage-decree and subsequently purchased the share now sued for in execution of his decree.

In 1897, the persons who were sued as minors in the mortgage action instituted a suit for a declaration that the mortgage-decree and the sale held in pursuance of the decree were null and void as against them and for recovery of possession of the share which had passed at the auction-sale. The plaint stated that the mortgage in question was improperly executed by Tilakdhari Singh without legal necessity or justification, and for immoral purposes, and that whatever money he received under it was spent for such purposes, none of it being applied for the benefit of the family; that, at the date of the mortgage Tilakdhari and his branch of the family formed part of a joint family of which his elder brother, Baiju Singh was *Karta* or managing member, the plaintiffs being children of seven years and under, that the suit on the mortgage was prosecuted against the present plaintiffs without the appointment or presence in the suit of any guardian on their behalf ; that none of the processes in the suit or in the execution of the decree was served upon them, or upon any guardian in their behalf ; or even upon their mother ; and that all the proceedings in the suit, including the sale, were fraudulent. It will be noticed that the plaint raised a defence to the mortgage suit on the merits, and contained an attack on the regularity of the proceedings adopted by the Court in the mortgage suit. The learned Subordinate Judge held that the mortgage was executed for the full consideration of Rs. 8,000 and that the money was applied for family purposes and not immorally. He disbelieved the evidence of the plaintiffs as to the dissipated character of Tilakdhari and

(11) 30 C. 1021 at p. 1031; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

he found that Tilakdhari was not joint with his brothers at the date of the execution of the bonds. He accordingly decided the merits against the plaintiffs, and came to the conclusion that there was no defence to the mortgage suit. On the question whether the minors were at all sued, he held that the suit was "substantially directed against the minors and they cannot say that they were not parties to it." On the question whether Moti Rani Koer was a proper person to be the guardian of the minors, he said that the minors were residing with her and that there was evidence that "she preferred an appeal on their behalf." As this passage is open to misconstruction, it ought to be pointed out that the act of Moti Rani Koer in preferring an appeal on behalf of the minors to which the learned Subordinate Judge referred was an act in another proceeding altogether, and not in the mortgage suit or in any proceedings arising out of the mortgage suit. As the view has been taken in some of the cases to which I shall presently refer that, though there was no formal order appointing Moti Rani Koer as the guardian of the minors for the suit, she actually appeared in the suit and took various steps for the protection of the minors, I have thought it necessary to examine the original record of the case brought by the minors to see if there is any justification for the view in the evidence that was adduced in that case. I find that Moti Rani Koer did not enter appearance in the mortgage suit, and took no part in it either on her behalf or on behalf of the minors. There was no suggestion that she did enter appearance or in any way protected the interests of the minors; but, as the learned Subordinate Judge pointed out, since there was no defence on the merits, "it cannot be said that her silence has prejudiced the plaintiff." In considering the question whether she was fit and proper person to act as the guardian of the minors, the learned Subordinate Judge pointed out that there was evidence that she had preferred an appeal on behalf of the minors. On examining the record, I find that that appeal was preferred in an execution matter in which Ghamandi Singh, Harshewak Singh and others were decree-holders, and not in the mortgage suit which was a suit by Muhammad Zahurul Haq. Dealing next with the question whether the minors were properly represented in the mortgage suit, the learned Subordinate Judge conceded that "no formal order appointing the guardian was drawn up," but he thought that "the Court must be deemed to have sanctioned the appointment, as it had before it the names of the minors and of their mother as guardian" and he came to the conclusion that, as there was no defence open to the widow, "it cannot be said that her silence has prejudiced the plaintiff." In the result, he dismissed the plaintiff's suit. On appeal, the Calcutta High Court refused to consider the question whether there was any defence on the merits, for it came to the conclusion that, if the minors were not properly represented in the action, the decree was a nullity, and the minors could disregard it. Dealing with the question whether the minors were properly represented, the High Court said as follows:—"Section 443 of the Code of Civil Procedure is imperative upon this point; the Court after satisfying itself of the fact of minority, is bound to appoint a proper person to act on behalf of the minor in the conduct of the case. From the proceedings in the mortgage suit, it seems clear to us that the Subordinate Judge never directed his attention to the question of the minority of these defendants or to the appointment of a proper guardian on their behalf; and there is nothing from which we can presume, as the lower Court his presumed, that the Court before which the mortgage suit was pending ever sanctioned, expressly or impliedly, the appointment of the minors' mother as their guardian *ad litem*." The High Court accordingly allowed the appeal, and made a declaration to the effect that the share of the plaintiffs could not be properly held to be liable under the mortgage-decree, or to have passed by the sale. The defendants carried an appeal to the Judicial Committee and the Judicial Committee reversed the decision of the High Court, and restored that of the Subordinate Judge. The Judicial Committee agreed with the view of the High Court that the rules laid down in section 443 should be strictly followed, but it did not agree with the view that a defect in following those rules was necessarily fatal to the proceedings. And dealing with the argument that the minors were not properly

represented, the Judicial Committee said as follows:—"It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court.....There is nothing to suggest that their interests were not duly protected. The only defects that can be pointed out are that no formal order appointing the mother of the now plaintiffs to be their guardian *ad litem* is shown to have been drawn up...It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs; nor indeed could there well be any, since it has been found that the original debt was one for which the present plaintiffs were liable. Their Lordships are of opinion that the defects of procedure alleged in this case are at most irregularities which, under section 578 of the Civil Procedure Code, would not have furnished ground for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit". I regard the decision of the Judicial Committee as establishing that the failure to comply with the provisions of section 443 of the old Civil Procedure Code is a defect of procedure which will not be fatal to the suit, unless it is shown that the defect or irregularity in the proceedings has affected the merits of the case. Section 578 of Act XIV of 1882 corresponds to section 99 in the present Civil Procedure Code.

If, as the Judicial Committee has held, the failure to comply with section 443 of Act XIV of 1882 corresponding with O. XXXII r. 3 (1) is not fatal to the suit, on what ground can it be urged that the failure to comply with the provisions of O. XXXII, r. 3 (4) and O. XXXII, r. 4 (3) will render the decree null and void, although it is shown that the failure to comply with those provisions has not affected the merits of the case? It is argued that these are new provisions, and that there are distinct prohibitions contained in these provisions. But there was just as much prohibition in section 443 of Act XIV of 1882 as there is in O. XXXII, r. 3 (4) and O. XXXII, r. 4 (3) of the new Code. What reason is there for suggesting that, though the failure to comply with the provisions of O. XXXII, r. 3 1)—section 443 of the old Act does not affect the jurisdiction of he Court, the failure to comply with the provisions of O. XXXII, r. 3 (4) and O. XXXII, r. 4 (3) does affect its jurisdiction? All these different provisions stand on the same footing and are intended to secure a fair trial of the case where a minor is a party to the suit. The argument, in my opinion, proceeds on a fundamental misconception that that which is, or ought to be, an exercise of jurisdiction is prerequisite to the existence of jurisdiction. As a distinguished American writer has said: "But if a judgment is rendered by a Court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be void because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to reversal or voidable on a proper proceeding for that purpose. The theory is that the appointment of a guardian is not a prerequisite to the jurisdiction of the Court." (See Black on Judgment, Volume I, section 193). If it were not for the opinion expressed by a learned and distinguished Judge, I should have said without hesitation that the decision of the Judicial Committee in the case to which I have referred is decisive of this case.

In *Bal Kishen Lal* v. *Topeswar Singh* (12) Mookerji, J. (sitting with Carnduff, J.) took the view that a decree passed in a suit to enforce a mortgage executed by the father was a nullity so far as the minor son was concerned if the father were appointed guardian *ad litem* without his consent and he did not appear in the suit and protect the interest of the minor. The learned Judge distinguished the case of *Walian* v. *Banke Behari Pershad Singh* (11) and thought that the case of *Khiarajmal* v. *Daim* (13) was applicable to the facts of the case. The ground of distinction, according to the learned Judge, is this, that whereas in *Walian's case* (12) the minor was properly represented on the face of the record by a competent guardian, in the case before him the minor was not so represented.

(12) 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219.

(13) 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

With all respect, I am unable to take this view. It is quite true that, in the case before his Lordship, the father did not intimate his acceptance of the office of the guardian *ad litem*; but neither did the mother in *Walian's case* (11). The record in each case showed on the face of it, that a guardian *ad litem* had been appointed for the minors, but in neither of the cases did the guardian *ad litem* actually appear and contest the suit on behalf of the minor. The only distinction which can be suggested is that in *Walian's case* (11) it was the mother who was appointed the guardian *ad litem*, whereas in the case before his Lordship the father who had executed the mortgage-bond was so appointed. Mr. Justice Mookerji thought that, there being a conflict of interest between the father and the son, it was not competent to the Court to appoint the father as the guardian for the minor son. With great respect to the learned Judge, I am quite unable to take this view. A person is said to have an interest adverse to that of another when one interest is capable of being enforced against the other. In a partition action, the interest of the father is clearly adverse to that of the son. But in a suit to enforce a mortgage-bond executed by the father, it is difficult to see how the interest of the father can be regarded as adverse to that of the son. It is quite true that in such a suit it is open to the son to question the validity of the mortgage-bond. but such a defence is clearly in the interest of the father, for if the defence succeeds, the bond as a whole must fail. The case of *Khiarajmal* v. *Daim* (13) is, in my opinion, a different case. The facts of that case were these. By certain transactions, certain properties became vested in the following persons in definite shares: Nabibakhsh and his brother Alibakhsh, Naurez, Bugro, Sanwan and Khan Mohammad. In 1874 two mortgages were executed by them, one in favour of Tekchand and his partner Kodumal, the predecessors-in-title of the defendants, the other in favour of Tekchand, Kodumal and Wali Ram. Between 1874 and 1878, the following changes took place in the family of the mortgagors, Naurez died leaving a widow and four childeren including Amirbaksh, Khan Mohammad died leaving seven children including Kadurbaksh, and Sanwan died leaving a widow and four children including Sumar. On the 4th June 1878, the following transactions took place, first, Nabibakhsh on behalf of himself and Alibakhsh executed a mortgage of a moiety of the property in favour of Kodumal and Tekchand by which the debts created by the previous mortgages of 1874 were satisfied so far as Nabibakhsh and Alibakhsh were concerned; secondly, Kadurbaksh, one of the childern of Khan Mohammad, purported to convey the share of Khan Mohammad in the property which he described as his share to Bugro in consideration of a sum of money which was taken to be "his share" of the mortgage-debts created by the two mortgages of 1874 which Bugro agrees to pay; thirdly, Bugro, Sumar, one of the children of Sanwan and Amirbakhsh, one of the children of Naurez, purported to mortgage the other moiety of the property to Kodumal and Tekchand, by which the debts created by the mortgages of 1874 were satisfied so far as Naurez, Khan Mohammad, Sanwan and Bugro were concerned. It will be noticed that, by the transactions of 1878 the entire sixteen annas of the property passed into the possession of Kodumal and Tekchand as mortgagees. In 1878 sometime before the execution of the mortgages, Kadumal and Tekchand commenced a suit (Suit No 160 of 1878) against "Naurez deceased by his legal representative, Amirbakhsh, by his guardian, his uncle Alahnawaz" and certain other persons to recover a sum of money on settled account. It will be noticed that the suit was neither in form nor in substance a suit against Amirbakhsh. The suit was against the estate of Naurez, and Amirbakhsh as one of the five heirs left by Naurez could not be said to represent the estate of Naurez nor could the share of Amirbakhsh be proceeded against in the suit, for, as I have said, the suit was not against Amirbakhsh personally. That suit was compromised for the sum of Rs. 519, and default having been made, the land standing in Naurez's name was sold to Ubhoromal who transferred it to Darianomal. One of the questions which the Judicial Committee had to consider was whether the equity of redemption which belonged to the estate of Naurez was effec-

tively sold in a suit to which the estate of Naurez was not a party. It may be mentioned that Darianomal was the *Gomasta* of the firm of Kodumal and Tekchand and was their *benamidar* in the purchase. In 1879 another suit was commenced, this time by Waliram against Nabibakhsh, Bugro, Sumar, Kadurbakhsh and Amirbakhsh described as "a minor aged about 14 years, legal representative of Naurez deceased, by his guardian, his uncle Alahnawaz" to recover a sum of money in respect of his share of the sum due under the mortgage to himself and his partners of 1874. It will be remembered that the mortgage in question had been executed by Nabibakhsh (on behalf of himself and his brother Alibakhsh), Naurez, Bugro, Sanwan and Khan Mohammad. The suit as constituted could not be regarded as a suit against Sanwan, Khan Mohammad and Naurez, since at the date of the institution of the suit they were already dead, and the legal representatives in whom their respective estates had vested were not cited as defendants in the action. So far as Alibakhsh is concerned, he was properly represented in the action by Nabibakhsh who had executed the mortgage on behalf of Alibakhsh as well as of himself. And though Alibakhsh was living and was not cited as a defendant, no objection could be taken to the constitution of the suit so far as he was concerned.

The proceedings in the suit were somewhat extraordinary. The names of Sumar and Kadurbakhsh were struck off from the record of the suit, and on an application by Waliram, Nabibakhsh, Bugro and Alahnawaz, the matters in dispute were referred to the arbitration of Kodumal, the partner of Waliram. Shortly afterwards Nabibakhsh died, and his heirs were properly brought on the record; but the death of Nabibakhsh had a material effect on the constitution of the suit in regard to Alibakhsh. Alibakhsh, as I have said, was not a party to the suit; but Nabibakhsh had executed the mortgage on his behalf, and, as the Judicial Committee pointed out, it might be possibly held that Nabibakhsh's authority extended to representing Alibakhsh in Waliram's suit. But by no possibility could it be considered that he was represented by the heirs of the deceased brother. The arbitrator in due course made his award by which he directed that Waliram should recover a sum of money from Bugro and from the estates of Nabibakhsh, Sanwan, Khan Mohammad and Naurez respectively in certain instalments, and the Judge passed a decree in terms of the award. It will be noticed that there was no decree against Alibakhsh, and the decree as against the estates of Sanwan, Khan Mohammad and Naurez was open to the objection that those estates were never sued. Execution followed the decree, and the properties, the subject of the mortgage (except a particular item which was taken to belong to Naurez and which was sold in execution of Tekchand and Kodumal's decree hereinbefore stated) were sold to Darianomal, the *benamidar* of the firm of which Tekchand and Kodumal were the partners. Thus the equity of redemption in the mortgaged properties apparently passed to the mortgagees as a result of the two execution sales.

The suit in which the question of the validity of the execution sales was raised was instituted by Alibakhsh, by the heirs of Nabibakhsh, by the heirs of Naurez, by the heirs of Sanwan, by the heirs of Khan Mohammad, and by the heirs of Bugro, and the suit was one for the redemption of the mortgages. Bugro, it appears, had died prior to the institution of the redemption action. The question which the Judicial Committee had to consider was whether the equity of redemption not only purported to be, but was in fact, sold under the money-decrees. Their Lordships conceded that the sales could not be treated as void on the ground of any mere irregularities of procedure in obtaining the decrees or in the execution of them, but they were of opinion that the Court had no jurisdiction to sell the property of persons who were not parties to the suit or properly represented in the record. There is no doubt whatever in my mind that what the Judicial Committee did consider was whether the record itself showed that the suit had been brought against the persons against whom the decrees were obtained not whether, apart from the record, the suit could be regarded as a suit against those persons, having regard to the rules

of procedure laid down in the Code or recognised by the Courts.

The Judicial Committee considered the case of each of the mortgagors separately, and found that the estates both of Nabibakhsh and Bugro were sufficiently represented for the purpose of the suit, and that their shares of the equity of redemption in the property sold in execution of the decree obtained by Waliram were bound by the sale and were, therefore, irredeemable. In regard to Alibakhsh, the Judicial Committee pointed out that he was not a party to the suit and that there was no decree against him, and that consequently the Court had no jurisdiction to sell his share. In regard to Sanwan and Khan Mohammad, the Judicial Committee had no difficulty in holding that their shares did not pass by the sale. In the first place, their estates were not represented in action, in the second place, Sumar (one of the heirs of Sanwan) and Kadurbakhsh, (one of the heirs of Khan Mohammad) who were sued in their personal capacities, were dismissed from the suit, and they were in no sense parties to the suit when the decree was passed against them. There is no difficulty in understanding the decision so far, but from what their Lordships said in regard to Amirbakhsh, one of the heirs of Naurez, it has been assumed that the Judicial Committee has decided that a decree obtained against a minor without a proper appointment of a guardian is a nullity so far as the minor is concerned. In my opinion, no such conclusion can be based on what was actually decided in the case, though there are observations in the judgment of Lord Davey which may support the contention. In order to understand the point, it is necessary to repeat that Amirbakhsh was a party to both the suits, not in his personal capacity but as the legal representative of Naurez. Now, Naurez had left a widow and four children, all of whom were his heirs under the Muhammadan Law, and by no possibility could it be considered that the estate of Naurez was all represented in the actions. This, in my opinion, was the basis of the decision of the Judicial Committee, though i was pointed out by Lord Davey that Alahnawaz was not the guardian of Amirbakhsh and had never been appointed as such by the Court. It was for this reason that the Judicial Committee discussed the question whether the estate of a deceased debtor could be represented by one member of the family. In dealing with this question, the Judicial Committee said as follows:—"The Indian Courts have properly exercised a wide discretion in allowing the estate of the deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control." After distinguishing the case of *Malkarjan* v. *Narhari* (7) on the ground that there was a decision in that case, an erroneous decision, it is true, but still a decision to the effect that execution could proceed, although the estate of the deceased debtor was not represented in the execution proceedings,—their Lordships stated their conclusion in these words: "Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was, therefore, without jurisdiction, and null and void. Nor can they hold that the share of Amirbakhsh himself in his father's estate was bound." I think it follows from this passage that what the Judicial Committee actually decided was that the sale of property belonging to a person or to an estate in execution of a decree in a suit in which that person or that estate is not represented is without jurisdiction, and null and void. As the last sentence in the passage cited is open to some misconception, it ought to be pointed out that Amirbakhsh was not the debtor and that he could not in law, and was in fact, sued in his personal capacity, and that *qua* his own share in the property inherited by him, he was in the same position as if he was not a party to the suit.

It was strongly pressed befo e us that Lord Davey was undoubtedly impressed by the fact that Alahnawaz was not the guardian of Amirbakhsh and was not

appointed as such by the Court. That undoubtedly is so, but, so far as this point is concerned, the case cannot be distinguished from the case of *Walian* v. *Banke Behari Pershad Singh* (11) which was cited before their Lordships, but which was not referred to in the judgment of Lord Davey. In *Walian's case* (11) as in *Khiarajmal's case* (13) a person appeared in the record as the guardian *ad litem* of the minor, but neither in *Walian's case* (11) nor in *Khiarajmal's case* (13) was that person appointed as such by the Court. The only difference between the two cases is this, that whereas in *Walian's case* (11) the guardian never appeared in the proceedings to protect the interest of the minor, in *Khiarajmal's case* (13) he did appear in one of the suits to refer the matter in dispute to the arbitration of a certain person, in the other suit, to compromise the claim for a certain sum of money. In *Walian's case* (11) the defect was regarded, not as affecting the jurisdiction of the Court, but as a defect or irregularity in the proceedings in the suit which would not affect the decree unless it affected the merits of the case. I cannot read the decision in *Khiarajmal's case* (13) as laying down the contrary proposition, unless the Judicial Committee has said so in express words. In my opinion, the actual decision in *Khiarajmal's case* (13) does not support the conclusion at which Mr. Justice Mookerji arrived in the case cited.

The only other case which I propose to discuss is the case of *Ananda Prasad* v. *Upendra Nath De* (14). In that case Mr. Justice Mookerji laid down that where a person has been appointed guardian without his consent in contravention of the express direction of O. XXXII, r. 4 (3), the infant is not represented and a decree made in a suit so constituted has no binding effect upon him; and the learned Judge referred to three decisions of the Judicial Committee so supporting his view. The cases referred to by the learned Judge are *Khiarajmal* v. *Daim* (13), *Rashid-un-nisa* v. *Muhammad Ismail Khan* (15) and *Partab Singh* v. *Bhabuti Singh* (16). I have already dealt with the first of these cases, and it is unnecessary to deal with it again. The second mentioned case is an authority for the proposition that a married woman is disqualified under section 457 of the Code from being appointed guardian for the suit, and that where a married woman is appointed guardian for the suit, the position is just the same as if the minor were not a party to the suit. It is not an authority for the proposition that "when a person has been appointed guardian without his consent the infant is not represented and a decree made in a suit so constituted has no binding effect upon him." It may be said that the prohibition contained in section 457 of the old Code stands on the same footing as a prohibition contained in O. XXXII. r. 3 (4) or a prohibition contained in Order XXXII, r. 4 (3). But, as has been pointed out, it is often a matter of some nicety to draw a distinction between the existence of jurisdiction and the exercise of jurisdiction. It may be said that the Court has no jurisdiction to pass any order against a minor unless the minor is represented in the record by a guardian competent to act as such; and that where the record itself shows that the minor is not properly represented, the effect is the same as if the minor were not a party to the suit. The record, in my opinion, is in each case decisive of the question. There is clearly a distinction between a case where a person disqualified from acting as guardian is so appointed and a case where a person competent to act as guardian is so appointed, though without the express consent of the guardian. In the one case, the record on the face of it shows that the representation is bad, in the other case the record on the face of it shows that the representation is complete. In my opinion, the Judicial Committee cannot be taken to

(14) 65 Ind. Cas. 18; 34 C. L. J. 293; 26 C. W. N. 781.

(15) 3 Ind. Cas. 804; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

(16) 21 Ind. Cas. 288; 35 A. 487; 17 C. W. N. 1165; 40 I. A. 182; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001 (P. C.).

have expressed any disapproval of *Walian's case* (11) which was cited before their Lordships, but which was not referred to in the judgment.

The last mentioned case is clearly distinguishable. The facts were these. One Raja Balbhadar Singh died leaving two minor sons, Pratab Singh and Abharan Singh, who were the plaintiffs in the action. The defendant Bhabuti Singh assumed to act as the guardian of the minors and as the manager of their property. Certain persons, who may be conveniently referred to as the vendors, sold certain properties to certain other persons who may be referred to as the vendees. Both the plaintiffs and Bhabutti Singh had right of pre-emption in the properties sold, plaintiff's rights being superior to that of Bhabuti in one of the properties sold, and in the other their rights were equal to that of Bhabuti. It is obvious that there was a conflict of interests between the plaintiffs and their guardian Bhabuti. On the 26th June 1899, Bhabuti on his own behalf brought a suit to pre-empt and made the vendors and the vendees defendants to the suit. On the 5th August 1899, Bhabuti Singh caused the new plaintiffs to be added as defendants to his suit. According to the amended plaint, the new plaintiffs under the guardianship of Hari Pershad were added as defendants under an order, dated the 5th August 1899. The Judicial Committee found, first, that Hari Pershad was a creature of Bhabuti and acted throughout in the interest of Bhabuti, and, secondly, that "the amendment of the plaint adding Partap Singh and Abharan as defendants was not attested by the signature of the Judge." It will be remembered that in *Walian's case* (11), as the Judicial Committee took pains to point out, "the Court admitted the plaint in which the mother was described as guardian," and "in its decree it so described her." Now, the distinction between this case and *Walian's case* (11) is this, that, whereas in this case no one appeared in the record itself as the guardian of the minor, for the amendment of the plaint was not attested by the signature of the Judge, in *Walian's case* (11) the mother of the minor appeared in the record with the sanction of the Court as the guardian of the minor. Now, it is impossible to have recourse to the doctrine that the Court by implication sanctioned the appointment, if the record itself is silent about the appointment, and, as I have shown, their Lordships took pains to point out that the amendment of the plaint adding Partap Singh and Abharan as defendants was not attested by the signature of the Judge. The position then is the same as if they were not parties to the suit and the consent decree which was ultimately passed was a nullity so far as they were concerned.

The other matter which the Judicial Committee had to consider was the compromise of another suit which Bhabuti caused Hari Singh to file on behalf of the new plaintiffs. That was also a suit to pre-empt the same properties against the vendors and the vendees, and Bhabuti caused himself to be added as a defendant. After compromise of his own suit, he caused Hari Parshad to present an application on behalf of the minors asking for leave to withdraw the suit on the ground that the matter had already been settled between the parties. The Judicial Committee pointed out that the Court was not informed that in the suit in which the compromise was entered—the suit of Bhabuti—the minors were not represented in law, nor was it informed that the compromise was entered into without the leave of the Court first having been obtained. According to the decision of the Judicial Committee in the case of *Manohar Lal* v. *Jadunath Singh* (17) the compromise was entirely void as against the minors, and the Judicial Committee came to the conclusion that on that ground the minors were entitled to have the decree dismissing their suit set aside. The whole decision of the Judicial Committee shows that there was fraud from start to finish, and that the irregularities of the procedure affected the merits of the case. It is material to point out that the Judicial Committee made a distinction between the compromise decree in Bhabuti's suit, and the order of dismissal of the plaintiff's suit. The compromise decree they regarded as void on the ground

(17) 33 I. A. 128; 8 Bom. L. R. 489; 4 C. L. J 8 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 28 A. 585 (P. C).

that the minors were not parties to the suit and were not represented in the record by a guardian. The order of dismissal of the plaintiff's suit they regarded as voidable on the ground that the Court was not informed of various matters which it was entitled to know when it was asked to sanction the withdrawal of the suit brought by the minors. I cannot regard the decision of the Judicial Committee as a decision to the effect that " when a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect on him."

While the three cases relied on by the learned and distinguished Judge do not support the conclusion at which he arrived, the decision in *Walian's case* (11), in my opinion, is conclusive of the matter. With reference to *Walian's case* (11) the learned Judge said as follows:—" As appears from the judgment of the Judicial Committee in that case, the mother who had been proposed for appointment as guardian of her minor son had entered appearance and acted throughout the trial of the suit. No trace, however, could be found on the record of a formal order for her appointment as guardian *ad litem*. The Judicial Committee held in substance that the absence of a formal order of appointment as guardian is not fatal to the validity of the proceedings, where the proposed guardian has in fact appeared and acted on behalf of the minor." With all respect, this is a wholly inaccurate statement of what was decided in *Walian's case* (11). There is no suggestion anywhere in the judgment of the Judicial Committee that the proposed guardian had entered appearance or had taken any part in the trial on behalf of the minor, nor, indeed, could there be such a suggestion; for, in truth, as the judgment of the Subordinate Judge shows and as an examination of the record of that suit establishes beyond doubt or controversy, the guardian did not enter appearance, nor did she take any part in the trial at any stage. In fact, she was wholly "silent," as the Subordinate Judge pointed out, and the only question which the Trial Court and the Judicial Committee considered was whether her silence had prejudiced the minors. Their Lordships did indeed say that the minors " were effectively represented in that suit by their mother and with the sanction of the Court," but it is to the state of the record that those observations were directed. That this is so will appear clearly from an examination of the earlier part of the judgment where their Lordships, after agreeing with the Subordinate Judge that no order appointing the mother as the guardian *ad litem* was ever drawn up, proceeded to say as follows: " An examination, however, of such proceedings in that suit as are forthcoming shows that the Court admitted the plaint in which the mother was described as guardian; that in its decree it so described her; and that similar language was used in the execution proceedings." There can be no doubt whatever that all that the Judicial Committee considered was whether she was described as the guardian of the minors in the proceedings of the suit and of the execution. It is one thing to say that the mother appeared in the proceedings of the suit as the guardian of the minors, it is another thing to say that she entered appearance in the suit and acted throughout the trial of the suit as the guardian of the minors.

I have examined the whole subject with some care, because, in my experience, the subordinate Courts, through carelessness or negligence, are constantly disregarding the provisions of O. XXXII, r. 3 (4) and O. XXXII, r. 4 (3) to the serious embarrassment of the course of justice, and questions are frequently coming before us whether, in such circumstances, the decree should be regarded as null and void. I cannot overlook what the Judicial Committee pointed out in *Walian's case* (11) that it is one thing to impress upon all the Courts in India the importance of following strictly the rules laid down in the sections referred to, and that it is quite another thing to say that a defect in following those rules is necessarily fatal to the proceedings. I have come to the conclusion that the question of jurisdiction stands apart from the question of a defect in following these rules, and that, on a question of jurisdiction the actual record or the proceedings of the suit should in each case be decisive. In other words, where on the face of the

record a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree to examine the evidence in order to see whether notices under O. XXXII, r. 3 (4), were in fact, served, or whether the person nominated as guardi-an did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case. But where the record, on the face of it, shows, that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified under the express provisions of the Statute from acting as guardian, the position is the same as if the minor were not a party to the suit, and the judgment rendered by the Court is without jurisdiction and null and void. I think the decisions of the Judicial Committee support the conclusions at which I have arrived.

In the present case, as I have shown, the present plaintiff had no defence to the suit in which he was cited as defendant. He was represented throughout in the proceedings of the suit by a guardian competent to act as such. That being so, it is impossible to hold that the decree passed against him in the mortgage suit and the sale held in pursuance of that decree are null and void.

I would dismiss this appeal with costs. The cross-objection is allowed.

Adami, J.—I agree.

P. H. & N. E. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL, NO. 944 OF 1922.

November 28, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

THE ZAMINDARA BANK, SHERPUR KALAN, THROUGH SHAH MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUBA—PLAINTIFF—RESPONDENT.

Co-operative Societies Act (II of 1912), s. 43—Rules framed under s. 43—Dispute between society and member—Jurisdiction of Civil Courts—Remedy—Construction of Statutes.

The rules framed by the Punjab Government under section 43 of the Co-operative Societies Act lay down the procedure to be adopted in case of a dispute between a society and a member and the remedy provided by the rules in the shape of a reference to the Registrar takes away by necessary implication the common law remedy by way of an action in the Civil Courts. [p. 724, col. 1.]

The object of the Co-operative Societies Act is to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and it will be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive litigation. [p. 724, col. 1.]

Statutes imposing restrictions on the subject's rights should be strictly construed and such restrictions should not be extended beyond what the words used actually cover. [p. 724, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Ludhiana, dated the 25th January 1922, reversing that of the Munsif, First Class, Ludhiana dated the 17th June 1921.

Lala *Badri Das*, R. B., for the Appellant.

Mian *Abdul Aziz*, for the Respondent.

JUDGMENT.—This appeal which raises an important question of jurisdiction arises out of a suit for a declaration that certain bonds alleged to have been executed by the plaintiff in favour of defendant No. (1) were not executed by him and that they were forgeries. The defendant, relying upon certain rules framed by the Local Government under the authority of section 43 of the Co-operative Societies Act, pleaded that the Civil Court had no jurisdiction to hear and determine this suit, and that the only remedy open to the plaintiff was by way of a reference to the Registrar who could either decide the dispute himself or refer it to the arbitrament of one or more arbitrators whose decision is final, and not liable to be ques-

tioned in a Civil Court except on proof of the receipt of a corrupt gratification by the latter. This plea was given effect to by the Court of first instance, but did not find favour with the District Judge who on appeal came to the contrary conclusion, and remanded the case for decision on the merits. The defendant has now preferred a second appeal to this Court, and the sole point involved for determination here is whether the District Judge was right in holding that the suit was cognizable by a Civil Court.

Rule 18 of the Rules made by the Local Government under the Co-operative Societies Act (published in *Punjab Government Gazette*, dated the 23rd June 1917) and invoked by the defendant in support of his contention is in the following terms :—

(*a*) Any dispute concerning the business of a Co-operative Society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming and the Committee or any officer shall be referred to the Registrar. Reference may be made by the Committee or by the Society by resolution in general meeting or by any party to the dispute, or if the dispute concern a sum due to the society by any member of the society.

(*b*) The Registrar may either decide the dispute himself or appoint an arbitrator or refer it to three arbitrators, of whom one shall be nominated by each of the parties and the third shall be nominated by the Registrar and shall act as Chairman. When any party to a dispute fails to nominate a suitable arbitrator within 15 days the Registrar may make the nomination. No legal practitioner may be nominated as arbitrator by any party.

(*c*) In such a proceeding the Registrar or arbitrator shall have power to administer oaths, to require the attendance of parties and witnesses, and to require the production of all necessary books and documents, by a summons delivered orally or sent by hand or by registered post or through the nearest Civil Court having jurisdiction in the area in which the society operates and shall further have power to order the expenses of determining the dispute to be paid either out of the funds of the society or by such party or parties to the dispute as he may think fit.

(*d*) The Registrar or arbitrator shall hear the evidence of the parties and witnesses who attend, and upon that evidence and after consideration of any documentary evidence produced by either side, a decision or award shall be given in accordance with justice, equity and good conscience and shall be reduced to writing. In the absence of any party, duly summoned to attend, the dispute may be decided against him in default. Where three arbitrators are appointed, the opinion of the majority shall prevail.

(*e*) Any person duly summoned by the Registrar or arbitrator to appear before him or to produce any document and failing to do so shall be liable to the penalties prescribed in paragraph 7 (2) of the Second Schedule of the Civil Procedure Code, 1908.

(*f*) Any party aggrieved by an award of an arbitrator may appeal to the Registrar in person or by agent within one month of the date of the award.

(*g*) An arbitrator's award, if no appeal has been made within a month, on a decision of the Registrar originally or in appeal, shall not, as between the parties to the dispute be liable to be called in question in any Civil or Revenue Court and shall be in all respects final and conclusive, except on proof of the receipt of a corrupt gratification by the arbitrator.

(*h*) A decision or award shall, on application to any Civil Court having jurisdiction in the area in which the society operates, be enforced in the same manner as a decree of such Court.

(*i*) In proceedings before the Registrar or arbitrator no party shall be represented by a legal practitioner.

The District Judge, *Sardar* Sewaram Singh, found, in the first place, that, in accordance with the rules set forth above, the plaintiff did refer the dispute to the Registrar, but that the latter officer declined to take any action in the matter and that the plaintiff was consequently obliged to institute the present suit. Secondly, he was of opinion that it is only suits of the nature specified in sub-clause (*g*) of rule 18 that were excluded from the jurisdiction of a Civil Court, and that in respect of other suits which do not fall within the purview of clause (*g*) there

was no such prohibition. In other words, his opinion was that Civil Courts were not precluded from taking cognizance of a dispute which had not resulted n an award and that it was an award and award alone which under the rules had been prohibited from being called into question in a Civil Court. In our opinion this view of the learned District Judge is erroneous and cannot be accepted. The principle of law as enunciated in various authorities is that Statute imposing restrictions upon the subject's rights shou'd be strictly construed and such restrictions should not be extended beyond what the words used actually cover. In the present case, however, it appears to us that the words used do clearly contain a necessary implication depriving the subject of his common law right of action, and provides a special and prompt procedure for cases in which, having regard to the class of people affected, a speedy decision as to their disputes is essential. It will be observed that the object of the Act is to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and it will, in our opinion, be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive and protracted litigation.

It should further be noted tha' the Engl'sh Law on the subject is also very much the same. Under the Friendly Societies Act, 1896 (59 & 60 Vic., Ch. 25) every society must by its rules determine the manner in which disputes are to be settled and when a direction on this point is con ained in the rules disputes must be decided in the manner directed and any de is'on so given will be binding and conclusive even if erroenous in point of law and unfair. The Tribunals provided are usually arbitrators or justices, but the parties have the option of referring to the Registrar.

We think that it would be entirely repugnant to the scope and object of the Act if a suit like this is allowed to be decided in a Civil Court and we accordingly hold that by the substitutional remedy provided under the rules in the shape of a reference to the Registrar the common law remedy by an action in a Civil Court has by necessary implication been taken away.

As to the finding that the dispute had in fact been referred to the Registrar and not entertained, it is sufficient to say tha we have not been able to discover any evidence on the record in support of this finding. A certain post card, marked as Exhibit P. 5, sent by the defendant to the plaintiff in reply to an application submitted by the latter has been relied upon, but it obviously does not help the plaintiff in any way whatever, and cannot be construed to mean that the Registrar was asked by the plaintiff to take action in respect of this specific matter and that he declined to do so. This finding, therefore, though a finding of fact, must be set aside as bas d on no evidence.

The result is that we accept the appeal, and dismiss the plaint ff's suit as not maintainable in a Civi Court, but, having regard to the peculiar circumstances of the case, we order the parties shall bear their own costs throughout.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 787 OF 1922.

November 11, 1922.

Present:—Mr Justice Broadway.

GOBIND SINGH—DEFENDANT—APPELLANT

versus

THE OFFICIAL LIQUIDATOR, UNION BANK OF INDIA, LIMITED, DEHLI—PLAINTIFF—RESPONDENT.

Companies Act (VII of 1913), s. 186—Order directing payment of debts by contributory—Debts due by firm of which contributory is member—Contract Act (IX of 1872), s. 43.

In order to make a contributory liable under section 186 of the Companies Act for payment of debts other than calls, the debts must be due from the contributory himself. Where debts are due from a firm of which a contributory is a member the payment of those debts cannot be enforced from the contributory under the provisions of section 186. Section 43 of the Contract Act has no applicability to such a case. [p. 727 col. 1.]

Miscellaneous first appeal from an order of the District Judge at Delhi, dated the 3rd February 1922.

Dr. *Gokal Chand Narang*, for the Appellant.

Mr. *Prem Lal*, for the Respondent.

JUDGMENT.—The Union Bank of India, Limited, Delhi, went into liquidation and on the 30th July 1920 the Official Liquidator filed an application under section 186 of the Indian Companies Act, 1913, in which it was set out that one S. Gobind Singh of Messrs. Rallia Ram-Daya Ram, a firm at Sangla Hill, was indebted to the said Bank in the sum of Rs. 3,250 due on account of unpaid calls and Rs. 3,507-14-0 on promissory-notes. To thes sums he added Rs. 1,666-7-0 as interest on the unpaid calls and Rs. 1,565-5-6 on the moneys due under promissory-notes, thus arriving at a total of Rs. 9,989-10-6. Although the pro-notes carried interest at ten per cent. the Official Liquidator only asked the Court to allow nine per cent. S. Gobind Singh contested the claim and alleged that he was not a shareholder, the allotment to him of the said 50 shares being invalid, and pleaded fraudulent misrepresentation and absence of a certificate of allotment. He also pleaded that he had been improperly settled on the list of contributories.

Qua the claim under the pro-notes he pleaded limitation and further contended that, as the moneys due (if any) under the pro-notes were due by the firm of Messrs. Rallia Ram-Daya Ram, he could not be called upon to pay the amounts under the summary procedure provided in section 180 of the Companies Act. He also urged that a former liquidator of this Bank (one Pandya) had come to a settlement of the said debts and had agreed to take in full payment a sum of Rs. 1,105-4-8 which had been duly paid. The learned District Judge framed the necessary issues and held that, inasmuch as Gobind Singh had been settled on the list of contributories, the matter was concluded and that his liability as a contributory was *res judicata*. This view is in accordance with a decision embodied as *Kanshi Ram* v. *Peshawar Bank, Limited, in Liquidation* (1). He also held that no fraudulent persuation had been proved and that Gobind Singh had purchased the shares for himself. So far as his liabilities as a contributory were concerned, it was held that Gobind Singh was liable to pay the calls due.

Qua the debts and the question of limitation it was held that inasmuch as the Limitation Act did not apply to proceedings under section 186 of the Companies Act, the suit was within time. This decision was based on *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co., Limited* (2), and *Fazulbhoy Jaffer* v. *Credit Bank of India, Ltd.* (3) as well as on Civil Appeal No. 1717 of 1921 decided by Chevis, J., on the 2nd of December 1921. This decision, however, is the subject of a Letters Patent Appeal. The question of the compromise or settlement was then gone into and it was held that, inasmuch as the alleged compromise had not been sanctioned by the shareholders as required by section 234 of the Act, it was not binding and could not be regarded as a settlement of the claim. The learned District Judge then examined the evidence led with regard to the payment by Gobind Singh of Rs. 1,105-4-8 subsequent to the settlement aforesaid and came to the conclusion that out of this sum Rs. 915-4-0 had been proved. In spite of the fact that the liquidator himself only asked for interest at nine per cent. the learned District Judge considered that interest should be allowed on the pro-notes at the agreed rate and finding that Rs 4,190-15-0 was due under the said pro-notes he ordered Gobind Singh to pay the sum of Rs. 7,440 allowing future interest on Rs. 4,190 at six per cent. till date of payment. Against this order Gobind Singh has preferred an appeal to this Court through Dr. Gokal Chand Narang and I have heard Mr. Prem Lal for the Official Liquidator.

Having regard to the decision reported in *Kanshi Ram* v. *Peshawar Bank, Limited, In Liquidation* (1) Gobind Singh's liability to pay unpaid calls must be regarded as finally settled and this case was not seriously contested by Dr. Narang. He, however, urged (1) that the summary procedure provided in section 186 was not applicable to debts due by persons other than contributories and that, therefore, the sums due under the promissory-notes

(1) 28 Ind. Cas. 95; 41 P. L. R 1915; 227 P. W. R. 1915.

(2) 35 Ind. Cas. 159; 38 A. 347; 14 A. L. J. 349.

(3) 27 Ind. Cas. 335; 39 B 331; 16 Bom. L. R. 730.

by the firm could not be made payable by Gobind Singh in these summary proceedings: (2) that the settlement arrived at with Mr. Pandya was a valid one and that under it the sum due was only Rs. 1,105-;-8; and (3) that the sum of Rs. 200 disallowed by the learned District Judge had been proved by the evidence on the record.

Mr. Prem Lal strongly contended that the compromise was not one that was binding on the Official Liquidator. It appears that when this compromise was entered into one Pandya had been appointed liquidator, the Bank having gone into voluntary liquidation. Section 234 of the Companies Act provides that such a liquidator could compromise all calls, liabilities to calls, debts, liabilities, etc., with the sanction of an extraordinary resolution of the Company. Admittedly, no such extraordinary resolution was ever passed sanctioning Pandya's action in this matter. Nevertheless, it seems to me that if the compromise was actually entered into between Gobind Singh and Pandya, the Bank should be held bound thereby so far as Gobind Singh is concerned, any loss accruing therefrom being recoverabl from Pandya, the liquidator, who had ignored or exceeded his powers. This opinion is in consonance with the decision in *Cycle Makers' Co-operative Supply Company* v. *Sims* (4). It has, however, to be seen whether this compromise has been proved. The document in question (Exhibit D. 1) sets out the sums due and allows credit for two items of Rs. 1,750 and Rs. 400, subject to a settlement after consultation with one Ganesh Das, Manager of the Gujrat Branch of the Bank. It appears that this amount of money had been paid by Gobind Singh towards his fifty shares. Apparently Gobind Singh was repudiating his liabilitie as a shareholder and wished the amount paid by him to be credited to the amount due to the Bank by the firm of which he was a member. Pandya, according to Exhibit D-1, was agreeable to this course subject to the consent of Ganesh Das. Ganesh Das has not been put into the witness-box and there is no direct evidence showing that his consent has been obtained to this arrangement. On the other hand, Gobind Singh, subsequent to the execution of Exhibit D.-1 has admittedly paid Rs. 915-4-0 towards the amount due under Exhibit D.-1 which Dr. Narang contended was an indication that the arrangement had been agreed to and acted upon. He also contended that the sum of Rs. 200 disallowed by the Court below was actually paid and that that being added to the sum of Rs 915-4-0 shows that the whole of the debt had been discharged, the subsequent silence of the Bank and its officers until 1920 being a further indication that the arrangement had been recognized. *Qua* this payment of Rs. 200 the only reason given for holding it not proved is that Gobind Singh's allegation that he paid the money is only supported by a postal receipt for a registered letter and the learned District Judge was of opinion that had he sent this sum in a registered letter he would most assuredly have insured that letter. On the other hand, there is the sworn testimony of Gobind Singh supported by his books which have not been found to be in any way irregular, and I would, therefore, hold that this sum was actually paid. The Bank has been unable to produce it account-books and other important papers, as the former liquidator Pandya is said to have absconded and to have taken away with him not only moneys but books and documents. This circumstance cannot be allowed to weigh against Gobind Singh who is in no way responsible for Pandya's disappearance. Having regard to all the surrounding circumstances I would be prepared to hold that this debt had been discharged under the terms of the compromise. I do not think it necessary, however, to do more than indicate my view on this point, as in my opinion Dr. Narang's contention that the summary procedure provided by section 186 cannot be invoked in the present instance must succeed. In order to make a contributory liable under section 186, for payment of debts other than calls the said debts must, I think, be due by the said contributory. In the present case the debt it is sought to recover in this summary manner was due, not by Gobind Singh but by the firm of Rallia Ram-Daya Ram of which Gobind Singh was a member. The pro-notes themselves clearly show that Gobind Singh signed them not in his private

(4) (1903) 1 K. B. 477; 72 L. J. K. B. 160; 88 L. T. 360; 19 T. L. R. 153.

capacity but merely as a member of the firm. The firm is not a contributory, and in these circumstances I am unable to see how section 186 can be applied to. Mr. Prem Lal cited *Piara Singh* v. *Peshawar Bank, Limited, in Liquidation* (5) and *Kamta Pershad* v. *Industrial Bank of India, Limited* (6) *Lahore Bank, Limited, in Liquidation* v. *Kidar Nath* (7). I am unable to see the applicability of *Piara Singh* v. *Peshawar Bank, Limited, in Liquidation* (5), and the two other authorities do not support his contention that a debt due by a firm can be thus recovered from one member who happens to be a contributory. It is true, as he pointed out, that the pro-note which formed the subject of discussion in *Lahore Bank, Limited, in Liquidation* v. *Kidar Nath* (7) was signed by persons one of whom was not a contributory, but it will be seen that it was the contributory who really owed the debt, the other signatory being merely a surety. In the present case the pro-notes are signed by Gobind Singh on behalf of the firm, and the debt is due by the firm as such.

Mr. Prem Lal further contended that under section 43 of the Indian Contract Act the Bank could recover its money from any of the joint promisors. I am, however, unable to hold that in proceedings under section 186 when the facts are as they are in the present case this section has any real applicability.

I, therefore, accept this appeal and set aside the order directing payment by Gobind Singh and the moneys claimed under the pro-notes. He is, however, liable to pay the calls which amount to Rs. 3,250 together with six per cent. interest from the 30th of July 1920 to date of the payment. The Bank is left to take such action as it may be advised against firm of Rallia Ram-Daya Ram.

Z. K. *Appeal accepted.*

(5) 28 Ind. Cas. 53; 54 P. R. 1915; 22 P. L. R. 1915; 235 P. W. R. 1915.

(6) 31 Ind. Cas. 54; 59 P. R. 1915; 139 P. W. R. 1915.

(7) 31 Ind. Cas. 746; 36 P. R. 1916; 4 P. W. R. 1916; 45 P. L. R. 1916.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 406 OF 1921.

December 9, 1922.

Present:—Mr. Batten, J. C.

RAMBHABAI—PLAINTIFF—APPELLANT

versus

TOTARAM—DEFENDANT—RESPONDENT.

Hindu Law—Local law—Personal law—Appeal, second—Arbitrary finding of fact, whether binding.

Prima facie, any Hindu residing in a particular Province of India is held to be subject to the particular doctrine of Hindu Law recognised in that province. But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it; consequently, where any such family migrates to another province governed by another law, it carries its own law with it. [p. 729, col. 2.]

Balwant Rao v. *Baji Rao*, 57 Ind. Cas. 545; 16 N. L. R. 187; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 25 C. W. N. 243; 48 C. 30 (P. C.), relied on.

Hira Lal v. *Tani Bai*, 2 C. P. L. R. 18, *Deorao Zamindar* v. *Sukhu Bai*, 11 C. P. L. R. 49 and *Ganno* v. *Beni*, 43 Ind. Cas. 943; 14 N. L. R. 82 at p. 94, referred to.

Inderun Valungypooly Tayer v. *Ramasawmy Pandia Talaver*, 13 M. I. A. 141; 14 W. R. P. C. 41; 3 B. L. R. P. C. 1; 2 Suth. P. C. J. 207; 2 Sar. P. C. J. 498; 20 E. R. 594, distinguished.

An arbitrary finding of fact by the lower Courts is not binding on a Court of second appeal. [p. 729, col. 2.]

Appeal from a decree of the District Judge, Nimar, dated the 3rd May 1921 in Civil Appeal No. 226 of 1921.

Messrs. *M. Gupta* and *S. B. Gokhale*, for the Appellant.

Dr. *H. S. Gour* and Mr. *W. R. Puranik*, for the Respondent.

JUDGMENT.—In this case the sole question for the decision of this Court is whether or not the adoption of Khushal by *Musammat* Kashibai was valid according to the law governing the parties.

It has been held by the lower Courts that Khushal, from whom the defendant derives his claim, was in fact adopted by *Musammat* Kashibai, that at the time of his adoption he was a married man, and that Kashibai had not received the consent or direction of her husband to make the adoption. If Khushal was not validly

adopted, then, admittedly the plaintiff is the nearer to the property and must succeed.

The pleadings on the subject of the School of Law by which the parties are governed were as follows. It was pleaded for the defendant that "the parties are governed by the *Mitakshara* of the Bombay School of Law, as the parties are Gujars and have emigrated to these parts from the Bombay Presidency about 15 or 20 generations back. These families have been all along governed by the Bombay School of Law." The following are the pleading for the plaintiff. "The parties have been residents of the Central Provinces from time immemorial. It is denied that they migrated to these Provinces from Gujarat, and they are governed by the Benares School of Hindu Law as applied to Central Provinces." The following issue was framed on this point: "Whether the parties are governed by the Bombay School of Hindu Law as alleged by the defendant?"

The only oral evidence on the subject is that given by the second and fifth witnesses for the defendant. The second witness said: "The Bhats who keep our traditions, say that we have come from Gujarat some four hundred years ago and have domiciled in Nimar. Our marriages take place with Gujars of Khandesh." The fifth witness, who is himself a Gujar, deposed: "We came from Gujarat and settled in Nimar many generations ago. Major portion of our community is in Gujarat and some have settled in Nimar and some in Khandesh. Bhats record our genealogy."

As will have been gathered the parties are residents of the Nimar District in the Central Provinces. The only other evidence relied on by the parties is that to be found in certain text books. In paragraph 418 of his report on the Land Revenue Settlement of the Nimar District for the year 1868-69, Captain Forsyth says: "The Goojurs arrived from Hindostan with the Muhammadans. Though they have there got a bad character as cultivators, here they are but little inferior to the Koonbee in industry." The following account is given of Gujars at page 160 of the third volume of Russell's Tribes and Castes of the Central Provinces of India: "Gujar.—A great historical caste who have given their name to the Gujarat District and the town of Gujranwala in the Punjab, the peninsula of Gujarat or Kathiawar and the tract known as Gujargarh in Gwalior. In the Central Provinces the Gujars numbered 56,000 persons in 1911, of whom the great majority belonged to the Hoshangabad and Nimar Districts. In these Provinces the caste is thus practically confined to the Nerbudda Valley, and they appear to have come here from Gwalior probably in the middle of the sixteenth century, to which period the first important influx of Hindus into this area has been ascribed. But some of the Nimar Gujars are immigrants from Gujarat." The following passage occurs at page 68 of the Gazetteer of the Nimar District edited by Mr. Russell: "The Gujars are more numerous in Nimar than in any District except Hoshangabad. Their original home is believed to have been Gujarat, but they came to Nimar through Malwa in Akbar's time."

The evidence of the two witnesses referred to above is not alluded to either by the learned Subordinate Judge who tried the case or by the learned District Judge in first appeal. The learned Subordinate Judge deals with the question in paragraph 5 of his judgment as follows: "It is better to decide this issue first, as the validity of the adoption, if proved, would depend upon the School of Hindu Law by which the parties are governed. Thus, we have to determine the question of the personal law of the deceased Ghisirao. The defendant contended that the Gujars came to this part of the Central Provinces from the Bombay Presidency and were governed by Bombay School of Law, while the plaintiff contended that the parties were residents of Central Provinces from time immemorial and were governed by Benares School of Law. There is no evidence on record to show from what Province Ghisirao's ancestors came to live in Nimar and what customs and law they followed. The learned Pleader for the plaintiff relied upon the observations at page 251 in paragraph 418 of the Report on the Land Revenue Settlement of British Nimar effected by Captain J. Forsyth in 1868-69, in which it is said that the Gujars arrived from Hindostan with the Muhammadans. The

defendant, on the other hand, relies upon the observations in Russell's Tribes and Castes of the Central Provinces, Volume III, page 166, and District Gazetteer of Nimar, page 68. In the former book it is remarked that the Gujars have come in the Central Provinces from Gwalior in the middle of the 16th century. It is further remarked that some of the Nimar Gujars are immigrants from Gujarat; while in the latter book it is remarked that they came to Nimar through Malwa, although their original home is believed to have been Gujarat. It is thus clear that nothing is known about Ghisirao's ancestors' original home except that they and he lived at Shiloda in Nimar. In such a case it will be assumed that his personal law is the law which prevails in that place. I am supported in this view by the recent Privy Council ruling reported as *Balwant Rao* v. *Baji Rao* (1). I, therefore, find the issue in the negative. The parties in the present case are governed by Benares School of Law which prevails in Central Provinces. The pleading of the defendant that Ghisirao had given authority to adopt also lends support to this issue." The learned District Judge deals with the subject in paragraphs 5 to 7 of his judgment which run as follows :—

"5. In the Nimar District Gazetteer, page 68, the Gujars are said to have come from Gujarat, and also in Russell's Tribes and Castes of the Central Provinces, page 166. Captain Forsyth, in paragraph 418 of the Settlement Report, expresses the opinion that they came from Hindostan with the Muhammadans, but he does not say where they came to Hindostan from.

"6. Looking to the balance of the evidence, I hold that the Gujars came from Gujarat, which is in the Bombay Presidency.

"7. According to *Balwant Rao* v. *Baji Rao* (1) they are, therefore, governed by the Bombay School or Mayukha. Accordingly, a married man can be adopted, and no permission of the deceased husband is required. The widow alone can adopt."

As far as I am able to judge, the learned District Judge referred only to the evidence derived from the text books and did not refer to the oral evidence.

For the appellant-plaintiff it is urged that there is no evidence worthy of the name that the family with which we are dealing, namely, the family of Kashibai's husband, Ghisirao, derived its origin from the Bombay Presidency, that is to say, that the remote ancestors of Ghisirao were ever residents in the Bombay Presidency. Their Lordships of the Privy Council in *Balwant Rao* v. *Baji Rao* (1) quoted with approval the following passages from Mr. Mayne on Hindu Law: "*Prima facie*, any Hindu residing in a particular Province of India is held to be subject to the particular doctrines of Hindu Law recognised in that Province. . . . . But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it; consequently, where any such family migrates to another Province, governed by another law, it carries its own law with it." Their Lordships also observed: "Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place." In these circumstances, unless we know that the family at some time migrated from the Bombay Presidency, we must assume that the parties are governed by the Benares School of Hindu Law. If authority for this is needed, it is to be found in *Hira Lal* v. *Tani Bai* (2), *Deorao Zamindar* v. *Sakhu Bai* (3) and *Ganno* v. *Beni* (4). The learned District Judge has not given any reason for holding that the Gujars came from Gujarat which is in the Bombay Presidency, and his finding does not, therefore, appear to be binding on this Court.

For the respondent reliance is placed on the oral evidence and to the name "Gujar" which suggests an origin in Gujarat, and on the tradition mentioned by Mr. Russell in his work on the Tribes and Castes and in the Gazetteer. It is also suggested that it is extremely unlikely that Kashibai should have adopted a married man and that Bholu, the plaintiff's father, should have concurred in the adoption

(1) 57 Ind. Cas. 545; 16 N. L. R. 187; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 35 C. W. N. 243; 48 C. 30 P. C.).

(2) 2 C. P. L. R. 18.
(3) 12 C. P. L. R. 49.
(4) 43 Ind. Cas. 943; 14 N. L. R. 82 at p. 94.

if it was not known to be a valid adoption according to the caste custom. I do not think there is much force in this last argument since this would mean that every adoption proved its own validity. Reliance is placed for the respondent on some observations of their Lordships of the Privy Council at page 158 in *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (5). The words are: "It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage . . . if it was known that that marriage was a marriage which was invalid in law." That case, however, was not a case of conflict between two schools of Indian laws and there was no authority for the view that the marriage set up was an illegal one: the circumstances in this case are entirely different. The oral evidence is of very little value. With reference to the evidence of the second witness for the defendant part of it is irrelevant as hearsay since no Bhat has been called as a witness. The fact that Gujars may occasionally marry persons in Khandesh in the Bombay Presidency does not prove that they accept the Hindu Law as interpreted in the Bombay Presidency. The evidence of the fifth witnss is of no evidential value.

As to the text books, Captain Forsyth, who was the Settlement Officer of the District came to the conclusion that the Gujars arrived from Hindostan with the Muhammadans. The passage quoted from the "Tribes and Castes" is consistent with the Gujars having given their name to Gujarat in the Bombay Presidency rather than with their having derived their name from it. It may be mentioned that neither Gwalior nor Malwa are in the Bombay Presidency. Though some Nimar Gujars may be immigrants from Gujarat there is nothing to show that this particular family were immigrants from Gujarat. It appears to me quite possible that one branch of the Gujars may have gone from the North of India to Gujarat and another branch may have come to the Nimar District without having previously gone to Gujarat.

(5) 13 M. I. A. 141; 14 W. R. P. C. 41; 3 B. L.R. P. C. 1; 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 E. R. 504.

It is also argued for the respondent that Bholu would have sued to set aside the adoption if he had known it to be invalid. To this it is answered for the appellant that Bholu got a deed of relinquishment from Kashibai which gave him all he wanted. It is argued for the respondent that, as the Mayukha Commentary did not come into effect till the beginning of the 18th century, the Mayukha view of the law was not in force at the time of the migration from Gujarat, if there was any such migration, for, admittedly, it must have been before that date. This argument is of little weight in view of the remarks of their Lordships of the Privy Council at page 280 in *Chandika Bakhsh* v. *Muna Kunwar* (6): "Although the migration of the Ahban Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom."

After full consideration of the case I am of opinion that there is no evidence that the family of Ghisirao had ever immigrated from Gujarat and that, therefore, the view taken by the First Court was the correct one. I set aside the decree of the District Judge and restore the decree of the Subordinate Judge. The respondent will bear the plaintiff's costs in all Courts.

N. H. *Decree set aside.*

(6) 24 A. 273; 6 C. W. N. 425; 29 I. A. 70; 4 Bom. L. R. 370; 8 Sar. P. C. J. 233 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 204 OF 1922.

November 23, 1922.

Present:—Mr. Justice Broadway.

NUR MUHAMMAD KHAN AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS

versus

Malik NOOR MUHAMMAD KHAN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside—Irregularity—Substantial injury.

NUR MUHAMMAD KHAN *v.* NOOR MUHAMMAD KHAN.

A material irregularity in the publication or conduct of an auction-sale would not justify the setting aside of the sale in the absence of proof that substantial injury to the applicant had resulted therefrom. [p. 733, col. 2.]

Swaminatha Aiyar v. *Swagurunatha Chettiar*, 32 Ind. Cas. 990, *Palaniappa Udayar* v. *Arumuga Pandaram*, 33 Ind. Cas. 692; (1916) 1 M. W. N. 256, *Muhammad Nizam-ud-din* v. *Amin-ud-din*, 67 Ind. Cas. 885; (1922) A. I. R. (L.) 35; 4 L. L. J. 441 and *Haladhar Mitra* v. *Prafulla Nath Tagore*, 57 Ind. Cas. 892, relied upon.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Karnal, dated the 14th October 1921.

Lala *Mool Chand*, R. S., for Mr. *Ghulam Rasul*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—On the 12th February 1916 the Marwar Bank in liquidation obtained a decree against one Sher Muhammad for Rs. 10,000. This money was charged on certain immoveable property and there was a condition to the effect that if the judgment-debtor paid up a sum of Rs. 6,000 in certain instalments, that amount would be taken in complete satisfaction of the decree. The condition was not complied with and, therefore, the sum due under the decree was Rs. 10,000. The Liquidators of the Marwar Bank sold their rights in this decree to *Malik* Nur Muhammad and Abdul Aziz, the former taking two-thirds and the latter one-third. The purchasers of this decree brought the property charged to sale on the 29th September 1920 and, with the leave of the Court, purchased the entire property for Rs. 4,000.

There was a previous charge of Rs. 2,500 which was included in this sum of Rs. 4,000. On the 4th October 1920 the sons of the original judgment-debtor, who is dead, filed an objection to the sale urging that it should not be confirmed as (1) no proclamation had been made in the city, which had prevented bidders from coming to the spot, (2) the decree-holders had brought in their friends to make fictitious bids, (3) the value of the property was Rs. 10,000 or over, and (4) in the notice affixed to the premises the date of sale was not entered. As the judgment-debtors claimed to be able to produce persons who were willing to give more for the property they were asked to produce such a man. On the 29th October 1920 the judgment-debtors produced a relative of theirs named Muhammad Rafiq Khan who expressed his willingness to raise the decree-holder's bid by Rs. 100. He was asked to put in the necessary money and did so on the 4th November 1920. On the 29th October 1920 the judgment-debtors filed a further application in which they alleged that the judgment-debtors had not been given notice of this sale and that there had been no proclamation. On the 11th November 1920 the decree-holders filed an application alleging that the sale had been correctly and legally carried out and should be confirmed.

The matter next came up before the Court on the 13th December 1920 on which date the Senior Subordinate Judge (Mr. Anderson) recorded a brief order confirming the sale. Against this order of confirmation the judgment-debtors preferred an appeal to this Court which was accepted by Martineau, J. on the 15th March 1921 and the Senior Subordinate Judge directed to give the judgment-debtors an opportunity to prove their allegations against the confirmation of the sale. When this appeal was filed in this Court, to it was attached a document referred to as the original of the proclamation of the sale affixed to the property.

The Senior Subordinate Judge (Mr. Gulwant Rai) then proceeded to give the judgment-debtors an opportunity of proving their allegations and, holding that they had failed to establish any cause for setting the sale aside, confirmed it by order, dated the 14th October 1921. Against this order of confirmation the judgment-debtors have once more come up to this Court and on their behalf I have heard Mr. Mool Chand while Mr. Shamair Chand has addressed me on behalf of the decree-holders.

During the proceedings before Mr. Gulwant Rai the judgment-debtors asked that the document referred to above as the original proclamation affixed to the house be sent for from the High Court. For some reason or other this document was never produced in the Court below. There is no evidence on the record showing that the document in question was removed from the premises sold and neither of the judgment-debtors have thought fit to go into the witness-box to explain how they got possession of the said document. It has also to be noted that no affidavit was filed

with the first appeal to the High Court in connection with this document.

The first point taken by Mr. Mool Chand was that the provisions of O. XXI, r. 66 (2) had not been complied with, the notice therein contemplated not having been issued—a circumstance which, it was argued, entirely vitiated the subsequent proceedings. Reliance was placed on *Bipin Behari Bejali* v. *Kanti Chandra Mandal* (1), *Tanguturi Jagannadham* v. *Seshagiri Rao* (2) and *Raghunath Das* v. *Sundar Das Khetri* (3).

Mr. Shamair Chand, on the other hand, placed reliance on *Thekkedath Neelu Neithiar* v. *Subramania Moothan* (4). It is, however, not necessary for me to discuss these authorities, as a reference to the record discloses the fact that the notice contemplated by the rule and order in question was actually issued on the 1st of August 1920 and served on both the judgment-debtors. Mr. Mool Chand on hearing this withdrew this objection. He, however, strongly urged that the proceedings were bad, as there had been no proclamation by beat of drum and the notice affixed to the premises to be sold did not contain the time, date, and place where the sale was to be held. He, therefore, contended that, as the property was worth considerably more than Rs. 4,000, substantial loss had been caused to the judgment-debtors which loss was directly attributable to the irregularity in the notice.

It appears that on the 20th August 1920 an order was issued directing the sale of the property in question. It was ordered that a notice and a warrant of sale should be issued, service of which was to be returned within a week and the sale to be held thirty days later on the spot from the hours of 10 A. M. to 4 P. M. on the 29th September 1920. On the 29th August 1920 the bailiff submitted his report showing that a proclamation by beat of drum had been duly made and a notice affixed on the property as well as on a conspicuous place in the city. The sale was held on the 29th September 1920 and the property sold in lots, as directed, the decree-holders being declared the auction-purchasers at a bid of Rs. 4,000. The Senior Subordinate Judge has found that proclamation by beat of drum was duly made, and on the evidence on the record I hold the same. The important points for consideration are whether, (1) the notice affixed to the premises contained the date, hour and place of the sale, and (2) if it did not, whether the sale should be set aside.

On the first point there is the sworn testimony of the bailiff who was examined as a witness, the evidence of the decree-holder's agent, and of one Abdul Hakim. The first two have sworn that the notice affixed to the premises contained the date, hour and place of the sale. As against this testimony there is the existence of a copy of the notice filed in this Court which does not contain the date, hour and place of the sale. As noted above, there is no evidence on this record to show that the document produced in the Court was taken from the premises sold. The judgment-debtors have produced four witnesses who have deposed to the absence of any proper proclamation by beat of drum and to the fact that the notice affixed to the premises did not give the date, hour and place of the sale. The first of these witnesses is Karam Nawaz, a person with whom the property was already mortgaged. His evidence is that there was no proclamation of any kind regarding the sale of this property either on the 29th August or 29th September 1920. He admits having seen a notice for sale affixed to the property, but states that it did not contain the date, hour and place of the sale. He also says the value of the property is about Rs. 8,000. At the same time this witness admits having filed an application in the Court of the Senior Subordinate Judge on the 31st August 1920, two days after the proclamation had been made according to the evidence led by the decree-holders. Now, in this application he distinctly stated that he had learnt that the sale of this property was to be held on the 29th September. He explains this by saying that he had heard this *am taur par*. Having regard to this statement there seems to be no doubt whatever that a proclamation announcing the date of this sale as the 29th September 1920 was actual-

(1) 18 Ind. Cas. 715.
(2) 37 Ind. Cas. 387; 20 M. L. T. 479.
(3) 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.).
(4) 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59.

ly made and, as this witness says, was generally known. The next witness is Muhammad Sadiq who was the agent of the judgment-debtors in the execution proceedings and is also nearly related to the judgment-debtors. He fixes the value of the property from Rs. 10,000 to Rs. 12,000, and says that he heard no public proclamation. He saw a notice affixed two days after the sale and read it finding that it did not contain the date, hour and place of the sale. He, however, does not profess to have taken it down. The next witness is Muhammad Latif who says that there was a notice of sale affixed to the property but no proclamation by beat of drum. He himself is illiterate and asked one Yakub when the sale was to be held and was told that no date, hour and place was entered. This Yakub has not been produced. The 4th witness is Ata Muhammad who merely states that he himself heard no proclamation by beat of drum and that he never saw any notice affixed on the property at all. This is the whole of the evidence on which the judgment-debtors want the sale to be set aside.

After a careful consideration of all the circumstances it seems to me that it must be held that the judgment-debtors were fully aware that the property was to be sold on the 29th September 1920. In coming to this conclusion I have not lost sight of the copy of the notice filed in this Court in which the date, hour and place had been omitted. The bailiff in his report of the 29th August 1920 noted that he had fixed a copy of the notice containing all the necessary particulars including the date, hour and place on the premises to be sold and also affixed another similar notice in another part of the city. There is no evidence on this record to show that the copy of the notice filed in this Court was the identical copy which was affixed on the premises to be sold. It is possible that the copy now produced was the one which had been affixed elsewhere and which was not required by law to have been so affixed.

Again, it seems to me that the judgment-debtors have not proved that they have in any way suffered any substantial injury or loss attributable to the alleged omission. In *Swaminatha Aiyar* v. *Sivagurunatha Chettiar* (5) it was laid down by a Division Bench of the Madras High Court that a person seeking to set aside a Court auction-sale on the ground of an irregularity in the conduct of the sale and of consequent loss to himself must adduce direct evidence to connect the irregularity with the loss. In *Palaniappa Udayar* v. *Arumuga Pandaram* (6) the same Court laid down that the Court must be satisfied that the applicant has sustained substantial injury by reason of the irregularity complained of; some actual connection must be shown between the irregularity and the inadequacy of the price which the property fetched at the sale. In *Muhammad Nizam-ud-din* v. *Amin-ud-din*(7) LeRossignol, J., gave expression to a similar view holding that a material irregularity in the publication or conduct of a sale would not justify the setting aside of the sale in the absence of proof that substantial injury to the applicant had resulted therefrom; In *Haladhar Mitra* v *Prafulla Nath Tagore* (8) a Division Bench of the Calcutta High Court held that before an execution sale can be set aside on the ground of material irregularity in publishing or conducting it, the judgment-debtor must prove not only the irregularity but also substantial injury resulting from the irregularity. In the present case Mr. Mool Chand has endeavoured to show that owing to this alleged irregularity the price at which the sale was concluded was far below the actual value of the property. According to him, this property is worth about Rs. 12,000, and in support of this he points to the fact that it had been mortgaged to the Marwar Bank for Rs.10,000. His own witnesses have fixed the price at between Rs. 8,000 and Rs. 12,000, the higher figure being given by the judgment-debators' agent and relative. On the other hand, in ground No. 7 of the appeal to this Court the appellants have expressed their willingness to have the bid made by Muhammad Rafiq, which is only Rs. 100 in excess of the price paid by the decree-holders, accepted. Mr. Mool Chand says that they are agreeable to this simply be-

(5) 32 Ind. Cas. 990.
(6) 33 Ind. Cas. 692; (1916) 1 M. W. N. 256;
(7) 67 Ind. Cas. 885; (1922) A. I. R. (L.) 357; 4 L. L. J. 441.
(8) 57 Ind. Cas. 892.

cause of the relationship between them and Muhammad Rafiq. On the evidence on the record I am unable to hold that the value of the property is really greatly in excess of that fetched at the auction-sale.

I, therefore, hold, (1) that it has not been proved that there was any irregularity in the publication or conduct of the sale, and (2) that even if the alleged irregularity be established no serious loss has been caused to the judgment-debtors directly attributable to the sale. I would note that had it been established that the value of this property was greatly in excess of the price bid at the sale, and that in the copy of the proclamation affixed to the premises sold the time, date and place of sale had been omitted I would have considered this a material irregularity vitiating the sale.

In the circumstances, I dismiss this appeal with costs.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 146 OF 19 2.

November 22, 1922.

Present :—Mr. Justice Broadway.

THE FIRM BISHAMBAR MAL-PALA MAL OF JAKHAL MANDI—DEFENDANT—PETITIONER

versus

THE FIRM GANGA SAHAI-NIHAL CHAND OF JAKHAL MANDI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXX, r. 1, Sch. II, r. 1— Arbitration—Suit between firms —Reference—Minor members, whether bound.

Where a suit is brought by a firm against a firm acting under the provisions of O. XXX, r. 1, of the Civil Procedure Code, and a reference to arbitration is made by the parties as firms and an award is made against one of them as a firm and not against the individual members thereof, the reference or the award cannot be objected to on the ground that they are not binding on the minor members of the firm who did not join in making the reference.

Sukha Nand v. *Behari Ram-Ishar Das*, 68 Ind. Cas. 750, *Ghaznavi & Co.* v. *Budge-Budge Jute Mills*, 25 Ind. Cas. 955, *Uppara Chinnagappa* v. *Gaddam Chinna Hanumanna*, 50 Ind. Cas. 471; 9 L. W. 314; (1919) M. W. N. 425, relied upon.

Ram Bharose v. *Kallu Mal*, 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. S.) 1120, *Pokardas Jashomal* v. *Forbes, Forbes, Campbell and Co., Limited*, 19 Ind. Cas. 363; 6 S. L. R. 127, referred to.

Jagan Nath v. *Mannu Lal*, 16 A. 231; A. W. N. (1894) 66; 8 Ind. Dec. (N. S.) 150, distinguished.

Petition, under section 44 of Act VI of 1918, for revision of the decree of the Senior Subordinate Judge, Hissar, dated the 31st January 1922.

Mr. *Nanak Chand Pandit*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The firm of Ganga Sahai-Nihal Chand purporting to act through Nihal Chand and Rameshwar Das, two of their members, instituted a suit for the recovery of Rs. 2,932-13-3 against the firm Bishambar Mal-Pala Mal. A written statement was filed on behalf of the defendant firm in which the defendants described themselves as the firm Bishambar Mal-Pala Mal through Pala Mal and Ram Karan as proprietors. The suit proceeded before the Junior Subordinate Judge, and on the 11 h June 1921 an application was filed on behalf of the parties *as firms*, referring the matter to the arbitration of the Junior Subordinate Judge himself (Diwan Sita Ram). This application was signed on behalf of the plaintiff firm by the same persons who had signed the plaint and on behalf of the defendant firm by Pala Mal and Ram Karan. The said application was also signed by the respective Vakils of the parties whose powers-of-attorney gave them the authority to refer to arbitration. Diwan Sita Ram reported the matter to the District Judge who transfered the case to the Senior Subordinate Judge and subsequently Diwan Sita Ram drew up and filed his award which was dated 28th August 1921. To this award one Bishambar Mal and certain minors, claiming to be members of the defendant firm, filed objections to the effect that the reference to arbitration was bad owing to the fact that it had not been signed by all the members of the defendant firm some of whom were minors. The learned Senior Subordinate Judge held an enquiry and came to the conclusion that Pala Mal and Ram Karan were the managing partners of the firm. These two persons had signed the pleas as well as the agreement to refer

and the other adult members of the firm were fully cognizant of the reference and the proceedings thereunder. The objections were, therefore, disallowed and a decree passed against the *defendant firm* in accordance with the terms of the award. *Against* this decree Mr. Nanak Chand Pandit has filed a petition for revision which purports to be on behalf of the firm Bishambar Mal-Pala Mal.

Mr. Pandit has urged that, inasmuch as the minors did not sign the reference to arbitration which was further not signed on their behalf by any one, there was no legal reference to arbitration. He also took exception to the reference being made to the Junior Subordinate Judge instead of to the *Panchayat* of Mandi Jakhal, and further urged that the Junior Subordinate Judge acted wrongly in agreeing to be appointed arbitrator. As to the last contention, I am unable to see anything objectionable in the conduct of Diwan Sita Ram in the matter in agreeing to act as arbitrator. Doubtless under the terms of the contract a reference to the *Panchayat* of Mandi Jakhal was contemplated, but this fact did not bar the parties from making the reference in question and I hold that there is no force in this contention.

The real objection relates to the reference not having been made by the minors, and Mr. Nanak Chand Pandit referred me to Agarwala's Arbitration in British India, page 8, where it has been pointed out that in the case of a firm of partners one of whom enters into an agreement to refer, such a reference is not necessarily binding on the other members of the firm, inasmuch as the submission to arbitration is not an act necessary for, or usually done, in carrying on the business of a partnership [*Ram Bharose* v. *Kallu Mal* (1).] In the present case, however, as I have endeavoured to show above, the suit was brought *by a firm against a firm* acting under the provisions of O. XXX, r. 1.

The defendant firm accepted the situation and the case proceeded accordingly. In *Sukha Nand* v. *Behari Ram-Ishar Das* (2) Harrison, J., held that in circumstances similar to those in the present case, a reference to arbitration was valid and legal. Similarly, in *Ghaznavi & Co.* v. *Budge- Budge Jute Mills* (3), it was held by Chaudhuri, J., of the Calcutta High Court that 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, as the new Civil Procedure Code provides for suits against firms in the firms' names, which is an obvious reference to O. XXX, r. 1.

The next case cited by Mr. Shamair Chand was *Jagan Nath* v. *Mannu Lal* (4) which, however, deals with the powers of the father of a joint Hindu family and is not directly in point. In *Uppara Chinnagappa* v. *Gaddam Chinna Hanumanna* (5) a Division Bench of the Madras High Court held that where the manager of the family refers a dispute to arbitration in good faith and the circumstances are such that there is no collusion, the result of the submission will be binding on the other members of the family.

At page 9 of Agarwala's Arbitration in British India a reference is made to *Pokardas Jashiomal* v. *Forbes, Forbes, Campbell and Co., Limited* (6), a case which appears to me to refute Mr. Nanak Chand Pandit's contention. It is to be borne in mind that the suit in the present case was brought against a firm, the reference to arbitration was made by a firm and the award is against a firm and not against the individual members thereof.

In these circumstances it seems to me that the proceedings in the Court below were with jurisdiction and in accordance with law. No case has been made out for interference in revision and I dismiss this petition with costs.

Z. K.

Petition dismissed.

(1) 22 A. 135; A. W. N. (1900) 12; 9 Ind. Dec. (N. S.) 1120.
(2) 68 Ind. Cas. 750.
(3) 25 Ind. Cas. 955.
(4) 16 A. 231; A. W. N. (1894) 60; 8 Ind. Dec. (N. S.) 150.
(5) 50 Ind. Cas. 471; 9 L. W. 314; (1919) M. W. N. 425.
(6) 19 Ind. Cas. 363; 6 S. L. R. 127.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 161 OF 1922.

June 9, 1922.

Present:—Mr. Justice Scott-Smith.

SHAHADAT AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

HUKAM SINGH—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Court-Fees Act (VII of 1870), ss. 4, 28—Appeal, presentation of—Copy of order appealed against unstamped—Delay in filing appeal—Sufficient cause—Negligence of clerk—Duty of Counsel.

Having regard to the provisions of sections 4 and 28 of the Court-Fees Act an appeal cannot be regarded as having been validly presented if the copy of the order appealed against is not properly stamped.

It is the duty of Counsel when filing an appeal to see that all documents which require a stamp are properly stamped. He cannot shelter himself behind his clerk and if his clerk has been guilty of any carelessness he is responsible for it.

Where an appeal is returned as incomplete and is again filed after the expiry of limitation, it is not a sufficient cause for admitting it within the meaning of section 5 of the Limitation Act, that the mistake was made by the Counsel's clerk who put in the appeal.

Krishnasami Panikondar v. *Ramasami Chettiar*, 43 Ind. Cas. 493; 41 M. 412; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 21 Bom. L. R 541; 11 Bur. L. T. 121; (1918) M. W. N. 906; 45 I. A. 25 (P. C.), distinguished.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Sargodha, dated the 5th October 1921.

Sheikh *Niaz Ali*, for the Appellants.

Dewan *Mehr Chand*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the lower Court directing execution of the decree-holder's decree to proceed against Shahadat and others, judgment-debtors. A preliminary objection is raised by Counsel for the respondent to the effect that the appeal is barred by time. The appeal was filed on the 7th January 1922, but the copy of the order appealed against filed along with the memorandum of appeal was unstamped and the translation fee had not been paid. The appeal was, therefore, returned as incomplete. It was re-filed complete on the 17th January. The 9th of January was the last day of limitation for filing the appeal and it was, therefore, barred by time when filed on the 17th January. Having regard to sections 4 and 28 of the Court Fees Act there was no legal appeal filed on the 7th January and Counsel for the appellants does not contest that the appeal is not barred by time. He urges, however, that there is sufficient cause for admitting it within the meaning of section 5 of the Limitation Act. He cites *Krishnasami Panikondar* v. *Ramasami Chettiar* (1). That case is distinguishable from the present one. Every Counsel knows or ought to know that the copy of the order appealed against must bear a Court-fee stamp of eight annas or one rupee according to the value of the subject-matter. Mr. Niaz Ali says that the mistake was that of the clerk who put in the appeal. In my opinion it is the duty of the Counsel when filing an appeal to see that all the documents which require stamp are properly stamped. He cannot shelter himself behind his clerk, and if his clerk has been guilty of any carelessness, he is responsible for that. A valuable right has accrued to the respondent by reason of the period of limitation for filing the appeal having elapsed, and I do not think it would be fair to him to admit this appeal. Even when the appeal was returned to Counsel on the 7th January he had still two more days in which he could have stamped the copy of the order appealed against but did not re-file the appeal until ten days later. In my opinion he has been guilty of carelessness and I see no sufficient reason within the meaning of section 5 of the Limitation Act for admitting the appeal beyond time.

The appeal is accordingly dismissed, but I make no order as to costs in this Court.

Z. K. *Appeal dismissed.*

(1) 43 Ind. Cas. 493; 41 M. 412; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 21 Bom. L. R. 541; 11 Bur. L. T. 121; (1918) M. W. N. 906; 45 I. A. 25 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3362 OF 1917.
August 3, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

RAM KISHAN AND ANOTHER, REPRESENTATIVES OF GOKAL CHAND, DECEASED—PLAINTIFFS—APPELLANTS

versus

HIRDE RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Hindu joint family—Acknowledgment by one member, whether binding on others—Court-fees—Suit against several defendants—Decree against one—Appeal in order to make others liable—Court-fee payable on memo. of appeal.

An acknowledgment made by a member of a joint Hindu family, who is not the manager of the family, is not binding on the other members of the family, except those who claim through him, for instance, his sons. [p. 739, col. 1.]

Where the Trial Court grants the plaintiff a decree against one of several defendants and the plaintiff appeals with the object of getting the other defendants made jointly liable for the amount decreed, the memorandum of appeal ought to bear an *ad valorem* Court-fee stamp. [p. 738, col. 1.]

Amir Chand v. *Kanhaya Ram*, 16 Ind. Cas. 777; 86 P. R. 1912; 222 P. L. R. 1912; 225 P. W. R. 1912, followed.

Second appeal from a decree of the District Judge, Ambala, dated the 17th November 1917, varying that of the Subordinate Judge, First Class, Ambala, dated the 19th May 1917.

Dr. *G. C. Narang*, for the Appellants.

Mr. *Nanak Chand Pandit*, for Respondents Nos. 1 to 4.

JUDGMENT.

Abdul Qadir, J.—The plaintiff, Gokal Chand, brought a suit to recover a sum of Rs. 385, due on a balance struck in 1900 by two brothers, Hirde Ram and Harbans Rai. The suit was brought in August 1916 against defendants Nos. 1 and 2, Hirde Ram and Harbans Rai, and three sons of Hirde Ram, and one son of Harbans Rai, defendants Nos. 3 to 6, who were said to be members of a joint Hindu family. It was claimed that the suit was within time and that limitation was saved by an acknowledgment made by Harbans Rai, in a letter written on the 5th December 1910, acknowledging the debt, as well as by a payment of Rs. 101 made by him in the same year. The Trial Court held that there was a binding acknowledgment within the meaning of section 19 of the Limitation Act, which brought the suit within time, and decreed the plaintiff's claim with costs against all the defendants, subject to the reservation that defendants Nos. 3 to 6, *i. e.* the sons of the two brothers, would be liable only to the extent of the joint property of the family. The defendants appealed against this decision, with the result that the decree of the Trial Court was modified to this extent that Harbans Rai only was held to be liable for the debt, and defendants Nos. 1, 3, 4, 5 and 6 were relieved from liability. The plaintiff has preferred a second appeal to this Court against the decision of the learned District Judge, and all that he seeks in this second appeal is that defendants Nos. 1, 3, 4, 5 and 6 should also be made liable for the debt. The Court-fee stamp paid on this appeal was Rs. 101. The learned Judge, who admitted the appeal to a hearing, noted at the time that the question of the Court-fee would be settled at the hearing. The case came up for hearing before a Division Bench of this Court on the 9th November 1921 and was adjourned, because the transliteration of a *bahi* entry, which was in dispute in the case, was not on the record. Orders were also passed at the time that *ad valorem* Court-fee should be paid on the appeal and should be made up at the next hearing. The case then came up before us on 27th July 1922, and the Counsel for the appellant made up the deficiency in Court-fee before the hearing started.

Mr. N. C. Pandit, on behalf of the respondents, raises a preliminary objection that the proper Court-fee having been paid so late, the appeal cannot be said to have been presented within time, as at the time of presenting it there was no properly stamped appeal before the Court. He contends, therefore, that this appeal is barred by time and that there is no reason for giving an extension of time and it should be rejected. He relies on *Umed Ali* v. *Municipal Committee, Jhang Maghiana* (1), where an appeal was rejected under similar circumstances. He refers to *Amir Chand* v. *Kanhaya Ram* (2) as a clear authority

(1) 56 Ind. Cas. 143; 2 L. 1; 2 L. L. J. 486; 86 P. W. R. 1920; (1922) A. I. R. (L.) 233.

(2) 16 Ind. Cas. 777; 86 P. R. 1912; 222 P. L. R. 1912; 225 P. W. R. 1912.

for the proposition that *ad valorem* Court-fee stamp should have been paid on the amount decreed by the lower Court, where the lower Court granted the plaintiff a decree against one of several defendants and the plaintiff appealed with the object of getting the other defendants made jointly liable for the amount decreed. He argues that there could have been no *bona fide* mistake made by the Counsel for the appellant when he filed his appeal on a Court-fee stamp of Rs. 10 only. Dr. Gokal Chand Narang, who appears for the appellant, urges, in the first place, that the Division Bench which passed orders on the 9th November 1921 that the deficiency in stamp should be made up at the next hearing, must be understood to have decided to extend the time in favour of the appellant and that it is not open to the respondents to raise this objection now that that order has been carried out. He adds that in case it is held that this matter was left open when the order dated 9th November 1921 was passed, he would ask for an extension of time on the ground that the mistake made in filing the appeal on a Court-fee stamp of Rs. 10 was a *bona fide* one. He cites *Ujagar Lal* v. *Mohan Kuar* (3) as an authority for the proposition that where a plaintiff does not ask for a fresh decree but only wishes to have it declared that certain defendants exonerated from liability are liable under the decree, he can pay Rs. 10 for the declaratory relief. He also points out by way of analogy, to a Division Bench ruling of the Chief Court reported as *Kirpal Singh* v. *Sant Singh* (4) where it was held that "as regards the claim for a declaration as to who was entitled to receive the balance due" in that case a Rs. 10-stamp was sufficient under Art. 17 (6), Schedule II, Court Fees Act. He states that he believed at the time he was filing this appeal on the strength of the two authorities mentioned above, that he was acting correctly in paying a Rs. 10 stamp and that *Amir Chand* v. *Kanhaya Ram* (2) must have been out of his mind at the time, if it had come to his knowledge at all. He goes on to say that he would still urge with all respect to the learned Judges responsible for *Amir Chand* v. *Kanhaya Ram* (2) that there is something to be said for the view taken by the Allahabad Court on the ruling above cited. After hearing this explanation of Dr. Narang I think that the question involved was a debateable one and the deficiency in Court-fee as originally paid was due to a *bona fide* mistake and that, therefore, this case is a fit one for extension of time and for allowing the appeal to be heard on the merits.

It has been definitely held that Harbans Rai did write a letter acknowledging the debt in 1910 and thus, so far as he is concerned, the suit has been held to be within limitation and there is no dispute now as regards his liability. The sole question before us is whether his acknowledgment is binding on the other defendants. The answer to this question depends on the decision which may be arrived at on the following two points :—

(1) Whether Hirde Ram and Harbans Rai and their sons were members of a joint Hindu family at the time of this acknowledgment ?

(2) Whether this acknowledgment was made by Harbans Rai in his capacity as the *karta* or manager of the joint Hindu family ?

The defendants alleged that the family was originally joint, but in *Sambat* 1964 (corresponding to 1907) a partition had taken place, by which the two brothers had become separate and that this fact was evidenced by an entry made in the *bahi* of one Chaukas Mal. This entry was produced in Court and was proved by the evidence of Chaukas Mal and it does recite the fact of a partition between the two brothers, but its admissibility was objected to in the Trial Court on the ground that it was not a properly stamped document and also required registration. The learned Subordinate Judge held that it was inadmissible for want of registration and held that no partition was proved. The learned District Judge, on appeal, came to a different conclusion. He held, on the authority of *Gongod Gir* v. *Sham Gir* (5), that it was merely a recital of an accomplished fact in the *bahi* of a third

(3) A. W. N. (1886) 312.
(4) 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912; 205 P. W. R. 1911.
(5) 48 P. R. 1905; 33 P. L. R. 1905; 51 P. W. R. 1905.

party and as such admissible. He also held that there was a reference to a separate debt on his own account in the letter, Exhibit P-11, written by Harbans Rai to the plaintiff on the 5th December 1910, which also indicated a separation. Dr. Narang draws our attention to the words of the document, which in some passages recites present events and in others makes use of the future tense, and points out that the use of the words "*zabani*" (oral) agreement in the said document repeatedly shows that the writer was adopting this device in order to save the expenses of registration and stamp, but, as a matter of fact, the parties were executing a deed of partition, which cannot be admitted in evidence without being properly stamped and registered. I think there is force in this contention and I cannot hold it proved on the basis of this document, that a partition of the joint family had been effected.

In spite, however, of the view taken by me as to the document mentioned above the question remains whether Harbans Rai had any authority to bind his brother or his nephews. Dr. Narang describes him as one of the *kartas* of the family, that is to say, he tries to make out that both Hirde Ram and Harbans Rai were jointly managing the family business. There is nothing on the record to show that both of them were acting as *kartas*, which is somewhat unusual, though not absolutely unknown. Hirde Ram was admittedly the elder of the two brothers and would, as such, be presumed to be the head or the manager of the family, in the absence of any positive evidence to the contrary. There is no evidence to show that Harbans Rai had been authorised by his brother or by his minor nephews to take the step he did. I am, therefore, of opinion that his acknowledgment is not binding on his brother or his nephews and section 19 of the Limitation Act cannot help the plaintiff against defendants Nos. 1, 3, 4 and 5, inasmuch as they do not derive their title or liability through Harbans Rai. I would, therefore, dismiss this appeal with regard to the liability of defendants Nos. 1, 3, 4 and 5.

The case of Jiwan Lal, defendant No. 6, the minor son of Harbans Rai, however, stands on a different footing. He derives his liability through his father and an acknowledgment by his own father must be held to be binding on him. Therefore, the appeal of the plaintiff is accepted to this extent that Jiwan Lal will be liable along with his father to the extent of the joint property. The plaintiff will pay the costs of defendants Nos. 1, 3, 4 and 5.

Shadi Lal, C. J.—I am of opinion that Harbans Rai was not the manager of the family and had no authority to acknowledge the debt on behalf of Hirde Ram and his sons. The appeal is accepted to this extent only that Jiwan Lal also will be liable to the extent of his share in the property jointly owned by him and his father.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 853 OF 1922.
November 30, 1922.
Present:—Mr. Justice Harrison.
TIRKHA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SOHLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (*XVI of* 1908), *s.* 12—*Memorandum, unsigned, of mortgage—Registration.*

The Registration Act presumes throughout that a document tendered for registration has been executed. Before a document can be treated as such for purposes of registration, it must be executed, *i. e.*, signed. [p. 740, col. 1.]

Chet Po, In the application of, 22 Ind. Cas. 75; 7 L. B. R. 77; 7 Bur. L. T. 48 (F. B.), referred to.

A memorandum made in the account-books of a mortgagor reciting the names of the parties, the account of the charge, the period of the mortgage and the names of witnesses but not signed by any body is not a mortgage-deed and does not require registration under section 17 of the Registration Act. [p. 740, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Delhi, dated the 7th March 1922, reversing that of the Honorary Munsif, Second Class, Rohtak, dated the 6th July 1921.

Mr. *Shamair Chand*, for the Appellants.

Lala *Amar Nath Chona*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued to redeem a mortgage which, it is alleged, had been effected in the year 1890. The suit was decreed by the First Court on payment of Rs. 137, and on appeal the District Judge held that the document on which the plaintiffs relied required registration and, inasmuch as it was unregistered and inadmissible in evidence, no secondary evidence of its contents could be produced and he, therefore, dismissed the suit on this preliminary point.

Plaintiffs appeal and the first point to be decided is whether the document in question is a mortgage-deed and as such requires registration or whether it is merely a memorandum in an account-book. There are several curious features of this document. It is to be found not in the account-book of the mortgagees but in the account-book of the mortgagors. It recites the names of the parties, the amount of the charge, the period of the mortgage and the names of certain witnesses. It is not signed by any body, a point overlooked or rather not clearly realised by the learned District Judge who says that it is signed by witnesses. Now, before a document can be treated as such for purposes of registration, or, in fact, for almost any purpose, it must be executed, and, as defined in section 2 (12) of the Stamp Act, "Executed" means "signed," a point explained in *Chet Po, In the application of* (1), a Full Bench ruling of the Lower Burma Chief Court. If unsigned, the document is not liable to stamp duty and *a fortiori* is not compulsorily registrable, nor, in fact, registrable at all. The Registration Act presumes throughout that the document tendered for registration has been executed (see section 58 and section 74). Under section 58 the Registration Officer must endorse the signature of every person admitting the execution of the document. The first ground on which the Registrar can refuse to register a document under section 74 is that it has not been executed. Under section 59 of the Transfer of Property Act we find who must execute a mortgage, and where that Act applies in its entirety, it is the mortgagor and two witnesses. Although the Act does not apply in its entirety to the Punjab, this section is valuable as explaining that the mortgagor is the executant of a written mortgage. Not only, therefore, was this entry not compulsorily registrable but it could not be registered nor charged with stamp duty. It is shown to be written by the scribe Ballu, who has since died, and in the account-book of the mortgagors, not of the mortgagees, as would be the case had it even been intended that it should be treated as a mortgage and not a memorandum. The whole tenor of the entry, moreover, is that it is written for the use of the mortgagors in case there should be any doubt as to the terms in years to come. For all these reasons I find that the document in question is a memorandum and not a deed of mortgage.

Counsel for the respondents urges that, inasmuch as the plaintiffs did not allege the existence of an oral mortgage antecedent to this entry in their plaint nor in the early stages of the case but only took up their present position when the defendants had objected to the document, they should not be allowed to shift their ground and base the claim on an earlier oral mortgage. He points out that in the plaint the words *ba-ru-i-bahi* are to be found and that it is on the mortgage contained in the account-book and nothing else that the suit is based, and in this contention he quotes *Sheo Prasad* v. *Lalit Kuar* (2), a ruling which appears to me to be not in point. The plaintiffs have relied on one and the same mortgage throughout. They have not attempted to base their claim on anything else, not to substitute any other mortgage for that relied upon in the plaint and no mistakes in pleadings can make a document registrable when it is not registrable, and still less can it make any document compulsorily registrable which is not so under the provisions of the Act.

I, therefore, accept the appeal on this preliminary point and remand the case to the lower Appellate Court for decision on the merits under O. XLI, r. 23, Civil Pocedure Code.

(1) 22 Ind. Cas. 75 ; 7 L. B. R. 77 ; 7 Bur. L. T. 48 (F. B.).

(2) 18 A. 403 ; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975.

Stamp on appeal will be refunded and costs will follow the result.

Z. K. *Appeal accepted; Case remanded.*

PATNA HIGH COURT.

CIVIL REVISION NO. 239 OF 1922.

December 22, 1922.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Kulwant Sahay.

Rai Bahadur RAM SUMRAN PRASAD AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

Babu RAM BAHADUR AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Execution of decree—Concurrent applications, whether maintainable—Amendment of application—Jurisdiction of Execution Court.

There is no provision of law which prevents a Court from entertaining concurrent applications for execution of the same decree, and r. 11 of O. XXI of the Civil Procedure Code is no bar to the maintenance of such applications. [p. 742, col. 2.]

Saroda Prosaud Mullick v. *Luchmeeput Sing Doorgur*, 14 M. I A. 529; 17 W.R. 289; 10 B. L. R. 214; 2 Such. P.C. J. 560; 3 Sar. P.C.J. 77; 20 E.R. 883 *Krishtokishore Dutt* v. *Rooplall Dass*, 8 C. 687; 10 C. L. R. 609; 4 Ind. Dec. (N. S.) 442. *Baij Nath Goenka* v. *Holloway*, 1 C. L. J. 315, *Maharaja of Bobbili* v. *Narasaraju Peda*, 15 Ind. Cas. 738; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 236, *Maharajah of Bobbili* v. *Narasaraju Peda Baliara*, 36 Ind. Cas. 682; 21 C. W. N. 162; 31 M. L. J. 300; 18 Bom. L. R. 909; 39 M. 640; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 1 P. L. W. 26; 43 I. A. 238 (P. C.), relied on.

Radha Kishen Lall v. *Radha Pershad Singh*, 18 C. 515; 9 Ind. Dec. (N. S.) 344 and *Sadho Saran* v. *Hawal Pande*, 19 A. 98; A. W. N. (1893) 57; 9 Ind. Dec. (N. S.) 63 (F. B.), referred to.

A Court of execution has jurisdiction to permit the amendment of an application for execution by the addition of other properties to the list of properties sought to be attached. [p. 742, col. 2.]

Gnanendra Kumar Rai Chowdhury v. *Shayama Sunder Jen*, 44 Ind. Cas. 553; 27 C. L. J. 398; 22 C. W. N. 540, relied on.

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.), distinguished.

Revision from an order of the Subordinate Judge, Monghyr, dated the 11th July 1922.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Petitioners.

Messrs. *S. K. Mitter* and *L. K. Jha*, for the Opposite Party.

JUDGMENT.

Mullick, J.—This case has been well argued on both sides and the result seems to me to be quite clear.

The petitioners before us obtained a decree for money against the opposite party in Suit No. 858-80 of 1913-15 in the Court of the Subordinate Judge of Monghyr and on the 20th May 1915 they made to that Court an application, No. 153 of 1913, for the execution of that decree. Some property belonging to the judgment-debtors was sold for a sum of Rs. 37,642, leaving a balance of Rs. 7,396-2-4 still due, and the execution case is still pending for the disposal of two applications for setting aside the sale; the sale has, therefore, not been confirmed. On the 11th July 1922 the decree-holders filed a petition before the Executing Court stating that they had learnt that an amount of Rs. 6,309-10-0 realised upon a decree in favour of the judgment-debtor, was in deposit in the Court of the Subordinate Judge and praying that this sum might be attached and paid to the decree-holders in satisfaction of their debt. On the 12th July 1922 the Subordinate Judge made the following order:—

"Heard the Vakil for the decree-holders. As the execution case in respect of the same decree is still pending before this Court, no fresh execution petition in respect of the same decree can be entertained. Rejected."

The present application for revision has been made by the decree-holders against this order.

It is urged by the opposite party that while Execution Case No. 133 of 1918 is pending no fresh execution proceeding can be instituted. In my opinion, this is a wholly incorrect view of the law. Under the Civil Procedure Codes of 1859, 1877 and 1882 the legality of concurrent execution has always been recognised though in practice it was not generally carried out. If authorities are required reference may be made to *Saroda Prosaud Mullick* v. *Luchmeeput Sing Doogur* (1); *Krishtokishore Dutt* v.

(1) 14 M. I. A. 529; 17 W. R. 289; 10 B. L. R. 214; 2 Suth. P. C. J. 560; 3 Sar. P. C. J. 771 20 E. R. 883.

Kooplall Lass (2) *Baij Nath Goenka* v. *Holloway* (3) and *Maharaja of Bobbili* v. *Narasaraju Peda* (4), affirmed by the Privy Council in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (5); indeed on principle, there seems to be no difference between a concurrent execution after transfer in another Court and a concurrent execution in the Court in which the decree was passed. That the present Code does not view with disfavour concurrent executions is, among other sections, indicated by section 46 which is new and relates to precepts. That section enacts that, upon the application of the decree-holder, the Court, which passes the decree, may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree, to attach any property belonging to the judgment-debtor and specified in the precept, provided that no attachment shall continue for more than two months unless the period of attachment is extended by an order of the Court or unless before the determination of such attachment the decree has been transferred to the Court and the decree-holder has applied for an order for the sale of such property.

Further, it has been held by the Calcutta and the Allahabad High Courts that separate and successive applications for execution giving reliefs of different character may always be made, see *Radha Kishen Lal* v. *Radha Pershad Singh* (6) and *Sadho Saran* v. *Hawal Pande* (7), and I see no reason why two applications for attachment of different properties cannot proceed simultaneously in execution of the same decree. In my opinion there is no provision of law which prevents the Court in the present case from entertaining a fresh application for the execution of the decree by attachment of money in deposit to the credit of the judgment-debtor in the same Court or in any other Court.

O XXI, r. 11 of the present Act which requires that the decree-holder shall state the result of all previous executions is, in my opinion, no bar to the maintenance of concurrent execution.

If, then, it is open to the decree-holder to file a fresh application, I see no reason why the Court cannot allow the amendment of the application already filed, while the execution case is still pending, by the addition of other properties to the list of properties sought to be attached. It is contended that r. 17 of O. XXI contemplates that there can be no amendment after the execution case has been registered, but, in my opinion, there is no force in this contention and it has been so held in *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen* (8).

It is contended by the learned Counsel for the opposite party that this last mentioned case was wrongly decided and that it conflicts with the Full Bench decision of the Calcutta High Court in *Asgar Ali* v. *Troilokya Nath Ghose* (9). But this Full Bench case, in my opinion, has no application to the present case. There an application for execution was made which was not in proper form, and when the prayer for amendment was made, the period of limitation for executing the decree had expired. The Court held that the amendment could not be made after the decree had become barred by limitation. But where the decree is still alive, I do not see why an application for amendment cannot be allowed if the Court so chooses at any time before the close of the execution proceedings. To hold otherwise would mean that, although the decree-holder has discovered property belonging to the judgment-debtor, which is within his grasp, and although he knows that the properties which he has already attached will not satisfy his decree, he cannot have any relief till the disposal of the execution case, which may, as in the present instance, be protracted for a considerable time. The argument, that the object of the law is to prevent excess in realization, does not conclude the matter, the Courts

(2) 8 C. 687; 10 C. L. R. 609; 4 Ind. Dec. (N. S.) 442.
(3) 1 C. L. J. 315.
(4) 15 Ind. Cas. 738; 37 M. 231; 12 M. L. T 119; (1912) M. W. N. 721; 23 M. L. J. 236.
(5) 36 Ind. Cas. 682; 21 C. W. N. 162; 31 M. L. J. 300; 18 Bom. L. R. 909; 39 M 640; 14 A L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W.558; (1916) 2 M. W. N. 541; 1 P. L. W. 26; 43 I. A. 238 (P. C.).
(6) 18 C. 515; 9 Ind. Dec. (N. S.) 344.
(7) 19 A. 98; A. W. N. (1893) 57; 9 Ind. Dec. (N. S.) 63 (F. B.).
(8) 44 Ind. Cas. 553; 27 C. L. J. 398; 22 C. W. N. 540.
(9) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.).

will always endeavour to protect the judgment-debtor against unnecessary harassment.

Reference has been made to the English practice on the subject. It seems that a judgment-creditor in England may, in execution of a judgment for money or costs, issue any number of writs addressed to the Sheriffs of different counties or places in which the judgment-debtor's assets are and he may also issue more than one writ in the same county, but he cannot, in the latter case if a seizure be made under one of the writs, ordinarily proceed with the other writs without obtaining a return of the first writ. Two or more writs of the same kind can be executed in different counties but care must be taken that too much is not realized. These rules cannot, of course, affect the procedure in India, but they support the view that there is no objection in principle to the concurrent execution of a decree.

In the case before us the Subordinate Judge was wrong in holding that he had no jurisdiction to entertain the decree-holder's application of the 11th July 1922. He had jurisdiction to accept it either as a fresh application for execution or as an application for amendment of the previous application, and he must now exercise the discretion with which the law vests him and dispose of the application according to law.

The application is, therefore allowed with costs. Hearing fee five gold *mohurs*.

Kulwant Sahay, J.—I agree.

W. C. A. *Application allowed*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 840 OF 1922.

November 14, 1922.

Present:—Mr. Justice Broadway.

Mussammat ISHRI—DEFENDANT—APPELLANT

versus

SHIB RAM AND OTHERS—PLAINTIFFS AND PARLAD RAI—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 —Receiver, appointment of—Notice—Discretion of Court—Instructions to Receiver—Appeal, whether lies.

Rule 1 of O. XL of the Civil Procedure Code does not lay down that notice should issue before a Receiver is appointed, and in many cases the object of the appointment of a Receiver may well be nullified if notice were issued. [p. 745, col. 1.]

The question which the Courts have to decide in dealing with applications under O. XL, r. 1 of the Civil Procedure Code for the appointment of a Receiver is whether, in the circumstances of the case, the appointment of a Receiver is just and convenient, the main object being to preserve the property. The power is discretionary with the Court, but at the same time this discretion is not to be exercised arbitrarily but in a regulated manner. [p. 745, cols. 1 & 2.]

Ramji Ram v. *Salig Ram*, 5 Ind. Cas 96; 14 C W. N. 248; 14 C. L. J. 215, referred to.

Sidheswari Dabi v. *Abhoyeswari Dabi*, 15 C. 818; 7 Ind Dec (N S.) 1128, *Chandidat Jha* v. *Padmanand Singh Bahadur*, 22 C 459, 11 Ind. Dec. (N S) 307, *Sivagnanathammal* v. *Arunachelam Pillai*, 11 Ind Cas. 870; (1911) 2 M W. N. 75; 21 M. L. J 821; 10 M L T. 490, *Hobibullah* v *Abtiakallah*, 34 Ind. Cas. 93; 23 C L. J. 567, *Bhai Bhagat Singh* v. *Harnam Singh*, 136 P. R. 1890, *Jiwani* v. *Labhu Ram*, 4 Ind. Cas. 694; 107 P. R. 1908; 12 P. L. R. 1909; 179 P. W. R. 1908, *Bakht Bhari* v. *Isa Shah*, 11 Ind. Cas. 403; 62 P. W. R. 1911 and *Sant Ram* v. *Ram Chand*, 6 Ind. Cas 659; 36 P. R. 1910; 53 P. W. R 1910; 72 P. L. R. 1910, distinguished.

No appeal lies against instructions issued by the Court to the Receiver. [p. 744, col. 2.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ludhiana, dated the 11th March 1922.

Lala *Badri Das*, R. B., for the Appellant.

Bakhshi *Tek Chand* and Lala *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—One Indar Singh died in Burma on the 11th February 1920, leaving him surviving two brothers, Shib Ram and Assa Ram, and a widow, *Musammat* Ishri. Assa Ram has been adopted out of the family and is no further concerned in this matter, the dispute being between *Musammat* Ishri on the one side and Shib Ram, his son Charanji Lal, and his grandsons Manohar Lal and Amrit Lal, on the other. Shib Ram, etc., claim that Indar Singh and they formed a joint Hindu family and that for this reason they are entitled to succeed to the property in suit by right of survivorship On the other hand, *Musammat* Ishri claims that her husband was not a member of any joint Hindu family, and that she is, therefore, entitled to whatever he left, Indar Singh

had been carrying on business in Burma although he originally came from Ludhiana and the bulk of the property is in Burma and consists in the main of cash or debts due to the deceased. On the 8th November 1920, *Musammat* Ishri moved the Courts in Burma for a Succession Certificate. A similar course was adopted by Shib Ram, etc., on the 16th July 1921. These proceedings have been dropped by both the parties and need not be further considered.

On the 2nd March 1921, Shib Ram, etc., instituted a suit against *Musammat* Ishri asking for a declaration that Indar Singh, deceased, had been a member of their joint Hindu family and that the widow was only entitled to receive maintenance. *Musammat* Ishri contested the suit and during its pendency one Parlad Rai of Burma propounded a Will, said to have been executed by the late Indar Singh, for the Probate of which Parlad Rai has filed proceedings in the Courts in Burma.

On the 10th March 1922, Shib Ram, etc., filed a second suit asking (*a*) that the property left by Indar Singh should be administered by the Court, (*b*) that an injunction should be issued putting a stop to the Probate proceedings in Burma, and (*c*) that an injunction be issued against *Musammat* Ishri prohibiting her from realising any of her husband's debts or intermeddling with the estate. At the same time applications were filed asking for orders to issue under O. XXXIX, r. 1 and O. XL, r. 1, Civil Procedure Code, and the learned Senior Sub-Judge acting on the affidavits filed by the plaintiffs, appointed a Receiver and issued the injunctions asked for without issuing notice to *Musammat* Ishri or Parlad Rai who had been made a party to the second suit. Parlad Rai has not attempted to have the orders set aside. *Musammat* Ishri, after in vain asking the Court to reconsider that decision, has preferred appeals to this Court against (*a*) the appoinment of the Receiver and (*b*) the issue of the injunction.

While the Receiver appointed by the Court below was carrying out his duties a letter was written to him by the Court below containing certain directions. This letter was issued after an order by this Court staying further proceedings and *Musammat* Ishri has preferred another appeal complaining against what is termed to be an order in that letter. Mr. Badri Das for the appellant, *Musammat* Ishri, (Parlad Rai has not appealed) in all the three appeals has quite frankly admitted that the appeal against the letter is incompetent. This is Appeal No. 2086 of 1922 and my attention has not been drawn to any provision of law which would authorise an appeal from instructions, such as these, issuing from a Court to a Receiver appointed by it. The matters involved in this appeal admittedly are to be decided in the appeal against the appointment of the Receiver and I accordingly dismiss Appeal No. 2086 of 1922.

I now proceed to deal with the appeal against the injunction (No. 841 of 1922). According to the order appealed against which is dated 11th March 1922, a temporary injunction was issued to *Musammat* Ishri restraining her from realising debts due to her husband or from interfering with the property in suit as shown in the list *be* attached to the plaint. Secondly, Parlad Rai was directed to deposit the money due by him to Indar Singh's estate forthwith and to deliver over any property belonging to the deceased that was in his possession. Lastly, a letter was to be sent to the Myitkin District Court in Upper Burma, conveying the information that a Regular Suit had been filed in the Ludhiana Court relating to the administration of the property of Indar Singh and suggesting that the Probate proceedings pending in the Court in Upper Burma should be stayed. I have been given to understand by the Counsel for the parties that the District Judge of Myitkina has not complied with this request, so that it is not necessary for me to do more than to point out that in my opinion the request should not have been made. The Probate proceedings had been taken in Burma before the present suit was filed, and I am unable to see any good reason for asking that Court to hold its hands pending the decision of the present suit. Parlad Rai has not paid in the money but has not objected to the order, and I must confess that I am unable to see that *Musammat* Ishri stands in any way to suffer any loss by the order, although I am of opinion that such an order was scarcely advisible in the circumstances. *Qua* the injunction issued to *Musammat* Ishri, I certainly think that it

would have been advisible to issue notice before the injunction had been issued. But I am not inclined to interfere with the discretion of the Court below in this matter merely on that ground. There is a *bona fide* dispute between the parties and the injunction relates only to such properties belonging to the deceased as are not in possession of the appellant, and, I, therefore, see no reason to interfere and dismiss this appeal.

Turning now to the question of the Receiver (Appeal No. 840 of 1922), Mr. Badri Das complains that the order appointing a Receiver was made, firstly, without notice and, secondly, without any real necessity. R. 1 of O. XL does not lay down that notice should issue and it is obvious that in many cases the object of the appointment of a Receiver mihgt well be nullified if notice were issued. On the questi n of necessity my attention has been draw to *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1), *Chandidat Jha* v. *Padmanand Singh Bahadur* (2), *Sivagnanathammal* v. *Arunachelam Pillai* (3), *Hobibullah* v *Abtiakallah* (4), *Bhai Bhagat Singh* v *Harnam Singh* (5), *Jiwani* v. *Labhu Ram* (6), *Bakht Bhari* v. *Isa Shah* (7) and *Sant Ram* v. *Ram Chand* (8). Most of these decisions proceeded on the old Act and the provisions relating to Receivers have been materially altered in the new Code. This alteration was emphasized in a case reported as *Ramji Ram* v. *Salig Ram* (9) and the result is that the provisions for the appointment of a Receiver have been made the same as those under the law in England. The question that the Courts have to see in dealing with applications under O. XL, r. 1, is whether, in the circumstances of the case, the appointment of the Receiver is just and convenient, the main object being to preserve the property. The power is discretionary with the Court, but at the same time discretion is not to be exercised arbitrarily but in a regulated manner. In the present case the appointment of a Receiver did not necessitate removing *Musammat* Ishri from possession of any of the property. All that the application disclosed was, that there were a large number of outstandings due to the estate of the deceased some of which were liable to be lost owing to the efflux of time, and the Court appointed a Receiver solely with a view to recover these outstandings and getting the proceeds brought into Court. After a careful consideration of all the circumstances it seems to me that it would not be right to interfere with the discretion of the Court below in this instance. By the appointment of the Receiver the estate of the deceased will be brought into the custody of the Court and will thus be easily available to whichever party in the suit is entitled thereto.

Next, objection was taken to the appointment of this particular gentleman as Receiver. He is a practising Vakil in Ludhiana and his renumeration has been fixed at Rs. 500 a month, the plaintiffs being directed to pay his expenses to Burma and advance all necessary funds for the prosecution of any cases. At first sight this renumeration may appear large, but the moneys that are to be recovered amount to Rs. 1,27,000 odd and the Receiver has furnished security in the sum of Rs. 1,30,000. It was urged by Mr. Badri Das that this gentleman is interested in the other side, being a witness to a certain agreement set up by Shib Ram, etc., as having been entered into between them and *Musammat* Ishri. At the same time, Mr. Tek Chand on behalf of the respondents has filed an affidavit, which has not been in any way contradicted by Mr. Badri Das, in which it is stated that this Receiver has succeeded in actually realising Rs. 51,424 and has obtained a decree for another Rs. 16,763 while he is busily employed in taking out execution of a decree that had been obtained by the deceased during his lifetime. The results are obviously substantial, and had Parlad Rai who is said to be indebted to the deceased in a sum of nearly Rs 45,000 paid up his debt the result would have been

(1) 15 C. 818; 13 Ind. Jur. 258; 7 Ind. Dec. (N. S.) 1128.
(2) 22 C. 459; 11 Ind. Dec. (N. S.) 307.
(3) 11 Ind. Cas. 870; (1911) 2 M. W. N. 75; 21 M. L. J. 821; 10 M. L. T. 490.
(4) 34 Ind. Cas. 693; 23 C. L. J. 567.
(5) 136 P. R. 1890.
(6) 4 Ind. Cas. 694; 107 P. R. 1908; 12 P. L. R. 1909; 17 P. W. R. 1908.
(7) 11 Ind. Cas. 403; 62 P. W. R. 1911.
(8) 6 Ind. Cas. 659; 36 P. R. 1910; 53 P. W. R. 1910; 72 P. L. R. 1910.
(9) 5 Ind. Cas. 96; 14 C. W. N. 248; 14 C. L. J. 215.

still more so. I am, therefore, unable to see that the appointment of this particular gentleman was in any way detrimental to the interests of the widow. Mr. Badri Das suggested that if the Receiver was to be maintained it would be possible to get one to carry out the duties at a cheaper rate and he suggested the names of two persons in Burma. As pointed out in the affidavit referred to above, some of the debts due will be barred in December next. The bulk of the balance due is represented by the claim against Parlad Rai and I, therefore, accept this appeal in part and pass the following order :—

I appoint Parlad Rai Receiver in place of Raghuwansh Lal on condition that the said Parlad Rai deposits the sum due by him in the Imperial Bank at Myitkina to the credit of the Senior Subordinate Judge, Ludhiana, by the 22nd of November 1922, and undertakes to proceed with the realisations of the other sums mentioned in the list *be* forthwith without any remuneration (Mr. Badri Das has stated that he was instructed that Parlad Rai will be agreeable to this course). If Parlad Rai fails to make the said deposit by the date fixed then Raghuwansh Lal will continue to act as Receiver. I also accept this appeal so far as to modify the order relating to remuneration by directing that the plaintiffs shall pay the remuneration of Rs. 500 a month to the said Mr. Raghuwansh Lal, as well as make necessary advances for any litigation that may be necessary, the Receiver keeping the accounts as ordered.

Costs in these proceedings will follow the event.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1179 OF 1920.
October 27, 1922.

Present :—Mr. Justice Broadway and Mr. Justice Campbell.

LAL CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mussammat BEGAM—PLAINTIFF—RESPONDENT.

Punjab Pre-emption Act (*I of* 1913), *s.* 5 (2)—*Shop or house—Test.*

The question whether a building is a shop or residential house for purposes of pre-emption must be decided with reference to the chief or most important purpose to which the building is devoted. [p. 747, col. 2.]

Jaithu Mal v. *Janki Das*, 37 Ind. Cas. 843; 30 P. W. R. 1917, relied upon.

Dial Singh v. *Bakshish Singh*, 21 P. R. 1907; 24 P. L. R. 1908; 129 P. W. R. 1907, *Hannu Mal* v. *Atma Ram*, 27 Ind. Cas. 799; 47 P. L. R. 1915; 239 P. W. R. 1915, distinguished.

Where it was found that two of the principal rooms of the building in suit had been converted into shops which opened into a regular Bazar full of other shops and had been continuously used as such for several years, and that the primary value of the building lay in those shops, the rest of it being neglected and of comparatively insignificant value:

Held, that the building must be regarded as a shop within the meaning of section 5 (2) of the Punjab Pre-emption Act and no right of pre-emption arose on a sale of it. [p. 748, col. 1.]

First appeal against a decree of the Senior Subordinate Judge, Lahore, dated the 22nd March 1920.

Pandit *Sheo Narain*, R. S., for the Appellants.

Bakhshi *Tek Chand* and Lala *Gobind Ram*, for the Respondent.

JUDGMENT.—This is a first appeal against a decree in favour of *Mussammat* Begam giving her possession by pre-emption of an undivided half share in a building in Lahore city sold by her co-sharer Fazal Din to Lal Chand and Karm Chand.

The Trial Court held against the vendees-defendants that the right of pre-emption prevailed in the locality where the property was situate, that the property was not a shop and was subject to the right of pre-emption, that the ostensible price of Rs. 9,000 had been neithe paid nor fixed in good faith and that the market value on payment of which the decree was granted was Rs. 6 700.

On appeal the two findings that the property is not a shop and that the ostensible

price was not fixed in good faith are contested. In our opinion the vendees-appellants must succeed on the first point and the decree of the Court below must be reversed.

The building is an old one, and in its original shape the back wall, which was blank, faced what is now the Akbari Mandi Bazar. The original entrance was in a back street called the Kucha Khajur. The building is two storyed and consists of four rooms and a *deorhi* on the ground floor and four rooms and an open yard on the second floor. About 40 years ago the wall facing the Akbari Mandi Bazar was pierced, the two back rooms of the ground floor were opened on the Bazar side. A third small shop was also created, apparently by removing a portion of the party wall between these two rooms which appears from the plan on the record to have been exceptionally thick.

These three shops have been in existence and have been used as such ever since. The rest of the ground floor at the back is used for cattle and the upper storey has been occupied by the owners and is apparently now occupied by the plaintiff. Of the doors connecting the rooms converted into shops with the rest of the ground floor one has been built up entirely and the other has been nailed up in such a way as to be permanently closed. There is no staircase from the shops to the upper storey. The upper storey and the rest of the house apart from the shops is in a dilapidated condition. At present the shops yield a rent of Rs. 23 per mensem and the rent of the rest of the house is estimated by one of the plaintiff's witnesses to be Rs. 3 only.

The facts have been stated by the witnesses produced by the plaintiff herself, except that those witnesses say that the shops have only been in existence for 10 or 12 years. The Trial Court, however, has held that they date certainly from 1890 and are in fact some 40 years old. We agree with this conclusion.

It has been argued by Mr. Tek Chand for the plaintiff-respondent that the original character of the house should be regarded, that the upper storey of the shop is not used for any pu pose connected with them and that the intention of the proprietor in opening the shops was merely to augment his or her income and not convert the building from a dwelling house into a shop. He relies upon two previous rulings of this Court: *Dial Singh* v. *Bakshish Singh* (1) and *Hannu Mal* v. *Atma Ram* (2). Neither of these cases, however, appears to us to resemble the present. In each a portion of the ground floor of a dwelling house had been converted into shops but the shops had not been used continuously as such, and were not so used at the time of the sale, which occasioned the suit.

Mr. Sheo Narain for the appellants has cited *Jaithu Mal* v. *Janki Das* (3), the facts of which more nearly approximate to, yet differ somewhat from, those of the present case, but in which the principle is emphasized that the question whether a building is a shop or residential house must be decided with reference to the chief or most important purpose to which the building is devoted. This, we consider, is the correct method of dealing with cases of this kind.

Here we have it proved that the two principal rooms of the house have been made into shops and that the primary value of the building lies in these shops. The rest of the house is neglected and is of comparatively insignificant value. The shops open into a regular Bazar full of other shops. They have been occupied continuously as shops for many years. It appears to us clear that 30 or 40 years ago the owner or owners of the house resolved to put it to its most profitable purpose and to take advantage of the Bazar at the back by converting into shops every portion of the house that could be so used. So thoroughly was the scheme carried out that a third small shop was hollowed out of the wall and squeezed in between the two main shops.

The building thus became a block of shops. The mere fact that the owner or owners continued to live in the uncared for upper storey which could not be put to commercial purposes does not, in our opinion, take away from the building such a character, and, although the upper storey may not be occupied by the lessees of the shops, it is none-the-less a mere appendage to the shops in its present condition.

(1) 21 P. R. 1907; 24 P. L. R. 1908; 129 P. W R. 1907.
(2) 27 Ind. Cas. 799; 47 P. L. R. 1915; 239 P. W. R. 1915.
(3) 37 Ind. Cas. 843; 30 P. W. R. 1917.

For these reasons we hold that, under section 5, sub-section (2) of the Punjab Pre-emption Act, no right of pre-emption exists in respect of the property in suit. We accept the appeal, set aside the decree of the Senior Subordinate Judge, and order that the plaintiff's suit be dismissed with costs.

The cross-objections fail and are dismissed.

Appeal accepted.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 678 OF 1922.

November 29, 1922.

Present:—Mr. Justice Harrison.

RAM KISHEN—PLAINTIFF—APPELLANT

versus

Musammat BHAGIRTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will—Devise in favour of widow—Estate taken—"Malik," use of.

The mere use of the word "*Malik*" in making a devise, if qualified by the surrounding context, does not exclude the possibility of merely a life-estate being conferred. [p. 749, col. 1.]

Ram Chand v. *Dewan Chand*, 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W.R. 1912, followed.

A Will made by a Hindu testator devised certain property in the following words:

"After my death my wife shall be the owner and possessor and after her death my daughters shall be the owners of the property in half shares and shall exercise proprietary rights over it:"

Held, that the widow took only a life-estate in the property. [p. 749, col. 1.]

Surajmani v. *Rabi Nath Ojha*, 30 A. 84; 35 I A. 17; 7 C.L.J. 311; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 3 M. L. T. 144 (P. C.), relied upon.

Mohan Lal v. *Niranjan Das*, 60 Ind. Cas. 619; 2 L. 175, distinguished.

Second appeal from a decree of the District Judge, Karnal, dated the 31st January 1922, affirming that of the Munsif, First Class, Karnal, dated the 28th November 1921.

Mr. *K. J. Rustomji*, for the Appellant.

Lala *Rama Nand*, for the Respondents.

JUDGMENT.—One Ram Kishen, grandson of Shib Chand, brought a suit against his grandmother, *Musammat* Bhagirthi, *Musammat* Rani, his aunt, and one Tasadduq Hussain, alienee of his grandmother, for a declaration that a sale of land effected by her will not affect his reversionary rights.

The First Court decided all the five issues against the plaintiff and on appeal to the District Judge only one point was decided. Shib Chand, the grandfather, had left a Will in virtue of which the widow has claimed that she has an unfettered right of alienation and the Munsif held that this contention was correct. This view was upheld by the District Judge and without going into the other questions he was thus enabled to dismiss the appeal. The passage in question runs as follows:—

"*Bad wafat man mukar Musammat Bhagirthi zauja man mukar malik wa kabiz hogi aur bad wafat zauja man mukar ke jaidad mandarja bala ki meri har do dukhtaran mazkura bala ba hissa nisaf nisaf malik hongi aur unko ikhtiarat malikana hasil honge.*

The District Judge states that he is unable to distinguish this case from *Mohan Lal* v. *Niranjan Das* (1) and the authorities quoted therein and holds that an absolute and unfettered right of alienation was conferred by the words quoted above. Now, this ruling follows and is based on the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (2) which is to the effect that the use of the word "*Malik*" implies "absolute ownership" unless there is anything in the context or surrounding circumstances to qualify such meaning. The property in dispute in that case was left to the testator's widow. It was provided distinctly that she would be at liberty to alienate or dispose of it as she wished and that if she did not dispose of it by gift or other form of alienation it would descend to the testator's grandsons. She had, therefore, an absolute and unfettered right to do what she chose with the property, and it was only if she did not see fit to exercise her right that and after her death that, any body else's right, could materialise. Here the position is wholly different. It is true that the word "*Malik*" is used, but this appears to me to be qualified by the context and surrounding circumstances in

(1) 60 Ind. Cas. 619; 2 L. 175.

(2) 30 A. 84; 35 I. A. 17; 7 C. L. J. 131; 5 A.L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 3 M. L. T. 144 (P. C.).

exactly the way contemplated by their Lordships of the Privy Council. The widow, *Musammat* Bhagirti, is to have the property and after her death (all in the same sentence) the two daughters are to inherit in equal shares. Reading this sentence as a whole I think that the intentions of the testator are quite clear and that he meant that his widow should have a life-estate and no more and that after her death the two daughters should succeed. I quite realize that, as laid down by their Lordships of the Privy Council, the fact that the beneficiary is a female in no way affects the interpretation to be put upon the words used, but every case of this sort has to be decided on its own merits and its peculiar circumstances, and, as explained in *Ram Chand* v. *Dewan Chand* (3), the mere use of the word "*Malik*," is qualified by the surrounding context does not preclude the possibility of merely a life-estate being conferred.

I, therefore, accept the appeal and return the case to the learned District Judge for decision on the remaining points. The costs will follow the result.

Z. K. *Appeal accepted.*

(3) 13 Ind. Cas. 571; 65 P. R. 1912; 99 P. L. R. 1912; 209 P. W. R. 1912.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 265 OF 1920.

January 11, 1923.

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

Lala RAM RAGHUBIR LAL—DEFENDANT—APPELLANT

versus

Babu DIP NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Legal necessity—Burden of proof—Member on trial on serious charge—Legal necessity—Declaratory decree—Discretion of Court.

When a creditor wants to enforce on the joint family property a charge created by one member of the joint undivided Hindu family, and the charge is challenged by the other members of the family on the ground that it was created without legal necessity, it is for the creditor to make out a *prima facie* case of legal necessity. However, in a case where it is not the creditor who is enforcing his charge against the family property, but it is one of the members of the joint family who is seeking a declaration that the charge created upon the family property by one or some of the members of the family should be declared null and void on the ground that it was created without legal necessity, it is for such member to make out a *prima facie* case that the charge was without legal necessity. [p. 751, col. 1.]

Therefore, where a member of a joint Hindu family, who is on his trial on a serious charge, *e.g.*, of murder, raises money by hypothecating the joint family property and another member of the joint family brings a suit to have the mortgage declared null and void on the ground that it was created without consideration and legal necessity, it is for the plaintiff, before the mortgagee can be called upon to give evidence with regard to the validity of his document, to establish, by some *prima facie* evidence, that the deed was fictitious and without consideration. [p. 751, cols. 1 & 2.]

If a member of a joint Hindu family is standing his trial on a serious charge of murder and wants funds to defend himself and raises funds by creating a charge on the family property, he does so under necessity which may be called legal necessity under the Hindu Law. And there is no difference in principle whether a *karta* or a younger member of the family, in case he is in trouble, borrows money by hypothecating the family property in order to defend himself. [p. 751, cols. 1 & 2.]

***Beni Ram* v. *Man Singh*, 11 Ind. Cas. 663; 34 A. 4; 8 A.L.J. 1015 and *Ramalingam Pillai* v. *Muthayyan*, 24 Ind. Cas. 356; 26 M. L. J. 528; 16 M. L. T. 76; 1 L. W. 544, followed.**

The question of the granting of a decree in a declaratory suit is always in the last resource a matter of discretion with the Court, and that discretion has to be exercised upon proper and legal principles. [p. 751, col. 1.]

First appeal from a decree of the Subordinate Judge, Azamgarh, dated the 13th May 1920.

Messrs. *B. E. O'Conor*, *G. Agarwala* and *Damodar Das*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.

Rafique, J.—Babu Ram Sewak Singh, defendant-respondent No. 2, was implicated in the murder of one Mr. Lawrence Barber in the District of Azamgarh in the year 1915. While Babu Ram Sewak Singh was in Jail he with his two sons and his brother executed a deed of mortgage for Rs. 10,000 in favour of Lala Ram Raghubir Lal, the defendant-appellant before us. Subsequently Babu Ram Sewak Singh was tried and acquitted. On the 1st of April 1920 the uncle of Babu Ram Sewak Singh, namely, Dip Narain Singh

brought the suit, out of which this appeal has arisen, for a declaration that the mortgage-deed of the 16th February 1915 executed by Ram Sewak Singh in favour of Raghubir Lal was fictitious and given without legal necessity. The material allegations were made in paragraphs 4 and 5 of the plaint. They were as follows:—

"Para. 4. In 1915, Babu Ram Sewak Singh, defendant No. 2, was charged with the murder of Mr. Lawrence Barber. The Criminal Court had ordered an attachment of the property in dispute for the appearance of defendant No. 2, and it was apprehended that the property would be confiscated; hence defendant No. 2, who on account of previous connection and friendship had great confidence in defendant No. 1, executed on the 16th February 1915 an entirely fictitious mortgage-deed, without consideration, for Rs. 10,000 without any family necessity, and without the knowledge of the plaintiff. In this document he hypothecated all the property in dispute specified below which belongs to the whole family.

"Para 5. The expenses of the said criminal case were defrayed entirely from the income of the family property while Babu Ram Sewak Singh, defendant No. 2, was in Jail. Contracting loans under such circumstance cannot be regarded as valid necessity by law."

There were other allegations impeaching the validity of the deed of mortgage, such as the high rate of interest and the absence of the consent of the plaintiff to the deed, which need not be considered at present. The claim was brought against Ram Raghubir Lal and the four executants of the mortgage-deed. Ram Raghubir Lal was the principal defendant. Ram Sewak Singh and his brother Sri Newas filed a written statement in which they made no definite statements with regard to the allegations in the plaint but stated that they had no objection to the claim of the plaintiff and, therefore, they may be exempted from the array of the defendants and costs. Ram Raghubir Lal did not put in an appearance and no defence was filed by him. The Court of first instance tried the case *ex parte* and decreed it, *i.e.*, the declaration sought by the plaintiff in his relief No. 1 was granted. Ram Raghubir Lal in his appeal to this Court contends that the evidence produced by the plaintiff was insufficient for the lower Court to grant the relief that has been granted. It is argued on behalf of the appellant that the deed of mortgage of the 16th February 1915 was challenged by the plaintiff mainly on two grounds, namely, that it was fictitious and without any consideration and, secondly, that it was given without any legal necessity. There is no evidence in support of either of these two allegations. On the other hand, the contention for the plaintiff-respondent is that the *onus* was upon Raghubir Lal to prove that the deed of mortgage of the 16th February 1915 was a good and valid deed, *i.e.*, that it was obtained for consideration and that there was a legal necessity at the time of its execution for creating a charge on the family property. It was further argued that, though Ram Sewak Singh was in trouble at the time, the mere fact of his being in Jail on the charge of murder would not entitle him to burden the joint family property, as he was not the *karta* of the family, nor has it been shown that the income of the family property was insufficient to supply funds for his defence. In my opinion, the contention for the appellant ought to prevail. Dip Narain, though *karta* of the family, came into Court as a plaintiff to get a declaration that the hypothecation bond of the 16th February 1915 wherein the property specified in the plaint has been hypothecated is entirely fictitious and without consideration and was executed without any legal necessity, is null and void in law and inoperative, and may be cancelled. It was, therefore, for him to prove that the deed of the 16th February 1915 was fictitious and without consideration. He had distinctly stated in his plaint the reason why he described the document as fictitious. In paragraph 4 of the plaint he said that a warrant of attachment for the property of Ram Sewak Singh was out from the Court of the Magistrate and in order to save the property the mortgage in question was given without any consideration. Ram Raghubir Lal was a friend of the family and the deed was written in his favour knowing that he would not take advantage of the mere execution of the deed and the procedure would save the property from attachment and sale. These circumstances required evidence in their support. It was for the plaintiff to establish

these circumstances. The fact that the defendant, Ram Raghubir Lal, was absent and the case was tried *ex parte* would not do away with the necessity of proving those circumstances. I, therefore, think that the declaration sought by the plaintiff, Dip Narain, that the deed of the 16th February 1915 should be declared null and void on the ground that it was fictitious and without any consideration cannot and should not be granted to him in view of the state of the evidence on the record. The second ground upon which the deed in question is challenged is the absence of legal necessity. It is true that when a creditor wants to enforce a charge on the joint family property created upon it by one member of the joint undivided Hindu family, it is for the creditor to make out a *prima facie* case of legal necessity, if the charge is challenged by the other members of the family on the ground that it was created without any legal necessity. In the present case it is not the creditor who is enforcing his charge against the family property. It is one of the members of the joint family who is seeking for a declaration that the charge created upon the family property should be declared null and void on the ground that it was created without legal necessity. I should think that in such a case there should be some *prima facie* evidence given by the plaintiff before the creditor is called upon to give evidence with regard to the validity of his document. The facts alleged in the plaint themselves go to show that there was legal necessity at the time that the deed in question was given. The plaintiff admits in his plaint that one of the executants, namely, Ram Sewak Singh, was in Jail at the time on a very serious charge *i.e.*, of murder. The plaintiff, however, goes on to say that, though Ram Sewak Singh was in Jail on the charge of murder, yet his defence was conducted from the joint funds. I think that if a member of a joint undivided Hindu family is standing his trial on a serious charge of murder and wants funds to defend himself and raises funds by creating a charge on the family property he does so under necessity which may be called legal necessity under the Hindu Law. In the present case the plaintiff has failed to show that the defence of Ram Sewak Singh was conducted from joint found. The mere denial of legal necessity by Dip Narain when he comes into Court as a plaintiff is, to my mind, not sufficient. I have in reciting the case for the respondent observed that the attitude of the plaintiff-respondent with regard to this point is, that if a member of a joint Hindu family is on his trial on a serious charge and raises money by hypothecating the joint family property such hypothecation is not for legal necessity. No authority has been cited in support of this proposition. There are two cases in which the *karta* of the family raised money for his defence, *Beni Ram* v. *Man Singh* (1) and *Ramalingam Pillai* v. *Muthayyan* (2). The learned Counsel for the plaintiff-respondent distinguishes those cases from the present one by stating that in the reported cases the *karta* of the family was implicated and he borrowed the money on the security of the family property. I do not think that there is any difference in principle whether a *karta* of the family or a younger member of the family borrows money by hypothecating the family property in case he is in trouble in order to defend himself. I would, therefore, hold that the plaintiff, Dip Narain, has failed to make out a case for the declaration that he seeks in his plaint. I would further remark that on the terms of the mortgage in question the plaintiff-respondent is not affected at all. The executants of the mortgage hypothecated their half share only in the joint family property. It is, however, said on behalf of Dip Narain that, as the family was joint at the time of the execution of the mortgage, he (plaintiff) had an interest in each *bigha* of the property. That is quite true, but the terms of the mortgage do not affect his interest in the family property. In any case the granting of a declaration is a matter of discretion with the Court and in my opinion, this is not a case in which such a discretion should be exercised. I should, therefore, allow the appeal, set aside the decree of the Court below and dismiss the claim of the plaintiff. I would make each party bear its own costs.

Piggott, J.—I agree that the plaintiff Dip Narain ought not in this suit, and on this record as it stands, to be granted

(1) 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015.
(2) 24 Ind. Cas. 356; 26 M. L. J. 528; 16 M. L. T. 76; 1 L. W. 544.

any declaration whatsoever. I admit that the case is a very peculiar one and that I have felt considerable difficulty as to the proper order for us to pass. We do not know why the appellant, Lala Ram Raghubir Lal, failed to enter an appearance in the Trial Court. There is a finding in the judgment under appeal that notice of the suit had been duly served "upon his *mukhtar-i-am* in the District of Fyzabad." If Ram Raghubir Lal had made any attempt to obtain a re-hearing of the suit in the Trial Court, or had even in his memorandum of appeal to this Court formally challenged the finding that notice of the suit had been duly served on any person authorised to accept service on his behalf, I think other considerations would have arisen. On the other hand, if the plaintiff, Dip Narain, had, even by way of a subsidiary defence to the appeal, submitted a formal application, supported by an affidavit to the effect that he would have produced further evidence in the Trial Court if the Court itself had not intimated that the evidence actually tendered was sufficient to warrant the passing of an *ex parte* decree, I should have felt much disposed to send the case back to the Trial Court to be fully tried out on the merits. Practically, however, so far as this Court is concerned, both parties to the appeal have elected to stand upon the evidence recorded in the Court below. On that evidence I feel no doubt that the plaintiff was not entitled to a decree declaring the bond in suit to be entirely fictitious and without consideration. There lay upon him, when he came into Court as plaintiff, a certain burden of proof which, in my opinion, was by no means discharged by the single statement of one of the executants of the bond to the effect that he personally had received no money in connection with the same. There remains the question whether a declaration regarding the legal necessity for the bond ought to be granted in this suit. As has been remarked by my learned brother, the question of the granting of a decree in a declaratory suit is always in the last resource a matter of discretion with the Court. No doubt that discretion has to be exercised upon proper and legal principles. But the present case is an altogether peculiar one. I am inclined to doubt whether a plaintiff coming into Court like Lala Dip Narain Singh has done in the present suit, should have been allowed to raise the question of legal necessity before the mortgagee had made any attempt to enforce his claim against the mortgage security and while it was still open to the mortgagee to seek relief by way of a claim for a simple money-decree, if it had not been for the allegations in the plaint regarding the wholly fictitious character of the document. At any rate, I am clearly of opinion that in the present state of the record, we ought to refuse to make any declaration on the subject of the legal necessity for this document. As for granting the plaintiff a declaration that the deed in suit was executed without his knowledge and information, or that it does not affect the interest in the joint family property, if any, which the said plaintiff would take on partition, I do not think it would be proper to grant any declaration to this effect. Except in so far as they would be mere statements of law, they could not be based upon satisfactory evidence on the record. For these reasons, I agree in the order proposed.

By the Court.—The order of the Court is, that the appeal is allowed and the decree of the lower Appellate Court is set aside and the claim of the plaintiff is dismissed. The parties shall bear their own costs.

S. D. *Appeal allowed.*

SALAYJEE *v.* FATIMA BIBI.

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

November 16, 1922.

Present:—Lord Phillimore, Mr. Ameer Ali, Sir Lawrence Jenkins and Lord Salvesen.

A. E. SALAYJEE—DEFENDANT—APPELLANT

versus

FATIMA BIBI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Will—Legacy to one heir—Consent—Burden of proof.

The Muhammadan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share The burden of proving such consent is on the legatee. [p. 753, col. 2.]

Appeal from the judgment of the Lower Burma Chief Court.

Mr. *De Gruyther, K. C.*, and Mr. *Parikh*, for the Appellant.

Mr. *Dunne, K. C.*, and Mr. *Sanders*, for the Respondent.

JUDGMENT.

Lord Phillimore.—The dispute in this case arises in the course of the administration of the estate of a wealthy Muhammadan, who died on the 25th February 1907 having left a Will, dated the 15th June 1903, which was admitted to Probate on the 18th March 1908. By that Will he left his only son, the defendant in this suit and the present appellant, his executor, and he gave him certain powers and professed to entitle him to a commission of 10 per cent. on the proceeds of the sale of all his estate. That provision is twice over expressed, but substantially the effect is the same on the two occasions. He also, instead of reserving, as by Muhammadan Law he could, one-third of his estate for his general disposition, reserved somewhat less—one-fourth, and with regard to that fourth he directed the executor, whom he described also as "executor and trustee," to pay certain charitable legacies amounting to Rs. 13,700, directing at the same time that none of his heirs or any other persons should be entitled to have any right to claim an account of his disbursements from the executor, and, with regard to the balance of the fourth share, he gave it to the executor to spend or to dispose of in such manner as to him should seem fit and proper. This has been treated in both Courts as a legacy of the residue of the fourth share to the defendant, the present appellant.

There were various heirs, widows and children, by various families. The plaintiff and respondent, now a widow lady, was the eldest sister and of the same full-blood as the defendant, appellant.

In 1917 she instituted this suit alleging that the two provisions for the benefit of her brother, namely, that giving him 10 per cent., and that giving him the balance of the fourth share, were contrary to Muhammadan Law. It appeared in the course of the suit, if it had not appeared before, that several of the heirs had agreed nevertheless to the appellant retaining his interest, as, according to Muhammadan Law, they could, but there remained the plaintiff, and there remained three minor children, and the contest in the suit was with regard to the plaintiff. The Muhammadan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and, therefore, when it appeared in the course of the suit that the other heirs had agreed, the only contest was as regards the plaintiff and the three minors. As regards the three minors there could be no question of their consent and the dispute, therefore, turned on the question whether the plaintiff had consented or not.

Now, the burden of proving that consent was on the appellant, the defendant in the suit. Both parties tendered oral evidence, each putting his or her case more strongly than the Trial Judge thought was correct; the plaintiff averring that she had protested from the first and had been put off by a promise that she should have her proper share (this the Trial Judge did not accept); the defendant averring on the contrary that he had made quite clear to the plaintiff what the provisions of the Will were, and the plaintiff regarding him as the only male in the house had expressed not only her consent but her pleasure that he should have this benefit. With regard to that the Trial Judge found that there was oath against oath; that there was no corroboration, the only other person present being the husband of the plaintiff, who was by this time dead, and, in the end, he was not satisfied that this consent was proved. He thereupon said

that there was no direct evidence of explicit consent and the question turned upon whether there was implied consent, and the only two grounds of implied consent that he relied upon were delay and a certain transaction with regard to a loan and the interest upon it. On those materials he found in favour of the defendant that there was an implied consent.

The plaintiff appealed to the Chief Court, and the Chief Court reversing the decision of the Primary Judge, found that there was not sufficient evidence of an implied consent, and the learned Judges agreed with the Trial Judge that there was no proof of an explicit consent.

Thereupon this appeal was brought; but, in their Lordships' opinion, unsuccessfully. The burden of proof was, as already stated, upon the defendant, and the only two elements to be considered were the question of time and the question of the loan. As to the first the delay is explained, because the estate was not in fact realized until after the suit—by general consent only realized in parts from time to time—and there was no such realization and no such stating of accounts, even temporary or provisional stating of accounts, as could be suggested to have shown to the plaintiff that the estate was being divided upon the footing that the defendant was to be entitled to retain these advantages, for both Courts decided that both these advantages were legacies which had to be justified.

With regard to the loan it appears that in 1908 the lady's husband wanted some money to release a mortgage on his house, and the lady, not unnaturally, went to her brother, who was collecting money from time to time and asked for some money—it was not a very large sum— to enable her to pay off this mortgage. He thereupon appears to have said that he had no money, but as the lady was pressing him and he probably felt that he was an accounting party, he offered to borrow it, but said that she would have to be surety for the loan. She was prepared to do this but demurred to paying interest. Up to that point the parties are in substantial agreement. He did borrow money; she did, jointly with him, execute the promissory-note to a Chetty, and she took from her brother a letter promising her that she should not have to pay the interest. Now what was the reason of this transaction? It is suggested for the defendant that she said to him that he was taking great advantages under their father's Will—more than the Muhammadan Law allows and, therefore, the least he could do was to pay this interest. She denies this and says that she was asking for some of the money which was coming to her, and, therefore, it was quite right that he should relieve her from paying this interest. Now, if it had appeared that he had really relieved her from paying the interest there would be some substance in the contention, although their Lordships do not say there would be very much substance in it then. But it appears that he has now debited this lady, as part of her share, with the interest on this loan. After that it becomes of less importance to consider this transaction, but, even apart from that, the transaction is far from sufficient by itself to support an implied consent. That is the view the Chief Court took, and, their Lordships think, quite rightly, and, therefore, they will humbly recommend His Majesty that this appeal should be dismissed with costs.

W. C. A. *Appeal dismissed.*

Solicitors for the Appellant :—Messrs. *Mount, Sterry* and *Wheeler.*

Solicitors for the Respondent :—Messrs. *Bramah* and *White.*

JAGDEO TIWARI *v.* KUBER NATH PANDEY.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 24 OF 1922.

February 8, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Gokal Prasad.

JAGDEO TIWARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KUBER NATH PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Gift by widow in favour of reversioner—Nearest reversioners interested—Remote reversioner, suit by, for declaring gift invalid, whether maintainable.

A remote reversioner is entitled to challenge a gift by a Hindu widow, if the nearest reversioners are interested in maintaining the gift even though the donee is a nearer reversioner to the plaintiff.

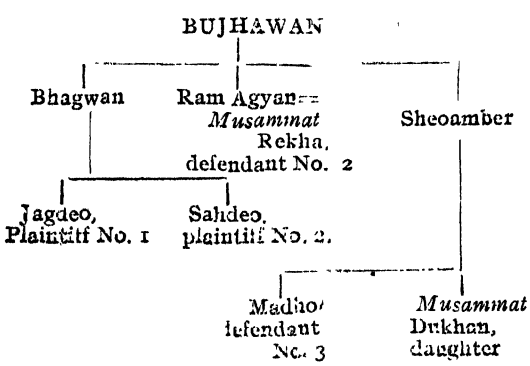
Raja Dei v. *Umed Singh*, 13 Ind. Cas. 632; 34 A. 207; 9 A. L. J. 158, *Gumanan* v. *Jahangira*, 46 Ind Cas. 180; 40 A. 518; 16 A. L. J. 465 and *Jaint Singh* v. *Gosain*, 46 Ind. Cas. 85; 16, A. L. J. 493, followed.

Second appeal against a decree of the District Judge, Ghazipur, dated the 29th September 1921.

Dr. *M. L. Agarwala* and Mr. *Haribans Sahai*, for the Appellants.

Mr. *M. A. Aziz* for Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are briefly as follows and the following pedigree will make them more clear.



The suit was by the plaintiffs to set aside a gift made by *Musammat* Rekha of certain property to Kuber Nath. They pleaded that *Musammat* Dukhan was not the daughter of Rekha but she was the daughter of Sheoamber and, consequently, the transfer by Rekha was not justified in any case. They, therefore, prayed for a declaration of the invalidity of the gift in favour of defendant No. 1 and consequential reliefs. The plaintiffs' suit was based on the ground that the three brothers, Bhagwan, Ram Agyan and Sheoamber, were members of a joint Hindu family, and the plaintiffs being the sole survivors were entitled to the declration claimed; in the alternative also they claimed the declaration as being the next reversioners after the death of *Musammat* Rekha. The First Court came to the conclusion that the three brothers, Bhagwan, Ram Agyan and Sheoamber, were not joint but separate, that Kuber Nath was not the daughter's son of *Musammat* Rekha and Ram Agyan but that he was Sheoamber's daughter's son, and coming to these findings it decreed the claim. The learned Judge of the lower Appellate Court says that the plaintiffs failed to prove that they were the next reversioners. Perhaps the learned Judge meant that Kuber Nath was the daughter's son of Ram Agyan and was thus a nearer heir, but he has omitted to consider the question that Kuber Nath being himself the donee under the deed of gift executed by *Musammat* Rekha was interested in the upholding of the gift and his mother *Musammat* Dukhan could not object either. Therefore, even if he was the daughter's son of *Musammat* Rekha he had precluded himself from suing to set aside the gift in his own favour. That a remoter reversioner could sue for a declaration in such a case was decided by this Court in the case of *Raja Dei* v. *Umed Singh* (1). This ruling has been followed in the cases of *Gumanan* v. *Jahangira* (2) and *Jaint Singh* v. *Gosain*, (3). Having regard to this view, the plaintiffs, who are the sons of Ram Agyan's brother, had a right to sue to have the deed of gift declared invalid beyond the life-

(1) 13 Ind. Cas. 632; 34 A. 207; 9 A. L. J. 158.
(2) 46 Ind. Cas. 180; 40 A. 518; 16 A. L. J. 465.
(3) 46 Ind Cas 85; 16 A. L. J. 493.

time o *Musammat* Rekha. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The parties will bear the costs of this litigation.

N. K. *Appeal allowed.*

MADRAS HIGH COURT.

REFERRED CASE NO. 4 OF 1922.

October 30, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

THE SECRETARY TO THE BOARD OF REVENUE, (INCOME-TAX), MADRAS —REFERRING OFFICER

versus

THE MADRAS EXPORT CO., MADRAS —ASSESSEE.

Income-Tax Act (VII of 1918), ss. 3, 5, 33—Non-resident firm making purchases in British India—Profits accruing abroad, whether liable to income-tax.

Section 33 (1) of the Income-Tax Act, 1918, is not a charging section but a machinery section setting out the method by which the tax, if otherwise chargeable, is to be collected in certain cases where the direct beneficiary cannot be got at. It is not a section designed to declare some other gains taxable beyond what has been declared by section 5 of the Act to be taxable. [p. 757, col. 2; p. 759, col. 2.]

Greenwood v. *Smidth & Co.*, (1922) 1 App. Cas. 417; 91 L. J. K.B. 349, *Smidth & Co* v. *Greenwood*, (1920) 3 K. B. 275; 89 L. J. K. B. 993; 36 T. L. R. 760, *Smidth & Co.* v. *Greenwood*, (1921) 3 K. B. 583; 37 T. L. R. 949, *Secretary to the Commissioner, Salt, Abkari and Separate Revenue, Madras* v. *Ramanathan Chetty*, 53 Ind. Cas. 970; 43 M. 75; (1919) M. W. N. 820; 10 L. W. 570; 37 M. L. J. 663; 20 M. L. T. 447 (F. B.), relied upon.

Section 33 (1) of the Income-Tax Act was not intended in any way to enlarge the scope of section 5 or bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connection in British India. [p. 760, col. 1.]

Section 3 ( ) of the Income Tax is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India which are transmittable and are transmitted through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent. [p. 760, col. 1.]

The condition precedent to assessability under section 3 (1) of the Income Tax Act is business in British India and not merely a business connection in British India, and it is not laid down in the Act that the two phrases are identical in meaning. The test is this:—Is the non-resident firm by its agency in British India making profits in British India which pass to it through the hands of its agent. If it is, then section 33 (1) of the Income-Tax Act applies. If not, then the section does not apply. [p. 759, col. 2; p. 760, col. 1.]

A non-resident firm which merely purchases raw material in British India through its agent for shipment and sale abroad and realises the profits from the sale abroad does not thereby carry on trade or business in British India and is not liable to assessment in respect of such profits. [p. 760, col. 1.]

Sulley v. *Attorney-General*, (1860) 5 H. & N. 711; 29 L. J. Ex. 404; 6 Jur. (N. S.) 1018; 2 L. T. 439; 8 W. R. 472; 157 E. R. 1304; 120 R. R. 793, relied upon.

Case stated under section 51 of Act VII of 1918 by the Secretary, Board of Revenue (Income-tax), Madras.

The Government Pleader, for the Government.

Messrs. *R. N. Aingar* and *O. T. Coman-dan Nambiar*, Counsel, instructed by Messrs. *King* and *Partridge*, Solicitors on behalf of the Assessee.

JUDGMENT.

Schwabe, C. J.—The question for determination in this case is whether the profits made by a resident in France with a branch or agent here—which profits are received and retained in France, are liable to income-tax.

The relevant facts are that a French firm has a branch in Madras whose sole duty is to buy leather goods here and ship them to France. The French firm are a firm of commission agents and they make the profits in question by being paid at a defined rate of commission on the value of the goods shipped. I had some doubt whether the fact that the French firm made this profit by commission would distinguish the case from that in which a similar

firm bought here through agents and made a profit by re-sale in France but have come to the conclusion that it is an irrelevant consideration how it makes its profits, if it is in fact made and received in France and not here. By section 3 (1) the Act is to apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is, under the provisions of the Act, deemed to accrue or arise or to be received in British India. By section 5, which is the charging section, certain classes of income are chargeable to income-tax and they include " (*iv*) Income derived from business." Chapter IV of the Act, headed, " Liability in apecial cases," contains a group of sections providing for taxation of certain persons, although not the actual persons entitled to the income in question, such as guardians, trustees, agents and partners in a firm which has discontinued business. Section 33 (1), one of those grouped sections, is in the following words: " In the case of any person residing out of British India all profits or gains arising to such person, whether directly or indirectly, through or from any business connection in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agents are to be deemed for the purpose of this Act to be assessees in respect of such income-tax." It is argued on behalf of the Government that this section brings into tax income wherever earned or whether received in British India or not by a foreign resident if any part of the business which ultimately results in profits is conducted in British India. If this contention is right, it would result in all foreign purchasers of goods in India for the purpose of manufacture or re-sale elsewhere being liable for Indian income-tax on any ultimate profits made in fact in the countries to which the goods are exported. This would be a startling innovation and quite contrary to the established principle of taxation in England, and, as far as I know, elsewhere, and one which might lead to protest on the ground that it was contrary to the Comity of Nations, and would also in all probability result in residents in foreign countries as far as possible avoiding purchasing in this country its products; though these are considerations with which the Courts are not concerned if the Statute clearly imposes such taxation, though they are material considerations in selecting between alternative interpretations if there is found to be an ambiguity. It may be that the words of sections 33 (1), taking its language literally, would be sufficient to impose this taxation, though it is to be observed the words 'through or from any business connection in British India' are very vague and the meaning thereof is not defined. The words are, in my view, most unsuitable if intended and have a wider meaning than the well-known meaning of the words in the charging section 5 (*a*) " income derived from business," and bring into tax in respect of residents something which is not covered by those words. I think the right view is that section 33 (1) is not a charging section at all, but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but to point to the method of collecting the income-tax where a person whose income is to be taxed is not himself available. In this view, we are supported by an authority in which the same point arose in England. Section 31 (2) of the Finance Act II of 1915 is in the following terms:—" A non-resident person shall be chargeable in respect of any profit or gains arising, whether directly or indirectly, through or from any branch, factorship agency, receivership or management, and shall be so chargeable under section 41 of the Income-Tax Act of 1842 in the name of the branch, factor, agent, receiver or manager." In *Greenwood* v. *Smidth & Co.*(1)the House of Lords, affirming the decision of Rowlatt, J., in *Smidth & Co.* v. *Greenwood* (2) and of the Court of Appeal in *Smidth & Co.* v. *Greenwood*(3),decided that this section, though in terms wide enough to bring into tax non-residents in respect of profits carried abroad through direct or indirect dealing through an agency in England, did not bring into tax profits, unless earned or received in Great Britain and held that that section was a machinery

(1) (1922) 1 App. Cas. 417; 91 L. J. K. B. 349.
(2) (1920) 3 K. B. 275; 89 L. J. K. B. 993; 36 T. L. R. 760.
(3) (1921) 3 K. B. 583; 37 T. L. R. 949.

section and not a charging section. Lord Buckmaster at page 423* stated the principle in the following words:—"It is important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation it is essential that the intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing Statute is of doubtful and ambiguous meaning it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the tax-payer." In my judgment this rule applies to this case.

Nor is the matter without authority here, for in the *Secretary to the Commissioner, Salt, Abkari and Separate Revenue, Madras* v. *Ramanathan Chetty* (4) this Court, although it was not necessary for the decision of that case, expressed its view that section 33 (1) was merely a machinery section and not a charging section and I agree with the reasoning on that point, and particularly with that of Oldfield, and Seshagiri Aiyer, JJ.

For these reasons the judgment of this Court must be in favour of the assessee with costs to be taxed.

Wallace, J.—This is a case referred to this Court under section 51 of the Income-Tax Act VII of 1918 by the Board of Revenue. The stated case rests on the following facts. A firm with head-quarters in Paris purchases skins in British India to the orders of constituents in various parts of Europe and America, and makes its profit by commission on the sales. The skins are bought in British India for the firm by an agency called the Madras Export Company, resident in Madras. This Company buys skins at the lowest prices it can get, subject to a maximum fixed by the Paris firm, and ships them in the raw state, as purchased, under the directions of the Paris firm. It is admitted that the Madras Export Company makes none of the profit on the sales of these skins, and that no part of the profits of the firm in Paris are remitted as such to Madras. It is presumed that the Paris firm puts the Madras Export Co., in funds for the purchases out here. The question is whether the Madras Export Co., is assessable by force of section 33 (1) of the Income-Tax Act VII of 1918 as the agent of the Paris firm on the profits made in Paris by the Paris firm through or from its business connection with the Madras Export Co., in British India.

The section of the Act called in aid by the Board, section 33 (1), runs as follows:—"In the case of any person residing out of British India all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to Income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act the assessee in respect of such income-tax." The phrase "shall be deemed to be income accruing or arising within British India" relates back to section 3 (1) where under the heading "Taxable Income" it is enacted that "this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India." Hence sections 3 (1) and 33 (1) read together import that the Act shall apply to all income accruing or arising to a non-resident in British India, whether directly or indirectly, through or from any business connection in British India. The Government Pleader, on behalf of the Board of Revenue, contends that this renders liable to income-tax all business profits made by a non-resident received not only within but outside of British India in so far as these accrue or arise through or from any business connection in British India. If the phrase 'business connection' is to be read, as the Government Pleader contends, as something much wider than the term 'trade or business' itself, then the far reaching effects of such a claim are obvious, and will extend beyond what has been hitherto recognised in British India as the territorial limit of taxation of income derived from trade. Hitherto such taxation has been limited to incomes accruing or

(4) 53 Ind. Cas 976, 43 M. 75; (1919) M. W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447 (F. B.).

*Page of (1922) 1 App. Cas.—[*Ed.*]

arising in or received in British India from trade, carried on in British India, whether the recipient resides in British India or not, to income received in British India though derived from a foreign source when the recipient resides in British India. The general scope of sections 3 and 5 of the Act of 1918 does not seem to me to alter the previous general principle that the profits taxed should accrue in British India. If it was intended to abandon this well recognised restriction and to reach profits accruing outside British India, more apt and express terms should have been employed in those sections.

The term 'business connection' has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax, but when it is contended that 'business connection' was designed to mean something different from and wider than the business itself, which *ex hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious and not to accept the contention unless we find it justified by the legal maxim enunciated by Lord Sterndale, M. R., in *Smidth & Co.* v. *Greenwood* (3): "the well-known canon of construction of taxing Acts is that none is to be taxed except by express words." Does the Act then expressly charge income accruing outside British India, but derived through or from a business connection in British India?

The charging section of the Act is section 5. Sub-section (*iv*) makes chargeable 'income derived from business,' and 'income' for the purpose of this case has the meaning read into section 3 (1) which I have set out above; that is, it would cover income accruing or arising outside British India through or from any business connection in British India. Thus such income itself is only chargeable when it is "income derived from business" by force of section 5. The phrase in section 5 is not income derived from or through any business connection. At one stage of his argument, the Government Pleader contended that such a phrase might be implied under sub-section (*vi*) of section 5, 'income derived from other sources' but such a contention I cannot accept, as it violently contravenes the principle enunciated above that taxation must be imposed by express words. The real question for decision is, is the phrase 'through or from any business connection' in section 33 (1) governed or controlled by the phrase 'derived from business' in section 5 (*iii*) or not? That it is, seems to me to be obvious from the fact that section 33 (1) is not designed or situated in the Act as a charging section in addition to section 5. It is not found under the charging sections, but under the Chapter headed 'Taxable income' alongside 'Liability in special cases", a Chapter which is designed to provide for the collection of the tax from persons other than the direct beneficiaries of the income received, that is, guardians, trustees, agents, receivers and so on, that is, it is a part of the machinery sections setting out the method by which the tax, if otherwise chargeable is to be collected in certain cases when the direct beneficiary cannot be got at, and it is not a charging section designed to declare some other gains taxable beyond what has been declared by section 5 to be taxable. I am fortified in this conclusion by the remarks of Oldfield, J., no doubt *obiter dicta*, in *Secretary to the Commissioner, Salt Abkari and Separate Revenue, Madras* v. *Ramanathan Chetty* (4) that section 33 is intended to provide for the liability to tax of a person through whose hands in one capacity or other the profits in question will pass in British India and whom, therefore, the Crown can reach in order to collect it, and also by the rules framed under section 33 by the Governor-in Council printed at page 76 of the Income-Tax Act Manual of 1920, where it is laid down that profits in a case like this may be calculated on the percentage of the turn over of the business carried on in British India. The object of section 33 (1) then is merely to provide for an agent being the assessee in place of his non-resident principal, so far as that principal is liable under section 5, as hitherto interpreted, to the tax, *i.e.*, in respect of income derived by the principal from business in British India. The condition precedent to assessability is business in British India and not merely a business connection in British India, and it is not laid down in the Act that the two phrases are identical in meaning

The test, I take it, is:—Is the non-resident firm by its agency out here in British India, making profits in British India which pass to it through the hands of its agent. If it is, then section 33 (1) applies. If not, not. I am, therefore, unable to hold, in the absence of more clear and express words, that section 33 (1) was intended in any way to enlarge the scope of section 5 or bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connection in British India.

Section 33 (1) then is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent.

In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad, and the profits realised from the sales are realised in Paris. There is clear authority in the leading case of *Sulley* v. *Attorney-General* (5), which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India. It was, therefore, held that the place of trade is the place where the profits come home to the firm, and a non-resident firm is not assessable on profits made abroad merely because it has a resident agent for purchasing and shipping raw material, and that it is no part of the income-tax law as so far laid down that the firm shall be taxable in every country in which it has established buying agents. To a similar effect is the decision in *Smidth & Co.* v. *Greenwood* (3) where it is laid down that a trade is exercised in the place where the business transactions are closed, that is, in the case of a selling business, the place where the sales are effected and the profit thereby realised. The latter decision interprets section 31 (1) and (2) of the British Finance Act II of 1915, which closely resembles section 33 (1) of the British India Income Tax Act of 1918, and it is noteworthy that, though in the case of *Sulley* v. *Attorney-General* (5), the Nottingham partner in the case was obviously a 'Branch' of the New York firm, the Court in *Smidth & Co.* v. *Greenwood* (3) held that the decision in *Sulley's case* (5) had not been radically affected by the new legislation and held in effect that the extension of the Income Tax Act of 1842, which made a non-resident firm chargeable in the name of its branch, did not mean that the existence of a branch sufficed to imply that the non-resident firm carried on trade in the United Kingdom or sufficed to make the profits of the non-resident firm received outside the United Kingdom taxable.

In the present case, no profits of a non-resident firm exist in this country or pass from it through the hands of the Madras Export Co. The Company transmits to the Paris firm raw material, and not profits derived thereon. It realises for the Paris firm no income made in British India which is taxable before it leaves British India. To my mind, then, there is no income chargeable with income-tax under section 5 of the Act, and section 33 (1) read with section 3 does not bring within the scope of section 5 income accruing or arising wholly outside British India to the firm of which the Madras Export Company is the local agent.

Therefore, the answer to the reference is that the Madras Export Company is not liable to be taxed on the profits of the business carried on in Paris by its Paris principals which are realised by the latter's business connection with British India.

V. N. V. *Appeal dismissed*

Z. K.

(5) (1860) 5 H. & N. 711; 29 L. J. Ex 464; 6 Jur. (N. S.) 1018; 2 L. T. 439; 8 W. R. 272; 157 E. R. 1364; 120 R. R. 793.

KESHO RAM *v.* PEARE LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1329 OF 1921.

January 26, 1923.

Present:— Mr. Justice Walsh.

KESHO RAM—DEFENDANT—APPELLANT

versus

PEARE LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oaths Act (X of 1873), ss. 8, 9—Special oath—Ordinary oath—Agreement to have suit decided on ordinary oath of party, legality of.

An agreement between the parties to a suit providing that the suit may be decided according to the evidence of one of the parties taken on an ordinary oath—and not on a special oath within the meaning of sections 8 and 9 of the Oaths Act, is not without consideration or illegal.

Muhammad Asghar Ali Khan v. *Muhammad Imtiaz Ali*, A. W. N. (1898) 200, followed.

Second appeal against a decree of the First Additional District Judge of Aligarh, dated the 16th July 1921.

Dr. *M. L. Agarwala* and Mr. *Panna Lal*, for the Appellant.

Mr. *Ambika Prasad*, for Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This appeal must be allowed. There is no question whatever but that the parties agreed to be bound by the defendant's oath. The document is in writing. No attack is made upon it. It is not contrary to law. It is in these terms as translated by the plaitiffs' Vakil in this Court. "On behalf of the plaintiff an application has been made. On this defendant No. 1 refused to take oath on Ganges water. The Vakil for the plaintiff states that the evidence of the defendant may be taken with the ordinary oath and that the suit may be decided according to that." This is signed by Kesho Ram, defendant No. 1, in Roman character, and by Peare Lal, the plaintiff, in Nagri character. There can be no serious question as to the interpretation of this document. "Decided according to" is "decided according to and nothing else."

There can be no doubt as to the deliberate intention of the parties, because the date of this document, the 17th of March, was the date of the filing of the written statement and the date fixed for framing issues. No issues were framed. The defendant's evidence was taken on the 17th of March. No other witnesses were summoned. No evidence of any kind except the defendant's was taken, and the Court of the Munsif proceeded to decide the case the next day, but not according to the defendant's statement but according to its own ideas arrived at from admittedly adequate materials.

Assuming that the document was made, and that it bound the parties to abide by the defendant's statement, I can see nothing illegal in such a contract. It is merely a binding contract for good consideration. It does not say that the defendant shall tell the truth. If it bound the defendant merely to tell the truth, there would be no consideration, because every body is bound to tell the truth by law, and we know that that is the object for which they come into the box. But the defendant was not bound to come into the box at all. He might come into the box and refuse to answer the questions. He could be punished for that, but the agreement is: "that if the defendant comes into the box and takes the ordinary oath and tells his story, I will be bound by it." The result of that is to alter the position both of the plaintiff and of the defendant. If the defendant tells an untrue story, the plaintiff is then in a position to prosecute him for perjury which he could not do before, and in addition to that the defendant has run the risk of being visited in this world and the next by such punishment as he believes his God prepares for those who take a false oath. He might be prepared to run the risk of the anger of his God so long as he could win his case. But he might not be prepared to run the risk of being punished by his God, prosecuted for perjury, and also disbelieved by the Munsif and lose his case. The result is that the position of both parties was changed by this agreement.

I agree with the respondents' Counsel that this is not an agreement for a special oath within the meaning of sections 8 and 9 of the Oaths Act. I think these sections of the Oaths Act only show that such an agreement may be binding on the parties, even though it relates to an oath not ordinarily recognised by the procedure of the Court, provided it is an oath which the Court is permitted to administer under section 8. It is only an argument by analogy. The argument for the appellant is that, as such agreements are sanctioned by this Act, there can be nothing illegal in an agreement relating to an ordinary oath. I agree and, apart from that

I think the decision in the case of *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (1) is to the same effectand, therefore, binding on me.

I do not know why the Court seemed so unwilling to give effect to the agreement of the parties. An appeal was brought to the lower Appellate Court on the ground that the Munsif had totally ignored the agreement, which he did. The learned District Judge has treated the matter as though it was a question whether the learned Munsif was bound to believe the defendant. That has nothing to do with it at all. The very reason for the plaintiff signing the agreement may be that he knows the defendant is going to commit perjury. The agreeement makes the truth or untruth of the defendant's story immaterial for the purpose of the immediate decision. The learned Judge is probably right when he says that this question should be decided by a consideration of the circumstances rather than by hard swearing. But that was not what he was bound to decide. He seems to think the defendant an unscrupulous person and the plaintiff a fool. But if the plaintiff has made a binding agreement it does not matter to the Court how foolish it is, and after all the plaintiff probably knows his own business better than the Court, and it may not be so foolish in the eyes of the plaintiff as in the eyes of the Court. I have no alternative but to remand the suit to the lower Appellate Court to decide in accordance with the agreement, that is to say, according to the evidence given by the defendant. The appellant must have the costs of this appeal with fees on the higher scale. The other costs will depend on the result of the suit.

Appeal allowed; Case remanded.

S. D.

(1) A. W. N. (1898) 200.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1297 OF 1921.
January 18 1923.

Present:—Mr. Justice Daniels.

S. MOHAMMAD AHMAD AND OTHERS —DEFENDANTS—APPELLANTS
versus
BABU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Second appeal—Possession adverse or permissive—Inference drawn from documents or facts in evidence —Question of law—Weight to be attached to evidence, whether question of law.

A question whether a possession is adverse or permissive may be one of legal inference to be drawn from documents or from undisputed facts in evidence, and when this is so it is a question of law and a High Court may interfere in second appeal. But where the question is mainly one of the weight to be attached to different items of evidence (*e. g.*, instances in which a certain right was or was not recognised), the question is one of fact and the High Court will not interfere in second appeal. [p. 763, cols. 1 & 2.]

Satgur Prasad v. *Raj Kishore Lal*, 55 Ind. Cas. 486; 18 A. L. J. 235; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 2 U. P. L. R. (P. C.) 55; 22Bom. L. R. 451; 42 A. 152; 46 I A. 197; 27 M. L. T 200 (P. C.) and *Kishan Kunwar* v. *Fatch Chand*, 29 A. 203; 4 A. L. J. 38; A. W. N. (1906) 307, referred to.

Second appeal against a decree of the Judge of Small Cause Court exercising the powers of a Subordinate Judge, Allahabad, dated the 28th May 1921.

The Hon'ble Mr. *S. Raza Ali*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This is a second appeal in a case which has *prima facie* been decided by the Courts below on grounds of facts. The plaintiffs are certain persons known as Thanimalis who act as officiating priests of a temple of Sitlaji. The defendants are Zemindars of the village. The temple is admittedly a very old one. It is said that, according to the Gazetteer, it is some 400 years old. The temple is held under a rent-free grant from the Muhammadan Kings. The allegations in the plaint were that there was an area of 15 *bighas* 15 *biswas* appurtenant to the temple of which the plaintiffs have all along been in adverse proprietary possession and with which the Zemindars have no right of interference. The defendants have erected a small platform or *chabutra* on a portion of this area. The plaintiffs asked that the defendants be ordered to demolish this platform; that the plain-

tiffs be put in possession of its site and that the plaintiffs be granted a perpetual injunction forbidding the defendants to make any construction on the land in dispute or interfere with it in any way to the prejudice of the plaintiffs. Objection has been taken to the third relief on the ground that the plaintiffs ought to have asked for possession of the entire area, but it is not the plaintiff's case that they have been dispossessed from any part of the area except the portion on which the *chabutra* stands and it was not, therefore, necessary for them to ask for any further relief.

A large amount of documentary evidence was produced on both sides. The plaintiffs produced documents commencing with a report of the Kazi in the year Hijri 1198, nearly a century and a half ago, and including another old document called the *muchilka* of the year 1214 Hijri. Apart from the question of limitation and other questions not now material, the learned Munsif framed two important issues :—

(*a*) Does the site of the platform in dispute attach to this temple? (*b*) Had the Muhammadan Government granted the land in dispute revenue-free to the plaintiffs' predecessors as priests of the temple? On the evidence before them both Courts came to the conclusion that the land in dispute was appurtenant to the temple; that the plaintiffs are in adverse possession of it, and that the defendants have no right to interfere with it. It has been argued that because the evidence is mainly documentary the findings of the Court below are findings of law and not of fact, and I have been referred in particular to two rulings in support of this contention. In *Satgur Prasad* v. *Raj Kishore Lal* (1) their Lordships of the Privy Council held that the question whether possession is adverse or permissive may be one of legal inference from documents and that in such a case the question in dispute was a question of law. Similarly, in the other case cited, *Kishan Kunwar* v. *Fateh Chand* (2), the dispute was whether the persons in the occupation of certain groves and land were the proprietors or not. The facts of the case were undisputed. In second appeal this Court held that the Subordinate Judge had drawn a wrong inference of law from the facts which were in evidence before him. It accordingly set aside his judgment in second appeal. In this case the question is mainly one of the weight to be attached to the different items of evidence on both sides. None of the judgments which have been cited have been relied upon as *res judicata*. They have been relied on as instances in which the rights claimed by the plaintiffs were either recognised or not recognised. The question of the weight to be attached to such instances is certainly a question of fact. It is argued also that the Courts below were wrong in presuming that the oldest document relied on by the plaintiffs related to this land. The document is a very old one and refers to the temple of Sitlaji; it was produced from the custody of the plaintiffs and mentions an area of 15 *bighas* and 15 *biswas*, but there is nothing in it to definitely identify the area with that now in dispute. I am not prepared to hold, however, that the Courts below were wrong in treating it as referring to this land. They read it in connection with the other evidence, and the document is not produced in this case for the first time. It has admittedly been produced in a previous litigation relating to this land. The case has been decided on questions of fact and I am not prepared to hold there is any error of law sufficient to justify the findings being set aside in second appeal. I accordingly dismiss the appeal with costs.

S. D. *Appeal dismissed.*

(1) 55 Ind. Cas. 486; 18 A. L. J. 235; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 2 U. P. L. R. (P. C.) 55; 22 Bom. L. R. 451; 42 A. 152; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

(2) 29 A. 203; 4 A. L. J. 38; A. W. N. 1906) 307.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 20, 1922.

Present:—Lord Atkinson, Lord Sumner, Lord Carson and Mr. Ameer Ali.

HARICHAND MANCHARAM—DEFENDANT—APPELLANT

versus

GOVIND LUXMAN GOKHALE, SINCE DECEASED—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92—Written agreement—Oral evidence—Construction of document—Agreement, for sale—Document to be prepared by Vakil—Agreement, whether subject to condition—Completed agreement—Provisional arrangement—Test.

HARICHAND MANCHARAM *v.* GOVIND LUXMAN.

Oral evidence to show, what took place on the occasion when an agreement for sale was drawn up, is inadmissible in evidence under section 92 of the Evidence Act. [p. 765, cols. 1 & 2]

Where an agreement for the sale of certain property contains the condition that the bargain paper in respect of the sale shall be made through a Vakil, it does not mean that it is a condition to which the bargain is subject but that it is only one of the terms of the contract. [p. 766, col. 1.]

The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. [p. 766, cols. 1 & 2.]

Ridgway v. *Wharton*, (1857) 6 H. L. C. 238 at p. 289; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 10 E. R. 1287; 108 R. R. 88, relied on.

Von Hatzfeldt-Wildenburg v. *Alexander*, (1912) 1 Ch. 284; 81 L. J. Ch. 184; 105 L. T. 434, distinguished.

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations took a concrete shape. [p. 766, col. 1.]

Appeal from the judgment of the Bombay High Court (Sir Norman Macleod, Kt., C. J., and Mr. Justice Heaton.)

Messrs. *Upjohn, K. C., De Gruyther, K. C., Holman Gregory, K. C., Raikes* and *Parikh*, for the Appellant.

Messrs. *Clanson, K. C., Tomlin, K. C.*, and *Gibson*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali.—The suit which has given rise to this appeal was brought by the plaintiff in the High Court of Bombay in its Original Civil Jurisdiction for a decree against the defendant for specific performance of a contract entered into on the 28th November 1917 for the sale, by the defendant to the plaintiff, of certain immoveable property in Bombay. Two documents in the Gujrati vernacular were prepared on the occasion, one of which was signed by the defendant Harichand Mancharam, the other by the plaintiff, the vendee, Govind Luxman Gokhale. Both bear one and the same date, and are practically in identical terms. The document executed by the defendant is marked in these proceedings as Exhibit "A", the other, signed by the plaintiff, is marked Exhibit "A1." Exhibit "A", after giving the name and designation of the intending purchaser, the plaintiff, and describing the vendor, Harichand Mancharam, proceeds thus:—

"I agree to give you in sale the said immoveable property, together with the messuage building (standing thereon), for the price of Rupees two lacs and fifteen thousand."

It then gives the "conditions" of the sale in these terms:—

"The conditions thereof are as follows:—

1. "The bargain paper in respect of the sale of the said immovable property shall be made through a Vakil within two days from this day and at the time of making the bargain paper I am to take from you by way of earnest-money in respect thereof Rs. 10,000, that is, you are to pay the same to me and, as regards Rs. two lacs and five thousand being the balance, you are to pay the same to me at the time of the execution of the sale-deed by me and by way of earnest thereof I am to take from you, that is to say, you are to pay to me, Rs. 10 ten thousand at the time of the (execution of the) bargain paper and the balance of Rupees two lacs five thou and is to be paid to me by you at the time when the deed of sale is executed by me.

2. "As regards the said Jaga premises to be sold suits are pending against me in the High Court. If perchance these suits are decided against me then this bargain shall be treated as cancelled and if such a thing happens then I am to return to you the Rs. ten thousand without interest received as earnest-money by me."

3. "As to the costs in respect of stamp, registration, Vakil, &c., in the matter of the said sale which may be incurred on behalf of both the parties, *i.e.* you and myself, the same shall be totalled up and borne by you and me half and half."

4. "The time of completing the said matter of the said sale-deed is agreed to be six months from the date of the bargain paper on the decision in the case being given in my favour during the said period*. I am to get passed, *i.e.*, made out marketable title for you and to complete the matter of sale. If perchance the suit pending in the High Court be not disposed of within six months then this agreement shall be in force till the disposal of the said suit and on the said suits being decided in my favour I am to complete

*The equivalent of I and you are partly altered in the original.

the matter of this sale, and if the High Court suits be decided in my favour within six months I am to complete and you are to get completed the matter of sale within six months."

5. "For the purpose of the sale you are to get for me the signature of Ishwarlal, the adopted son of Shankerbhai, along with your signature on the sale-deed."

6. "In the matter of this sale I am not to pay brokerage."

"The agreement I have given and taken from you to the above effect of my and your free will and pleasure. The 28th day of November 1917 corresponding with the *Sudi* 15th of Kartak 1974, Wednesday."

Exhibit "A1," after reciting the terms of the contract, in paragraph 7 says as follows:—

7. "This bargain is for the purchase of this immoveable property together with buildings and structures thereon, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1917 (corresponding with) the 15th of Kartak Sudi of Samvat 1974, Wednesday."

The case came on for trial before Mr. Justice Marten on the Original Side of the Court. The plaintiff contended that the two documents which formed the foundation of the suit, formed a completed contract; whilst the defendant-vendor urged that it was only a provisional arrangement conditioned to the preparation by a Vakil of a formal document evidencing the contract. The learned Judge framed a number of issues, but so far as the present appeal is concerned only the two following are material:—

"(1) Whether suit is maintainable having regard to fact that the writing sued on was conditional upon an agreement being entered into?

"(2) Whether there was a concluded contract between the parties and, if so, what are the terms thereof?"

At the trial the defendant attempted to tender some oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff. The Trial Judge refused the application in these words: "I reject that evidence; irrelevant and inadmissible."

In their Lordships' opinion he was quite right, under section 92 of the Indian Evidence Act, in rejecting the evidence, and no attempt appears to have been made on appeal to take exception on behalf of the defendant to this part of Mr. Justice Marten's order. Their Lordships do not think it necessary to refer further to this matter.

On the main case the Trial Judge came to the conclusion that Exhibits "A" and "A1" did not constitute a completed contract, chiefly relying on the use of the words, "The conditions thereof are as follows." He considered that the condition that the "bargain paper" in respect of the sale shall be made by a Vakil within two days from the date of the agreement was a condition to which the whole bargain was subject, so that until the Vakil prepared a bargain paper "there was no completed contract." He accordingly dismissed the plaintiff's suit with costs. On appeal by the plaintiff to the High Court in its Appellate Jurisdiction the learned Judges (Macleod, C. J., and Heaton, J.) arrived at a different conclusion. They held that the two documents executed on the 28th November 1917 constituted a "binding agreement," and that the provision relating to the preparation of a "bargain paper" by a Vakil was not a condition to which the contract was subject, and accordingly they reversed the order of the Trial Judge and decreed the plaintiff's suit.

On appeal before the Board it is urged, on behalf of the defendant, as it was urged in the Appellate Court in India, that the Gujratihahers of the 28th November 1917 represented only a provisional arrangement on which no decree could be made. In support of this contention various clauses in the document executed by the defendant were referred to. It is said that the fact that the bargain paper was to be made within two days from the date of the execution of the documents "A" and "A1", and was to be prepared by a Vakil, and that at the making of the bargain paper the earnest-money is to be paid, shows that the real and effective contract was to be founded on the paper prepared by the Vakil. Again, reference was made to clause 4, Exhibit "A," *viz.*, that "the time of completing the said matter of the said sale-deed is agreed to be six months from the date of the bargain

paper on the decision in the case being given in my favour during the said period." It may be remarked here that two suits had been brought against the defendant contesting his title to the property which he had bargained to convey to the plaintiff, and the reference in paragraph 4 is to these two suits. Their Lordships understand that these two actions were subsequently settled, and there is no dispute now as regards the title of the vendor (the defendant).

The appellant's Counsel refers also, in support of his contention, to the fact that formal documents were prepared by the defendant's Solicitors, in which certain additional terms were inserted, and he urges that the insertion of those terms indicates that the original agreement entered into on the 28th November 1917 was not intended to be a completed contract. On behalf of the respondent reliance has been placed on the whole tenor of the two documents, and especially on clause 7 of Exhibit "A1," to show that the parties intended to have a definite and completed agreement on that date when they executed those two papers, and what was left to be done by the Vakil was only to embody the contract in a formal document and to insert in it such subsidiary terms as are usual in such conveyances. The learned Chief Justice points out in his judgment that the word "conditions" used at the beginning of Exhibit "A," in connection with the preparation of the "bargain paper" by a Vakil, does not mean that it is a condition to which the bargain is subject, but that is only one of the "terms" of the contract. Their Lordships concur in that view.

He has also examined at some length the cases in which the principle applicable to the construction of such documents is laid down; it is, therefore, not necessary to refer to them in detail in this judgment. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Wharton* (1), the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg* v. *Alexander* (2) Lord (then Mr. Justice) Parker laid down that where "the acceptance by the plaintiff was subject to a condition that the plaintiff's Solicitors should approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract," the negotiations did not form a binding agreement between the parties.

The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition. Here Exhibits "A" and "A1" show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a Vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary terms that the Vakil might consider necessary for insertion in a formal document. The letter of the 1st December 1917 by the defendant's Attorney to the plaintiff's Solicitor shows that the terms of the vernacular document "A" were regarded by them as forming the foundation of the contract. They are as follows:—

"With reference to your letter of Yesterday, delivered to us by your articled clerk after 4 P.M., we note that you agree that the alterations which you had made in the English draft agreement prepared by us and handed to your client are not in consonance with the terms of the Gujrati Chitti which our client gave to yours. We, however, do not agree with you that the English agreement as drafted by us originally, or as sent to you with our letter of the 29th ultimo, is not in consonance with the terms of the said Chitti."

(1) (1857) 6 H. L. C. 238 at p. 289; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W.R. 804; 10 E. R. 1287; 108 R. R. 88.

(2) (1912) 1 Ch. 284; 81 L. J. Ch. 184; 105 L. T. 434.

Clause 7 of Exhibit "A1," to which reference has already been made, is explicit :-

"This bargain is for the purchase of this immoveable property, together with buildings and structures theron, (you) have given and I have taken from you the agreement to the above effect, of our free will and pleasure. The 28th day of the month of November in the year 1917 (corresponding with) the 15th of Kartak Sudi of Samvat 1974, Wednesday."

It shows clearly that a completed bargain was intended by the plaintiff.

On the whole, therefore, their Lordships are of opinion that the judgment appealed from is correct, and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

N. K. *Appeal dismissed.*

Solicitors for the Appellant :—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents :—Messrs. *Lateeys & Hart.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 129 OF 1922.

January 25, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

INAYAT HUSAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAIZ MUHAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, application of.

Section 92, Civil Procedure Code, does not apply to a suit in which the plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees, have been properly dismissed, and they seek possession on the ground that the defendants are mere trespassers.

Muhammad Abdul Majid v. *Ahmad Saeed Khan*, 20 Ind. Cas. 37; 35 A 459; 11 A. L. J. 673 and *Ayatannessa Bibi* v. *Kulper Khalifa*, 22 Ind. Cas 677; 41 C 749; 19 C. W. N. 234, followed.

First appeal from an order of the Additional Subordinate Judge, Agra, dated the 18th May 1922.

The Hon'ble Mr. *N. P. Asthana*, for the Appellants.

Mr. *Mushtaq Ahmad*, for Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.

Walsh, J.—In this case I can see no satisfactory answer to the view expressed in the judgment of the First Court. Left to my own view, I should hold unhesitatingly that this was a suit by the plaintiffs to recover posession of an *Imambara* by virtue of having been appointed as trustees in the place of the defendants, and that the order asked for involved removing an old trustee and vesting the property in the plaintiffs as trustees, and that in bringing this suit they were asserting, not a private individual right merely, though no doubt a private individual right is involved, but a right on behalf of the community which has elected them; in other words, a general public right. This is, in substance, the argument which was submitted to this Court in the case of *Muhammad Abdul Majid* v. *Ahmad Saeed Khan* (1), on behalf of the respondents, and if the matter were *res integra* I should feel difficulty in following the decision in that case. But as there seems a weight of authority in support of the view taken in that case and the matter is one of no practical importance and it is desirable that the practice of the Court in these matters should be uniform, I, with considerable hesitation, agree with the order and dismiss the appeal.

Ryves, J.—I think that the question involved in this appeal is covered by authority. *Muhammad Abdul Majid* v. *Ahmad Saeed Khan* (1), which was a case under the present Procedure Code. Most of the previous authorities under the old Code were then considered. According to that ruling section 92 would not apply to a suit like the present in which the plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees, have been properly dismissed, and they seek possession on the ground that the defendants are now mere trespassers. This decision has been followed in the case of *Ayatannessa Bibi* v. *Kulper Khalifa* (2) and, so far as I know, has

(1) 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673.
(2) 22 Ind. Cas. 677; 41 C. 749; 19 C. W. N. 234.

not been dissented from in any reported decision. I think, therefore, the weight of authority is against the appellants in this case. I, therefore, agree in dismissing the appeal.

By the Court.—The order of the Court is that this appeal is dismissed with costs including fees on the higher scale.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1640 OF 1922.
January 19, 1923.
Present:—Mr. Justice Walsh.
LALA SINGH—DEFENDANT—APPELLANT
versus
BASDEO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, Pro. (2)—Sale—Consideration less than entered in sale-deed—Evidence, oral, admissibility of—Fraud—Advantage of one's own fraud.

It cannot be proved that a sale really took place for a lesser price than that mentioned in the sale-deed.

Adityam Iyer v. *Ramakrishna Iyer*, 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602 and *Indarjit* v. *Lal Chand*, 18 A. 168; A. W. N. (1896) 16; 8 Ind. Dec. (N. S.) 818, relied upon.

Chuni Bibi v. *Basanti Bibi*, 24 Ind. Cas. 661; 36 A. 537; 12 A. L. J. 969, referred to.

A litigant cannot be allowed to prove his own fraud in this own favour.

Second appeal against a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Cawnpore, dated the 10th of October 1922.

Mr. *B. N. Vyas*, for the Appellant.

JUDGMENT.—This is a clear case. It is difficult to improve on the judgment of the Court below. It is not a question of a mortgage. It is a question of a sale. The consideration in the sale-deed is Rs. 3,000. The appellant wants to prove a separate oral agreement of Rs. 2,500. I do not know how anybody can persuade himself that Rs. 2,500 as the price of the property is not inconsistent with Rs. 3,000. The proviso No. (2) which is the one relied on by the appellant, of section 92, permits the proof of a separate oral agreement on a matter on which the document is silent, and which is not inconsistent with its terms. It is quite clear that the attempt to prove that a sale really took place for Rs. 2,500 when the deed says it took place for Rs. 3,000, is not within that proviso. The learned Judge in a very clear judgment has pointed out why this case comes within the principle laid down in the case of *Adityam Iyer* v. *Ramakrishna Iyer* (1) and not within the well-known principle established in the case of *Chuni Bibi* v. *Basanti Bibi* (2) which is a totally different question. Another case was cited to me, the case of *Indarjit* v. *Lal Chand* (3). On page 171 in the judgment of the Court it is said that there was no dispute as to the terms contained in the deed for Rs. 30,000 consideration. The section in question merely enacts a well-known English rule that you cannot contradict a written agreement by an oral collateral one.

But it seems to me in this case that there is another reason why the defence must fail and why the appeal ought to be dismissed, which the lower Appellate Court has not touched upon. The lower Appellate Court says that the defence is that the property was sold not for Rs. 3,000 but for Rs. 2,500, and that Rs. 500 was fictitiously entered to save the property from the pre-emptor. By seeking to prove this, the defendant is seeking to prove his own fraud which a litigant is never allowed to do in his own favour, and on that ground alone I should have rejected the evidence and I think it is an equally good answer to the appeal which must be dismissed.

Appeal dismissed.

S. D.

(1) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602.
(2) 24 Ind. Cas. 661; 36 A. 537; 12 A. L. J. 969.
(3) 18 A. 168; A. W. N. (1896) 16; 8 Ind. Dec. (N. S.) 818.

SAHDEO NARAIN DEO *v.* KUSUM KUMARI.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 4, 1922.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge and Lord Salvesen.

SAHDEO NARAIN DEO AND OTHERS—APPELLANTS

versus

KUSUM KUMARI—RESPONDENT.

Hindu Law v *Custom—Converts to Hinduism for generations—Hindu Law and usages—Adoption—Lachmipur* gadi, *District Bhagalpur, Bengal—Impartibility of estate—Custom.*

A family of non-Hindu origin which became converted to Hinduism at least 100 years ago is sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times, come in with the rest of Hindu Law, and this though the family may still retain some relics of non-Hinduism. [p. 772, col. 2.]

Fanindra Deb Raikat v. *Rajeswar Das*, 12 I. A. 72; 11 C. 463; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.), *Mahomed Ibrahim Rowther* v. *Shaikh Ibrahim Rowther*, 67 Ind. Cas. 115; 49 I. A. 123; 30 M. L. T. 85; 26 C. W. N. 793; 45 M. 308; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 30 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.), *Palaniappa Chettiar* v. *Alagan Chetti*, 64 Ind. Cas. 130; 48 I. A. 539; 44 M. 740; (1921) M. W. N. 687; 26 C. W. N. 417; 30 M. L. J. 208; 15 L. W. 521; 4 U. P. L. R. (P. C.) 21; (1922) A. I. R. (P. C.) 228 (P. C.), considered.

The holders of the *gadi* of Lachmipur Estate, District Bhagalpur, Bengal, comprising one of the *chawrasi gadis*, even supposing their origin to be non-Hindu, have adopted, in general, not only Hindu religion and Hindu social usages, but also the Hindu Law regulating the succession of landed property. [p. 772, col. 1.]

Although an estate only becomes impartible by custom, and the custom has in each case to be proved, the custom of impartibility affords no evidence whereby to determine that a family does not follow Hindu Law as a whole. [p. 773, col. 1.]

Appeal from the Patna High Court.

Messrs. *De Gruyther, K. C., Dunne, K. C.* and *Dube*, for the Appellant.

Messrs. *Lowndes, K. C., K. Brown* and *McNair*, for the Respondents.

JUDGMENT.

Lord Phillimore.—The question to be decided in this case is whether the succession to an impartible estate, called the Lachmipur Raj, devolved upon the adopted son of the last owner, or upon his nearest collateral blood-relation. The action was brought by two half-brothers, claiming in the alternative that one or other was entitled to succeed according to the rule of primogeniture established for this property (with a third plaintiff, the assignee, for value of part of their claims), to recover possession from the defendant, who alleged that he was the adopted son of the last holder. Various points were raised as to the fact and regularity of the adoption, but these were disposed of in the course of the case in favour of the defendant. The plaintiffs' main case, however, was that there was a "family or clan custom which forbids and bars inheritance by adoption," or, as Counsel for the plaintiffs has invited their Lordships to look at the matter, that the succession to this estate is not regulated in any sense by Hindu Law, but wholly by custom, which custom has no place in it for adoption, or, alternately, for the succession of an adopted son.

The Lachmipur Raj, is situated in N.W. Bengal in the District of Bhagalpur, part of it extending into the Santhal Parganas. A point was raised in the case that by reason of Regulation III of 1872, relating to these Parganas, the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to try it, even though the plaintiffs abandoned that part of their claim which related to the portion in the Santhal Parganas.

This view was taken in the High Court, and, if it be correct, is at once fatal to the case of the plaintiffs. It seemed, however, to their Lordships not so plain, on first impression, that this decision was correct, and Counsel for the respondent desiring to have the matter tried upon the merits, their Lordships have heard the argument upon the merits without further discussion of the preliminary question of jurisdiction, and as upon the merit they have come to a conclusion, in accordance with that of both Courts below, that the plaintiffs have failed to make out their case, they do not deem it necessary to enquire further into the question of jurisdiction.

The Lachmipur Estate appears to be one of several which are comprised under the term, the 84 *gadis* called *chowrasi*—apparently a form of the vernacular word for 84. The holders of these *gadis* all claim to be Surjabansi Rajputs, and, as such, high-caste Hindus. They differ, however, in some customs, social and otherwise, from ordinary high-caste Hindus, and it is now said of them by the plaintiffs that they are really descendants of an aboriginal tribe

called Bhuiyas, who have assimilated the manners of Hindus for many generations, and, having had fictitious pedigrees made out for them by Brahmans, now claim to be Rajputs. Certainly the bulk of the inhabitants in the district are Bhuiyas, and, though it is possible that these particular *gadi* holders may be lineal descendants of Rajput invaders and conquerors, the High Court has proceeded on the footing that they are by descent Bhuiyas. Their Lordships, without pronouncing upon the anthropological question, will assume, as the assumption is favourable to the plaintiffs, that this clan or collection of families, and in particular the family in which this estate has been held, are aboriginal Bhuiyas. The question then will be whether in matters of succession they have retained their aboriginal customs, or have adopted Hindu Law, in whole or in part, and specifically whether by law or custom the succession of an adopted son is admitted.

Upon this point the plaintiffs have the decision of both Courts in India against them, and if the point to be decided is to be regarded as a question of pure fact, this would in an ordinary case be enough to dispose of the appeal. But it is said that the Subordinate Judge disqualified himself from coming to a correct conclusion, because he omitted all consideration of the origin of the family, and that both he and the High Court erred in law in putting the burden upon the plaintiffs, whereas it ought to have been put and put strongly upon the defendant. This latter argument depends upon a consideration of the decision of this Board in the case of *Fanindra Deb Raikat* v. *Rajeswar Das* (1) and, as it is upon this case that the appeal is founded, it is desirable to deal with it *in limine*. It turned upon the question whether the custom of adoption and succession by adoption was admitted in a family of the Koch tribe, who had begun to designate themselves as Rajbansi, and for social purposes affected to be Hindus. This Board came to the conclusion that, though they affected to be Hindus, they were not generally governed by Hindu Law, but had retained and were governed by family custom, which as regards some matters was at variance with the Hindu Law; and this Board held that the High Court had been wrong in holding that the question was "whether the general Hindu Law was modified by a family custom forbidding adoption," and that the real question was "whether with respect to inheritance the family is governed by Hindu law or by custom which did not allow an adopted son to inherit." Having thus stated the question, their Lordships came to a conclusion upon the evidence agreeing in this respect with the Judge of first instance, and disagreeing with the High Court, that without regarding the burden of proof the facts showed that no succession by way of adoption was admissible. They summed up their judgment by saying:—

"Whether, if the Baikunthpur family were shown to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom, need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that, whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced."

The effect of this decision is stated in *Mahomed Ibrahim Rowther* v. *Shaikh Ibrahim Rowther* (2) where their Lordships express themselves as follows:—

"The question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been governed by Hindu Law, and there would have been this power. But though they affected to be Hindu, that in fact was not their status; the utmost that could be said was that, though the family had introduced many Hindu customs, they in fact were governed by family customs Of such a family it was manifestly appropriate to remark that 'the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit.'"

Upon the principle thus laid down, the

(1) 12 I. A. 72; 11 C. 463; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

(2) 67 Ind. Cas. 115; 49 I. A. 123; 30 M. L. T. 85; 26 C. W. N. 793; 45 M. 308; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944, (P. C.).

proper enquiry is whether this family can be said to have become so far Hindu as to throw the burden of proof upon the plaintiffs, or whether the opposite conclusion should be come to, which would throw the burden upon the defendants.

A great mass of evidence was given in the case, mostly on the specific question of the custom of adoption, but, incidently, with regard to the other customs of the family or clan of *chowrasi gadis*. But before coming to this evidence their Lordships would wish to begin at the beginning, and see the account which the plaintiffs, other than the assignee, give of themselves. Their plaint, filed on the 18th September 1907, said that either of the claimants was "a Hindu governed by the Benares School of Hindu Law": that the Lachmipur Estate was an impartible Raj, the succession to which was governed by a family custom or *Kula char*; that it was one of 84 *gadis* "owned and possessed by Sujrabansi Rajputs of the same clan" as the deceased, which went by the collective name of *chowrasi*; and that among the holders of these *gadis* there was a "family or clannish custom which forbids and bars inheritance by adoption and the succession to these *gadis* by blood relation cannot be defeated by adoption." This allegation made in paragraph 5 is repeated in paragraph 11. It should be added that in paragraph 3, when dealing with the rights of a widow who came into the line of succession, she is said to have come into possession "with the limited rights of a Hindu widow succeeding to the property of her deceased husband under the Benares School of Hindu Law."

In accordance with this contention, the issue framed in respect of this matter was stated, as follows: "Is the Lachmipur Estate one of the alleged 84 *gadis* called *chowrasi*, as stated in paragraph 5 of the plaint, and governed by a family or clannish custom by which adoption is forbidden and which bars inheritance by an adopted son? Is such a custom valid?" And upon that a large part of the evidence had been given when, on the 26th July 1915, an application was made by a petition presented on behalf of the plaintiffs of which the following passages are important:—

"1. That the plaintiffs have within the last week come to know from a very authoritative source that the ancestors of the late Thakur Lalit Narain Deo were originally non-Hindus, and in course of time adopted only certain rules of Hindu Law and called themselves Hindus.

"2. That this fact was never known to the plaintiffs herebefore until one of them was shown an extract from the report of the Settlement operations, Santhal Parganas, by H. McPherson, Esq., a true copy of which is annexed herewith.

"3. That on account of the fact mentioned in paragraph 1 of this petition it is essentially necessary that the plaint should be amended at certain places which are more fully stated below.

"4. That the plaintiffs, therefore, pray that the following amendments may be made in the plaint, namely, that (1) in paragraph 1 the words 'who was a Hindu governed by the Benares School of Hindu Law' after describing Thakur Lalit Narain Deo of Lachmipur be omitted and struck off.

"(*a*) In paragraph 3 the words 'under the Benares School of Hindu Law' at the end of the paragraph, be struck off.

"(*b*) That after paragraph 1 the following paragraph may be inserted and added as paragraph 1 (*a*):—

"'That the ancestors of the said Thakur Lalit Mohan Deo belonged to a tribe called the Bhuiyas and were originally non-Hindus who in course of time adopted certain customs and practices in vogue amongst Hindus after they settled down in that part of the country where the Estate Lachmipur is situate.'"

Then followed certain consequential alterations which were also said to be important. This petition was supported by an affidavit, but it is remarkable that the affidavit was only made by the assignee, and it may well be doubted whether any inducement would have led the original claimants to commit themselves by oath to the statements in paragraph 1 of the petition. The application made in this petition was refused by the Subordinate Judge, and his action was approved by the High Court, and, in their Lordships' view, rightly; and this puts the plaintiffs into a great difficulty. But the Judges in the High Court thought that nevertheless it was possible for the plaintiffs to go into the question of the origin of their

community, and, as already stated, they held that indications, pointed to the holders of these *gadis* being as a group originally indigenous, and having, at some time not known, accepted Hinduism. The High Court Judges place this acceptance somewhere near the beginning of the nineteenth century. At any rate, there are many decisions which unquestionably proceed upon the footing that Hindu Law, according to the School of Benares—that is, the Mitakshara—was of general application to these *chowrasi gadis*. Their Lordships listened to an analysis of such of these cases as Counsel for the appellants thought could be scrutinised usefully, and they see no reason to qualify the conclusions of the High Court.

To sum up this part of the case, the combination of the plaintiffs' own statement, the oral evidence and the judgments in former cases is, in their Lordships' opinion, sufficient to justify the conclusion of the High Court that this clan, even supposing its origin to be not Hindu, had adopted in general, not only Hindu religion and Hindu social usages, but also the Hindu Law regulating the succession of landed property, and this though, as the Judges held, "there were still some relics of non-Hinduism."

It was suggested for the appellants that this conclusion was not enough that, if it could be proved that there was a Customary Law of succession before these people became converted to Hinduism, that custom could not be abrogated by conversion.

Now, this case does not deal with modern conversion, but with a conversion which is at least 100 years old, and the Indian Courts and this Board have with regard to these ancient conversions admitted the possibility that they might carry with them abrogation of former customs. Thus, in the case in *Fanindra Deo Raikat* v. *Rajeswar Das* (1) already cited, it was an accepted matter that the family was of non-Hindu origin, but their Lordships nevertheles embarked upon the enquiry whether they had become Hindus "out and out;" and in the recent judgment of this Board in *Palaniappa Chettiar* v. *Alagan Chetti* (3), it was accepted as an explanation of the custom of Putrabhaga, according to which the sons of each wife formed a class, and the classes divided the inheritance, instead of the individual sons, that it was probably due to the Dravidian origin of the people in question, who had retained some of their non-Hindu customs, though they had become Hindus and were governed by general Hindu Law. In that case authority was cited for considering a mass of tribes in Southern India as having become Hinduised and subject to the law of the Smirtis in most respects, though still adhering to particular customs.

The High Court, therefore, was right in treating it as a thing possible in law that this clan on the assumption that it was originally non-Hindu, had become sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times come in with the rest of Hindu Law, though the custom of non-adoption might be as survival, as in *Palaniappa Chettiar* v. *Alagan Chetti* (3).

The High Court, however, without applying any principle as to the burden of proof, leaving that question open, came to a decision unfavourable to the appellants, and, after giving due weight to the criticism of the judgment of the Subordinate Judge, which Counsel of the appellants has administered, their Lordships see no reason why the two judgments should not be treated as concurrent findings of facts, or why they should not stand. But, as the case is important, they will go with some detail into the reasons which lead them independently to the same conclusion.

It is said for the appellants that there were a great number of cases where, if adoption had been the custom, it would have taken place, and they support this argument by saying that weight was given to a similiar argument in *Fanindra Deb Raikat* v. *Rajeswar Das* (1). There is force in this contention, though there are counter-observations to be made. But in the case in *Fanindra Deb Raikat* v. *Rajeswar Das* (1) there was no single instance of adoption carrying succession, whereas in the case now before the Board there were certainly some instances, though not very many, proved. And more remarkable still, the defendant was adopted with much publicity

(3) 64 Ind. Cas. 439; 48 I. A. 539; 44 M. 740; (1921) M. W. N. 687; 26 C. W. N. 417; 30 M. L. T. 208; 15 L. W. 521; 4 U. P. L. R. (P. C.) 21; (1922) A. I R. (P. C.) 228 (P. C.).

and solemnity as far back as 1885, and was installed on the *gadi* with considerable pomp in February 1902, and no protest or objection appears to have been raised. Moreover, later on he was with almost equal solemnity outcasted, in February 1907, because he consorted with another outcaste, and in the document recording his sentence he is described every time his name is mentioned as "the adopted son Pratap Narayan Deo." This document is signed by nearly all the great men of the clan. After this, it is not altogether surprising that the very eminent Counsel who appeared for the appellants in the High Court felt himself, as it were, driven from his other arguments, and took up the position that adoption might indeed be permissible, but that succession to the estate did not follow from the adoption. It was open to him to take this point without abandoning his other contentions, but the position would be so unusal, and so contrary to Hindu ideas, that if the appellants were driven to this their chance of success was small.

It was urged that there was here a plain departure from Hindu Law, inasmuch as the estate, instead of descending to all the sons of a previous holder, was impartible. It is true that an estate only becomes impartible by custom, and that the custom has in each case to be proved. But it is a custom which is usually found to exist where the estate belongs to a King or independent Chief, or even a semi-dependent Chief of sufficient importance.

The Prince, to use a neutral term, regards the whole estate which his predecessor had as necessary for the support of his dignity or *gadi*, and he takes it of his princely power and keeps it, giving appanages or maintenance to the junior members of the family. The custom of impartibility in such a case affords no indicia whereby to determine that a family does not follow Hindu Law as a whole. Regulation X of 1800 points to the frequency of this custom among Hindus in parts of Bengal.

It was further argued that where estates are impartible they usually descend to the nearest of kin and not in lineal primogeniture, and that here again was a departure from Hindu usage. This was disputed, and their Lordships were not invited to make any profound search into the question. Again, however, the case originally made by the plaintiffs appears to get in the way of and trip up their later arguments, for in the plaint (paragraph 2) it is stated that the family custom is "governed by the ordinary rule of lineal primogeniture," the only departure suggested being that a junior son by a senior wife is preferred; and this latter assertion was held not to be proved.

Upon the whole, their Lordships, after giving full attention to the very interesting argument of Counsel for the appellants, have come to the conclusion that there is no reason to interfere with the decision arrived at in the Courts below, and they will humbly recommend His Majesty that this appeal should be dismissed with costs.

W. C. A. & N. H. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *Pugh and Co.*

Solicitors for the Respondents.—Messrs. *Morgan, Price & Co.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 78 OF 1922.

January 25, 1923.

Present:—Mr. Justice Lindsay.

LALTA PRASAD—PLAINTIFF—APPLICANT

versus

KHARGA AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), ss. 177 (e) 158 · Muafi, suit for resumption of—Proprietary title set up in defence—Jurisdiction—Appeal.

If in a suit for the resumption of a *muafi*, under section 150, read with section 154, of the Tenancy Act, the defendant sets up a plea based on section 158 of the Tenancy Act, a question of proprietary title is raised, for, if the plea is determined in his favour, he is entitled to have a declaration of his proprietary title, and the case falls within the purview of section 177 (*e*) of the Tenancy Act. [p. 774, col. 2.]

Sunder Singh v. *Collector of Shahjahanpur*, 11 Ind. Cas. 514; 33 A. 553; 8 A. L. J. 539, referred to.

The words "in all suits" in section 177 of the Tenancy Act comprise suits of any description in whatever group they may be. Therefore, in a suit falling in group C an appeal lies to the District Judge. [p. 774, col. 2.]

Civil revision from an order of the District Judge, Farrukhabad, dated the 16th February 1922.

Dr. *K. N. Katju*, for the Applicant.

Mr. *A. P. Dube*, for the Opposite Parties

JUDGMENT.—This application for revision calls in question the propriety

of an order passed by the learned District Judge of Farrukhabad, on the 16th of February 1922.

The case has arisen in the following way. A suit was filed in the Court of the First Class Assistant Collector by Lalta Prasad, plaintiff, against Kharga and other defendants. This suit was framed as a suit for resumption of a *muafi* under section 150, read with section 154, of the Agra Tenancy Act (II of 1901).

By way of defence to the suit the defendants pleaded (1) that the land was not capable of resumption, inasmuch as it was *abadi* land and not agricultural land, and (2) that by reason of certain facts they had become the proprietors o the land in question. The defendants pleaded that they had held the disputed land in circumstances which gave them the right under section 158 of the Tenancy Act to be deemed proprietors.

Three issues were framed by the Assistant Collector, (1) whether the land in suit was *abadi* land, (2) whether the land was resumable and (3) whether the land had been held rent-free by the defendants for more than two generations and for more than fifty years.

The learned Assistant Collector decided only issues Nos. 1 and 2. He found that the land in suit was *abadi* land and that it was not resumable under the provisions of Chapter X of the Tenancy Act. He came to no finding on the third issue, *viz.*, as to whether the defendants had held the land rent-free for two generations and for more than fifty years.

The result was that the suit was dismissed. The plaintiff then went in appeal to the learned District Judge and the learned District Judge refused jurisdiction being of opinion that the only question which was before him was whether or not the land in suit was land under the Tenancy Act. He held that there was no question of proprietary title or jurisdiction before him. He accordingly returned the memorandum of appeal for presentation to the Commissioner.

The argument here is that the learned District Judge was wrong in declining jurisdiction. In my opinion this contention must be upheld. Section 177 of the Tenancy Act describes the cases in which an appeal lies to the District Judge from the decree of an Assistant Collector of the First Class. It is declared by this section that in *all* suits in which (*e*) a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal or (*f*) a question of jurisdiction has been decided, the appeal lies to the District Judge. It has been argued before me that this suit was one of the suits described in group C which is mentioned in Schedule IV to the Tenancy Act. That, no doubt, is true but, the words "in all suits" in section 177 would comprise suits of any description in whatever group they may be. It cannot be argued that, because this particular kind of suit falls in group C, the appeal does not lie to the District Judge.

It remains to be considered whether a question of proprietary title was raised in the Court of the Assistant Collector and was a matter in issue in the appeal.

I do not agree with the learned District Judge when he says that no question of proprietary title was raised. It seems to me that if in a suit for resumption the defendant sets up a plea based on section 158 of the Tenancy Act he is raising a question of proprietary title, for, obviously, if the plea is determined in his favour he is entitled to a declaration of his proprietary right. This view is supported by the judgment reported as *Sunder Singh* v. *Collector of Shahjahanpur* (1).

It is clear that the question of proprietary title was raised in the Court of first instance. I was rather inclined to doubt whether this question was also put in issue in the Court of the District Judge, but the learned Counsel for the applicant has referred me to the memorandum of appeal and on a fair construction of the grounds of appeal I think it may be said that the question of proprietary title was also raised in the memorandum of appeal.

This being so, the case, in my opinion, falls within the purview of section 177 (*e*) of the Tenancy Act and the appeal lay to the District Judge who ought not to have declined jurisdiction. The result, therefore, is that the application is allowed. The order of the Judge is set aside and he is directed to receive the

(1) 11 Ind. Cas. 514; 33 A. 553; 8 A. L. J. 539.

memorandum of appeal and to dispose of it in accordance with law. The applicants are entitled to the costs of this application against the opposite party.

S. D. *Application allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2394 OF 1921.

May 15, 1922.

Present:—Mr. Justice Broadway.

THE MUNICIPAL COMMITTEE, DELHI, THROUGH SECRETARY, MUNICIPAL COMMITTEE, DELHI—DEFENDANT—APPELLANT

versus

ABDUL HASSAN KHAN—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 3 (13), 189 193—"Street"—"Accessible to public," meaning of—Application for sanction to build—Conditional sanction, grant of.

The expression "accessible to the public" in the definition of "street" in section 3 (13) of the Punjab Municipal Act does not mean merely physical access, but such access coupled with the right of access. [p. 776, col. 2.]

Municipal Commissioner of Bombay v. *Mathurabai*, 30 B. 558 at p. 562; 8 Bom. L. R. 457; 4 Cr.L. J. 23, *Emperor* v. *Manilal Mohanlal* 15 Ind. Cas. 785; 14 Bom. L. R. 490; 13 Cr. L. J. 513; 1 Bom. Cr C. 144, *Kalidas* v. *Municipality of Dhandhuka*, 6 B. 686 at p. 689; 3 Ind. Dec. (N. S.) 913, *Ahmedabad Municipality* v. *Manilal Udenath*, 20 B. 146; 10 Ind. Dec. (N. S.) 655 and *Shahab-ud-din* v. *Emperor*, 44 Ind. Cas. 46; 60 P. L. R. 1918; 15 P. W. R. 1918 Cr.; 19 Cr. L. J. 254, referred to.

Under section 193 of the Punjab Municipal Act, a Municipal Committee can take advantage of an application for sanction to erect a new building to attach a condition to this sanction, for instance that an existing wall be removed. [p. 776, col. 1.]

Bhawanishankar Ravishankar v. *Surat City Municipality*, 21 B. 187 at p. 191; 11 Ind. Dec. (N. S.) 126, *Tribhovan* v. *Ahmedabad Municipality*, 27 B. 221 at p. 259; 5 Bom. L. R. 48, referred to.

Damodar Das v. *Municipal Committee Delhi*, 27 P. R. 1901; P. L. R. 1900, p. 395, distinguished.

Second appeal from a decree of the District Judge, Delhi, dated the 22nd August 1921, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 25th April 1921.

Kunwar *Dalip Singh*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—Nawab Abdul Hassan Khan applied to the Municipal Committee of Delhi for permission to erect a certain building. Sanction was accorded and the plans passed subject, however, to the condition that a certain existing wall, marked A. B. on the plan in Court, should be put back from the centre of the street. The building was erected but the wall was left standing in its old position. During the building operations the Committee pointed out to the Nawab that he was not complying with the condition imposed, and warned him in writing that he was failing to do so at his own risk. Nevertheless, the building was proceeded with and the condition ignored. The Committee then proposed to demolish the building and issued a notice to this effect to the Nawab.

The Nawab instituted a suit asking for a perpetual injunction directing the Committee to refrain from interfering with the said building.

He alleged that the space on which the wall A. B. abuts is not a "street" and that the Committee had no power to impose the condition to the demolition of an existing wall.

The Trial Court granted the Nawab a decree holding that the Committee's action in imposing the condition was *ultra vires* and that in any case the order to demolish was unreasonable and oppressive.

The Committee thereupon appealed to the District Judge who, however, held that the space on which the wall A. B. abutted was not a "street" within the definition given in the Act, and that, therefore, the action of the Committee in imposing the condition was *ultra vires*. Its appeal having then been dismissed the Committee has come up to this Court in second appeal through Mr. Dalip Singh, while I have heard Mr. Moti Sagar for the Nawab.

Mr. Dalip Singh has contended that the Act gives the Committee power to impose any reasonable conditions when sanctioning the erection of any buildings and that, therefore, the condition imposed was not *ultra vires* whether the space in question was a "street" or not. He

also contended that the said space was a street.

Now, section 189 of the Municipal Act lays down that "no person shall erect . . . . any building without the sanction of the Committee", and that any person intending to erect any building must give notice in writing to the Committee of such intention. Sub-clause (3) empowers the Committee to prescribe, by its bye-laws, the manner in which such notice is to be given and the particulars that should accompany it. One of the bye-laws framed by the Committee under section 189 (3), *viz.*, No. 26, deals with the distance that must be left round buildings abutting on streets and lanes.

Section 193 of the Act empowers the Committee to refuse to accord sanction or to grant sanction subject to such modification as it may deem fit in respect of all or any of the matters specified in section 189 (3): and one of these matters related to the space to be left about the proposed building.

In the present case when the Nawab applied for sanction it was granted subject to the condition that the wall A. B. which in the plan of the proposed new building was to form part of the Southern boundary wall, was put back a certain distance.

Assuming that the Committee had no power to direct the demolition of an existing wall, can it be said that it could not take advantage of the application to erect a new building, which was to include this wall as an integral part of it, to sanction the new building on condition that the wall A. B. should be put back a few feet?

After a careful consideration of the arguments of the learned Counsel and the authorities cited, *viz.*, *Bhawanishankar Ravishankar* v. *Surat City Municipality* (1) and *Tribhovan* v. *Ahmedabad Municipality* (2), by Mr. Dalip Singh and *Damodar Das* v. *Municipal Committee, Delhi* (3), by Mr. Moti Sagar I am of opinion that the Committee was not acting beyond its powers in imposing the condition in question. *Damodar Das* v. *Municipal Committee, Delhi* (3) is clearly distinguishable. On the question whether the plot of land in question is or is not a "street" Mr. Dalip Singh referred to *Municipal Commissioner of Bombay* v. *Mathurabai* (4) and *Emperor* v. *Manilal Mohanlal* (5), while Mr. Moti Sagar cited *Kalidas* v. *Municipality of Dhandhuka* (6), *Ahmedabad Municipality* v. *Manilal Udenath* (7) and *Shahab-ud-din* v. *Emperor* (8). The expression "street" is defined in section 3 (13) of the Act as meaning any road, footway, square court, alley or passage *accessible* whether permanently or temporarily to the public whether a thoroughfare or not. Mr. Dalip Singh contended that "accessible to the public" meant merely *physical* access apart from *right* of *access*. As pointed out by Mr. Moti Sagar, however, that would include the drive to any house and I am inclined to think that mere physical access alone cannot be regarded as the test.

The lower Appellate Court has held on the evidence that this piece of land is the private property of one Banarsi Das who can prevent the public from using it at his own will and pleasure. I am inclined that this is a finding of fact by which I am bound, but in any case on the finding that the public can be prevented from using this land by Banarsi Das at will it seems to me that it cannot be regarded as a street.

As, however, I hold that the Committee had the power to impose the condition under consideration I allow the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

Z. K.

(1) 21 B. 187 at p. 191; 11 Ind. Dec. (N. S.) 126.
(2) 27 B. 221 at p. 259; 5 Bom. L. R. 48.
(3) 27 P. R. 1901; P. L. R. 1900, p. 395.
(4) 30 B. 558 at p. 562; 8 Bom. L. R. 457; 4 Cr. L. J. 23.
(5) 15 Ind. Cas. 785; 14 Bom. L. R. 439; 13 Cr. L. J. 513; 1 Bom. Cr. C. 144.
(6) 6 B. 686 at p. 689; 3 Ind. Dec. (N. S.) 913.
(7) 20 B. 142; 10 Ind. Dec. (N. S.) 655.
(8) 44 Ind. Cas. 46; 60 P. L. R. 1918; 15 P. W. R. 1918 Cr.; 19 Cr. L. J. 254.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 88 OF 1922.

January 2, 1923.

Present:—Mr. Hallifax, A. J. C.

R. S. RAMKRISHNA PURI—DEFENDANT—APPELLANT

versus

TANBA—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 188 (2) (a)—Partition of mahal—Lambardar, *powers of, over separated* patti.

The *lambardar* of a *mahal* cannot, after the *mahal* is partitioned, exercise his powers under section 188 (2) (*a*) of the Land Revenue Act over a *patti* in which he may cease to have proprietary rights. [p. 778, col. 1.]

Appeal from a decree of the District Judge, Nagpur, dated the 21st November 1921, in Civil Appeal No. 116 of 1921.

Sir *B. K. Bose*, Messers *W. R. Puranik* and *P. N. Rudra*, for the Appellant.

Mr. *D. P. Tiwari*, for the Respondent.

JUDGMENT.—The plaintiff Tanba Malli is owner of an eight-anna share in the village of Gondhni in the Nagpur District. The other half is owned by Jasoda Bai, who was appointed *Lambardar* of the *mahal* not long before 1916 on the death of her husband. In 1893 the defendant Rao Sahib Ramkrishnapuri took a mortgage of an absolute occupancy holding in the village without getting the consent of the landlord. In 1913 he obtained a preliminary decree for foreclosure on this mortgage, which was made final in 1914, and he took possession of the holding under a warrant of the Court on the 13th of December 1915. On the 1st of September 1916 an imperfect partition of the village between the two co-sharers was completed in which the holding was alloted to the *patti* of the plaintiff Tanba. This would have effect from the 1st of May 1917, and it was four months after this, that is, on the 1st of September 1917, that Act II of 1917, the new C. P. Land Revenue Act, came into force. A year later on the 28th of August 1918 Jasoda Bai accepted the defendant as the tenant of the holding on payment by him of Rs. 406-9-9. Even if Jasoda Bai had the right to receive payment of the whole of this sum, Rs. 299-8-0 of it represented arrears of rent due to the plaintiff and not to her, though this fact does not seem to have been recognised. On the 14th of May 1920 Tanba filed the suit out of which the present appeal has arisen claiming possession of the holding from the defendant. It may be mentioned that Tanba was appointed *Lambardar* of his own *patti* in January 1921.

(2) The suit has succeeded in both the lower Courts and the defendant has come to this Court with the sole contention, which was his main defence all through the case that a conferral of the tenancy on him by the *Lambardar* of the *mahal* was valid, although the holding was in the *patti* of another proprietor. It is urged that as Jasoda Bai was the *Lambardar* appointed for the whole *mahal* she is still to be deemed to be the landlord of the whole of it, including the *patti* in which she has no proprietary right whatever, under section 188 (2) (*a*) of the Land Revenue Act, 1917. It is not necessary to go outside the facts of this case for a reduction of this proposition to an absurdity, and it is only on a very casual reading of clause (*a*) of section 188 (2), detached even from the remaining clauses of the same sub-section, that it can have ever been put forward, though this has happened not infrequently. But the reason given by the learned District Judge for repelling the contention is not correct. That reason is more fully stated in a judgment by the same learned Judge in another case, which happened to be before me on the same day as this appeal, in the following words: "Clause 2 (*a*) of section 188 does not enact any new rule of law. Even before the new Land Revenue Act was passed, it was all along held in these Provinces that the *Lambardar* was, in the absence of evidence to the contrary, the accredited agent of the proprietary body [*Haijnath* v. *Raghunath* (1) and *Ganpatsao* v. *Pandurang* (2)]. Clause 2 (*a*) of section 188 of the new Land Revenue Act embodies the case-law on the subject as it existed prior to the enactment of that Act. In other words, that clause simply enacts a rule in regard to burden of proof. It does not clothe the *Lambardar* with higher rights than those already possessed by him. It simply gives statutory

(1) 26 Ind. Cas. 608; 10 N. L. R. 93.
(2) 33 Ind. Cas. 758; 12 N. L. R. 24.

recognition to his status as the accredited agent of the proprietary body in the absence of evidence in regard to revocation of his authority generally or with respect to a particular transaction or transactions".

3. Clause (*a*) of section 188 (2) enacts that the *Lambardar* shall be deemed to be the landlord. If it had been intended to enact that the *Lambardar* was to be regarded as the accredited agent of the proprietary body only until the contrary was proved, the expression used would have been that he shall be presumed to be the landlord, when the qualification suggested would have followed by virtue of section 4 of the Evidence Act. It is perhaps still clearer that the remaining three clauses of section 188 (2), which all speak of what the *Lambardar* shall do, cannot be rules of evidence or have anything to do with the burden of proof. It seems to me beyond doubt that section 188 (2) does concentrate in the *Lambardar* certain powers appertaining to the whole proprietary body, which before 1917 were in almost all cases given to him by that body, sometimes expressly but more often tacitly, but need not have been so given and could be withdrawn or modified at any time: now the *Lambardar* has those powers by law, and his co-proprietors can neither refuse or limit them at the beginning nor withdraw or modify them subsequently.

4. But this, the only possible reading of section 188 (2), does not by any means involve the impossibility that a *Lambardar* appointed for a *mahal* should continue to exercise those powers over a separated *patti* in which he is not even a proprietor. It is no compliment to the Legislature to suggest, as is done in the contention with which we are now concerned, that they used words not only capable of being interpreted but bound to be interpreted so as to give a person a right to collect the rents and grant leases of land of which he is not an owner at all only because he had once been a part owner of it, and to take away those powers from the present owner. The new provision of Act II of 1917 which prevents any such absurdity is that where a *mahal* has been divided the unit for the appointment of a *Lambardar* is to be the *patti*, and not the *mahal*. Section 187 lays down that "there shall be appointed one or more *Lambardars* for each *mahal* or *patti*", and section 188 (2) confers certain powers on the *Lambardar* to be excercised only "in the *mahal* or *patti* for which he is appointed". In this case Jasoda Bai was never appointed *Lambardar* of Tanba's *patti* after it came into existence and section 188 (2) confers no powers on her in that *patti*.

5. I am fortified in this opinion, if any support for it is necessary, by a somewhat curious passage in the part of the preface to the official edition of the Act published in 1918 which deals with Chapter XII. It runs as follows: "Many important changes have been introduced into the law. Taking first *Lambardars*, who are dealt with in sections 187 to 189, it will be noticed that the definition of *Lambardar* and his functions have ben largely modified. A *Lambardar* will in future be appointed to each *patti* or *mahal*, while in *mahals* where there are more than one *Lambardar*, a *Sadar-Lambardar* will be appointed to represent the whole proprietary body of the *mahal* in its relations with Government. Steps must now be taken for the appointment of *Sadar Lambardars* in all villages, where they are required by the new law. Under section 188, sub-section 2, the *Lambardar* in the *mahal* or *patti* for which he is appointed will be the agent of all the co-sharers, and his actions in connection with the management of the village will be binding upon them. If they are dissatisfied with him, they have two remedies: first, they may apply for his removal under section 189 and applications for the removal of a *Lambardar* on the ground of unpopularity with the co-sharers whom he represents himself, having regard to the important duties which he now will perform, should receive careful attention, and if there are any grounds for dissatisfact on on the part of the co-sharers, such applications should always be granted". The preface then goes on to deal with a different matter, and says nothing about the second of the two remedies mentioned, but it seems fairly clear that what was intended to be stated as the second remedy was an application by the dissatisfied co-sharer for a partition of his own share into a seperate *patti*. The omission seems to have

been noticed when this preface was incorporated in Volume I of the Revenue Manual of 1921 as an introduction to the Act, but the mistake was corrected by the omission of the words: "they have two remedies: first" and not by the addition of any words describing the second remedy.

6. It has been urged for the appellant that Jasoda Bai's appointment as *Lambardar* of the *mahal* continued under section 229 of the Act, until some other *Lambardar* was appointed. Section 229 declares among other things that all appointments made under the old Act are to be deemed to have been made under the present Act. It is, of course, clear that Jasoda Bai's appointment, whatever it was, was not cancelled by the passing of Act II of 1917. But she never was appointed and never could be appointed *Lambardar* of a *patti* in which she had no share. Her appointment as *Lambardar* came to an end, as far as Tanba's *patti* was concerned, by her ceasing to have any interest in it, just as much as her appointment as *Lambardar* of the *mahal* would have come to an end if she had sold her share in it. Indeed in absolute strictness her appointment as *Lambardar* of the undivided *mahal* came to an end entirely when it ceased to be an undivided *mahal* and she would no longer be the *Lambardar* even of her own *patti* until she had been so appointed formally, though as sole owner she would of course still be landlord of it. The appeal will be dismissed and the appellant must pay all the costs.

Appeal dismissed.

N. H.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 144 FO 1922.

January 1, 1923.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Fforde.

KEWAL RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ABDUL HAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Denial of landlord's title—Forfeiture.

The denial of his landlord's title by a tenant in clear unmistakable terms will operate to create a forfeiture of the tenancy and enable the landlord to resume possession, and the mere institution of a suit to recover possession is a sufficient expression of the landlord's intention to determine the tenancy. [p. 780, cols. 1 & 2.]

The denial must, however, not only be of a clear and unambiguous nature but must be antecedent to the suit for possession; the suit must be founded upon the denial. The denial cannot be extracted from the pleadings in the suit itself. [p. 780, col. 2.]

Letters Patent Appeal from the following decree of Mr. Justice Martineau, dated the 13th May 1922, passed in Civil Appeal No. 315 of 1921, affirming that of the District Judge, Ambala, dated the 6th December 1920:

"My order of the 15th June 1921 will be read as a part of this judgment. The lower Appellate Court has found that the defendants are permanent tenants, but it has also found that the defendants denied the plaintiffs' title before the institution of the suit, and the question then arises whether this fact does not render them liable to ejectment in accordance with the principles laid down in section 111 (*g*) of the Transfer of Property Act. The learned District Judge thinks that the defendants may not have known of the plaintiff's ownership, as the plaintiff's father acquired his right by a deed executed in 1886. Ignorance of the plaintiffs' title would, however, not justify the defendants in denying the title, and, besides, it has been established by evidence that defendants have been paying rent to the plaintiffs, so that they must have known that the plaintiffs were the owners.

"It is contended for the defendants-appellants that under section 111 (*g*) of the Transfer of Property Act a denial of the landlord's title is not sufficient to work a forfeiture, but that it is also necessary that the lessor should have done some act showing his intention to determine the lease, and it is urged that no such act is shown to have been done.

"The plaintiffs have, however, stated in their plaint that they asked the defendant to leave the house, and gave him a notice, and that he refused to quit. In reply to that allegation the defendants said, not that no notice to quit had been given to them, but only that the plaintiffs had no right to give them notice. It is true that in a sub-

sequent paragraph of their pleas, they, said that the plaintiffs had not given them a *legal* notice, but this does not mean that no notice was given to them at all. As the plaintiffs' allegation in their plaint that they gave the defendants a notice to quit has not been denied the defendants must be taken to have admitted that the plaintiffs gave them such a notice. The giving of a notice to quit the house was an act sufficient to show the plaintiffs' intention to determine the lease, and I hold, therefore, that in accordance with the principles enunciated in section 111 of the Transfer of Property Act the lease, though of a permanent nature, has determined by reason of the defendants having denied the plaintiffs' title, and that the defendants are liable to ejectment.

"I dismiss the appeal with costs."

Sardar *Kharak Singh*, for the Appellants.

Mr. *Abdul Ghani*, for the Respondents.

JUDGMENT.—The appellants are permanent tenants of a certain house and premises situtate at Sadhaura, and under a parole letting created prior to 1852. Certain ejectment proceedings have been brought against the tenants and a decree for possession has been granted by the Court of first instance. This decree has been affirmed on appeal to the District Judge. On second appeal to the High Court the learned Judge came to the conclusion that the respondent's right to the possession had not been determined, and remitted the case for such determination. The learned District Judge thereupon considered and decided two net points, namely:—

1. Is the tenancy of the defendants a permanent tenancy ?

2. Are they liable to ejectment, because they have denied the plaintiffs' title as landlords ?

The first of these questions was decided in the affirmative and the second in the negative. On the matter coming up again to the High Court the judgment of the lower Court was affirmed on the first of these issues and reversed on the second. The only question we have to consider is, whether or not there has been a forfeiture of the tenant's interest by a denial of the landlord's title.

It is a well-established rule of English Law that the denial of a landlord's title in clear unmistakable terms whether by matters of record or by certain matters of *pais*, will operate to create a forfeiture of the tenancy and enable the landlord to resume possession. This principle has been adopted in India and is embodied in the Transfer of Property Act, 1882, [section 111 (*g*)]. This Statute does not expressly apply to the Punjab, but the principle therein enacted does. The material parts of the section read as follows :—

"A lease of immoveable property determines by forfeiture....in case the lessee.... renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

It has been held that the mere institution of the suit to recover possession is a sufficient expression of the landlord's intention to determine the tenancy. That being so, all that remains to be decided here is whether or not there has been a denial of the nature contemplated by the Act. The only denial in the present case is an omission by the defendants to traverse the plea of denial alleged in the plaint. The material parts of the plaint are as follows:—

The defendants have begun denying the plaintiffs' proprietary rights in the house in suit. This plea has not been traversed and it is contended on behalf of the plaintiffs that this failure to traverse amounts to an admission of the truth of the allegation contained in the plea. From the point of view of strict pleading it is true that all material allegations of fact contained in a statement of claim, if not specifically denied, must be deemed to be admitted. But can it reasonably be held that such a purely technical admission amounts to a denial in clear unmistakable terms so as to operate a forfeiture within the rule of law? We are of opinion that it does not.

In a recent case before the Privy Coucil it has been held that "denial in a suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have occurred before the suit was instituted." The denial, therefore, must not only be of a clear unambiguous nature but must be antecedent to the suit for possession. The suit must be founded upon the denial. The denial cannot be extracted from the pleadings in the suit itself, even if such a denial by inference

could be held to be one made in clear unmistakable terms. Rules for pleading are not strictly enforced in these Courts and, moreover, the Courts have wide powers of amendment.

For these reasons we are of opinion that the plaintiffs have failed to establish a valid ground for forfeiture of title and we accordingly allow the appeal and dismiss the suit with costs throughout.

Z. K.

Appeal allowed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER MISCELLANEOUS APPEAL
NO. 27-3 OF 1922.
December 16, 1922.

Present :—Mr. Pipon, J. C.

SAID KHAN—DEFENDANT—APPELLANT
versus
ZARIF KHAN—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Agreement to sell—Possession, transfer of—Promisee already in possession as mortgagee—Transferee, subsequent, rights of—Equity.

A purchaser, who has actually taken possession under an agreement to sell, can retain such possession as against the seller even though the agreement to sell has not been converted into an actual sale. But this principle is one of equity only. It does not amount to the conversion of an agreement of sale into an actual sale, and the enforcement of this equity depends entirely upon the fact of the purchaser having taken actual possession. [p. 782, col 1.]

Begam v. *Muhammad Yakub*, 16 A. 344; A. W. N. (1894) 101; 8 Ind. Dec. (N. S.) 224 and *Trimalrav Raghavendra* v. *Municipal Commissioners of Hubli*, 3 B. 172; 2 Ind. Dec. (N. S.) 116, referred to.

Where a person who is already in possession of a property as mortgagee, enters into an agreement to purchase the same and there is nothing to show that his possession is definitely altered from that of a mortgagee to that of a vendee, he cannot be protected against a subsequent transferee without notice. [p. 782, col. 2.]

Further appeal from an order of the Divisional Judge, Derajat, dated the 30th November 1921, reversing that of the Munsif, First Class, Bannu, dated 6th August 1921.

Mr. *Muhammad Aurangzeb Khan*, for the Appellant.

Mr. *P. C. Kapur*, for the Respondents.

JUDGMENT.—In this case the plaintiff held a mortgage-deed dated the 3rd of July 1920 from the owners of the land. The land was under a prior mortgage to the defendant-appellant, Said Khan. The plaintiff sued for possession of the land from Said Khan and the owners by redemption of the prior mortgage. Said Khan in contesting the suit set up a deed described as a sale-deed in his favour executed by the owners on a date which cannot be accurately determined, but was probably either in February or April 1920. The terms of the deed in question show it clearly to have been not a deed of sale but an agreement to sell. This fact cannot be contested. As a mere agreement to sell, its registration was optional. After the institution of the present suit, Said Khan applied for registration of the document, and this was resisted by the owners who denied execution. After inquiries by the Collector acting as Registrar, it was held that the thumb impressions of the owners were genuine, and forcible registration of the deed was ordered. The First Court dismissed the present suit holding that Said Khan was a purchaser under a deed prior to the mortgage, and that, therefore, the mortgage to the plaintiff was invalid. The Divisional Court on appeal pointed out that, the deed held by Said Khan amounted to no more than an agreement to sell and that as he had never sued for specific performance, there had been no sale which could defeat the right of the owners to make the mortgage to the plaintiff, or the right of the plaintiff to redeem from the prior mortgagee. The Divisional Court then remanded the suit under O. XLI, r. 23, Civil Procedure Code, for a decision on the issue as to the amount of the mortgage charge held on the land by Said Khan. Against this order Said Khan has appealed.

It is argued by the learned Counsel for the appellant that the agreement to sell was

one which bound the sellers and which debarred them from the equity of redemption; that they could give the plaintiff no better title than they had themselves, and that the plaintiff was equally debarred from the equity of redemption. Two rulings, *Begam* v. *Muhammad Yakub* (1) and *Trimalrav Raghavendra* v. *Municipal Commissioners of Hubli* (2) are quoted as showing that where a purchaser under an agreement to sell has taken possession of the property, he cannot be dispossessed by the seller when the latter claims that the sale has not been completed by failure of consideration under the agreement to sell. As against this, it is contended for the respondent-plaintiff that in the present case no possession was delivered by the owners to Said Khan, Said Khan having been in previous possession as mortgagee. It is, further, contended that the plaintiff had no notice of any incumbrance on the land other than the mortgage to Said Khan, and that he is entitled to treat the agreement of sale as a question between the seller and the purchaser which does not affect his rights.

The rulings quoted by the learned Counsel for the appellant lay down a rule of equity. It has been held that a purchaser, who has actually taken possession under an agreement to sell, can retain such possession as against the seller even though the agreement to sell has not been converted into an actual sale. It is perfectly clear from those rulings that this principle is one of equity only. It does not amount to the conversion of an agreement of sale into an actual sale, and the enforcement of this equity depends entirely upon the fact of the purchaser having taken actual possession. It is in fact a principle which prevents a fraudulent seller, who has actually delivered possession of the thing which he had agreed to sell, from taking advantage of the incompleteness of the sale and ousting a person who has obtained *bona fide* possession. It appears to me that in the present case there is great force in the argument put forward by the learned Counsel for the respondents that there was no actual delivery of possession. I do not think that the contention of the appellant can be accepted that Said Khan obtained the only possession which the owners could then give him. The question really is not one as to whether Said Khan is or is not in possession, but whether there was a *transfer* of possession and whether that possession was definitely altered from that of a mortgagee to that of a vendee. I cannot see in this case the least ground for supposing that there was any outward or visible change in the status of Said Khan. Nothing was done which amounted to an act which Courts are obliged by equity to maintain in respect of the land itself as something which has resulted from the agreement to sell. This becomes still clearer by an examination of the agreement to sell itself and the proceedings taken upon it. The document was one which was written by a private person and not by a regular deed-writer. The date of its execution has clearly been tampered with. It was certainly not disclosed to the public and registration of it was applied for after the present suit had been instituted and simply with a view to defeating the present suit. It is clear to my mind that the plaintiff had no notice of the existence of this agreement to sell. It appears to me that to adopt the view that the existence of this agreement debars a subsequent mortgagee acting *bona fide* without notice from enforcing his equity of redemption, would amount to nothing more than treating an agreement to sell as a completed sale. In the authorities which I have been shown the *ratio decidendi* was not that a mere agreement to sell, still unconverted into an actual sale, debarred the seller from giving a title to a third person, but that the seller himself could not regain possession from the purchaser when he had once delivered it. The rule is one of equity only, and it depends entirely upon the fact of transfer of possession. I do not consider that a prior mortgagee whose status, as I have shown above, has remained unaltered by the agreement to sell, can claim to put himself in the same position as a purchaser to whom actual and tangible possession has been delivered on the strength of the agreement to sell to him. I consider, therefore, that the order of the learned Divisional Judge is the only order which can be passed in this case. The question as to the payment or failure of consideration under the agreement to sell

(1) 16 A 344; A. W. N. (1894) 101; 8 Ind. Dec. (N. S.) 224.
(2) 3 B 172; 2 Ind. Dec. (N. S.) 116.

is one between the seller and purchaser and does not affect the right of the present plaintiff as subsequent mortgagee to redeem prior incumbrance of mortgage. I, therefore, dismiss this appeal with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1571 OF 1919.

June 15, 1922.

Present :—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

MUHAMMAD HUSSAIN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

RAM LAL—PLAINTIFF -RESPONDENT.

Pro-note, suit on—Execution admitted —Consideration—Burden of proof.

When a defendant admits the execution of a pro-note and pleads want of consideration the *onus* is on him to substantiate his plea.

Second appeal from a decree of the District Judge, Lahore, dated the 12th April 1919, affirming that of the Sub-Judge, First Class, Lahore, dated the 30th October 1918.

Lala *Hukam Chand*, for the Appellants.

Messrs. *Jai Gopal Sethi* and *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken by Mr. Jai Gopal Sethi for the respondent. It is to the effect that the findings arrived at by the learned District Judge are findings of fact which cannot be attacked in second appeal. It appears that the suit giving rise to this appeal was based on a pro-note. The defence set up was that, although the pro-note had been executed by the defendants, no consideration had passed. In the written pleas the defendants then detailed what they asserted were the real facts of the case, and alleged that no cash had passed in connection with the document. Subsequently, with the advent of Mr. Hukam Chand as representing the defendants a totally new defence was set up and it was asked that the *onus* be shifted to the plaintiff. Objection was taken by the plaintiff's Vakil and then Mr. Hukam Chand definitely stated that he did not press the application. It appears that, in spite of this statement, evidence relating to pleas set up therein was led, but the question of *onus* was not re-agitated. It is perfectly clear that when a defendant admits the execution of a pro-note and pleads want of consideration, the *onus* is on him to substantiate his plea. The learned District Judge has in a very lengthy judgment considered every one of the various pleas set up and has decided every one against the defendants. His finding is clear and unmistakable that the pro-note was executed for consideration. This is clearly a finding of fact behind which we are unable to go. We, therefore, dismiss the appeal but in the circumstances leave the parties to bear their own costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1652 OF 1921.

June 12, 1922.

Present :—Mr. Justice Abdul Raoof.

SHOP DARSHAN RAM-GANESH DAS OF OKARA—DECREE-HOLDER—APPELLANT

versus

THE FIRM OF KHAIR DIN-ALLAH BAKHSH OF KASUR- JUDGMENT-DEBTOR AND *Sheikh* FATEH MOHAMED—SURETY —RESPONDENT.

Principal and surety—Change in agreement without consent of surety—Discharge of surety.

DARSHAN RAM-GANESH DAS *v.* KHAIR DIN-ALLAH BAKHSH.

Petitioners obtained a money decree against one *K* and the respondent became surety for the payment of the decretal amount by *K*. At that time the entire property of the judgment-debtor was under attachment. Subsequently, the judgment-debtor obtained permission with the consent of the decree-holders to effect a private sale or mortgage of his properties and to pay the proceeds into Court. The surety had no knowledge of this:

Held, that a change had been brought about in the original agreement to the prejudice of the surety without his consent and he was, therefore, entitled to be relieved from his undertaking.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, First Class, Montgomery, dated the 4th July 1921.

Dr. *G. C. Narang*, for the Appellant.

Mr. *Jagan Nath*, for Fateh Mohamed, for the Respondents.

JUDGMENT.—The facts giving rise to this appeal may be summarised as below:-

On the 31st August 1920 the Firm of Darshan Ram-Ganesh Das brought a suit against the Firm of Khair Din-Allah Bakhsh for the recovery of Rs. 3,250. The 7th October 1920 was fixed for final hearing. On that date the parties put in a compromise, and a decree was passed in accordance with the terms of the compromise. The judgment-debtors were ordered to pay the decretal amount by certain instalments. One Fateh Mohamed stood surety for the performance of the agreement relating to the payment by instalments. It appears that an attachment of the property of the defendants had been effected before judgment. The decree, therefore, provided that the property already under attachment must continue to remain under attachment until the realization of the decretal amount, and, further, that in case the amount was not realized from the judgment-debtors, it was to be realized from Fatteh Mohamed, the surety. Apparently, after the passing of the decree, on the same date, an application was put in by Abdullah and others of the defendant firm asking the Court's permission to effect mortgage and sale of the hypothecated property, and pay the proceeds into Court to the credit of the decree-holders. This led to the present dispute. The decree-holders sought to recover the first instalment from Fateh Mohamed, and the latter applied to the Court on the 20th June to be relieved of his liability as surety, as the decree-holders and the principal judgment-debtors had brought about a change in the original agreement without his consent or knowledge. This application has been allowed by the Court below, and Fateh Mohamed has been absolved from his liability as a surety.

The decree-holders have appealed against the order of the lower Court and have contended, firstly, that no change has taken place in the original undertaking and the things are still the same as they were before; and, secondly, that the application for permission to effect mortgages and sales privately had already been made and granted before the surety undertook the liability.

As regards the second contention, I may at once observe that there is nothing on the record to justify this assertion. Having regard to the various applications made on the 7th October 1920, and the orders passed thereon, the only legitimate conclusion that is possible is that the application for permission was made after the decree had been passed. This contention may, therefore, at once be dismissed.

As regards the first contention, it is idle to contend that no change has taken place. When the surety undertook the liability to pay, the entire property belonging to the judgment-debtors was under attachment, and the surety must have felt secure when he undertook the liability. The moment permission was granted to the judgment-debtors to effect private mortgages or sales the whole position was changed, and, in my opinion, the surety was justified in applying to the Court to be relieved of his undertaking. There is no force in this appeal and it is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 592 OF 1921.

January 23, 1922.

Present:—Mr. Justice Jwala Prasad.

KAMLA PRASAD SINGH—1ST PARTY—PETITIONER

versus

GOBIND SAHAY AND OTHERS—2ND PARTY OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute relating to land—Possession delivered by Civil Court, effect of.

Though, ordinarily, a dispute relating to land should be enquired into in a proceeding under section 145 of the Criminal Procedure Code, yet when possession in the land is vested in one party as against every person claiming to be in possession of the property by reason of a writ of delivery of possession issued by a Civil Court, for instance, under O. XXI, r. 95 of the Civil Procedure Code, section 145 has no applicability. [p. 788, col. 2.]

Criminal application.

Messrs. *Manuk* and *G. P. Das*, for the Petitioner.

Mr. *Gour Chandra Pal*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Magistrate, dated the 9th of December 1921, directing proceedings under section 145 to be drawn up with respect to 652 *bighas* of land in *Mouza* Amousi and the said land to be attached under the emergency clause (4) of section 145 of the Code of Criminal Procedure.

The village in which the land in dispute is situated belonged to one Ram Bahadur Singh, whose estate was brought under the management of the Court of Wards. Babu Kamla Sahay, a leading Mukhtar of Monghyr, took *thica* of the village for a term of years 1309 to 1314 (1902 to 1908), agreeing that he would give up all *khudkasht* land acquired by him during the lease. After the expiry of the lease, however, he refused to part with the possession of 823 *bighas* 1 *katha* 7 *dhurs* of land claiming that he had acquired *jote* therein by virtue of *hukumnamas* given to him by the proprietor of the village. The *hukumnamas* were said to be of the year 1902. The Court of Wards then brought an action for ejecting Kamla Sahay from the land in question and in the alternative for having a fair and equitable rent assessed thereon. By that time Kamla Sahay was dead and his father, his brother, and two of his step-brothers were impleaded as parties to the suit. The suit was resisted only by Gobind Sahay, his own brother, on the ground that Kamla Sahay was separate from the other defendants and that after his death the interest in the land in dispute devolved upon Gobind Sahay. That litigation terminated with the judgment of the Subordinate Judge, dated the 11th of June 1918, whereby the claim of the Court of Wards was dismissed upon the ground that Kamla Sahay, though a trespasser up to the year 1320, became a non-occupancy tenant from the year 1321.

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

On the 19th of April 1920, the purchaser, Kamla Prasad Singh, obtained a sale certificate and an order for delivery of possession. The writ for delivery of possession was executed by the Nazir, report whereof was made by him on the 26th of November 1920. The possession delivered by the Nazir was with the standing crops. The judgment-debtors, however, continued to throw obstacles in the enjoyment of the property by the auction-purchaser Kamla Prasad Singh. This led to a number of informations lodged to the Police by the *Chaukidars*, and ultimately to a proceeding under section 144 of the Code of Criminal Procedure, on the 4th of April 1921.

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

"Considered the case of Gobind Sahay. Harsahai Lal (Tahsildar of Gobind Sahay) does not contest. The first party has got the land by purchase at sale certificate. He has got sale certificate and has been regularly put in possession with standing crops on 26th of April 1920. He appropriated the same and has since then produced the present standing crops. The second party ought to have gone to the Civil Court after having lost their certificate objection. They did not do so, but are trying to harass the first party by setting up untenable claims. I

confirm the section 144, Criminal Procedure Code notices issued against the second party (of Harsahai Lal) and cancel and withdraw those issued against the first party."

The trouble, however, did not cease, and on the 8th of November 1920 the Police reported for an action under section 107 of the Code against Kamla Prasad Singh with respect to 150 *bighas* and Kutchery and against Gobind Sahay and others with respect to 652 *bighas*, the subject-matter of dispute in the present case. The former property, that is 150 *bighas* and the Kutchery in the village, was also sold at a certificate sale and was purchased by Kamla Prasad Singh. The sale certificate was, however, set aside on objection. Therefore, Kamla Prasad Singh had no right to the possession of 150 *bighas* and the Kutchery in the village. Dealing with the report of the Police, the Magistrate recorded the following order:—

"The position is made perfectly clear by the District Magistrate's order on a motion against my predecessor's order under section 144, Criminal Procedure Code. Kamla Prasad Singh is in lawful possession of an estate of some 650 *bighas* purchased by him at auction last year, of which he was given *dakhal-dehani*. Gobind Sahay, the other party, is in lawful possession of another estate of about 150 *bighas* including the Kutchery, which was auctioned and bought by Kamla Prasad Singh but of which the sale was subsequently annulled. It appears from the Sub-Inspector's report that Gobind Sahay and 37 others now intend to try to loot the crops of the 650 *bighas* of which Kamla Prasad Singh is in possession. Issue notice under section 144, Criminal Procedure Code, on them all, forbidding them to enter on any part of the 650 *bighas* estate, as from the Sub-Inspector's report it is clear that there is serious danger of a breach of the peace and urgent action is necessary . . . . . .

"Issue notice under section 144, Criminal Procedure Code on Kamla Prasad Singh, his *gomashta* and servants not to enter the Kutchery or any other portion of the 150 *bighas* estate, as there appears to be a danger of a serious breach of the peace and immediate action is necessary. Cause against both these orders may be shown on 21st November."

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

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

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

There is no dispute in the present case with respect to 150 *bighas* and the Kutchery, inasmuch as the first party does not lay claim to it, the sale having been set aside. The order in question, therefore, relates to 652 *bighas* only. The proceeding drawn up details the Survey plots of 652 *bighas*. The first party objects to the order in question on the ground that after the *dakhal-dehani* of the Civil Court the Magistrate had no jurisdiction to open the dispute betweem the parties by a proceeding under section 144 of the Code. This contention appears to be well-founded. The possession in the present case was delivered with the standing crops, and the writ of delivery of possession shows that the possession was to be delivered under O. XXI, r. 95 of the Code of Civil Procedure, under which the Court puts the purchaser into possession of the property, if need be, "by removing any person who refuses to vacate the same." In a delivery of possession under that rule, not only the judgment-debtor but also any other person who may be then occupying has to be dispossessed. Now, a person not bound by the decree may resist the delivery of possession and such a resis

tance may be inquired into under rr. 97, 98 and 99 of the Code. If, as a result of the enquiry made under the aforesaid rules, a person other than the judgment-debtor is dispossessed of the property, he may make an application to the Court complaining of such dispossession and if the Court finds that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct the applicant to be put into possession of the property (*vide* r. 101). The party aggrieved by the order of the Court passed under the above-mentioned sections may institute a suit to establish his right to the present possession of the property as is provided for by r. 103 of the Code. That rule concludes in the following words: "But, subject to the result of such suit if any, the order shall be conclusive." Similar provisions have been made in the Bihar and Orissa Public Demands Recovery Act by sections 33 to 37. Section 37 corresponds to r. 103 of O. XXI of the Code. The words in both the sections are almost the same. Therefore, if the possession was delivered to the purchaser in the present case under O. XXI, r. 95, as the writ of delivery explicitly mentions at the top of it and as the report of the Nazir of the 26th of November 1920 clearly states, then the only remedy left to any person claiming any right to the present possession of the property was to apply to the Court which issued the writ of delivery of possession and confirmed the possession so delivered by the subsequent order of the 4th of December 1920. Failing the step to be taken under section 37 of the Bihar and Orissa Public Demands Recovery Act, or O. XXI, r. 103 of the Code of Civil Procedure, the next remedy left to the members of the 2nd party is to institute a suit in a Civil Court, but, subject to the aforesaid proceedings, the order of the Court confirming the possession delivered by the Nazir in December 1920, is final and conclusive, an order which must be accepted as binding upon the Criminal Courts and any Court which has to adjudicate upon the possession of the parties. The first party purchaser has certainly to establish that possession was delivered to him by the Nazir under the writ issued by the Court. That is a question of fact and the 2nd party had a right to dispute this fact and put the first party purchaser to a proof of it. In other words, if the *factum* of the delivery of possession was raised as an issue in the present case, then certainly no order under section 145 could be passed until that was decided and such an enquiry could possibly have taken place under section 145 of the Code of Criminal Procedure. In the present case the judgment-debtor and the members of his family, his *Tahsildar* and other servants and in fact those claiming under him, have no right to dispute the delivery of possession, as they were parties to the certificate and the sale proceedings and it was after the disposal of their objection that the sale was confirmed and the writ of delivery of possession was issued. The remaining members of the 2nd party who claim to be under-*raiyats* or intermediate holders of the land in suit were not parties to the proceedings in the Survey Department which resulted in the sale of the property and the *dakhal-dehani* and had a right to dispute the actual service of the *dakhal-dehani* on the spot. In the written statement filed in this Court (paragraphs 5 to 8) they clearly admit that they had full knowledge of the proceedings instituted by the purchaser for obtaining the possession of the property and state that the purchaser was attempting to take possession of the property and to dispossess the under-tenants and that for that purpose he had actually come upon the scene and was putting up in the Kutchery of the judgment-debtor. They further admit that they had come to know that the *dakhal-dehani* was to be served on the spot and that prior to that they went to the Police complaining of the action of the purchaser to take *khas* possession of the property with standing crops and to dispossess them thereby. The result of this dispute between the purchaser and the udgment-debtor and the persons claiming to be under-*raiyats* seems to have been taken notice of by the Police, inasmuch as the Nazir in his report says that two constables were also present at the time when he was delivering possession of the property, with standing crops, to the purchaser. The Nazir further reports that he went from

plot to plot and compared the same with the Survey Record of Rights. There can, therefore, be no doubt that the possession in this case was publicly delivered with full notice to all the persons in possession of the property. It may be, as is alleged by the members of the 2nd party, that they were living two miles away, but that does not in the least take away the effect of the delivery of possession of which they had proper notice and knowledge. Therefore, upon the admission of the 2nd party in the written statement filed in this case the *dakhal-dehani* is not disputed. The 2nd party do not claim any right in the property subsequent to the *dakhal-dehani* and all their rights of possession were lost by the *dakhal-dehani* effected by the Court, and they could establish their rights, if any, only by a suit in a Civil Court. It was stated before me by Mr. Pal that they were under-tenants of the land and were holding receipts from Kamla Sahay, the original debtor. Those receipts were filed in the Court below and have now been received here. They show that they relate to a period prior to the sale of the property and the *dakhal-dehani*. These receipts are up to the years 1320, 1325 and 1326. They admit that they derived their right from Kamla Sahay. Kamla Sahay was only a non-occupancy tenant of the land in dispute from 1321 (1914) in accordance with the decision of a case in Suit No. 3 of 1916, dated the 11th of June 1918. These receipts, therefore, do not at all help the 2nd party in claiming possession of the property as against the Civil Court *dakhal-dehani*.

Mr. Pal has also drawn my attention to a judgment of the Criminal Court, dated the 5th of October 1921, in which two of the members of the 2nd party, Righu Mahto and Mushaheb Mahto, were acquitted of offences of having removed crops from 4 *bighas* of the land in dispute. The Magistrate acquitted them observing that he disbelieved the occurrence altogether which had not been proved. No doubt, he answered in the affirmative an issue raised by him as to whether they were under-tenants or not of the land in question. That judgment cannot in any way affect the Civil Court *dakhal-dehani* which is binding upon the members of the opposite party. Similarly, the order of the Criminal Court dismissing the complaint of the first party cannot in any way nullify the effect of the Civil Court *dakhal-dehani* in the present case.

Therefore, though ordinarily a dispute of land should be enquired into in a proceeding under section 145 of the Code of Criminal Procedure, yet when the possession in the land is vested in the first party as against any person claiming to be in possession of the property by reason of the writ of delivery of possession, I do not think that section 145 is at all necessary. There is no *bona fide* claim of possession of the 2nd party. In other words, there is no dispute in law as to the possession of the property. Section 145 summarily determines the right to possession. O. XXI, r. 95 as well as the similar provisions in the Bihar and Orissa Public Demands Recovery Act, actually puts the purchaser into the possession of the property and a person claiming a right to the present possession of the property has either to move the Court delivering the possession or to go to the Civil Court. The previous orders under section 144 passed on two occasions in favour of the first party also establish clearly that the first party was allowed to be in possession of the property and to maintain the possession delivered by the Civil Court. Even on the 21st of November the Magistrate clearly held that the cultivation of 652 *bighas* should not be prevented by the Police and that was the season of cultivating the land and sowing the seeds with respect to the present standing crop on the land.

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

Rule made absolute.

Z. K.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 171 OF 1922.
December 9, 1922.
Present:—Mr. Piper, J. C.
KHEM CHAND—ACCUSED—APPLICANT
versus
EMPEROR, THROUGH JHANGI SINGH—RESPONDENT.

Procedure—Criminal proceedings, institution of—Issue involving adjudication by Civil Court—Criminal proceedings premature.

The criminal law ought not to be set in motion for the purpose of adjudicating upon an issue which clearly is within the province of a Civil Court to decide. In such a case the civil adjudication should precede, and not succeed, an adjudication by a Criminal Court. [p. 790, col. 2.]

Emperor v. Bishen Das, 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50; 50 P. W. R. 1910 Cr., referred to.

Case reported by the Sessions Judge, Derajat, with his No. 749-Criminal, of 17th November 1922:

FACTS appear from the following order of the Sessions Judge, Derajat, dated the 22nd November 1922.

"This is an application made by one Khem Chand in revision requesting that the charge and proceedings against him under sections 421 and 423, Indian Penal Code, may be quashed and the complainant, Jhangi Singh, referred to a Civil Court to seek his remedy. An interesting point of law arises and I have heard arguments on both sides at some length. The facts, which are not disputed, leading to the criminal prosecution are as follows:—One Gela Ram out of whose actions every thing in this case springs, is the son of a well-to-do and influential Hindu, a Municipal Commissioner, District Durbari and several other distinctions of a similar nature.

"Gela Ram had separated from his father and was possessed of lands, a house and a shop. He was heavily indebted owing to his gambling propensities. By this I do not imply that he was a "gambler" in the vulgar sense of the word. Speculation may have been the cause. Be this as it may, he owed Jhangi Singh Rs. 5,000 on a promissory-note which, together with interest, had amounted to Rs. 5,700 14-0.

"Gela Ram received information that he would be sued for this amount.

"He proceeded to dispose of his property as follows:—

"He mortgaged his house to Khem Chand (accused) for Rs. 5,000 by deed dated 2nd-3rd March 1922. Khem Chand's wife is sister of Gela Ram's father.

"Gela Ram sold his shop for Rs. 3,000 to Daulat Ram, by deed, registered on the 3rd March 1922.

"Daulat Ram's granddaughter is the daughter-in-law of Khem Chand. The Transfer of Property Act not being in force in this Province, a mutation was put up to the Patwari transferring the lands worth Rs. 5,500 into the name of another relative, no deed being required. This was also on or about the 3rd March 1922.

"On the 10th March 1922 Jhangi Singh filed a suit against Gela Ram for Rs. 5,700-14-0 and eventually obtained a decree on the 4th July 1922.

"Amongst other defences Gela Ram pleaded he was a gambler; the consideration was for a gambling contract and, therefore, illegal: and that he was a poor man without any property.

"During the pendency of the civil suit the plaintiff Jhangi Singh applied for and succeeded in getting the lands attached and after decree attached further lands.

"The present complaint was lodged on 1st September 1922 against Khem Chand and a separate complaint against Gela Ram, who has absconded, under sections 421 and 423, Indian Penal Code.

"Section 421, Indian Penal Code, lays down the penalty for a transferor of property who transfers to defeat his creditors. Section 423, Indian Penal Code, lays down the penalty for a person, "*inter alia*," being a party to a transaction in which the consideration is falsely stated in the deed of transfer.

"The Magistrate, M. Sadullah Khan, Judicial E. A. C., framed a charge against Khem Chand and this order has been challenged on the following grounds and the High Court is requested to interfere in the further conduct of the case.

"The main issue in question is put forward that the case is really purely a civil matter. It is argued that by this criminal proceeding the accused Khem Chand has no method by which he can defend his title.

"If the house were attached; he could raise objection to the attachment; if he failed in his objection, he could bring a civil suit to establish his title.

"This relief he cannot avail himself of, nor can he avail himself of the relief under section 42, Specific Relief Act, because his title as mortgagee has not been assailed.

"It is argued that the procedure adopted by Jhangi Singh is merely to avoid the delay inherent in the Civil Procedure, and also expenses, and get a Criminal Court to decide a civil question, *i.e.*, whether a transfer was for valid consideration or not.

"In support of the argument *Emperor* v. *Bishen Das* (1) has been quoted and further minor considerations have been placed before the Court, such as, (*i*) delay in making the prosecution, (*ii*) prosecuting Counsel wished to serve the defence witnesses as quickly as possible and (*iii*) that when applying for attachment before judgment the house and shop were excluded.

"It is further pointed out that the Magistrate had no powers to deal with the merits if he were approached in his civil capacity as a Munsif. First Class—the value of the property being beyond his pecuniary jurisdiction—and, therefore, it is a clear case of the criminal law being set in motion to get an issue decided in a Criminal Court which really is within the province of a Civil Court to decide.

"The complainant in reply urges that, (*i*) the petitioner *can* rely on section 42 of the Specific Relief Act and if he thinks his title is assailed, can ask for a declaration of his right. The delay in bringing this complaint is explained by the fact that complainant asked for sanction to prosecute under sections 206 and 207, Indian Penal Code, but the District Judge did not grant the sanction.

"In the application for attachment before judgment the house and shop were mentioned and it is stated therein that they had been transferred purposely and, therefore, the lands, mutation of which had not yet been sanctioned, were the only immediate assets. It is argued that the charge had been framed not only on evidence of the transfer, but on the passage in the judgment of the District Judge in the civil suit in which the transfers are described as intended to defeat creditors

"I am of opinion that this is a fit case to report to the Judicial Commissioner

"The principles on which a High Court will interfere are enunciated in *Choa Lal Dass* v. *Anant Pershad Misser* (2), *Javat Chandra* v. *Queen-Empress* (3) and *Emperor* v. *Bishen Das* (1).

"No hard and fast rule can be laid down but the safe practical test would be that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that it is a fit one for interference Applying this test we have the bare facts that the house was mortgaged, and that the District Judge in his judgment remarked that the transfer was fraudulent. This remark must be treated as "*obiter dictum*," as Khem Chand was no party to the suit.

"The prosecution evidence so far recorded does not show that the consideration mentioned in the deed is a false statement. But, apart from this, should the prosecution result in a conviction the effect will be that a Magistrate will have determined the validity or otherwise of a transfer of property which is purely a matter for a Civil Court to decide, and, as the property is worth over Rs. 1,000, the Magistrate in his capacity as a Munsif. First Class, could not determine the question.

"The point in issue is the validity of the mortgage-deed, a question which a Civil Court is more competent to decide. The remarks of the Division Pench at page 112 of 33 P. R. 1910 (Criminal) [*Emperor* v *Bishen Das* (1)] are relevant to the present case.

"I do not think it necessary to discuss whether the petitioner Khem Chand has a cause of action under section 42, Specific Relief Act. Even if he has, he is not bound to avail himself of it until the house in question is attached, or some other present danger to his title arises.

"I accordingly report the case to the Judicial Commissioner with the recommenda-

(1.) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50; 50 P. W. R. 1910 Cr

(2) 25 C. 233; 13 Ind. Dec. (N. S.) 157.
(3) 26 C. 786; 3 C W N 491; 13 Ind. Dec. (N. S.) 1103.

tion that proceedings against Khem Chand be quashed."

JUDGMENT.—The facts of this case are given in the order of the Sessions Judge, Derajat, dated the 17th November 1922. I have taken up this reference simultaneously with the disposal of the appeal by Gela Ram against the decree for Rs. 5,700-14-0 passed in favour of Jhangi Singh. I have observed in disposing of that appeal that there is no justification for a definite finding by the Trial Court that the transfers of the 2nd and 3rd of March to Khem Chand and Daulat Ram were necessarily fictitious, though it may be assumed that they are open to grave suspicion. I have taken the view that, even on the construction most favourable to Gela Ram they were transfers which favoured creditors who were nearly related to him at the expense of an outsider who was on the eve of lodging a suit, and for this reason I have rejected an appeal by Gela Ram praying for the fixing of instalments and the reduction of the rate of interest allowed. There is, therefore, no definite finding in existence by a Civil Court to the effect that these transfers of property were actually fraudulent or invalid for want of consideration.

I may remark that the judgment quoted by the learned Sesssions Judge, *Emperor* v. *Bishen Das* (1), dealt with a case where there was actually a finding by a Civil Court opposed to the facts on which the charge in a criminal prosecution was based. This is not the case in the present proceedings. There is no civil pronouncement one way or the other as to whether the transfer to Khem Chand was fictitious, fraudulent or without consideration. At the same time, I must accept the view of the learned Sessions Judge that the issue is essentially one which would have eventually to be decided by a civil suit. I agree that Jhangi Singh is by these criminal proceedings not so much attempting to bring home a crime, as to obtain an adjudication upon the question of Khem Chand's title and to allow him thereby to attach the property in satisfaction of his decree. His proper course would be to attempt to attach that property, and if Khem Chand's title were accepted by the Executing Court, to institute a suit impugning the title and for a declaration of his right to attach and sell the property under O. XXI, r. 63. It is, in my opinion, clearly upon him that the *onus probandi* lies of establishing that the transfer was fraudulent in order to attach, and he cannot establish his right merely by success in criminal proceedings. In a case of this kind the civil adjudication should precede, and not succeed, an adjudication by a Criminal Court. It would be open to Jhangi Singh to institute criminal proceedings if, and when, he has established the position which he seeks to take up. I, therefore, accept the recommendation of the learned Sessions Judge and quash the proceedings against Khem Chand under sections 421-423, Indian Penal Code, as being premature. This will not necessarily operate as a bar to criminal proceedings if the invalidity of the mortgage is subsequently established by civil litigation.

W. C. A. *Proceedings quashed.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 447 OF 1922.

June 2, 1922.

Present:—Mr. Justice Brasher.

NAURANGA—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 379, 447, 511—Intention to commit theft—Trespass—Attempt.

Accused was caught at night in the vicinity of some cattle which were tethered on complainant's land and near which complainant and his brother were sleeping;

Held, that it could reasonably be inferred that accused intended to commit theft and was, therefore, guilty of the offence of criminal trespass, but that he could not be held guilty of an attempt to commit theft.

Walidad v. *King-Emperor*, 15 P. R. 1907 Cr.; 14 P. W. R. 1907 Cr.; 6 Cr. L. J. 444; 56 P. L. R. 1908, followed.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Montgomery at Lahore, dated the 19th December 1921, modifying that of the Magistrate, First Class, Montgomery, dated the 14th November 1921.

Lala *Amar Nath Chona*, for the Petitioner.

Mr. *Zafarullah Khan*, for the Government Advocate, for the Respondent.

JUDGMENT.—The petitioner in this case has been convicted under sections 379-511, Indian Penal Code, the finding being that he was caught at night time in the vicinity of some cattle which had been tethered on the complainant's square and near which complainant and his brother were sleeping. It may reasonably be inferred that the petitioner intended to commit theft and there can be no doubt that he committed the offence of criminal trespass, but I do not think he can properly be held guilty of an attempt to commit theft. The case is analogous to *Walidad* v. *King-Emperor* (1), where it was held that a person who went at night on the roof of the house of another person with a stick and an instrument for house breaking was guilty of house trespass and not of an attempt to commit house-breaking by night. In the present case the petitioner had not gone beyond the stage of preparation for the theft.

(1) 15 P. R. 1907 Cr.; 14 P. W. R. 1907 Cr.; Cr. L. J. 444; 56 P. L. R. 1908.

6

I accordingly alter the conviction from sections 379-511, Indian Penal Code, to section 447, Indian Penal Code. The petitioner, who is on bail, has already undergone more than the maximum period of imprisonment which can be awarded for the latter offence, and no further order is necessary.

Z. K. *Conviction altered.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 386 OF 1922.

AND

CRIMINAL REVISION NO. 677 OF 1922.

January 25, 1923.

Present:—Mr. Justice Rankin.

PROMOTHA NATH MUKHOPADHYA

—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused—Proper time—Omission to examine at the proper stage—Illegality or irregularity.

The duty of a Magistrate to examine an accused under section 342 of the Code of Criminal Procedure arises when the witnesses for the prosecution have been examined, cross-examined and re-examined. (p. 793, col. 1.)

The fact that an accused person pleads not guilty and promises to file a written statement, does not in any way exonerate or exempt the Court from examining him at a later stage as required by section 342. (p. 793, col. 1.)

A mere discussion between the Magistrate and the Counsel for the defence as to the number and nature of the witnesses to be examined on behalf of the defence is not a compliance with the provisions of the section, as it is necessary that the accused should be brought face to face solemnly with an opportunity given to him to make a statement in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. (p. 793, col. 2.)

To ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. (p. 793, col. 2.)

A trial becomes illegal from the moment when, without compliance with section 342 of the Criminal Procedure Code, the Magistrate calls upon the accused to enter on his defence. (p. 794, col. 1.)

Mazahar Ali v. *Emperor*, 71 Ind. Cas. 601; 27 C. W. N. 93; 36 C. L. J. 417, 24 Cr. L. J. 198, followed.

Appeal and Revision.

PROMOTHA NANH MUKHOPADHYA *v.* EMPEROR.

Babus *Dasarathi Sanyal, Narendra Kumar Bose, Samarendra Kumar Dutta, Hemendra Nath Basu, Mon Behari Sarkar, Lalit Mohan Sanyal, Satindra Nath Roy Chowdhury*, and *Asita Ranjan Ghosh*, for the Appellant in Appeal No. 386 of 1922.

Babus *Dasarathi Sanyal, Samarender Nath Dutt, Hemendra Nath Bose* and *Bon Behari Sarkar*, for the Appellant in Revision No. 677 of 1922.

Mr. *B. L. Mitter*, Standing Counsel, (with him Mr. Rai *Tarak Nath Sadhu Bahadur*), for the Crown, in both the Appeal and Revision.

JUDGMENT.—In my opinion, this case must be disposed of on the footing that there has not been a compliance by the Magistrate with the provisions of section 342, of the Criminal Procedure Code.

According to the order-sheet, the accused were properly called upon to plead. That was on the 14th March 1922, and at that time they stated that they pleaded not guilty and also that they would both file written statements. The duty of the Magistrate under section 342 is not in question at that stage. It arises when the witnesses for the prosecution have been examined, cross-examined and re-examined and, according to the order sheet, that process was completed on the 12th April 1922, on which date the case was adjourned until the 25th for the purpose of the accused entering on their defence. It is quite clear that the promise to file written statements made at the time of the plea in no way exonerates or exempts the Court from examining the accused at a later stage as required by section 342. There is no minute in the order-sheet to the effect that on the 12th April or on the 25th April anything purporting to be an examination of the accused took place, nor is there any indication of the questions put and the answers obtained upon such examination. It appears from the report made by the Magistrate that, at the close of the prosecution case, he had discussions with the learned Counsel for the defence as to the number and nature of the witnesses the accused were going to call. It also appears from the Magistrate's report that he always understood and so far as he now remembers, he was told, that the accused would file the written statements promised by them. In these circumstances the Magistrate has said in his report: "It will thus be seen that I did examine the accused and give them the fullest opportunity to make their statements. And they did so in their written statements filed on the 20th May 1922, when not only had the prosecution witnesses been cross-examined and re-examined but also their own defence been furnished."

Now, the first question which I have to address myself to, is the question whether there has been a compliance with the section. In this country it often happens that a prisoner is tried in a language which, for one reason or another, he understands but indifferently well and for that reason as well as for other equally grave reasons the intention of the Statute is that at a certain stage in the case the Court itself shall put aside all Counsel, all Pleaders, all witnesses, all representatives and shall call upon an individual accused, with the authority of the Court's own voice and take advantage of the opportunity which then arises, to state in his own way anything which he may be desirous of stating. In the case of an accused who is in no difficulty in understanding the proceedings, a question addressed to his Counsel in his hearing and answered by his Counsel in his hearing may, perhaps, be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section: but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is, that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips. Now, I cannot think that the fact that there was a discussion with Counsel about the number and nature of the witnesses is the same thing at all as what the section requires. It is important also to have regard to the time at which this examination took place. In the decided cases it has been pointed out that to ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. In

my opinion, to ask the accused not at the beginning of his defence but later on when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime, that is not to be assumed to be a substantial compliance with the requirements of the section. In the present case I have an instance not on the side of the accused but on the side of the complainant of this very matter and it is a very good illustration: because in this case much difficulty has been caused and much criticism has been made, because the complainant, whose examination was not finished till after the other witnesses for the prosecution had been examined, introduced matters the value of which might have been taken quite differently if they had been introduced at the earliest possible opportunity. In like manner, an accused who is only given an opportunity to state his defence after the witnesses called by himself have been examined and cross-examined may not be in as good a position as if he had been invited to make his defence at the proper time and before those witnesses were heard. The fact that the accused were asked to put in written statements, in my opinion, is of no great moment for this purpose. There is all the difference in the world between a written statement presumably prepared, almost certainly revised, by the lawyers appearing for the defence and a statement made by the accused himself, so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusion as to the value of his evidence. In this country an accused is not allowed to give evidence on his own behalf and, in view of this, section 342 is of cardinal importance. I say these things not because I am desirous of introducing any new technicalities or any new difficulties as regards procedure in the lower Courts. I quite appreciate that the Stipendiary Magistrates in the City of Calcutta have to get through a mass of important and difficult work and that some slips are not only natural but inevitable. At the same time, the question whether a non-compliance with section 342 is fatal to the proceedings is a question as to which I am not prepared, sitting as I now am, to call into question the decision given in the case of *Mazahur Ali* v. *Emperor* (1). The importance of that case is that the learned Chief Justice distinctly stated this: "On the merits, so far as I can see, there is nothing to be said in support of this application, but these are the words of the section which, in my judgment, expressly provide that the Magistrate shall question the accused generally on the case at a certain stage in the proceedings." It is, no doubt, arguable that the words of the section are mandatory, but that it does not follow that every non-compliance is more than an irregularity. In the present case, on the facts, it is also argued with great plausibility that if it is a proper question to entertain whether or not these accused have suffered any prejudice, the answer should be in the negative. It seems to me highly undesirable that the ruling in the case of *Mazahar Ali* v. *Emperor* (1) should be whittled down by a Court which is not entitled to overrule it: and I expressly reserve my opinion on the question whether that case did or did not go too far. That, however, is the measure of justice and strictness which was meted out to the accused there—and I am not going to exact a lower scale in the present case.

In Mr. B. L. Mitter's argument there was a contention that, whether or not failure to comply with the section properly amounts to an irregularity or to an illegality vitiating the proceedings depends on the question of merits, that is to say, on the question whether the accused person has been prejudiced or has not been prejudiced. I must point out that there are some manifest difficulties in this view. My duty, I think, is clear, namely, to follow the decision of a Division Bench of this Court and to treat this trial as having become illegal from the moment when, without compliance with section 342, the Magistrate called upon the accused to enter on their defence.

The case is, therefore, sent back to the same Magistrate to begin the proceedings anew as from the end of the re-examination of the witnesses for the prosecution, that being the point at which, in my opinion, for non-compliance with section 342, the proceedings became illegal under the authority to which I have already referred.

(1) 71 Ind. Cas. 662; 27 C. W. N. 99; 36 C. L. J. 417; 24 Cr. L. J. 198

Mr. Sanyal must excuse me if I do not discuss certain matters which he has mentioned in arguing this part of the case, but I have to remember that anything I might say at the present moment might seriously embarrass one or the other of the parties when the proceedings begin afresh in the lower Court.

The result, therefore, is that the convictions of the accused are set aside and the case sent back to the same Magistrate to begin the trial afresh from the point which I have indicated.

The fines, if paid, must be refunded.

The same order is made on the revision petition at the instance of the second accused, the printer.

B. N. & W. C. A. *Conviction set aside; Case sent back.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 544 OF 1922.

January 5, 1923.

Present:—Mr. Justice Harrison.

DEWA SINGH, MUKHTAR OF KIRPAL SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250—Witnesses of complainant not examined—Order directing payment of compensation, legality of.

Though compensation under section 250 of the Criminal Procedure Code can be awarded in exceptional cases before all the evidence for the complainant has been recorded, when there are witnesses present whom the complainant wishes to produce, the Magistrate should examine them before passing an order awarding compensation.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the District Magistrate, Rawalpindi, dated the 22nd November 1922, affirming that of the Magistrate, Second Class, Rawalpindi, dated the 23rd November 1921.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—Though compensation can be awarded in exceptional cases before all the evidence for the complainant has been recorded, when, as here, there were witnesses present whom the complainant wished to produce, the Magistrate should have examined them before passing his order awarding compensation. I set aside that order.

Z. K. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION (REFERENCE) NO. 311 OF 1922.

December 16, 1922.

Present:—Mr. Hallifax, A. J. C.

EMPEROR—PROSECUTOR

versus

JIYALAL BHOI—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 562, applicability of—"Misappropriation," meaning of—"Cheating," meaning of—Penal Code (Act XLV of 1860), ss. 403, 404, 405, 417, 418, 419 420,

The word "misappropriation" in section 562 of the Criminal Procedure Code covers the offences punishable under sections 404 and 405 of the Penal Code as well as section 403, and the word "cheating" covers the offences punishable under sections 418, 419, 420, as well as section 417 of the Penal Code. [p. 796, col. 2.]

Emperor v. *Bapu Rao Maratha*, 4 N. L. R. 18; 7 Cr. L. J. 319 and *Har Narayan* v. *Ramji Das*, 23 Ind. Cas. 743 12 A. L. J. 465; 15 Cr. L. J. 375, referred to.

Sundaram Ayyar v. *Emperor*, 47 Ind. Cas. 658; 41 M. 533; 19 Cr. L. J. 934 and *Emperor* v. *Rab Nawaz*, 59 Ind. Cas. 854; 1 L. 612; 22 Cr. L. J. 150, not followed.

Reference under section 438, Criminal Procedure Code, by the Sessions Judge, Raipur, dated the 14th November 1922.

ORDER.—The facts of this case are stated as follows in the report submitted by the Sessions Judge under section 438 of the Criminal Procedure Code. "The accused Jailal was convicted under section 419, Indian Penal Code. He pretended to be the servant of the *malguzar* entitled to levy dues at the Mungeli Bazar and exacted one pice each from four different people. He pleaded guilty and his plea that he had to get money for his starving child has been believed by the Magistrates; he was bound over under section 562, Criminal Procedure Code, after the charge had been changed by the Sub-Divisional Magistrate from one under section 419, Indian Penal Code, to one under section 420, Indian Penal Code." The learned Judge makes no specific recommendation as to the action to be taken by this Court on his report;

he merely states that, in his opinion, the order is illegal in that the word "cheating" in section 562 of the Criminal Procedure Code refers only to the offence made punishable by section 417 of the Indian Penal Code and not to any one of those mentioned in the three following sections, so that the Magistrate could not release the offender under section 562 of the Criminal Procedure Code, though he would have been justified, in the circumstances, in passing a sentence that was a sentence in name only.

2. The object of the reference, then, can only be that this Court should set aside the order merely because it is not strictly in accordance with the law, and not because it has any ill effect or any effect at all on anybody and should then proceed to stultify itself either by passing a sentence of imprisonment for one day, after having haled the accused to Nagpur to show cause why his sentence should not be "enhanced" from nothing at all to nothing more, incidentally relieving him of a liability to a real sentence if he offends again within six months, of which he has not complained, or else by directing the Magistrate to go through a similar farce. It is hard to imagine a more unnecessary or impractical proceeding or one involving more unjustifiable waste of time in at least two Courts. A previous somewhat similar reference from a District Magistrate in the same Sessions Division, in which it was expressly admitted that the question raised was of academic interest only, was returned with the remarks that this Court is not an academy, but a Court of Justice and a busy one. That would be the natural course in this case also, but the point raised may possibly have importance in future cases, and as the learned Judge's view of it is undoubtedly wrong and others may fall into the same error, it may be as well to discuss the matter.

3. The list of offences given in section 562 of the Criminal Procedure Code is: "theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment." In *Emperor* v. *Bapu Rao Maratha* (1), which is mentioned by the learned Sessions Judge in his reference, Drake-Brockman, J. C., held that, as section 562 mentioned only two of the four forms of theft with which the Indian Penal Code deals, it must be interpreted as excluding the other two from its scope. The reasoning is inevitable, but it does not apply, nor was it meant to apply, to the words "misappropriation" and "cheating" which appear in the same section.

4. There appear to me to be two very cogent reasons for holding that in section 562 of the Code of Criminal Procedure the word "misappropriation" covers sections 404 and 405 of the Penal Code as well as section 403, and that the word "cheating" covers sections 418, 419 and 420 as well as section 417; indeed it appears more correct to say that those words were not meant to cover sections 403 and 417 at all, and only do so accidentally. As was pointed out by Mr. Justice Pigott in *Har Narayan* v. *Ramji Das* (2), section 417 of the Penal Code deals with an offence punishable with not more than two years' imprisonment. The offence punishable under section 403 comes in the same category and it is impossible, indeed it would be an insult to the Legislature, to suppose that those two offences would have been chosen for entirely unnecessary double mention in section 562 out of all the offences included in the general clause at the end of the list quoted above. Restricted to reference to sections 403 and 417 of the Penal Code the words "misappropriation" and "cheating" in section 562 of the Procedure Code are otiose and redundant. In their ordinary meaning, which covers the other two forms of misappropriation and the other three forms of cheating they have use and purpose. I may add that I can see no reason for calling the latter an extended meaning of the words, as is done in most of the judgments I have consulted on this point; the former is rather an unnatural restriction of their meaning.

5. The second basis for my opinion in this matter is an inversion, if I may make it with due respect, of the reasoning by which the learned Judges of the Madras High Court arrived at a contrary result in *Sundaram*

(1) 4 N. L. R. 18; 7 Cr. L. J. 319.

(2) 23 Ind. Cas. 743; 12 A. L. J. 465; 15 Cr. L. J. 375.

Ayyar v. *Emperor* (3). It was held by Ayling and Phillips, JJ., that a wide interpretation could not be given to the word "cheating" in section 562 without giving an equally wide interpretation to the word "theft" in the same section and that the latter word must be restricted to the offence made punishable by section 379, and cannot be extended to cover the offences punishable under the three following sections of the Penal Code, as is clear from the specific mention of theft in a building (section 380) and the omission of the other two varieties of theft in section 562.

6. That the word "theft" at the beginning of the list of offences in section 562 refers only to section 379 of the Penal Code is beyond question, and it is equally clear that the reason for this is that the second offence mentioned in the list is the second of the four varieties of theft. That is what is laid down in *Emperor* v. *Bapu Rao Maratha* (1). But it is for that reason only that the word "theft" at the beginning of the list is given a restricted meaning in this instance, its natural meaning being the offence defined in section 378 of the Indian Penal Code which covers all the offences punishable under the four following sections of the Code. That reason, however, does not exist in the case of the offences of dishonest misappropriation and cheating and the terms describing those offences must be given their ordinary meaning, that is to say, the offences of dishonest misappropriation and cheating, as defined in the Penal Code, in their aggravated as well as their simplest forms.

7. I may add that the learned Judges of the Madras High Court follow a Bombay ruling said to be reported in the Criminal Law Journal, which is not available to me and, that in the Lahore High Court Mr. Justice Martineau held the same view in *Emperor* v. *Rab Nawaz* (4). No reasons for the decision are, however, given in the last case mentioned which is based solely on a previous ruling of the Chief Court of the Punjab cited as reported in a publication described by the letters P. W. R., to which also I am unable to refer. The records will be returned.

G. R. D. *Records returned.*
W. C. A.

(3) 47 Ind. Cas. 658; 41 M. 533; 19 Cr. L. J. 934.
(4) 59 Ind. Cas. 854; 1 L. 612; 22 Cr. L. J. 150.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1019 OF 1921.
July 15, 1922.
Present:—Mr. Justice Abdul Qadir.
LAZARUS MEGH NATH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 183—Theft committed during journey—Jurisdiction—Place of trial.

Where a theft is committed in a train during the course of a journey the offence can, under the provisions of section 183 of the Criminal Procedure Code, be enquired into and tried by any Court having jurisidction over any part of the territory through which the train passed in the course of that journey.

Accused, a Railway Guard, committed a theft in a train running from Delhi to Bhatinda. He was convicted by a Magistrate of the First Class exercising jurisdiction within the Ferozepore District. An appeal was preferred to the Sessions Judge and a doubt arose whether he was competent to hear the appeal;

Held, that inasmuch as a portion of the line between Delhi and Bhatinda passed through the Ferozepore District, the Sessions Judge of Ferozepore had jurisdiction to hear the appeal.

Criminal appeal referred by the Sessions Judge, Ferozepore, with his letter No. 23, dated the 21st June 1921, for the orders of the High Court with regard to the Sessions Judge's jurisdiction to hear the appeal.

Mr. *D. R. Sawhney*, for the Petitioner.

Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—The petitioner in this case, Mr. Lazarus, was a Guard on the North-Western Railway. He was with the train coming from Delhi to Ferozepore on the 22nd of December 1920, when some hats were stolen from a hat-box, belonging to a passenger, which was deposited in the brake-van. He was suspected of having stolen them and later on, after he was accused of the theft, he produced four hats from two different places. He was convicted on the 13th June 1921 by a Magistrate, First Class, at Ferozepore. The theft was said to have occurred somewhere between Delhi and Bhatinda. As a considerable part of that line passes through the territory of Patiala State, a doubt was felt, on his appeal being

filed in the Sessions Court at Ferozepore, whether the Sessions Judge of Ferozepore had jurisdiction to try that appeal or should it have gone to the Political Agent, Phulkian State, who has the powers of a Sessions Judge for hearing appeals in criminal cases with regard to the offences committed in any part of the State territory (*vide* Notifications Nos. 515 and 516 I. B., dated the 17th March 1913).

The Sessions Judge referred this matter to the High Court. On the 9th December 1921, Mr. Justice Abdul Raoof passed an order, calling upon the learned Sessions Judge to enquire and let this Court know whether during its journey from Delhi to Bhatinda the Railway in question at any time passed through the Ferozepore District. A report, dated 16th May 1922, has now been received, showing that the main line between Delhi and Bhatinda does pass, for about two miles, through a portion of the Moga Tahsil of the Ferozepore District. On this report it is clear that the appeal can be heard by the learned Sessions Judge of Ferozepore, under the provisions of section 183, Criminal Procedure Code, as the offence is said to have been committed during a journey and the train in question passed through Ferozepore territory during a part of that journey. Thus, the Court at Ferozepore has as much jurisdiction as the Court of the Political Agent, no matter at what point in the course of that journey the said offence was committed.

It is directed, therefore, that the appeal may be heard and decided according to law by the Sessions Judge of Ferozepore, to whom the records will be returned.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 259 OF 1922.
CRIMINAL REVISION PETITION NO. 239 OF 1922.
November 24, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice.

A. V. SRINIVASALU REDDIAR AND ANOTHER—ACCUSED—PETITIONERS

versus

GOVINDA GOUNDAN—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 379—Theft, what constitutes—Removal in bona fide assertion of right.

If there is a taking under a colour of right, or, in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft. It is immaterial whether the claim is good or bad. [p. 800, col. 1.]

It may be material in considering, as a question of fact, whether the claim was a *bona fide* claim, to consider whether or not there was any right at all, because the complete absence of right and circumstances, such as the Court would be justified in saying could not have led any reasonable man to a belief that he had a right, would be cogent matters to consider in arriving at the conclusion whether the claim was a *bona fide* claim or not. [p. 800, col. 1.]

A certain kind of long grass growing in a village-tank used to be divided among the proprietors. One of the latter sold his land to accused. The latter asserted his right to a share in the grass but his vendor and the other proprietors denied this right. When the grass was being cut, accused removed a portion of it, and it was not found that the portion removed was in excess of the share claimed by him:

Held, that the removal being under a *bona fide* claim the accused could not be held to have been guilty of theft. [p. 800, col. 1.]

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 Personal Assistant Deputy First Class Magistrate, Cuddalore, in Criminal Appeal No. 1 of 1922, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Tindivanam Taluk, in C. C. No. 518 of 1921.

Messrs. *T. Rangachariar* and *E. V. Sundara Reddi*, for the Petitioners:—The petitioners have been convicted of what is called a technical theft, for having removed *vishal* grass, cut and stacked on the tank-bed of an irrigation tank in a *ryotwari* village. The *vishal* grass (long grass used for thatching purposes grown on tank-beds), was enjoyed in ten shares. The petitioner having purchased lands of one of the shareholders claimed to have one-tenth share in the grass also. In assertion of this claim he removed the grass from the tank bed which had been cut and stacked by the shareholders. There is no evidence to show that the petitioners removed a larger quantity than the disputed claim would warrant. Petitioner acted in the exercise of a *bona fide* claim of right. The lower Court took the view that the question of *bona fides* might well arise only as between the petitioner and the shareholder whose lands he has purchased. In this case the shareholders

combined together and resisted the claim of the petitioner. It is, therefore, wrong to say that the question of *bona fides* will not arise as between the petitioners and the other shareholders. Unless the claim is found to be a mere pretence the Court will not convict one of theft. If the removal was in the assertion of a *bona fide* claim of right, it is not dishonest and, therefore, the essential ingredient of theft, dishonest intention, is absent and the act does not amount to theft. The claim may turn out to be well-founded or not, but if the petitioner *bona fide* believed that he had the right his act will not amount to theft. The decision in *Suraj Ali* v. *Arfan Ali* (1) is an authority for the proposition that if there be any fair pretence of property or right in the accused the Court will direct an acquittal. I also rely upon the passages quoted therein from Sir Mathew Hale's Pleas of the Crown, pages 508 and 509, and Sir Edward Hyde's Pleas of the Crown, Volume II, page 659. The law of theft stated therein has been followed in this country also and that there is no material distinction between the English Common Law definition of Larceny and the definition of Theft in the Indian Penal Code. *Harendra Narayan Das* v. *Ramjan Khan* (2) See also *Hari Bhuimali* v. *Emperor* (3) and *Dhirendra Mohan Gossain* v. *Emperor* (4). The petitioners are entitled to an acquittal.

Mr. *J. C. Adam*, for the Crown.—The petitioners cannot be said to have acted in the exercise of a *bona fide* claim of right. They went with a large body of men armed with sticks in broad day light and removed the grass. The manner in which a right is exercised is one of the circumstances to be taken into consideration in coming to aconclusion on the question of *bona fides*. The petitioner also removed far more than the share which he claimed. The petitioner bought the lands with the knowledge of the dispute. The facts of this case do not support the plea of a *bona fide* assertion of right. The petitioners were, therefore, rightly convicted.

Mr. *S. T. Srinivasagopalachariar*, for the Complainant, Respondent.—The Samudayam rights in the village are enjoyed in ten shares and these included the right to the *vishal* grass. The first petitioner claimed to have acquired the right by reason of the purchase of lands belonging to one of the shareholders. The Samudayam is an independent and transferable right. The shareholder whose lands the first petitioner had purchased did not sell his Samudayam right. The petitioner was aware that he had no right thereto and removed far more than the share to which he may in any calculation be entitled and deprived the watchman and the cutters of the shares to which they were entitled, as for their remuneration, in the cut *vishal* grass. The accused went with a large crowd and removed the *vishal* cut and stacked by the shareholders. The circumstances of this case do not support the plea of *bona fides* at all. The conviction must stand.

ORDER.—In this case the 1st accused, a land owner and the 2nd accused, his agent, have been found guilty of theft. The facts of the case, so far as they are relevant, are these. The 1st accused bought some land from P. W. No. 2. That land is situated in a village. There is a large tank in that village where there is grown a large quantity of *vishal* grass used for purposes of thatching. The land-owners of that village have rights to that grass, and it appears to be the custom to allow the grass to grow for several years and then cut it and divide it, first allowing so much of the cut grass to the actual cutters of the grass and so much to persons employed to watch the grass during the years in which it has been growing. There are apparently some ten persons entitled to share in this grass. P. W. No. 2 was one of them. He having sold his land to the 1st accused, the 1st accused claimed, no doubt *bona fide*, that with that land went the right to the share of this grass. P. W. No. 2, on the other hand, contests that he sold the land without this right and that the right is severable from the land and, that, although he sold the land, he kept the right to the grass. In this he has the support of the other sharers and it is quite clear that he and they intended that the 1st accused should have no share whatever in that grass. When the reaping had pro-

(1) 36 Ind. Cas. 136; 44 C. 66; 20 C. W. N. 1270; 17 Cr. L. J. 456.
(2) 23 Ind. Cas. 506; 41 C. 433, 18 C. W. N. 397; 15 Cr. L. J. 298.
(3) 9 C. W. N. 974; 2 Cr. L. J. 836.
(4) 5 Ind. Cas. 794; 14 C. W. N. 408; 11 Cr. L. J. 248.

ceeded for a comparatively short time, some three days out of the usual fifteen occupied, the 1st accused taking the law into his own hands, either went himself or sent the 2nd accused with a large body of men with instructions to remove a quantity of the grass that had already been cut and stacked. Both the accused have been convicted of theft and fined.

Theft is defined in the Indian Penal Code thus: "whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft" and sections 24 and 23 define the meaning of the word "dishonestly." With small, and for the purposes of the present case immaterial, variations, that definition is a statement of the Common Law of England as to larceny as it existed at the time of the Code. The definition of larceny in the Common Law of England is correctly stated thus in Archbold's Criminal Pleading, "The wrongful or fraudulent taking and carrying away personal goods of another from any place, with a felonious intent to convert them to the taker's own use, and making them permanently his own property, without the consent of the owner." The word "felonious" in this definition means that there is no colour of right to excuse the act; and the "intent" being to deprive the owner, not temporarily but permanently of his property." In the Penal Code the word "dishonestly" takes the place of the words "with a felonious intent" in the English Common law definition. If there is a taking under a colour of right, or, in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft. It is immaterial whether the claim is good or bad. It may be material in considering as a question of fact whether the claim was a *bona fide* claim, to consider whether or not there was any right at all, because the complete absence of right and circumstances, such as the Court would be justified in saying, could not have led any reasonable man to a belief that he had a right, would be cogent matters to consider in arriving at the conclusion whether the claim was a *bona fide* claim or not. In this case it is to be observed that the learned Magistrate disposed of the matter by saying that the question of *bona fide* cannot arise where the matter affects third parties. He took the view that such question might well arise as between the 1st accused and P. W. No. 2 from whom he bought the land, but as there were third parties who were also entitled to a share in the grass in question, the question of *bona fides* could not arise. I have no doubt that this is an entire misconception of the principles to be applied to such cases. On that alone I should be satisfied that this conviction could not stand. But, here, I have before me all the necessary facts; indeed they are not disputed and I am consequently in a position to dispose of the matter. That the 1st accused claimed a right to a share of this grass there can be no doubt, for he claimed it openly. That P. W. No. 2 and other sharers meant to prevent him from having any share of that grass is equally clear and admitted. I am satisfied that he went there himself or sent his men to take the grass as being his or rather claiming it as his. It is suggested that he took so much that he could not have been exercising a *bona fide* claim; but I can not find that from an examination of the evidence and the findings in this case. In such matters the Court cannot go into niceties of calculation and arithmetic. It has to look at the broad question of whether this was theft and whether this man was a thief or not? The fact that he took a large amount of grass which under no calculation could be the right amount would be a very cogent thing to consider; but, whether in taking what he did, he made a proper allowance for the watchman or whether he allowed the right amount in his calculation for the exact number of shareholders—considerations of that kind are in my judgment entirely outside the purview of the Court considering this question. In my judgment this case is a case that ought not to have been brought. The parties have got their civil rights. I do not wish it to be understood that I in any way approve of the high-handed action of the 1st and the 2nd accused; but, in my judgment, it is quite an erroneous view of this case to hold that it is theft.

On these grounds this revision petition must be allowed, the convictions must be set aside and the fines refunded.

V. N. V. *Petition allowed.*

JWALA SINGH *v.* TEJA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1593 OF 1919.

May 17, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Harrison.

June 6, 1922.

Present:—Mr. Justice Scott-Smith.

JWALA SINGH—DEFENDANT—APPELLANT

versus

TEJA SINGH—PLAINTIFF, SOHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage-deed—Redemption clause—Evidence Act (I of 1872), s. 65—Secondary evidence admitted by Trial Court, Appellate Court, whether can reject.

A mortgage-deed contained the following clause: "The agreement is that I shall redeem the property on payment of the above mentioned sum (*i.e.*, the principal money) within three years and shall pay interest at the rate of Re. 1-6 per cent without objection. The mortgaged *haveli* shall remain in possession of the mortgagee who shall be responsible for repairs, etc;"

Held by the majority (*Martineau*, J., dissenting), that the conditions as to redemption on payment of the mortgage-money was complete in itself and the mortgagor was not bound to pay interest as a condition precedent to redemption. [p. 803, col. 2.]

Aulia Khan v. *Kanshi Ram*, 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913, relied upon.

Per *Harrison, J.*—Where secondary evidence is produced before the Trial Court and no objection is taken either by the opposite party or by the Presiding Officer, it is not open to the Appellate Court to reject that evidence. [p. 800, col. 2.]

Akbur Ali v. *Bhyea Lal Jha*, 6 C. 666; 7 C. L. R. 497; 3 Shome L. R. 260; 3 Ind. Dec. (N. S.) 432, *Kishori Lal Goswami* v. *Rakhal Das Banerjee*, 31 C. 155 and *Chimnaji Govind* v. *Dinkar Dhondev*, 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209, relied upon.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 6th January 1919, varying that of the Subordinate Judge, Second Class, Rawalpindi, dated the 19th June 1917.

Mr. *Badruddin Kureshi*, for Mr. *Devi Dayal*, for the Appellant.

Mr. *Anant Ram*, for Mr. *Gobind Ram*, for the Respondents.

JUDGMENT.

Harrison, J.—(*May* 8, 1922)—The plaintiff in this case being the successor-in-interest of the mortgagor sued to redeem a house and claimed to be entitled to do so on payment of Rs. 180. The First Court gave him a decree conditional on payment of Rs. 450 which sum was reduced to Rs. 80 by the learned District Judge, that sum to be paid to one Sohan Singh, a subsequent mortgagee from Jawala Singh, the contesting defendant. Jawala Singh appeals and claims Rs. 2,240.

The facts are that in his plaint the plaintiff disclosed one mortgage only as against himself effected by Sukhu in the year 1870 in favour of Kalyan Singh, father of Jawala Singh, and he contended that he was entitled to redeem on payment of the principal sum secured by this mortgage without the payment of any interest. Jawala Singh contended that not only was he entitled to the principal but also to the interest on this mortgage of Rs. 180 and also stated that he had redeemed a previous mortgage of Rs. 50 in favour of one Jai Singh and that he was entitled both to the principal and the interest on this first mortgage also. The questions to be decided are whether he is entitled to any sum on this first mortgage and whether he is entitled to receive the interest as well as the principal on the second mortgage effected in favour of his father before the property can be redeemed. Plaintiff denies all knowledge of the first mortgage and in order to prove its existence and the allegation that it had been paid off by Jawala Singh's father a copy was produced in the First Court and some oral evidence was tendered as to the payment. The learned District Judge, holding that although no objection had been taken to this copy the plaintiff should have fulfilled the necessary conditions laid down in the Evidence Act and should have secured the production of the original, disallowed the secondary evidence altogether and held that this first mortgage was wholly unproved. It has been laid down in *Akbur Ali* v. *Bhyea Lal Jha* (1), *Kishori Lal Goswami* v. *Rakhal Das Banerjee* (2) and *Chimnaji Govind* v. *Dinkar Dhondev* (3), that when secondary evidence is produced in the First Court and no objection is taken either by the other side or by the Presiding Officer it is not open to the Court of Appeal to reject that

(1) 6 C. 666; 7 C. L. R. 497; 3 Shome. L. R. 260; 3 Ind. Dec. (N. S.) 432.
(2) 31 C. 155.
(3) 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209.

evidence. Following these decisions I find that the copy should not have been rejected by the District Judge. This merely shows that in the year 1870 before the execution of the mortgage in favour of Jawala Singh's father a previous mortgage for Rs. 50 had been effected in favour of Jai Singh. As to redemption from Jai Singh or, as Counsel wishes to put it, the purchase of the rights of Jai Singh by Kalyan Singh, there is no evidence beyond the oral statement of one Lal Singh, son of Jai Singh, who says that he heard that before his birth his father had been paid Rs. 55 by the father of Jawala Singh. On this evidence Jawala Singh asks for a finding that because he is now in possession of a copy of that document he is entitled to payment of the principal and interest for 46 years. He has not gone into the witness-box himself to explain how he came by the copy nor has he attempted to tender the original mortgagor or rather his son to state what he knows about this ancient document. There is some Hindi writing on the back of the copy of which he has put in no transliteration and which he has not attempted to prove. It is, in my opinion, just as probable and in fact more probable that the original mortgagor paid off this mortgage if it has been paid off, than that Jawala Singh's father did so. The evidence of Lal Singh is, in my opinion, quite valueless and although it is doubtless difficult to produce evidence as to what happened or did not happen 40 years ago or more, this is not, in my opinion, any reasou for allowing a man on the mere production of a copy of an ancient mortgage-deed to claim the whole amount which would be due on that deed, if it be still alive, and this more especially when he has not the original document in his possession. In his statement before the framing of issues Jawala Singh said vaguely that his father had redeemed this mortgage in the year 1881. The original, which bears no endorsement whatever, was obtained by the District Judge from the record-room, it being found on the record of an old objection in execution, which was made by Jai Singh, and all that this shows is that the mortgage was alive in May 1870 or six months before the second mortgage was effected. In the absence of any evidence worth the name that this first mortgage still subsists and that Jawala Singh has acquired any sort of rights under it, I find that he is not entitled to any payment on its account.

The second point of whether interest is payable in addition to the principal as a condition of redemption depends on the interpretation placed upon the following words:—

"*Aur ikrar yeh mukarar kiya ki mublagh mazkur* (*i. e.*, Rs. 180) *andar arsa tin sal ke ada karke fakk-ul-rahn karlunga aur sud b hisab fi sadi ek rupiya chhe anna bila uzar ada kar dunga aur haveli marhuna par qabza murtahin ka rahiga aur marammat shikast, etc., ba zimma murtahin hogi.*"

Counsel has quoted many authorities such as *Mota Singh* v. *Bishen Singh* (4), which relates to the question of *post diem* interest. This is not the question here and I am only concerned with the meaning of the plain words used, for the intention of the parties can only be discovered from the words which they themselves used. Now, although the mortgagor undoubtedly bound himself to pay interest, he did so in a clause subsequent to and, in my opinion, disconnected from the clause regarding redemption and the words in which the conditions of redemption are laid down are that on payment of *mubligh mazkur, i.e.*, Rs. 180, principal, the land can be redeemed. It appears to me to be useless to argue that business-men usually make the payment of interest a condition of redemption or that it is very foolish not to do so. The document clearly and in definite words says that on payment of Rs. 180 the house can be redeemed. It is unnecessary to discuss what further remedy the mortgagee has and how he is to set about realising the interest, if any, which may be due to him. The deed says that the house may be redeemed on payment of Rs. 180, and only one interpretation can be placed upon these words.

The amount payable has been altered by the addition of the cost of re-building and the deduction of the value of the old materials of the house, and the decision on this point is a finding of fact.

I, therefore, find, agreeing with the learned District Judge, that the plaintiff is entitled to possession of the house on payment of

(4) 32 Ind. Cas. 821; 5 P. R. 1916; 23 P. W. R. 1916.

Rs. 80 and that this sum will be paid to Sohan Singh, the puisne mortgagee of Jawala Singh, and would dismiss the appeal with costs.

Cross-objections were put in by Sohan Singh, but he did not appear hismelf at the hearing nor was he represented by Counsel. They are, therefore, dismissed.

Martineau, J.—(*May* 17, 1922).—I agree with my learned brother that Jawala Singh has not proved that his father redeemed the property from Jai Singh or purchased Jai Singh's rights, and that he is not entitled to be paid anything on account of Jai Singh's mortgage of the 13th February 1870.

But I regret that I am unable to agree with my learned brother on the second point, namely, the question as to whether interest is payable in addition to the principal of the mortgage of the 20th December 1870 as a condition of redemption. In my opinion the sentence in which the mortgagor says that he will redeem in three years on payment of the amount previously mentioned, that is, the principal, should be read along with the sentence immediately following, in which he says he will pay interest at the rate of Re. 1-6 per cent, and the intention of the parties to the mortgage was that the mortgagor in order to redeem would have to pay interest as well as the principal, although the deed was carelessly drafted. The deed contains no clause regarding the right of the mortgagee to hold the mortgagor personally liable for the interest if it was not paid, and it seems to me improbable that such a stipulation would have been omitted if the intention had been that the property could be redeemed on payment of the principal only.

As the difference of opinion arises on a point of law, namely, as to the construction of the document of the 20th December 1870 by which the property that the plaintiff seeks to redeem was mortgaged, I propose that, if my learned brother agrees, the question whether under the terms of that document interest is payable in addition to the principal as a condition of redemption be referred to a Third Judge under the provisions of section 98 of the Civil Procedure Code.

Harrison, J.—(*May* 17, 1922).—I agree.

Mr. *Devi Dayal*, for the Appellant.

JUDGMENT.

Scott-Smith, J.—(*June* 6, 1922)—In this appeal the Judges who constituted the Division Bench have differed on a point of law which has been referred to me as a Third Judge under the provisions of section 98 of the Code of Civil Procedure. The suit out of which the appeal arises was one for redemption of a mortgage, and the question referred is whether under the terms of the deed of mortgage of the 20th December 1870, interest is payable in addition to the principal as a condition of redemption. The relevant terms of the deed of mortgage are set forth in detail in the order of Harrison, J. After reading the mortgage-deed and hearing what Mr. Devi Dayal has to say on behalf of the appellant, I have no hesitation in agreeing with the opinion of Harrison, J., that under the terms of the mortgage-deed interest is not payable in addition to the principal as a condition of redemption. There are four conditions in the deed of mortgage, (1) that within three years the mortgage would be redeemed on payment of the mortgage-money, Rs. 180, (2) that the mortgagor would pay interest at the rate of Re. 1-6 per cent; (3) that the mortgagee would retain possession of the mortgaged *haveli* and (4) that the mortgagee would be responsible for repairs. All these conditions are, in my opinion, quite distinct. The condition as to redemption on payment of the mortgage-money is complete in itself. The condition as to payment of interest constitutes a separate covenant, and I can see nothing in the deed which makes it obligatory on the mortgagor to pay interest as a condition precedent to redemption. Every case of this sort must be decided on its own merits and the cases cited by Mr. Devi Dayal are not in point. *Aulia Khan* v. *Kanshi Ram* (5) was a case in which it was held that the covenant to pay interest was quite distinct and that redemption could be effected on payment of the principal mortgage-money only. In the present case also I am clearly of opinion that redemption can be effected on payment of the principal mortgage-money only. In accordance, therefore, with the provisions of section 98 of the

(5) 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913.

Civil Procedure Code the point is decided according to the opinion of the majority of the Judges who heard the appeal, and the appeal is dismissed with costs. Counsel has not appeared before me on behalf of the plaintiff-respondent.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 358-B. OF 1921.

December 16, 1922.

Present :—Mr. Kotwal, A. J. C.

SHAMRAO DEWAJI—PLAINTIFF—APPELLANT

versus

PANDURANG AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76—Mortgage of land with Sindi trees—Mortgagee, liability of, to account for produce.

It cannot be said as a rule that Tadi from Sindi trees is ordinarily a source of income and that the mortgagor of a land on which there are Tadi trees can claim any profits on account of Tadi which it is possible to tap from the trees. He can, however, claim the profits if it is proved that the trees were actually tapped in any year. [p. 805. col. 1.]

Appeal from a decree of the District Judge, Amraoti, in Civil Appeal No. 91 of 1921, dated the 28th April 1921.

Mr. *R. R. Jaiwant*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—The plaintiff sues on a mortgage, dated the 28th January 1909, the property mortgaged is a field and a house. The plaintiff was admittedly in possession of the field from the year 1913-14. He pleaded that he was in possession under a lease given by the mortgagors on a *Makta* of Rs. 150 a year and that this amount was agreed to be applied towards the mortgage-debt. The lower Courts have found that the lease is not proved and held that the plaintiff is to be treated as a mortgagee in possession and is bound to account for the profits of the field. This finding is accepted. The defendants claimed credit for Rs. 600 as the annual profits. The lower Courts have allowed profits at the rate of Rs. 350 a year. The only issue material to the point now for decision is, "whether the field was given to plaintiff on an oral agreement to credit Rs. 150 as *Makta* per year. If not, to what amount are defendants entitled to get credit?" All that the Trial Court writes regarding the annual profits is, "since the mortgagee has kept no regular accounts nor there is any evidence that he has used his best endeavours to procure sub-tenants the defendants can claim a fair occupation rent. Had it been proved that plaintiff cultivated the mortgaged land and had he maintained a systematical account he would have been charged the net profits of his cultivation, but, as he has not maintained any account, the ends of justice would be met by allowing a fair occupation rent. . . . . Taking all the circumstances into consideration I allow Rs. 350 per annum as fair occupation rent of the land". What the circumstances are is nowhere mentioned in the judgment.

The lower Appellate Court found that there were some 500 or 1000 Sindi trees in the field which could produce Tadi, and even granting that the field is wholly waste the trees alone would bring an income of nearly Rs. 350. The lower Appellate Court writes in this connection: "The evidence of the defendants coupled with the admission of the plaintiff of the existence of the Sindi trees would show that the estimate of Rs. 350 a year as the income allowed by the lower Court is not excessive. The first witness of the defendant has deposed that the Sindi trees themselves would bring in an income of Rs. 300 or 400. The second witness had deposed that these trees were taken on lease by a Dhed for one year for Rs. 300 and in another for Rs. 350 and that he was a partner with that Dhed. The third witness has deposed that the *Makta* of the field would be Rs. 400 or Rs. 500. Now even granting that the field is largely waste as deposed by the plaintiff's witnesses, it seems that the Sindi trees alone would bring an income of nearly the full amount allowed by the lower Court and that, therefore, that amount is not, in any way, excessive. The learned Pleader for the appellant has referred to the District Gazetteer according to which letting value is only seven times the assessment. At the same time, however, this

can only be considered as an average, and in the present case where there is an exceptional circumstance, *viz.*, the presence of a large number of Sindi trees in the field, a much higher letting value could be assessed. I, therefore, will not reduce the amount allowed by the lower Court". It may be noted that there was no reference in the pleadings to the Sindi trees or to there being any income therefrom.

In this Court it is urged by the plaintiff that the lower Appellate Court is wrong in allowing profits in respect of the Sindi trees on the ground that they could produce Tadi. The lower Appellate Court seems to have assumed that as a matter of course Sindi trees can be made a source of income on account of the Tadi therefrom. The assumption is not justified. Tadi can be tapped from Sindi trees only by a person holding a license from the Government for the sale of Tadi. Such a license is taken generally only by persons who are by profession dealers in spirituous liquor. It requires the employment of men specially skilled in the art of tapping the trees. I do not think that the plaintiff in this case was called upon to take a license from the Government and engage in the business of tapping and selling Tadi. It is said that he could have leased the trees to persons dealing in Tadi and holding the necessary license. This he could, no doubt, have done, but the question is, were there any license-holders willing to lease the trees and was there any demand for the trees. In my opinion it cannot be assumed, as a matter of course, that there were. Nor was the plaintiff bound, as contended, to prove at least that he had gone about for license-holders. It cannot be said as a rule that Tadi from Sindi trees is ordinarily a source of income and that the mortgagor of land on which there are Tadi trees can claim any profits on account of Tadi which it is possible to tap from the trees, though he can claim the lease money if it is proved that the trees were actually leased in any year. It is not suggested that the plaintiff personally tapped the trees at any time or leased them to a third person for tapping.

I set aside the decree of the lower Appellate Court and remand the case for a fresh decision as to the annual profits with advertence to the above remarks. Costs in this Court will abide the result.

Decree set aside.

G. R. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2291 OF 1921.
August 3, 1922.
Present .—Mr. Justice Martineau.
MUHAMMAD HASSAN—DEFENDANT —APPELLANT
versus
SOHARA AND OTHERS—PLAINTIFFS —RESPONDENTS.

Registration Act (XVI of 1908), ss. 58, 60—Evidence Act (I of 1872), s. 79—Certificate of registration—Proof—Certificate, whether proof of execution—Co-sharers—Adverse possession.

The genuineness of a certificate of registration must be presumed under section 79 of the Evidence Act, and the evidence of the Registering Officer is not necessary to prove it. [p. 807, col. 1.]

Section 58 (*a*) of the Registration Act does not require a Registering Officer to endorse an admission of execution. Therefore, a certificate of registration is not, under section 60 (2) of the Act, evidence of such admission even though the admission is in fact mentioned in the endorsement. [p. 807, col. 2.]

Hori Lal v. *Thakur Bhagwan Bakhsh*, 34 Ind. Cas. 281 ; 19 O.C. 23, *Rajmangal Misir* v. *Mathura Dubain*, 30 Ind. Cas. 576; 13 A. L. J. 881 ; 38 A. 1 and *Salimatul Fatima* v. *Koylashpoti Narain Singh*, 17 C. 903; 8 Ind. Dec. (N. S.) 1147, approved of.

Ajudhia Prasad v. *Jagannath Bakhsh Singh*, 38 Ind. Cas. 605 ; 20 O. C. 18, *Thama* v. *Gobind Bilal*, 9 Bom L. R. 401 and *Nittyanund Kur* v. *Raj Bullubh Adyapurahit*, 25 W. R. 267, dissented from.

Where a co-sharer in possession of joint property has by an overt act shown to his co-sharers his intention of holding the property for himself alone, his possession does not cease to be adverse to the other co-sharers merely because the names of the latter are subsequently entered in the revenue papers as co-sharers. [p. 808, col. 1.]

Akbar v. *Tabu*, 22 Ind. Cas. 805; 45 P. R. 1914; 105 P. L. R. 1914 ; 61 P. W. R. 1914, followed.

Dalip Singh v. *Runnia*, 29 Ind. Cas. 348; 25 P.R. 1915; 20 P. L. R. 1916; 215 P. W. R. 1914, distinguished.

Obiter dictum :—The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord. [p. 808, col. 1.]

Second appeal from a decree of the District Judge, Multan, dated the 12th June 1921, affirming, except as regards

Khichiwala well, that of the Subordinate Judge, First Class, Muzaffargarh, dated the 8th March 1921.

Bakshi *Tek Chand*, for the Appellant.

Lala *Har Gopal*, for the Respondents.

JUDGMENT.—The land in suit was sold to defendant No. 3 in 1910 by Sohara and Piara, defendants Nos. 1 and 2, who are entered in the Revenue Records as joint owners with the plaintiffs. The latter sued for a declaration that they were the sole owners denying that Sohara and Piara had any rights in the land, and in the alternative they asked for a decree for pre-emption. The Subordinate Judge gave them a declaratory decree in respect of all the land except the land of the Khichiwala well, for which he gave a decree for pre-emption. The declaratory decree has been upheld by the District Judge, and defendant No. 3 has preferred a second appeal to this Court.

The plaintiffs and Sohara and Piara are the grandsons of Rai Khanan, the former owner of the land, the plaintiff's father, Fazal, having been Rai Khanan's son by one wife and Sohara's and Piara's father, Wasaya, his son by another wife. Rai Khanan died in 1870, and disputes then arose between the sons by the two wives, the plaintiff's father, Fazal, and his brother, Karam, contending that Wasaya and his brother, Jawaya, were illegitimate and had no right to succeed to the property. In 1871 the Deputy Commissioner decided that Wasaya and Jawaya were the legitimate sons of Rai Khanan, and ordered that all the four sons of Rai Khanan should be entered as owners. No change, however, was made in the records till 1878, when an order P-27 was passed by the *Tahsildar* of Alipur, which shows that Fazal and Karam again denied that Wasaya and Jawaya were the legitimate sons of the Rai Khanan, while Wasaya and Jwaya asserted their legitimacy and asked that they might be entered in the records as owners along with Fazal and Karam. The *Tahsildar* found that Wasaya and Jawaya were in possession of only two wells, and ordered that they should be entered as co-owners of the whole property but as being in possession of only two wells and not of the rest of the land. That order was carried out. The plaintiffs maintain that, notwithstanding the mutation effected in accordance with the *Tahsildar's* order of 1878, they remained in possession of the land in suit adversely to Jawaya and Wasaya, and they also allege that in 1897 Jwaya, Sohara and Piara executed a deed P-1 by which they agreed to take certain shares in the land of the Khichiwala well, Paluwala well and Tahliwala well in full satisfaction of their claim and gave up all rights in the remaining land.

The Courts below have found the execution of the deed P-1 to be proved, and the first question is whether there is evidence to support that finding. There is no evidence of the scribe or of any witness in whose presence the document was executed, but the Courts below rely on the statement of one Khuda Bakhsh, who says that the seal of one of the attesting witnesses to the deed is that of his father, Lal. This statement, however, would show only that Lal attested the deed and is no proof that Jawaya, Sohara and Piara executed it. Apart from Khuda Bakhsh's statement all that the plaintiffs have to rely on as proof of the execution is the Sub-Registrar's certificate of registration. The learned District Judge has held on the authority of *Ajudhia Prasad* v. *Jagannath Bakhsh Singh* (1) that that certificate is evidence of execution, and Mr. Har Gopal who, has argued the case for the respondents, has also referred to *Thama* v. *Govind Bilal* (2), and *Nityanund Kur* v. *Raj Ballubh Adyapurahit* (3). On the other hand, Mr. Tek Chand on behalf of the appellant has relied on *Hori Lal* v. *Thakur Bhagwan Bakhsh* (4), *Rajmangal Misir* v. *Mathura Dubain* (5), *Salimatul Fatima* v. *Koylashpoti Narain Singh* (6) and some older rulings, in which it was held that the certificate endorsed by the Registering Officer is not evidence of execution. He also urges that the Registering Officer has not been called as a witness and that he is not shown to be dead; but as to this it is

(1) 38 Ind. Cas. 605; 20 O. C. 18.
(2) 9 Bom. L. R. 401.
(3) 25 W. R. 267.
(4) 34 Ind. Cas. 281; 19 O. C. 23.
(5) 30 Ind. Cas. 576; 13 A. L. J. 881; 38 A. 1.
(6) 17 C. 903; 8 Ind. Dec. (N. S.) 1147.

sufficient to say that the Registering Officer's evidence is not necessary to prove the certificate, the genuineness of which is to be presumed under section 79 of the Evidence Act. The question is what the certificate proves.

Section 60 (2) of the Registration Act provides that the certificate shall be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned. The endorsements mentioned in section 59 are those made under sections 52 and 58. Section 52 requires only that the day, hour and the place of presentation and the signature of every person presenting a document for registration, shall be endorsed on the document at the time of presenting it. Section 58 requires the following particulars to be endorsed on the document, namely,—

(*a*) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(*b*) the signature and addition of every person examined in reference to such document under any of the provisions of the Act, and

(*c*) any payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

Now, it is noticeable that, while clause (*c*) requires the Registering Officer to endorse on the document any admission of receipt of consideration made in his presence in reference to the execution of the document, there is no similar provision in clause (*a*) requiring him to endorse an admission of the execution, but what he is required by clause (*a*) to endorse is the signature and addition of the person admitting the execution. There appears to me to be a clear distinction between endorsing the signature of the person who admits the execution and endorsing the fact of the admission being made. Ordinarily, no doubt, a Registering Officer does endorse on the document the fact that the executant admits its execution; but section 58 does not require him to do so, and I think that if it had been the intention of the Legislature to make it obligatory on the Registering Officer to endorse on the document an admission of execution made by the executant, there would have been a clear provision to this effect similar to the provision in clause (*c*) for endorsing an admission of the receipt of consideration. I hold, therefore, that, as the law does not require a Registering Officer to endorse on the document on admission of its execution by the executants, the certificate of registration is not evidence of such an admission under section 60 of the Registration Act even if the admission is in fact mentioned in the endorsement on the document. The certificate on P-1 is consequently under the law no proof that Jawaya, Sohara and Piara admitted having executed the document, and I find that the execution has not been proved.

The next question is, whether the plaintiff's possession has been adverse to defendants Nos. 1 and 2. The lower Appellate Court has found on the evidence that defendants Nos. 1 and 2 never succeeded in getting possession of their share of the peoperty left by Rai Khanan, and this finding of fact cannot be contested. Defendants Nos. 1 and 2 were no doubt co-sharers with the plaintiffs, and I do not appreciate the distinction which the learned District Judge seeks to draw when he says that it would be more correct to call them co-heirs than co-sharers, but the plaintiff's predecessors clearly denied the title of Jawaya and Wasaya, the predecessors of defendants Nos. 1 and 2, in 1871 after the death of Rai Khanan, and again in 1878 in the proceedings before the *Tahsildar*, and they asserted their exclusive rights to the property openly in the presence of Jawaya and Wasaya.

It is contended for the appellant that that assertoin was of no effect, because mutation was in spite of it effected in favour of Jawaya and Wasaya, but I do not agree with this contention. There is nothing to show that after the mutation the plaintiffs or their predecessors in any way changed

their attitude and recognised the title of Jawaya and Wasaya. They continued as before in exclusive possession of the land in suit, and I do not see how the nature of their possession, which became adverse when they denied the title of Jawaya and Wasaya, can be said to have been changed by the mere fact of those persons being recorded as co-sharers. *Akbar* v. *Tabu* (7), which is cited by Counsel for the respondents, is a case in point. In that case the owner in possession had by an overt act shown to his co-sharers that he wanted to hold the land for himself alone, and it was held that the mere retention by the Revenue Officers of the names of his co-sharers after the overt act had been done did not prevent limitation from running against them and that even a decree in their favour, unaccompanied by actual effective assertion of their rights and the taking of possession of those rights, would not help them.

Mr. Tek Chand has referred to *Dalip Singh* v. *Rannia* (8), a case in which the persons in possession of the land were lessees. They had at one time claimed to be proprietors, but on the objection of the landlords their claim had been rejected by the Revenue Officers. They remained in possession, but it was held that their possession had not become adverse and that they had not acquired proprietary rights. That case, however, is not in point, as the position of a tenant is not analogous to that of a co-sharer. The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord.

It is urged by Mr. Tek Chand that the greater portion of the land was *banjar*, as is remarked in the lower Appellate Court's judgment; but this fact does not appear to me to make any difference. The whole of the land in suit belonged to Rai Khanan, and there is no reason for treating that portion which is waste differently from the cultivated portion. The title to the former must go with the title to the latter and when it is found that the plaintiffs have by adverse possession acquired an exclusive title to the cultivated area they must also be held to have acquired an exclusive title to the waste.

Nothing has been said in argument with regard to grounds Nos. 5 and 8.

I agree with the lower Appellate Court that the plaintiffs have by adverse possession become sole owners of the land in suit, and that, therefore, defendants Nos. 1 and 2 were not competent to sell it to defendant No. 3. The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(7) 22 Ind. Cas. 805; 45 P. R. 1914; 105 P. L. R. 1914; 61 P. W. R. 1914.

(8) 29 Ind. Cas. 348; 25 P. R. 1915; 20 P. L. R. 1916; 215 P. W. R. 1914.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 215-B OF 1921.
November 23, 1922.
Present:—Mr. Prideaux, A. J. C.
SAMPAT AND ANOTHER—DEFENDANTS NOS. 3 AND 4—APPELLANTS
versus
MOTILAL AND OTHERS—PLAINTIFFS & DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Agreement to sell—Consideration paid—Vendee in possession—Registered deed not passed—Vendee, whether can resist vendor's suit for possession.

Where a person agrees to sell his property to another who is already in possession and who has paid the purchase-money but there is no registered deed of sale, the vendee can successfully resist a suit for possession by pleading that there has been in his favour an agreement to sell the property whether the time for filing a suit for specific performance has expired or not. [p. 810, col. 2.]

Venkatesh Damodar Mokashi v. *Mallappa Bhimappa Chikkalki*, 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B 722, followed.

Gangabisan v. *Tukaram*, 2 Ind. Cas. 244; 5 N. L. R. 70, *Jai Ram* v. *Balkrishnadas*, 3 N. L. R. 72, *Jeyram* v. *Ganpati*, 17 C. P. L. R. 19, cited.

Appeal against a decree of the First Additional District Judge, Akola, dated the 22nd March 1921 in Civil Appeal No. 250 of 1920.

Mr. *A. V. Khare*, for the Appellants.

Dr. *H. S. Gour* and Messrs. *G. G. Hatwaine* and *M. B. Niyogi*, for the Respondents.

JUDGMENT.—The present appeal is filed by defendants Nos. 1 and 2. Second Appeal No. 232-B of 1921 is filed by the plaintiff. Both appeals arise out of the same decision and this judgment will, therefore, dispose of the two.

The plaintiff's story is, that the father of the defendant No. 1 sold a half share in Survey No. 149 and a third share in Survey Nos. 64 and 65 of *Mouza* Goregaon Khurd, Taluq Akola, to the plaintiff's father, Hiralal, by a registered sale-deed dated 9th April 1886 (Exhibit P-20). Ganu, the father of defendant No. 1, also mortgaged his house with Hiralal in 1889. In May 1907 the defendant No. 1 and the father of the second defendant, Motiram, purchased the property from the plaintiff's father and Rs. 370 were paid in cash. No sale-deed was executed, but the plaintiff's father, the present defendant No. 4, returned the sale-deed of 1886 and the mortgage-deed of 1889 to the buyers and executed a receipt on 13th May 1907, giving the terms of the transaction. The only thing retained by the plaintiff's father was a fourth share in the mango trees of Survey No. 149. Possession was given to the defendants in pursuance of the agreement evidenced by the receipt. The plaintiff's father and uncle, who was a party to the sale, brought Suit No. 299 of 1907 on the file of the Subordinate Judge, Akola, asking for cancellation of the sale and for possession of the fields in dispute. That suit was dismissed. The present suit has been brought by the plaintiff claiming possession of the half share in Survey No. 149 and two-thirds share in Survey No. 64, contending that the defendants are not entitled to retain possession of this property, as their title is not supported by a registered deed of sale. It is also stated that as regards the plaintiff's own share his father and uncle did not sell on account of legal necessity. It is stated that the land in suit fell to the plaintiff's father's share in family partition. Defendant No.3 happens to be in possession of *pot hissa* No. 2 in Survey No. 149 and has, therefore, been added as a party. The plaintiff also claimed damages at Rs. 200 a year for three years commencing from 1917.

For the defence it was pleaded that as under the sale the defendants were put in possession of the property, being given the title-deed, their possession could not now be disturbed, the alienation being binding on the plaintiff as the transactions took place for the benefit of the plaintiff's family and in the ordinary course of business. The former suit is mentioned and it is pleaded that the present is *res judicata*. Mesne profits for the year 1916-17 were said to be Rs. 50 and in two succeeding years the crops were said to have failed. Defendant No. 3 admitted to be in possession of *pot hissa* No. 2 of Survey No. 149.

In the Trial Court the suit was dismissed, the Judge holding that the decision in the earlier case bound the plaintiff and that he could not question the sale of May 1907, as the defendants were put in possession in pursuance of the sale.

On appeal by the plaintiff, the lower Appellate Court holds that the sale could only have been made by a registered instrument, as the value of the property was over Rs 100; that the unregistered receipt (Exhibit D-4) was a mere agreement to purchase immoveable property in future, and that the defendants could not resist the plaintiff's claim for possession of the fields in suit, as no title passed to them in the absence of a registered sale-deed, and though the defendants could have set up by way of defence a right to claim specific performance, if that right subsisted, yet as in the present case time prevented such a suit being brought, the sale could not be pleaded in a suit for ejectment. The decision in the former case was held not to bar the present suit. Following the case of *Gangabisan* v. *Tukaram* (1) the Judge directed defendants Nos. 1 to 3 to put the plaintiff in possession of the land on receipt of Rs. 370 which was admittedly received by the plaintiff's father under the unregistered receipt on the 13th May 1907. As already stated, against that decision the present two appeals have been filed and I will deal with the defendants' appeal first

In the former suit in this Court it was held that the defendants were entitled to rely on the contract of sale, and the receipt itself and the endorsement on the original deed of sale by which the plaintiff's father got the property were admitted in evidence, action being taken under the Stamp Act to get them stamped. It has to be remembered that when that receipt and endorsement were executed the Transfer of Property Act was not in force in Berar and oral sales were permissible. Should however, there be a deed of sale over Rs 100 of value, it was essential that the document be registered. Here the

(1) 2 Ind. Cas. 244; 5 N. L. R. 70.

contention is, that the receipt and the endorsement constitute really a deed of sale and. therefore, as the documents were executed their non-registration is fatal to the defendants' case. I do not think I am bound by the decision come to by my learned predecessor in the former case. The translation of the receipt passed by Ganesh Prashad and Sheo Prashad states: "We have got a sale-deed for Rs. 150 executed by your father and a mortgage-deed for Rs. 100, dated 16th May 1889, and the date of the sale-deed is 9th April 1886. You have this day paid to us Rs. 370 in cash in respect of the sale-deed and the mortgage-deed through Vithaldas Aubaram Marwadi, and we have received that amount. There are four mango trees standing in Survey No. 149, we shall be taking one-fourth share of this together with the produce and trees. Nothing now remains to be received from you in respect of the sale-deed and the mortgage-deed. From this day we have ceased to have any right to the properties in respect of which the sale-deed and mortgage-deed were executed, except to the one-fourth share of the trees and the produce." Now, is this a sale-deed? It seems to me to recite a settlement as regards the former sale-deed and the mortgage-deed. By it the executants compounded their claim on the mortgage-deed and gave up their claim to the fields, retaining the four mango trees. It is in the handwriting of Ganesh Prashad himself. The endorsement on the sale-deed (Exhibit D-3) shows that the matter was settled. It seems to me that the receipt can be interpreted merely as a receipt for the money showing the settlement of the mortgage, a settlement in which the question of the fields was to be brought in. The document does not pretend, by itself, to convey title and I think it may be fairly argued that, there being no instrument of sale as regards the fields and the house, the question of registration does not arise, and an oral sale being permissible at that time complete title passed to the defendants. On the facts of the case there is no doubt. The evidence is conclusive. It is, that the plaintiff's father and uncle in 1907 sold the property which the plaintiff now seeks to recover. It is contended for the appellants-defendants that they can, even if their claim for specific performance is time-barred, use that claim as a shield against the present attack made on their title, while for the respondent-plaintiff *Jai Ram* v. *Balkrishnadas* (2) *Gangabishan* v. *Tukaram*, (1) and *Jeyram* v. *Ganpati* (3) are relied on. In a recent case, *Venkatesh Damodar Mokashi* v. *Mallappa Bhimappa Chikkalki* (4), it was held that where a person agrees to sell his property to another who is already in possession and who has paid the purchase money but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property, although the time has passed within which the vendee could have sued to get a sale-deed. The principle enunciated in that case can be applied here. It seems to me that when the vendee is in possession and has paid the purchase money, in a case of this nature he can plead this. It is a valid defence that the plaintiff has agreed to sell the property whether the time for filing a suit for specific performance has expired or not. It would be, in a case like the present, manifestly unfair to allow a plaintiff to oust the buyer. I, therefore, hold that, even assuming that the receipt and endorsement constitute the sale-deed inoperative because it was not registered, yet the defendants have a valid answer to the plaintiff's claim for possession. I agree with the lower Appellate Court that the question of *res judicata* does not arise. This disposes of the defendants' appeal.

Upon the finding I have come to, it is unnecessary to deal with grounds Nos. 1, 2 and 3 of the plaintiff's memorandum of appeal. Though not finding a place in the memorandum of appeal, it has been argued for the plaintiff that his father and uncle could not transfer his share in the fields. There was an issue on this point: "Whether the reconveyance was made in the course of the business of the family and is it binding on plaintiff," but no decision has been come to on it by the Courts below. The question is, whether the plaintiff as a member of a united family can sue to recover the whole of the property sold, leaving the defendants to bring a case for partition, or can sue to recover his own share in the property sold, his claim being based on the ground that there was no legal necessity for the transfer

(2) 3 N. L. R. 72.
(3) 17 C. P. L. R. 19.
(4) 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B. 722.

of his share. If the evidence shows that the transaction was on account of the family business of money-lending, then it is clear that the plea cannot avail him. It is admitted that the plaintiff's family were agriculturists and money-lenders and it has to be settled whether the settlement, the mortgage and the sale and the whole transaction taken as a whole was or was not one in the ordinary business of the family. As this question is not determined, I must remand the case for a finding on this point by the lower Appellate Court. A finding will be come to on the record and the case re-submitted by the 1st of November. Objections to the finding are to be filed by the 15th of November and the appeal will be heard on the 23rd of November next.

G. R. D. *Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1128 OF 1919.

June 30, 1922.

Present—Mr. Justice Harrison.

KANSHI RAM—DEFENDANT—APPELLANT

versus

SHAH NAWAZ AND OTHERS—PLAINTIFFS AND SULTAN MUHAMMAD AND ANOTHER DEFENDENTS--RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 4 (5)—Muqarridar, *whether tenant.*

A *muqarridar* of the Attock District is a tenant and not an inferior proprietor

Maya Das v. *Malik Aulia Khan*, 10 P. R. 1896 Rev., followed.

Gauhra v. *Har Bhaj*, 16 P. R. 1905; 41 P. L. R. 1905; 34 P. W. R. 1905, referred to.

Sawan Singh v. *Jafar Khan*, 13 Ind. Cas. 405; 39 P. R. 1912; 7 P. W. R. 1912; 13 P. L. R. 1912, distinguished.

Second appeal from a decree of the District Judge, Attock at Campbellpur, dated the 3rd February 1917, reversing that of the Munsif, First Class, Pindigheb, District Attock, dated the 4th April 1916.

Mr. *Bhagat Ram Puri*, for the Appellants.

Mr. *G. S. Salariya* for Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The only question argued in this appeal is whether a *muqarridar* of the Attock District is a tenant or an inferior proprietor, the facts being that two *muqarridars* had exchanged their houses in the *abadi* of the village and the plaintiff landlord had objected. Counsel relies on passages in *Maya Das* v. *Malik Aulia Khan* (1), *Gauhra* v. *Har Bhaj* (2) and *Sawan Singh* v. *Jafar Khan* (3), *Gauhra* v. *Har Bhaj* (2) relies on an earlier and exhaustive judgment of *Maya Das* v. *Malik Aulia Khan* (1) and merely says that it is enough to say that the *muqarridar's* status is fixed by custom only and that it is somewhat higher than that of occupancy tenants and somewhat lower than that of full proprietors. From this Counsel argues that inasmuch as he comes above all occupancy tenants the *muqarridar* must be classed as the lowest of the *adna maliks* or as a *malik qabza*. This, however, is not the view taken in the judgment which states the whole question exhaustively. At page 45* the position is laid down as follows :—

"That a *muqarridar* is a tenant and not an inferior proprietor is, I think, set beyond doubt by the quotations that I have already made. A tenant (*vide* section 4 (5) of the Tenancy Act) is a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person. A *muqarridar* holds the land which is subject to his right under the proprietor to whom he pays a fixed rent." The judgment goes on to hold that a *muqarridar* has special privileges which are denied to any occupancy tenant and that in claiming succession to a *muqarridar* it is not necessary to show that the common ancestor of the claimant and the deceased ever cultivated the land. *Sawan Singh* v. *Jafar Khan* (3) merely deals with the rights of the *malik qabza*, and it is, I think, absolutely clear that the *muqarridar* must be held as the chief of tenants, and not as the lowest of *malik qabza*, the essential difference being explained in the ruling from which I have quoted. I, therefore, dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 10 P. R. 1896 Rev

(2) 16 P. R. 1905; 41 P. L. R. 1905; 34 P. W. R. 1905.

(3) 13 Ind. Cas. 405; 39 P. R. 1912; 7 P. W. R. 1912; 13 P. L. R. 1912.

* Page of 10 P. R. 1896 (Rev.)—[*Ed.*].

RAHIMUDDIN *v.* SHAHBAZ KHAN.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 106-44 OF 1922.

January, 10, 1923.

Present:—Mr. Pipon, J. C.

RAHIMUDDIN AND ANOTHER—APPELLANTS

versus

SHAHBAZ KHAN—PLAINTIFF—RESPONDENT.

Custom—House tenants—Permanent right of residence—Hoti (Mardan)—Non-payment of rent—Long possession—Presumption—Open assertion of right of permanent residence—Appeal, second—Concurrent finding of fact.

In the village of Hoti, house tenants, who have built houses themselves, cannot be evicted from those houses by persons who have no other interest except ownership of the site. [p. 812, col. 1.]

Where a tenant is not able to show that the house occupied by him was built by his ancestors or re-built by himself, the mere fact that he has never paid rent or delivered manure or even rendered certain definite and special services, is not enough to establish a permanent right of residence in the house. In cases of this kind, mere length of possession cannot be held to operate as prescription and the presumption is that the tenant's possession is permissive. [p. 813, col. 1.]

There can be no question of any title to permanent tenancy adverse to the landlord unless such title is openly asserted and the right of the landlord to evict the tenant is definitely challenged. [p. 813, col. 1.]

A concurrent finding of fact should not be upset in second appeal without good reason. [p. 812, col. 2.]

Further appeal from an order of the Divisional Judge, Peshawar, dated the 26th June 1922, varying that of the Sub-Judge, Mardan, dated the 12th April 1922.

Sardar *Raja Singh*, for the Appellants.

ORDER.—In this case a decree for ejectment from a house situated in Hoti has been passed against the appellants on the suit of the plaintiff, a Pathan proprietor of the village, who is admittedly the ground landlord in respect of the site covered by the house. It may be taken as established by case law that in the village of Hoti house tenants who have built houses themselves, cannot be evicted from those houses by persons who have no other interest except ownership of the site. The appellants contended, in resisting the suit, that they and their ancestors had built the house in question. This is the first point argued on appeal. It is admitted, however, that, as shown by the settlement house enumeration of 1870, the original *kotha* in this house was built by the ancestors of the ground landlord and not by the ancestors of the defendants. The defendants, however, contended that they had re-built the house some 45 years ago. As regards this contention, we have the concurrent finding of two Courts that they did not re-build it, but that they have done nothing more than ordinary repairs. This finding of fact is challenged on appeal. But following the general practice of this Court, I should be slow to upset a concurrent finding of fact without good reason. I cannot see in this case any good reason to do so. The witnesses produced by the defendants to show that they had re-built the house were obviously worthless. The report of the Second Commissioner, which was accepted by both parties, shows that the value of the timber is only Rs. 111 and the value of the walls Rs. 25. I agree with the learned Divisional Judge in thinking that this argues that no extensive re-building operations were ever carried out. As he has pointed out, the building started as a *kacha* building and is now practically in the same condition. As against this, the learned Counsel for the appellants has urged that in the house enumeration papers of 1870 there was clearly only one *kotha* whereas there are now two. This fact does not seem to me to be of great importance or to prove definitely that the house was ever re-built as alleged. So far as regards this point, I agree with the finding of the two Courts below that the house must be treated as one built by the ground landlord and merely kept in repair by the tenants.

The appellants then fall back upon a separate position which is that, even if the house be regarded as originally built by the ground landlord, the tenants have nevertheless established a permanent right of residence as tenants by prescription including non-liability to ejectment. It appears to me that this is a position essentially difficult to maintain. Mere non-payment of rent is in these cases of very little value as showing any right to permanent residence. In many cases no actual rent is paid by tenants of this class except such incorporeal rent as is illustrated by a general position of dependency upon the ground landlord as one of the village proprietors. It is not sufficient

for a tenant to show that he has not actually delivered cash or even manure, or has not rendered certain definite and specified services, as his position as a temporary tenant may equally well be illustrated by the mere fact of recognizing a certain feudal dependency upon the landlord. I fail to see in cases of this kind how mere length of possession under such conditions can be held to operate as prescription. There can be no question of any title to permanent tenancy adverse to the landlord unless such a title is openly asserted, and the right of the landlord to evict the tenant is definitely challenged. There is a presumption in these cases that possession is permissive. It is argued by the learned Counsel for the appellants that the plaintiff himself corroborates the defendants' allegation by the fact that he attempted in his plaint to ascribe the tenancy to tenure of agricultural land by the defendants in the capacity of tenants, whereas, as a matter of fact, the defendants were never tenants of agricultural land owned by the plaintiff. The plaintiff indeed alleged that the defendants' possession was not more than 10 years old. I am unable to see, however, that the fact that the plaintiff exaggerated the strength of his own position in the plaint lends any colour to the view that the defendants were holding otherwise than as permissive tenants liable to eviction. As it is certain that the original house occupied by them was one built by the plaintiff's ancestor, they must be held to have come in originally as his tenants and dependents with the usual liability to eviction which attaches to a tenant who has not built the house himself. There is no evidence whatever to show that at any period their status became altered or that at any specified time they set up a title to a permanent right of residence as opposed to one dependent upon the will of the landlord. As their possession must be held to be permissive, the argument based upon prescription must fail.

On the above findings the suit, so far as regards possession of the house, must clearly succeed and I must maintain the finding of the lower Appellate Court. I, therefore, reject this appeal.

N. K. *Appeal rejected.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS NO. 430 OF 1921.
(CIVIL APPEAL NO. 933 OF 1921.)
June 27, 1922.

Present:—Mr. Justice Abdul Raoof.

NANAK CHAND AND OTHERS—PETITIONERS
versus
SAJJAD HUSSAIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal dismissed for default—Application for restoration—Sufficient cause.

When a Judge for any reason orders a case which is put down in the day's list for hearing to be put lower in the list he is not bound to give notice to the Counsel engaged in other cases.

Counsel are expected to be present within the compound of the Court if they have any case in the day's list.

Where an application for re-admission of an appeal which had been dismissed for default alleged that the petitioner's Counsel had been unable to appear owing to the fact that an earlier case was put lower in the list without notice to him and his case was called much earlier than was expected:

Held, that this was not sufficient cause within the meaning of O. XLI, r. 19 of the Civil Procedure Code for re-admission of the appeal.

Application under Order XLI. r. 19, Civil Procedure Code, on behalf of the appellants for restoration of Civil Appeal No. 933 of 1921.

Dr. *G. C. Narang*, for the Petitioners.

Dr. *Muhammad Iqbal*, for the Respondents.

ORDER.—This appeal was dismissed for want of prosecution on the 18th October 1921. This application is made for restoration mainly on the ground stated in paragraph (2) of the petition which runs as follows:—

"That an important case in which *Pandit* Sheo Narain and Mr. Noad, Government Advocate, were engaged was fixed at No. 3, but was without the consent of the appellant's Counsel and without notice to him, put down lower in the list, so that the above noted appeal was taken up much before the expected time in the absence of the petitioner's Counsel."

There is no rule laying down that where a Judge for any reason orders a case, which is before him for hearing, to be put down lower in the list he must give notice to the Counsel of the parties in other cases. On the other hand, Counsel are expected to be present within the compound of the Court

if they have got any case in the list. It is admitted that the Counsel for the appellants was not in the Court compound when case was called for hearing. Having regard to the present practice regulating the hearing of cases the plea put forward by the petitioner, if accepted, would bring the work of the Court to a standstill. On principle I must refuse to accept this application. I accordingly reject it with costs, as the opposite party is represented by Counsel and opposes the petition.

Z. K. *Application rejected.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2226 OF 1918.

July 15, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

THE FIRM SAWAN MAL-GOPI CHAND, THROUGH PHUNI SHAH, SON AND REPRESENTATIVE OF GOPI CHAND, DECEASED—PLAINTIFFS —APPELLANTS

versus

SHIV CHARAN DAS—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), s. 28—Transfer of shares—Articles of Association.

A share-holder in a Company has an absolute right to transfer his shares and the transfer is complete as soon as the parties sign the deed of transfer.

Bahadur Singh v. *Syam Sunder Tag*, 23 Ind. Cas. 900 ; 36 A. 365 ; 12 A. L. J. 629, referred to.

The Articles of Association of a Company provided that the Company could decline to register a transferee of its shares without assigning any reasons and that so long as a transferee's name was not registered the transferor would continue the owner of the shares ;

Held, that the Articles of Association of the Company were meant to safeguard the interests of the Company and could not affect the right of a share-holder to transfer his shares or determine the rights and liabilities of a share-holder and his transferee *inter se*. [p. 815, col. 2.]

Second appeal from a decree of the District Judge, Rawalpindi, dated the 20th April 1918, affirming that of the Subordinate Judge, Second Class, Rawalpindi, dated the 2nd July 1917.

Mr. *M. S. Bhagat*, for the Appellants.

Babu *M. N. Mukerji*, for the Respondent.

JUDGMENT.—A firm, known as Sawan Mal-Gopi Chand, sold 20 shares of the Lahore Bank, Limited, worth Rs. 2,000 to Shiv Charan Das, on the 12th or 13th September 1913. They had paid only Rs. 100 to the Bank on account of the said shares up to that time and a sum of Rs. 8 was due to them as divided. They sold the shares for Rs. 80 only and it was agreed that the defendant would be entitled to receive the dividend. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of Sawan Mal-Gopi Chand. In November 1913, however, the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of Sawan Mal-Gopi Chand as before. It may be mentioned that the sum of Rs. 80 had not been paid by the defendant at the time of the transfer. In October 1916 about three years after the above transaction, Sawan Mal-Gopi Chand brought a suit against Shiv Charan Das for the recovery of Rs. 80 as the price of the shares sold, and for establishing that the defendant was liable for any demands that the liquidators of the Bank may make from the person owning the said shares. The sui was described as one for specific performance of a contract. The defendant denied having entered into the contract and pleaded that the suit was barred by time and that the contract could not be specifically performed. The Trial Court held that the suit was within time, but that the transfer of the shares was not complete, because it required the sanction of the Bank and that, therefore, the contract could not be specifically enforced. The plaintiff appealed against this decision and the learned District Judge upheld the decision of the Court of

first instance and dismissed the appeal. The plaintiffs have now preferred a second appeal to this Court and we have heard Mr. M. S. Bhagat on their behalf and Mr. M. N. Mukerji for the respondent. It was noticed that the memorandum of appeal was insufficiently stamped and the appellants have made good the deficiency.

It has been found as a matter of fact that a deed of transfer selling the 20 shares was drawn up between the parties and handed over to Shiv Charan Das. He has failed to produce that deed in Court and the production of secondary evidence as to that deed has, therefore, been permitted and it is proved that the transfer did take place. The only point in dispute in the case is, whether in the eye of the law this transfer amounted to a complete transaction binding on the parties or not. Mr. Bhagat draws our attention to section 44 of the old Act VI of 1882, which corresponds to section 28 of the present Indian Companies Act VII of 1913, and provides that the shares of any member in a Company shall be moveable property, transferable in manner provided by the Articles of the Company. The Articles of Association of the Lahore Bank, Limited, are on the record, and provide for a transfer of the shares in the Company in a form prescribed in Article 30. He urges that the shares were transferred by his clients according to law and nothing further remained to be done by them. He relies on a note given under section 34 of Mr. Ranga Chariars' Indian Companies Act, which says that the transferor is only bound to execute a valid transfer and hand it to the transferee and that there is no warranty on his part that the Company will accept the transferee, nor is the transferor under any obligation to get the transfer registered. He argues, therefore, that, according to this test, the contract as between his clients and Shiv Charan Das was quite complete and, though it was open to the Company to refuse to register the name of the transferee in place of the transferor, such refusal could not render the sale incomplete. He goes on to say that if such refusal had taken place and the Bank had given any reasons for its refusal it would have been open to the defendant to apply to a Court and to have the reasons examined, or if he had paid the money and the Bank had refused to register his name, perhaps he could sue for its refund, but he could not say that the contract was in any way incomplete. Counsel refers to *Bahadur Singh* v. *Syam Sunder Tag* (1) which is a case where certain shares in a Company were sold by *A* to *B*, who, instead of paying the price in cash, executed a bond for it in favour of *A*. The transferee then applied for registration and the transfer was refused by a person who described himself as the Chief Manager of the Company, but was one apparently who had no authority to refuse registration of the transferor's shares, under the Articles of Association. It was held in that case that as the said Chief Manager's refusal to register this transfer was improper, it could not be said that the Company had refused to register the shares, and *B* was, therefore, held to be liable on the bond he had executed for th price of the shares. It is urged that the present case is stronger than the Allahabad case referred to above, because here the Bank has never refused to register the transfer and would probably have registered it, if the transferee had promptly presented an application for the substitution of his name for the transferor. Mr. Mukerji in reply lays stress on the terms of Articles 28 and 29 of the Articles of Association of the Lahore Bank, Limited, which provide that the Company may decline to register a transfer of shares without assigning any reasons therefor, and that the transferor shall be deemed to remain a holder of such shares until the name of the transferee is entered in the register in respect thereof. He contends that, under such circumstances, it could not be said that the ownership of the shares had completely passed to the defendant, simply because the deed of transfer was executed. It is, however, obvious that the Articles above alluded to are meant to safeguard the interests of the Banking Company and to give it an occasion to reject any transferee of whom it disapproves, but they are not meant to affect either the right of a shareholder to transfer his shares, which is absolute, nor can they d termine the rights and liabilities of a share-holder and his transferee *inter se*. The Bank has never refused

(1) 23 Ind. Cas. 900; 36 A. 365; 12 A. L. J. 629.

to register the shares and, what is more, the defendant has not given the Company any opportunity of refusing to register this transfer or registering it.

Under these circumstances the defendant can hardly be allowed to take advantage of his own omission to present the deed of transfer promptly to the Bank and to say that because it was not presented to the Bank, therefore, the contract be ween him and the plaintiff's firm became a nullity. We hold that the contract was complete on the day that the deed of transfer was signed by both parties and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the 20 shares in the Company in his place, with all the advantages and disadvantages attached to that status. If all had gone well he would have secured a dividend of Rs. 8 to-begin with, and might have got further dividends if the Company had continued, but as the Company has come to grief, he incurs the liabilities which his predecessor-in-interest would have incurred regarding these shares. We think the suit was not properly described as one for specific performance of a contract. The contract was complete and no specific performance can be ordered under the circumstances but we grant the plaintiffs a decree for Rs. 80 which the defendant was bound to pay as soon as the deed of transfer was handed over to him, and hold that by virtue of the transfer that he obtained from Sawan Mal-Gopi Chand, the defendant became the owner of the 20 shares standing in the name of the latter in the books of the Lahore Bank, Limited, with all the rights and obligations attached to those shares.

We, therefore, accept this appeal with costs.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 6 OF 1922,

December 4, 1922.

Present:—Mr. Batten, J. C.

GOVIND—NON-APPLICANT—APPELLANT

versus

ANANT—APPLICANT—RESPONDENT.

Probate and Administration Act (V of 1881), ss 56, 57—"Fixed", meaning of—Railway employee stationed for twenty years at one place—Place of residence, whether fixed—Deceased, leaving moveable property—Application for Probate—Jurisdiction

The word "fixed" in section 56 of the Probate and Administration Act does not mean "permanent." [p. 817, col. 1.]

An employee of a Railway Company had, for twenty years prior to his death, been stationed at a station on the Railway and resided there in Railway quarters:

Held, that he had a fixed abode within the meaning of section 56 of the Probate and Administration Act at the station, although he was liable to be transferred from there to another station. [p. 817, col. 1.]

A District Judge has full discretion to entertain an application for Probate if the deceased has left some moveable property within his jurisdiction. [p. 817, col. 1.]

Appeal from a decree of the District Judge, Saugore, in Miscellaneous Judicial Case No. 11 of 1921, decided on the 20th October 1921.

Mr. *M. B. Kinkhede*, R. B., for the Appellant.

Mr. G. I. Subhedar, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge, Saugor, granting Probate of a nuncupative Will made by Chintaman Krishna Gangpule to Anant Hari Bhide. The deceased Chintaman was a Railway Guard, stationed at Bina, and the applicant Anant Hari as Railway servant was admittedly a very great friend of his for the last 20 years; the non-applicant-appellant is the deceased's nephew who resides at Bomaby.

The first ground of appeal is, that the District Judge, Saugore, had no jurisdiction to entertain the application for Probate. Chintaman had been stationed as a Railway Guard at Bina for 20 years where he occupied quarters in the Railway lines. When he died he was in possession of the furniture of his quarters. The District Judge has held that, on the date of his death, Chintaman had no fixed place of abode at Bina, because he was liable to be trans-

ferred. I am unable to agree with the District Judge; the deceased's residence had been fixed at Bina for 20 years. "Fixed" cannot possibly mean "permanent," because no one in this world can be said to have a permanent place of abode; every body is liable to be transferred from his place of abode or to transfer himself to another place of residence. It is clearly a case where Chintaman's fixed abode within the meaning of section 56 of the Probate and Administration Act was at Bina where he died, and the District Judge had no power under section 57 of the Probate and Administration Act to refuse to entertain the application. Moreover, apart from the question of fixed abode, he had, under that section, full discretion to entertain the application, because the deceased had left some moveable property at Bina and the discretion was wisely exercised because all the witnesses about the Will resided at Bina. This ground of appeal, therefore, fails.

The remaining grounds of appeal call in question the finding of the District Judge that the nuncupative Will had been proved. This is not a case of disinheritance; the deceased's heirs are his sons and he has not disinherited them. The nuncupative Will was only a Will in the sense that he appointed Anant Hari to be the guardian of the person and property of his minor sons in preference to the non-applicant, his nephew. Neither the nephew nor the applicant could possibly gain any personal advantage. It has been proved beyond doubt that the person who was telegraphed for when the deceased was seriously ill was Anant Hari, which strongly supports the fact that he was the deceased's close friend; the nephew was not telegraphed for. The three witnesses who speak of the nuncupative Will were undoubtedly present at the death-bed of Chintaman, and I can see no possible reason for disbelieving their evidence. They agree in all important points, and the only conclusion that can be come to is, that the deceased expressed a wish that Anant Hari should take charge of the children and their property.

There is one somewhat unsatisfactory feature of the case, namely, that when the nephew first came to the place the witnesses made no mention to him of the nuncupative Will, but one of the witnesses explains this satisfactorily by saying that they were unaware that the nephew was not acting in concert with Anant Hari. I agree with the District Judge that the evidence of the witnesses must be accepted as in the main true, There is nothing improbable in the deceased appointing his close friend to be the guardian of his children and their property.

The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 278 OF 1922.
March 31, 1922.
Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.
Haji BAKHSH ILAHI—PETITIONER
versus
Haji ABDUL RAHMAN AND ANOTHER —RESPONDENTS.

Arbitration Act (IX of 1899), ss. 4, 8 (2)—Civil Procedure Code (Act V of 1908), s. 47—Compromise not embodied in decree—Arbitration—Reference—Order under s. 8 (2) of Act—Appeal.

Parties to a suit for accounts entered into a compromise, whereby they agreed to a preliminary decree being passed in accordance with the compromise. The petition of compromise also provided that one of the parties would have a certain share in the profits of a particular contract and that the profits would be determined by the certificate of a firm of Chartered Accountants. It was further provided that any dispute relating to this share of the profits would be referred to arbitration under the provisions of the Arbitration Act. A preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsoever was made of the clause relating to the sharing of the profits of the contract, as the compromise expressly provided that this matter would be entirely distinct and separate from the rest of the compromise. When the accounts of this contract were about to be audited the party entitled to a share in its profits insisted that it had a right to be represented at the audit. The other party denied this right; whereupon the former claimed to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under section 8 (2) of the Arbitration Act. The District Judge held that there was a valid submission to arbitration and made an order under the section;

Held, (1) that it could not be said that the proceedings related to the execution of a decree, within the meaning of section 47 of the Civil Pro-

cedure Code, inasmuch as the decree passed in the suit for accounts did not relate to the matter now in dispute ; [p. 819, col. 2.]

(2) that, therefore, no appeal lay from the order of the District Judge ; [p. 819, col. 2.]

(3) that the petition of compromise being signed by both parties amounted to a valid submission to arbitration within the meaning of section 4 of the Arbitration Act ; [p. 819, col. 2.]

(4) that the clause relating to the matter in dispute not having been embodied in the decree in the previous suit, advantage could still be taken of it ; [p. 820, col. 1.]

(5) that a dispute had arisen relating to the matters dealt with by this clause of the compromise and the order of the District Judge was not, therefore, *ultra vires*. [p. 820, col. 1.]

The definition of submission in section 4 of the Arbitration Act covers an agreement to refer future disputes as well as the reference, the reference amounting to delegation of authority to the arbitrator. [p. 820, col. 1.]

Dhanpatmal Diwanchand v. *Kishinlal Indraj*, 35 Ind. Cas. 536 ; 10 S. L. R. 1, relied upon.

Petition for revision of an order of the District Judge, Delhi, dated the 31st July 1921.

Bakhshi *Tek Chand* and Mr. *Ghulam Rasul*, for the Petitioner.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—This appeal has arisen out of an application filed by *Haji* Abdul Rahman and Ata-ul-Rahman against *Haji* Bakhsh Ilahi, C. I. E., of Delhi under section 8 (2) of the Indian Arbitration Act, IX of 1899. The circumstances which led to this application being made are briefly these. *Haji* Bakhsh Elahi, together with the petitioners and other relatives of his, was carrying on business in partnership. Disputes arose between the parties which resulted in a suit being filed by one of the partners, *Haji* Muhammad Taqi, against the other partners in which it was prayed that the partnership be dissolved and accounts taken. During the course of those proceedings a petition was put in, signed by the present petitioners as well as all the other parties to that suit, and in this petition a compromise was detailed. Paragraph 2 of that petition dealt with the matter now in dispute and in paragraph 3 of that petition, it was specifically stated that this was to be regarded as an *entirely separate matter* from the matters referred to in paragraph 4 to the end. Finally, it was prayed that a preliminary decree be passed in the terms of this petition. Accordingly, the Court passed the preliminary decree and to it attached this petition in its entirety. The preliminary decree was followed by a final decree which dealt with the dissolution of the partnership and rendition of the past accounts. No reference whatever was made to the subject-matter of paragraph 2 of that petition.

Now, sub-clauses (*e*) and (*f*) of the second paragraph of that petition referred to a certain contract between *Haji* Bakhsh Elahi, C. I. E., and the Imperial Tobacco, Co., and it was agreed that *Haji* Abdul Rahman and Ata-ul-Rahman, the present petitioners, were to be entitled to a three-annas ninepies share in the profits arising out of the said tobacco contract. The amount was to be ascertained for each year ending on the 31st day of December, three months' grace being allowed for the payment. It was also agreed that during the continuance of the said contract the present petitioners would not directly or indirectly carry on or be interested in any business of a nature competitive with that carried on by the other parties to that suit. It was further agreed that " any disputes arising in connection with the said share of such profits shall, if the parties are unable to settle the same, be referred to arbitration in accordance with the provisions of the Indian Arbitration Act of 1899." In sub-clause (*f*) it was laid down that the accounts relating to that tobacco contract were to be kept separate and were to be audited annually on notice to the present petitioners by a firm of European Chartered Accountants, whose certificate as to the profits was to be regarded as final and binding.

Now, the first payment due under this arrangement, was payable on the 31st of December 1920, and on the 7th of February 1921. *Haji* Abdul Rahman, etc., wrote to *Haji* Bakhsh Elahi asking for the amount. On the 11th of February 1921, *Haji* Bakhsh Elahi replied saying that the accounts had not been completed for the year and notifying the fact that Messrs. Meugens Peat and Co., Chartered Accountants, had been appointed to audit the accounts. *Haji* Abdul Rahman then, on the 17th of February, replied asking to be informed of the date when the audit was to commence, as they wished to be represented at the audit. *Haji* Bakhsh Elahi replied to this, saying that they were not entitled to be present, and on the

26th of February 1921, *Haji* Abdul Rahman at once claimed to be entitled to refer the dispute to arbitration and nominated an arbitrator. Correspondence then ensued and, ultimately, on the 29th of March 1921, *Haji* Abdul Rahman and Ata-ul-Rahman filed this present application under section 8 (2) of the Arbitration Act. *Haji* Bakhsh Elahi opposed this application on various grounds. The learned District Judge settled nine issues arising out of the pleadings and decided that a dispute had arisen and that there had been a valid submission to arbitration within the meaning of sections 4 and 8 of the Arbitration Act and directed that the parties were to nominate their arbitrators by a fixed date, *i.e.*, 19th of August 1921. Against this order *Haji* Bakhsh Elahi has come up to this Court through Mr. Tek Chand.

It has been contended by Mr. Tek Chand that an appeal is competent, inasmuch as these proceedings related to the execution of a decree, and, therefore, fell within the purview of section 47, Civil Procedure Code. In the alternative, he contended that if an appeal was not competent the matter should be treated as a revision. Mr. Moti Sagar, for the respondent, contended that no appeal was competent inasmuch as the present proceedings did not fall within the purview of section 47, Civil Procedure Code, and, further, an order of this nature should not be examined in revision. The first point to decide is whether the proceedings fall within the purview of section 47. Mr. Tek Chand contended that the petition filed in the suit for accounts was a compromise which had been given effect to by the Court and embodied in the decree, which *qua* the condition of the past accounts of the partnership was a preliminary decree which in due course was made final. Inasmuch as the petition or compromise in its entirety had been attached to that preliminary decree as a part of it, he contended that the compromise *qua* this part of the dispute merged in the preliminary decree and that, therefore, either by its omission from the final decree this portion of the compromise was rejected by the Court or the preliminary decree was preliminary only *qua* the past accounts and was a final decree in relation to paragraph 2 (*e*) and (*f*) of the compromise. He, therefore, contended that any disputes that might arise under paragraph 2 (*e*) and (*f*) were to be decided by a Court executing that decree, being a matter relating to the execution of the decree.

Mr. Moti Sagar, on the other hand, contended that the preliminary decree in which this compromise was embodied *qua* paragraph 2 (*e*) and (*f*), even if a decree, was only a declaratory decree, declaring the rights of the parties and was incapable of execution. He contended, therefore, that any infringement of those rights, as declared by that decree, would give rise to a cause of action entitling the injured party either to bring a suit or to take action under the Indian Arbitration Act, but that the decree itself could not be executed. After a careful consideration of the arguments advanced on both sides we are of opinion that the contention of Mr. Moti Sagar must prevail and that the question now before the Court is not one relating to the execution of any decree and that, therefore, section 47, Civil Procedure Code has no application and no appeal is competent.

Next comes the question whether we should take up this matter on the revision side. As to this, Mr. Tek Chand contended that there was no valid submission within the meaning of section 4 of the Arbitration Act. He contended that the petition or compromise when it was embodied in the decree, declaratory or preliminary, ceased to have an independent existence and that the rights of the parties were henceforward regulated by the terms of that decree, and that, as the parties had not signed the decree, there was no agreement in writing signed by the parties to refer any future disputes to arbitration and that, therefore, the Court below had no jurisdiction to entertain the application under section 8 (2) of the Arbitration Act. On the other hand, Mr. Moti Sagar contended that the compromise having duly been signed by the parties and filed in Court amounted to a valid submission which was not affected by its subsequent incorporation in the preliminary decree and that on the arising of any dispute the parties could take advantage of the provisions to refer to arbitration. Mr. Tek Chand also contended that even under the Arbitration Act when an agreement had been entered into to refer future disputes, before a valid reference to arbitration could be made,

it was necessary for both sides to again agree to make a reference relating to the actual dispute. In this view, however, we are unable to agree. The definition of submission in section 4 of the Arbitration Act appears to us to cover a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. In this view we are supported by *Dhanpatmal Diwanchand* v. *Kishinlal Indraj* (1). The question remains whether the incorporation of the compromise in its entirety in the preliminary decree passed in the suit for accounts affects the agreement to refer so as to make its operation cease. The point is one not free from difficulty and no direct authority has been brought to our notice.

After a careful consideration of the circumstances which led to the passing of that preliminary decree it seems to us that it was not intended to pass any decree relating to the matters embodied in paragraph 2 (*e*) and (*f*) of the compromise. It is obvious that no preliminary decree could have been passed affecting these matters. The petition itself prayed for the passing of the preliminary decree. "In paragraph 3 of that petition it was specifically declared that the matters referred to in paragraph 2 were to be regarded as entirely separate from the matters to be referred to in the subsequent paragraph 3. Instead of embodying in the preliminary decree only those portions of the petition or compromise which related to the past accounts, the Court passing the decree merely noted that the petition was to be attached to the decree sheet as a part of it. We, therefore, think that as a matter of fact the matters now in dispute between the parties were never embodied in any decree and that, therefore, the agreement in paragraph 2 (*e*) to refer to arbitration was one of which advantage could be taken by either party. It seems to us that disputes have arisen between the parties relating to the matters involved in (*e*) and (*f*) of paragraph 2 and that, therefore, the order of the Court below cannot be held to be *ultra vires*.

In our opinion the District Judge had jurisdiction to deal with the application and we do not think we would be justified in interfering with his order in revision.

(1) 35 Ind. Cas. 536; 10 S. L. R. 1.

We, therefore, dismiss the petition, but in the circumstances leave the parties to bear their own costs in this Court.

Z. K. *Petition dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 205 OF 1922.

June 12, 1922.

Present:—Mr. Justice Campbell.

Mussammat HUSSA'N', THROUGH MALAWA RAM—PLAINTIFF—APPELLANT

versus

Musammat SUNARAN—DEFENDANT RESPONDENT.

Muhammadan Law—Widow—Possession in lieu of dower.

A Muhammadan widow whose dower remains unpaid is entitled to retain possession of the properties of her husband which she obtained lawfully without force or fraud even though without the consent of, or any agreement with, the husband or his heirs. [p. 822, col. 1.]

Amanat-un-nissa v. *Bashir-un-nissa*, 17 A. 77; A. W. N. (1895) 7; 8 Ind. Dec. (N. S.) 374, *Hamira Bibi* v. *Zubaida Bibi*, 36 Ind. Cas. 87; 38 A. 581 at p. 588; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 294 (P. C.), *Bebee Bachun* v. *Sheikh Hamid Hossein*, 14 M. I. A. 377; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828, *Muhammad Karim-Ullah Khan* v. *Amani Begam*, 17 A. 93; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 385, *Ramzan Ali Khan* v. *Asghari Begam*, 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614, referred to.

Second appeal from a decree of Additional District Judge, Jullundur, dated the 5th February 1921, varying that of the Junior Subordinate Judge, Jullundur, dated the 13th May 1920.

Lala *Fakir Chand*, for the Appellant.

Lala *Badri Das*, R. B., for the Respondent.

JUDGMENT.—The suit out of which this second appeal arises was by the sister of RahmatAli Shah, deceased, against his widow for possession by partition of half of a house owned by Rahmat Ali Shah. The suit was resisted on the ground that the widow was entitled to retain possession until payment of her dower of Rs. 5,000. The First Court decreed the suit, but the finding was reversed on appeal and the suit was dismissed by the District Judge.

The following are the learned District Judge's findings.—The defendant widow's dower was fixed at Rs. 5,000 and was not

paid. She has been in possession of the house ever since the death of her husband who was the owner of it. The house was purchased by Rahmat Ali Shah in the name of a third person, Dhanpat Rai. After Rahmat Ali Shah's death Dhanpat Rai executed a deed declaring that Rahmat Ali Shah was the actual purchaser. The contention by the plaintiff that after Rahmat Ali Shah's death Dhanpat Rai had put the plaintiff and the defendant in possession of the house jointly was not proved.

In these circumstances the learned District Judge held that the defendant was entitled to retain possession of the house until her dower-debt was paid and he referred to paragraph 162 of Wilson's Anglo-Muhammadan Law, the first part of which reads as follows:—" When a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled against the other heirs of her husband to retain such possession until her dower-debt is paid."

The question in second appeal is whether the learned District Judge has interpreted and applied correctly the provisions of Muhammadan Law relating to a widow's lien on her deceased husband's property as a creditor for dower.

Counsel for the plaintiff-appellant relies upon a decision published as *Amanat-un-nissa* v. *Bashir-un-nissa* (1) and upon a pronouncement by their Lordships of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (2) on the law of dower. The first named authority undoubtedly is in favour of the plaintiff, but it has been dissented from in several subsequent rulings as will be shown presently. In *Amanat-un-nissa* v. *Bashir-un-nissa* (1), a previous Privy Council judgment, *Bebee Bachun* v. *Sheikh Hamid Hossein* (3), which is the basis of what has been quoted above from paragraph 162 of Wilson's Anglo-Muhammadan Law was interpreted to mean that if Muhammadan widow, entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs, if property to the possession of which they and she in respect of her share in the inheritance are entitled.

In *Hamira Bibi* v. *Zubaida Bibi* (2) the precise question now under consideration was not in issue but in a paragraph dealing with the Muhammadan Law on dower it was stated. " The dower ranks as a debt and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied."

In a subsequent judgment by the same Judges who delivered I. L. R 17 All. 77 [*Amanat-un-nissa* v. *Bashir-un-Nissa* (1)] reported at page 93 of the same Volume, [*Muhammad Karim-Ullah Khan* v. *Amani Begam* (4)] there was a slight modification of the previous attitude. It was held that when a Muhammadan widow has been in undisturbed possession for some time of her late husband's property and dower is due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that she was not let into possession by her husband in lieu of dower or did not obtain such possession with the consent or by the acquiescence of the heirs.

The plaintiff-appellant's case, however, depends upon whether *Amanat-un-nissa* v. *Bashir-un-nissa* (1) is to be followed, there being no evidence in the present case of any express disposition in defendant's favour by her husband. In a subsequent Allahabad case, *Ramzan Ali Khan* v. *Asghari*

(1) 17 A. 77; A. W. N. (1895) 7; 8 Ind. Dec. (N. S.) 374.

(2) 36 Ind. Cas. 87; 38 A. 581 at p. 588; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 294 (P. C.).

(3) 14 M. I. A. 377; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 53; 3 Sar. P. C. J. 39; 20 E. R. 828.

(4) 17 A. 93; A. W. N. (1895) 16; 8 Ind. Dec. (N. S.) 385.

Begam (5) it was dissented from and the latter ruling appears to have been followed subsequently by the Allahabad Court. It was held there not to be correct to say that unless a Muhammadan widow has obtained possession either by contract with her husband or with the consent of the heirs, she cannot be lawfully in possession so as to give her a right to retain possession until her dower-debt is paid, and one of the learned Judges remarked that the balance of authority was in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate, is entitled to hold that estate against the other heirs until her claim to dower is satisfied, without being asked to show either consent on their part, or on that of the deceased husband.

In *Sabjan Bewa* v. *Ansar-ud-din* (6), *Amanat-un-nissa* v. *Bashir-un-nissa* (1), was again dissented from. The learned Judges were unable to adopt as a correct exposition of the law the view that the possession of the widow cannot be maintained as against the heirs, unless it is established that such possession was obtained by agreement with either husband or his heirs, and it was remarked that in coming to this conclusion the Judges were adhering to what had been recognised as the rule on the subject in that Court.

Finally, the subject was discussed at great length in *Beeju Bee* v. *Moorthiya Sahib* (7) which reviewed a number of authorities and ruled that a Muhammadan widow, whose dower remains unpaid, is entitled to retain possession of the properties of her husband which she obtained lawfully without force or fraud but without the consent of, or any agreement with, the husband or his heirs.

The weight of authority, therefore, is in favour of the finding of the learned District Judge. There is no suggestion that the present defendant came into possession of the house in suit by any unlawful act or by force or fraud. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(5) 6 Ind Cas. 495; 32 A. 503; 7 A. L. J. 614.
(6) 9 Ind. Cas. 1031; 38 C. 475; 13 C. L. J. 427.
(7) 53 Ind. Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150; (1920) M. W. N. 26 (P. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2714 OF 1921.

June 20, 1922.

Present:—Mr. Justice Scott-Smith.

AZIM KHAN—PLAINTIFF—APPELLANT

versus

KARIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 12, 144—Execution of decree—Sale of house occupied by non-proprietor—Suit by proprietors to recover site—Limitation.

Article 12 of Sch. I to the Limitation Act applies only to the parties to an auction-sale. [p. 823, col. 1.]

Where the plaintiff in a suit for possession of property sold in execution of a decree, is the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties he is entitled to ignore the sale altogether, and his suit is governed by Art. 144 and not by Art. 12 of Schedule I, to the Limitation Act. [p. 823, col. 1.]

Saif-ud-din v. *Hamsraj*, 11 Ind. Cas. 76; 15 P. R. 1912; 203 P. L. R. 1911; 252 P. W. R. 1911, followed.

The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void. [p. 823, col. 1.]

A suit by the proprietors to recover possession of a site sold in execution of a decree against a non-proprietor, to which the plaintiffs were not parties would, therefore, be governed by Art. 144 and not by Art. 12 of Schedule I to the Limitation Act. [p. 823, col. 1.]

Second appeal from a decree of the District Judge, Attock, at Campbellpur, dated the 14th October 1921, affirming that of the Munsif, First Class, Campbellpur, dated the 28th February 1921.

Mr. *B. D. Qureshi*, for the Appellants.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge, Attock, dismissing the plaintiff's suit for possession of a site in Bhangi village on the ground that it was barred by time. The site together with the house on it was sold by public auction in execution of a decree against Karim, a non-proprietary resident, on the 28th July 1910. The sale-certificate was granted on the 4th October of the same year. The present suit was lodged on the 16th November 1918 by the plaintiff as representing the proprietary body of the village on the allegation that Karim had a saleable interest in the materials of his house only and not in the site in dispute. Both the lower Courts held that the suit

was barred by time under Art. 120 of the First Schedule of the Limitation Act. The lower Appellate Court begins by saying that the sale of the site in dispute as the property of Karim was not void, but voidable at the instance of the proprietary body. I am not able to agree with this proposition. The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void and not voidable. The sale of the site of a residential house may perhaps be voidable and not void, but that is quite another matter. If *A*'s property is sold by an unauthorised person without his consent, such sale is surely *ab initio* void and not merely voidable. It has been suggested by Counsel for the respondents that Art. 12 of the First Schedule of the Indian Limitation Act is applicable. That Article provides for the setting aside of a sale in execution of a decree of a Civil Court, but there is ample authority for the proposition that the parties alone are bound by that Article, (see the commentary in Mr. Rattomji's Law of Limitation, III Edition, page 265). In *Saif-ud-din* v. *Hansraj* (1) it was held that where the plaintiff in a suit for possession of property sold in execution of a decree, was the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties, and was consequently in a position to ignore the sale altogether, Art. 12 of the Limitation Act has no application and the suit falls under Art. 144. Again, Art. 91 of the First Schedule is not applicable. It provides for the cancellation or setting aside of an instrument not otherwise provided for. Here, again, the Article binds only the parties to the instrument and not strangers. I, therefore, hold that the present suit is governed by Art. 144 of the First Schedule and is not barred by time.

It appears that Shah Dad, one of the vendees and a defendant in the Trial Court, died even before the appeal was filed in the lower Appellate Court, but was not made a party thereto. His two sons, Razi Khan and Bazid Khan, are also vendees and parties to the suit, and Mr. Kureshi says that they are his sole legal representatives. No objection was made in the lower Appellate Court to the effect that he had any other representatives besides these two sons, and Mr. Bhagat, on behalf of the respondents, is unable to say that any other representative exists. No question of abatement, therefore, arises. The appeal is accepted and the order of the lower Appellate Court being set aside, the case is remanded for decision on the merits under O. XLI, r. 23, Civil Procedure Code. Stamps in this and in the lower Appellate Court will be refunded and other costs will be costs in the case.

Z. K. *Appeal accepted.*

(1) 11 Ind. Cas. 76; 15 P. R. 1912; 203 P. L. R. 1911; 252 P. W. R. 1911.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2598 OF 1921.

June 12, 1922.

Present:—Mr. Justice Brasher.

MISRI KHAN—PLAINTIFF—APPELLANT

versus

SHAHJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (*I of* 1913), *s.* 30—*Property sold in possession of vendee before sale—Physical possession—Limitation.*

Where prior to a sale the vendee is in physical possession of the property sold as a tenant physical possession of the property under the sale cannot be given to him *under the sale* within the meaning of Art. 30 of the Punjab Pre-emption Act of 1913, and the property must be treated as not admitting of physical possession being given. In such a case limitation begins to run from the date of attestation of mutation. [p. 824, col. 1.]

Second appeal from a decree of the District Judge, Rawalpindi, dated the 1st July 1921, reversing that of the Munsif, Second Class, Rawalpindi, dated the 28th July 1920.

Mr. *Kanwar Narain* for the Appellant.

Mr. *Mukund Lal Puri*, for the Respondents.

JUDGMENT.—The only question raised in this appeal is one of limitation. The plaintiff sued for pre-emption in respect of an oral sale, the vendee having been at the time of the sale a tenant under the vendor.

The mutation relating to the sale was entered up on December 24th, 1918, and the mutation was sanctioned on December 29th, 1918. The learned District Judge has found that the oral sale took place about a month before the mutation was entered, *i.e.*, about November 24th, 1918. Taking this as the starting point for limitation he has held that the suit is barred by time, it being admitted that the suit would be within limitation if time is to be reckoned from the date of the mutation. For the appellant the finding that the sale took place prior to the date of the entry of the mutation is challenged and it is contended that Art. 10 does not apply at all, but that even if this Article is to be applied the vendee did not take possession under the sale until the mutation was sanctioned.

The finding that the sale took place a month prior to the date of the mutation entry is a finding of fact which has some evidence to support it, and I cannot question this finding in second appeal.

The question whether Art. 10 of the Limitation Act is applicable to a case of this kind is not free from difficulty, and no authority directly in point has been cited. Prior to the sale the vendee was already in physical possession of the property sold as a tenant, and no physical possession could be given to him. I am disposed to hold that the subject of the sale did not admit of physical possession; but, if Art. 10 is to be applied, then limitation runs from the date of taking physical possession under the sale, and I do not see how the character of the vendee's possession changed on the date when the sale was effected. The vendee cannot, I think, be said to have taken possession under the sale until his new status was publicly proclaimed at the time of the mutation, and, therefore, whether Art. 10 of the Limitation Act or section 30 of the Punjab Pre-emption Act is to be applied the date from which limitation runs is the date when the mutation was attested.

In my opinion, therefore, the suit is within time. It has been found that the plaintiff has a right of pre-emption and that the price, Rs. 200, was paid and fixed in good faith.

I accordingly accept this appeal and give the plaintiff a decree for pre-emption on payment of Rs. 200, the purchase money to be paid into Court on or before August 12th, 1922. On payment into Court of such purchase-money the defendant shall deliver possession of the property to the plaintiff, but if the purchase-money be not paid on or before August 12th, 1922 the suit shall be dismissed with costs throughout to the defendant, Shahji, The appellant will get his costs in this Court against the respondent Shahji, in the event of the money being paid.

Z. K. *Appeal accepted.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 169 OF 1922.

December 1, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Fforde.

NANAK CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAJJAD HUSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Letters Patent (Lahore), cl. 10—Order refusing to set aside dismissal of appeal in default, whether judgment—Discretion of Court—Interference.

An order of a Single Judge refusing to set aside an order dismissing an appeal in default is a "judgment" within the meaning of clause 10 of the Letters Patent of the Lahore High Court and is appealable under that clause.

Ruldu Singh v. *Sawal Singh*, 67 Ind. Cas. 388; 3 L. 188; (1922) A. I. R. (L.) 380, *Muthura Sundari Dassi* v. *Haran Chandra Shaha*, 34 Ind. Cas. 634; 43 C. 857 at p. 870; 20 C. W. N. 594; 23 C. L. J. 443, relied upon.

The discretion exercised by a Single Judge in refusing to set aside an order dismissing an appeal in default cannot be interfered with in an appeal under the Letters Patent merely on the ground that the case appears to be a fit one for restoration.

Letters Patent Appeal from the order of Mr. Justice Abdul Raoof, passed in Civil Miscellaneous Application No. 430 of 1921 dated the 27th June 1922, and printed as 71 Ind. Cas. 813, rejecting the petition to set aside an order dismissing Civil Appeal No. 933 of 1921 in default.

Dr. *Gokal Chand Narang*, for the Appellants.

Dr. *Muhammad Iqbal*, for the Respondents.

RAM LAL *v.* GHANISHAM DAS.

JUDGMENT.—This is an appeal under clause 10 of the Letters Patent from an order made by a Single Judge rejecting an application for an order to set aside a dismissal of an appeal. The learned Counsel for the respondents raises a preliminary objection that the order in question does not amount to a judgment under the Letters Patent, and that no appeal lies from it. This objection is, in our opinion, not well-founded. The order satisfies the definition of the expression "judgment" as laid down in *Ruldu Singh* v. *Sawal Singh* (1) and has been held to be appealable *Muthura Sundari Dassi* v. *Haran Chandra Shaha* (2). We accordingly overrule the preliminary objection. On the merits we consider that there is considerable force in the contention of the learned Counsel for the appellants that this was a fit case for setting aside the dismissal, but the question before us is not whether we would have accepted the application for an order to set aside the dismissal if it had been made to us in the first instance, but whether there is any adequate ground for interfering with the discretion of a learned Judge of this Court who has declined to grant the application. This question we must answer in the negative. We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 67 Ind. Cas. 388; 3 L. 188; (1922) A. I. R. (L.) 380.

(2) 34 Ind. Cas. 634; 43 C. 857 at p. 870; 20 C. W. N. 594; 23 C. L. J. 443.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1469 OF 1921.

July 21, 1922.

Present:—Mr. Justice Martineau.

RAM LAL—DEFENDANT—APPELLANT

versus

Malik GHANISHAM DAS AND OTHERS—PLAINTIFFS—DURGA PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 77—Settlement Record, entries in, proof of—Certified copy—Statement of Kanungo.

An entry in a public document, such as a Settlement Record, can be proved only by the production of the original or by a certified copy. [p. 826, col. 1.]

The statement of a *Kanungo* is not relevant as evidence of what is contained in the Settlement Record. [p. 826, col. 1.]

Second appeal from a decree of the District Judge, Jhang, at Sargodha, dated the 22nd March 1921 reversing that of the Munsif, Second Class, Jhang, dated 17th May 1920.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The lands of the parties adjoin each other, and the plaintiffs brought the present suit for a declaration of their right of ownership in 10 *kanals* 2 *marlas* of land. The Munsif dismissed the suit finding on the strength of the Revenue Records that the land belonged to the defendants. The District Judge on appeal has reversed the decision of the First Court and given the plaintiffs a decree for a portion of the land in suit, namely, for 6 *kanals* 16 *marlas* in *Khasra* Nos. 1012 to 1016. The defendants have filed a second appeal.

The land in suit was admittedly recorded as the property of the defendants in the Settlement Record of 1904. The plaintiffs allege that this is a mistake and that in the Settlement Record of 1880 the field numbers corresponding to Nos. 1012 to 1016 of the Settlement of 1904 were entered as owned by them, and the District Judge has found in their favour on the strength of the statement of the special *Kanungo*, who says that the field numbers of the land in suit in the Settlement of 1880 were 1162 *min*, 1178 *min* to 1182 *min*, and 1187 *min*, which were parts of the plaintiffs' fields. But the learned Judge has failed to notice the fact pointed out in the judgment of the Munsif, that the *Kanungo's* statement is opposed to the entries is the Revenue Records. A certified copy of the entry in the Settelment Record of 1904, filed by the defendants in answer to the claim, shows that the field numbers in the Settlement of 1880 which correspond to the existing Nos. 1012 to 1016 and others are not those mentioned by the *Kannugo*, but are Nos. 1120 to 1128, 1132 to 1135, 1137, and 1161 which all belonged to the defendants. In the face of this evidence it is impossible to accept the statement of the *Kanungo*.

That statement is indeed not relevant as evidence of what is contained in the Settlement Record, for under the Evidence Act an entry in a public document such as a Settlement Record can be proved only by the original or by a certified copy.

As the learned District Judge has based his finding, not on the certified copy which shows what the entries in the records are, but on a statement which is not admissible to prove the entries, the finding can be contested in second appeal.

The entries in the records are entirely in the defendant's favour and are unrebutted.

I accordingly accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the Court of first instance dismissing the suit. The respondents will pay the appellants' costs throughout.

Appeal accepted.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 192 OF 1918.
May 8, 1922.
Present:—Mr. Justice Broadway and Mr. Justice Harrison.
BUDHA MAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SHIB DAYAL—PLAINTIFF—RESPONDENT.

Landlord and tenant—Repudiation of liability by tenant—Landlord, whether can sue for rent of whole period of tenancy—Appeal—Technical plea.

A landlord is entitled to sue for the rent of the whole period of the tenancy as damages where the tenant repudiates his liability to pay rent under the lease, and is not bound to wait until any particular date when the rent would become due under the terms of the lease. [p. 827, col. 1.]

A technical plea should not be allowed to be taken for the first time in appeal. [p. 827, col. 1.]

Second appeal from a decree of the District Judge, Lahore, dated the 10th December 1917, varying that of the Subordinate Judge, First Class, Lahore, dated the 1st October 1915.

Mr. *M. S. Bhagat*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The plaintiff in this case has been given a decree by the District Judge for Rs. 778, being the amount of one year's rent due for a brick kiln after various calculations have been made on both sides. The defendants present this second appeal, urging various grounds of which only two are pressed and these are practically the same, namely, that the suit was premature, and, therefore, must be dismissed and that rent for the whole year was not due.

The facts are clearly given in the judgment of the learned District Judge and it is clear that the defendants had been in occupation of this brick kiln during the preceding year, which terminated on the 31st of August 1913, and continued in possession until the 15th of November 1913, after renewing the lease for a period of a year. They vacated the premises on or before the 15th November of their own accord, but in spite of this the principal defendant wrote to the landlord on the 15th, saying that they had been turned out of the kiln by him, that the lease had thus been terminated and that they were not liable to pay any rent. The present suit was instituted on the 24th March 1914, and the plaintiff claimed rent up to the 31st of August 1914, or to the last day of the tenancy. In the First Court no plea was taken that the suit was premature but this was made a ground of appeal to the District Judge, who held that the plaintiff had a full cause of action for his whole relief and for the payment of a year's rent because of he defendants' repudiation of all liability in that the latter had put forward the false contention that he had been turned out by the plaintiff and maintained that the lease had been terminated and then through no fault of his. The District Judge also held that, even if this view were not correct, this was one of those rare cases in which the power to give relief on a cause of action, which accrued after the institution of the suit, should be exercised.

Counsel urges that, although the plea was not specifically taken in the First Court it is so patent from the plaint itself that the cause of action had not arisen that even on second appeal the suit must be dismissed for that portion of the rent which by the terms of the lease was made payable in July 1914, and he contends

that no repudiation and no denial of the relative positions of the parties can ever entitle a landlord to sue for rent which has not accrued under the terms of the lease at the time the suit is instituted. We find on the analogy of a suit for damages based on a breach of contract that the right to sue did accrue on the repudiation by the defendants and that the landlord was entitled to claim the full amount of his rent as damages due to him on accouut of the breach which took place on the defendants' repudiating all liability and that he was not bound to wait until the end of the year or until the month in which the remainder of the rent was payable. Apart from this the plea taken that the suit is premature is technical and can be met by the equally technical reply that it should have been taken in the Trial Court so as to enable the plaintiff to withdraw his suit or take such action as he thought right, and such a plea, when first taken in the Court of Appeal, should not be entertained. We find, therefore, that the plaintiff is entitled to the full relief which has been awarded to him by the District Judge and we dismiss the appeal with costs.

A cross-appeal has been presented by the respondent asking for an item of Rs. 54 which has been charged against him on account of coal with which, it was found, he was supplied by the plaintiff. The finding on this point is a finding of fact come to after consideration of the evidence and cannot be gone into on second appeal. The cross-appeal, is, therefore, dismissed.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 483 OF 1921.

JUNE 21, 1922.

Present:—Mr. Justice Scott-Smith.

AYUB AND OTHERS—DEFENDANTS—PETITIONERS

versus

KIRPAL SINGH AND OTHERS—PLAINTIFFS AND FAZL—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Appellate Court deciding Trial Court had jurisdiction—Revision.

An appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court, the lower Court having had jurisdiction to entertain and decide the appeal. [p. 827, col. 2.]

Arur Singh v. *Bua Ditta*, 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P.W. R. 1911, *Dowlat Ram* v. *Asa Ram*, 46 P. R. 1886, followed.

Petition, under section 44 of Act VI of 1918, for revision of the decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 25th April, 1921, varying that of the Munsif, First Class, Bhera, District Shahpur, dated the 10th January 1921.

Mr. *Nanak Chand*, for the Petitioners.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This is an application for revision of the order of the lower Courts decreeing the plaintiffs' claim for Rs. 30 on account of price of trees cut by the defendants-petitioners from land of which they are themselves the proprietors. In the lower Courts the question was raised whether the suit was triable by a Civil or a Revenue Court. The Munsif held that the suit was triable by a Civil Court and on the merits he gave the plaintiffs a decree. The point was again raised before the Senior Subordinate Judge who heard the appeal. He agreed with the Munsif that the suit was triable by a Civil Court. He also held in accordance with a decision of the Financial Commissioner in 1894 that the plaintiffs were *adna maliks* of the land, and, therefore, were *prima facie* owners of the trees, and without going into the oral evidence on the record he upheld the decree of the Munsif.

In revision the point is again raised as to whether the lower Courts had jurisdiction. Now, in *Arur Singh* v. *Bua Ditta* (1) it was held that an appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the Chief Court under section 70 (1) (*a*) of the Punjab Courts' Act, the lower Appellate Court having had jurisdiction to entertain and decide the appeal. The learned Judge followed a previous Divi-

(1) 9 Ind. Cas 674 : 4 P. R. 1911 ; 45 P. L. R. 1911; 26 P. W R. 1911.

sion Bench ruling reported as *Dowlat Ram* v. *Asa Ram*(2), and, therefore, I am not prepared to interfere in revision on a question of jurisdiction. The question is, moreover, a difficult one in the present case. It appears that the plaintiffs were originally *muafidars* of the land and that at the present time they receive a share of the produce from the proprietors (defendants-petitioners) in lieu of the land revenue which was previously paid to them. Whether this fact establishes the relationship of landlord and tenant between the parties is arguable. Having regard to the fact that the appellants are the proprietors of the land the presumption certainly appears to be that they are owners of the trees growing thereon. I have read the judgment of the Financial Commissioner of 1894 and I find that the question there was whether the new settlement should be made with the *muafidars* or with the owners of the land. It was decided that the settlement should be made with the *muafidars* and incidentally the Financial Commissioner remarked that they were *adna maliks* of the land, though this point was not clearly in issue at that time. Now, Article 139 of Rattigan's Digest shows that the *ala maliks* usually levy a sort of customary rent from the *adna maliks*. If this is correct the plaintiffs, who receive half the produce from the defendants, would be the *ala maliks* and the defendants would be the *adna maliks*, and not *vice versa*. However this may be, I consider that the *onus* was heavily upon the plaintiffs to prove that they were entitled to the trees growing on the land. I do not think that it can be said that the plaintiffs have established that they are *adna maliks* of the land, and, therefore, the reasons given by the learned Subordinate Judge for decreeing their claim are not sound. I have had the oral evidence read to me and, in my opinion, it is quite insufficient to rebut the initial presumption.

I, therefore, allow the revision and setting aside the decree of the Courts below, dismiss the plaintiffs' suit. Under all the circumstances of the case I direct the parties to bear their costs in all the Courts.

Z. K. *Revision allowed.*

(2) 46 P. R. 1886.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2626 OF 1921.
(MISCELLANEOUS NO. 23 OF 1922.)
June 6, 1922.

Present:—Mr. Justice Martineau.

MULA MAL—DEFENDANT—APPELLANT
versus
Sardar PIARA SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Indian Soldiers (Litigation) Act (IX of 1918), s. 11, applicability of.

Section 11 of the Indian Soldiers (Litigation) Act applies only to those cases where the plaintiff is an Indian Soldier at the time when he files his suit; the section does not become applicable by the mere fact that the plaintiff was a soldier at the time when the cause of action arose.

Second appeal from a decree of the District Judge, Sialkot, dated the 11th August 1921, modifying that of the Subordinate Judge, Second Class, Sialkot, dated the 11th April 1921.

Mr. *Dev Raj Sawhney*, for the Appellant.

Mehta *Amin Chand*, for the Respondents.

JUDGMENT.—Civil Appeals Nos. 2626 to 2629 of 1921 arise out of four suits for pre-emption instituted in December 1920 in respect of sales, of which three took place in 1918 and one in March 1919.

It is admitted that the suits are barred by limitation unless they are saved by the Indian Soldiers Litigation Act IX of 1918, section 11 of which provides that in computing the period of limitation prescribed for any suit in which the plaintiff is an Indian soldier the time during which such soldier has been serving under war conditions since the 4th August 1914 shall be excluded. The Courts below have held that the suits are within time when the period during which the plaintiff was serving under war conditions is deducted, and they have concurred in giving him decrees for pre-emption.

The Courts below have failed to notice that although the plaintiff was serving as a soldier for some time before the institution of the suits he was, as is admitted before me, no longer a soldier when he brought the suits and that, therefore, section 11 of Act IX of 1918 does not apply to the present cases. That section applies only where the plaintiff *is* an Indian soldier, and it does not become applicable by the mere fact that he was a soldier at the time when the cause of action arose.

As section 11 of Act IX of 1918 does not apply the time during which the plaintiff was serving under war conditions cannot be excluded in computing the period of limitation, and the suits are consequently barred by limitation.

I accept the appeals, reverse the decrees of the Courts below, and dismiss the suits with costs in all the Courts.

Z. K.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 325 OF 1922.
January 5, 1923.
Present:—Mr. Justice Campbell.
UGGAR SAIN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
TELU AND ANOTHER—PLAINTIFFS, AND
Musammat DAKHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Sonless proprietor—Rohtak Tahsil, Rohtak District.

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land.

Beg v. *Allah Ditta*, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C)., referred to.

Ramji Lal v. *Tej Ram*, 73 P.R. 1895(F. B.) and *Budal* v. *Kirpa*, 23 Ind. Cas. 211; 76 P. R. 1914; 148 P. L. R. 1914; 131 P. W. R. 1914, distinguished.

Second appeal from a decree of the Additional Judge, Rohtak, at Hissar, dated 4th November 1921, affirming that of the Munsif, Second Class, Rohtak, dated the 16th April 1921.

Messrs. *Shamair Chand* and *Sagar Chand*, for the Appellants.

Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—The question for decision in this second appeal is whether a sonless proprietor of land in the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation. In the certificate granted by the District Judge under section 41 (3) of the Punjab Courts Act the question was stated to be whether the powers to alienate of a sonless proprietor in the Rothak District are not restricted, but the land in suit being situate in the Rohtak Tahsil it is unnecessary to give a decision on the custom prevailing in the rest of the District. This is what was held in similar circumstances by the this Court in *Giani* v. *Tek Chand* (1) (a ruling to be mentioned in more detail presently) for the reason that the *Riwaj-i-ams* of the different Tahsils are not uniform. The Trial Court placed the *onus* of proving restricted powers on the plaintiffs and found in their favour on the strength of certain judicial decisions, *viz.*, *Budal* v. *Kirpa* (2) (which did not relate to the Rohtak Tahsil), a judgment by Major Knollys, District Judge, in Civil Appeal No. 280 of 1919 (since reversed on appeal by this Court in *Giani* v. *Tek Chand* (1), a judgment by Mr. Anderson, District Judge, in Civil Appeal No. 136 of 1920 (a case of Jhajjar Tahsil) and a judgment by Agha Muhammad Sultan Mirza which is eulogised as "memorable" but which dealt with land in Tahsil Gohana.

The learned District Judge affirmed the Munsif's findings holding that Major Knollys' judgment and *Budal* v. *Kirpa* (2), had settled authoritatively the previous controversy whether or not the custom of the Rohtak District differed from that of the other neighbouring Districts of the Province, and that it was for the defendants to establish a special custom which they had not done.

The defendants placed on the record a copy of a declaration in the 1879 *Riwaj-i-am* of the Rohtak Tahsil to the effect that the collateral heirs of a sonless proprietor cannot control alienations by him but possess merely the right to pre-empt. The current *Riwaj-i-am* contains no question on the subject.

It was held by this Court in *Giani* v. *Tek Chand* (1), referred to above, that the Rohtak Tahsil *Riwaj-i-am* of 1879 placed upon a son the *onus* of proving that

(1) 64 Ind. Cas. 549; 11 P. L. R. 1922; (1922) A. I. R. (L.) 69.
(2) 23 Ind. Cas. 211; 76 P. R. 1914; 148 P. L. R. 1914; 131 P. W. R. 1914.

he had a right to attack a mortgage by his father of ancestral land and that alienations by a proprietor in that Tahsil could be challenged only on grounds valid under Hindu Law. Another decision by this Court in Civil Appeal No. 33 of 1913 (*Telu* v. *Chuni* (3)) upheld on similar grounds the dismissal of a suit by the present plaintiff challenging another alienations of land in Tahsil Rohtak by the selfsame alienor whose sale is now in dispute.

These two decisions are conclusive in favour of the defendants-appellants, for no instance from the Rohtak Tahsil of control by a reversioner was proved by plaintiff except Major Knollys' judgment which is nullified by *Giani* v. *Tek Chand* (1). All that the learned Counsel for the plaintiff-respondent can urge is that the Full Bench decision, *Ramji Lal* v. *Tej Ram* (4), enunciated a general rule which the *Riwaj-i-am* cannot override and that this rule was re-affirmed for the Rohtak District by a Division Bench in *Budal* v. *Kirpa* (2). *Ramji Lal* v. *Tej Ram* (4), however, was considered in Civil Appeal No. 33 of 1913, [*Telu* v. *Chuni* (3)] and *Budal* v. *Kirpa* (2) dealt with land in another Tahsil, and the *Riwaj-i-am* of Rohtak Tahsil was not before the Court (nor apparently was the *Riwaj-i-am* of any Tahsil). Both judgments, moreover, must be read subject to what was laid down regarding the *Riwaj-i-am* by the Privy Counsel in *Beg.* v. *Allah Ditta* (5).

The learned District Judge, while finding that there is no evidence of necessity, has held that consideration passed in full; there was never any allegation of immorality against the vendor. Thus the suit must fail.

I accept the appeal and dismiss the suit with costs throughout.

K. Z. *Appeal accepted.*

(3) 20 Ind. Cas. 373; 231 P. L. R. 1913; 147 P. W. R. 1913.

(4) 73 P. R. 1895 (F. B.).

(5) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 791; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 284 OF 1921.

June 12, 1922.

Present:—Mr. Justice Scott Smith.

Musammat BAKHO—PLAINTIFF—APPELLANT

versus

LAL—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage—Apostacy, effect of.

A Muhammadan marriage is dissolved by the apostacy of either the husband or the wife. [p. 831, col. 1.]

Nowroz Ali v. *Aziz Bibi*, 124 P. R. 1876, *Khan Bibi* v. *Pir Shah*, 132 P. R. 1884, *Allah Baksh* v. *Amir Begam*, 61 P.R. 1899, *Imam Din* v. *Hassan Bibi*, 85 P. R. 1901, *Amir Beg* v. *Saman*, 7 Ind. Cas. 342; 33 A. 90; 7 A. L. J. 956 and *Abul Gani* v. *Azizul Haq*, 14 Ind. Cas. 641; 39 C. 409; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257, relied upon.

The question to be determined in such cases is not whether the adoption of the new religion by the alleged apostate is efficacious or not, but whether or not he has renounced the Muhammadan religion. [p. 831, col. 1.]

Second appeal from a decree of the District Judge, Lyallpur, dated the 17th November 1921 reversing that of the Munsif, First Class, Sheikhupura, dated the 22nd December 1920.

Mr. *Nanak Chand*, for the Appellant.

JUDGMENT.—In the case out of which the present second appeal arises *Musammat* Bakho sued for dissolution of marriage with Lal on two grounds, (1) that she was married by her father during her minority and (2) that she had renounced Islam and become a Christian. I am not concerned with the first ground. The case was first of all tried by a Muhammadan Munsif, Syad Zulfiqar-ud-Din, who decreed the claim holding that the plaintiff had renounced Islam and had become a Christian. On appeal the District Judge, Khan Bahadar Abdul Ghafur Khan, remanded the case for inquiry into certain points under O. XLI, r. 23, Civil Procedure Code. The case then came before a Hindu Munsif who held that the plaintiff had renounced Islam and become a Christian and gave a decree. The case then went on appeal before Mirza Zafar Ali, District Judge, who held that *Musammat* Bakho was not a Christian, because she had not been baptized by a duly authorized person. The learned District Judge set aside the decree and dismissed the plaintiff's suit. She has filed a second appeal to this Court which has been heard *ex parte* in the absence of the respondent.

SONBA *v.* DATTATRAYA.

The learned District Judge in the course of his judgment states that the plaintiff did not put herself in the witness-box to be examined with regard to her views on religion. Before the remand, however, she appeared as a witness on her own behalf and she subsequently was called as a witness on behalf of the defendant and again gave evidence. She clearly stated in the course of her evidence that she had renounced Islam and had been baptized as a Christian and that she professed the Christian religion. She was baptized by an Indian Christian named Hakim Ali who belongs to a sect of Christians called the Christ Mission. Now Hakim Ali clearly deposed that he baptized *Musammat* Bakho and that for a month before baptizing her he instructed her in the principles of the Christian religion, in other words, he prepared her for baptism. It appears from the evidence of Mr. Samad and Mr. Smith that Hakim Ali was what is called a section-in-charge and that every section-in-charge is authorised to perform the rite of baptism. Even according to the rules of the Church of England, any private person can, in the case of emergency, perform the rite of baptism. and I am not prepared to agree with the learned District Judge that the baptism of *Musammat* Bakho was wholly inefficacious. But even if it was, the real question which had to be determined was whether *Musammat* Bakho had renounced the Muhammadan religion.

There is ample authority for holding that by the apostacy of either the husband or the wife a Muhammadan marriage is dissolved, see, *inter alia*, *Nowroz Ali* v. *Aziz Bibi* (1), *Khan Bibi* v. *Pir Shah* (2), *Allah Baksh* v. *Amir Begam* (3), *Imam Din* v. *Hasan Bibi* (4), *Amir Beg* v. *Saman* (5) and *Abdul Gani* v. *Azizul Haq* (6). The learned District Judge has not come to a clear finding as to whether the plaintiff is an apostate from Islam or not. In my opinion, there can be no doubt of this fact. We have her own clear statement in the witness-box and this is supported by the evidence of Hakim Ali who baptized her, and of Lal Din. I, therefore, hold, in accordance with the authorities above mentioned, that the marriage has been dissolved.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, restore the decree of the First Court with costs throughout.

Z. K. *Appeal accepted.*

(1) 124 P. R 1876.
(2) 132 P. R. 1884.
(3) 61 P. R 1899.
(4) 85 P. R. 1906 ; 148 P. L. R. 1906; 97 P. W. R. 1906.
(5) 7 Ind. Cas. 342; 33 A 90; 7 A. L. J 956.
(6) 14 Ind. Cas. 641; 39 C. 409; 15 C.L. J. 263; 16 C. W. N 451; 13 Cr. L. J 257.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 430 OF 1921.
October 9, 1922.
Present:—Mr. Hallifax, A. J. C.
SONBA—DEFENDANT—APPELLANT
versus
DATTATRAYA—PLAINTIFF—RESPONDENT.

Easement—Long user—Evidence of grant—Encroachment, removal of.

Long user may certainly with other circumstances, and in some cases even by itself, be good evidence of an agreement or grant. [p. 832, col. 2.]

Pranjwandas v. *Mayaram*, 1 B. H. C. R. O. C. J 151 and *Bagram* v. *Khettranath Karjormah*, 3 B. L. R. O. C. J. 18, not followed.

Where a person has encroached on the plaintiff's property by building a portion of his own wall on the top of the plaintiff's wall, it is entirely unnecessary for the plaintiff to prove the extent of the encroachment or the weight of the burden imposed by it. He is clearly entitled to claim that any portion, however small, of the defendant's wall that projects on his own property, shall be removed. [p. 833, col. 1.]

Appeal from a decree of the Additional District Judge, Nagpur, in Civil Appeal No. 141 of 1920, dated the 12th May 1921.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—The defendant has filed two Appeals (No. 430 and No. 431 of 1921) against different decisions in the same judgment and the plaintiff has filed a cross-objection in the

second of these two appeals. I have examined both appeals and the cross-objection in the manner appropriate to a first appeal but have been unable to find more than two points , both arising in the cross-objection, which could properly be put forward in a second appeal at all. I do not propose, therefore, to discuss more than these two points. The first has reference to the windows of the plaintiff's house situated at the points marked *Wa*, *Ka*, *Dha* and *Jha* in the map filed with the plaint. It is contended that these openings have been in existence for 50 or 60 years, and, therefore, a right of easement has accrued in regard to them independently of section 15 of the Easements Act, 1882, although the use of that easement had been discontinued for more than two years previous to the institution of this suit. The learned Pleader for the plaintiff urged that continuous user of that extent was of itself presumptive evidence of a grant or agreement, so that what is practically a period of limitation of two years prescribed by section 15 of the Easements Act in respect of an easement acquired by prescription only does not apply here, as was held by their Lordships of the Privy Council in *Rajrup Koer* v. *Abul Hossein* (1).

(2) In support of this suggestion the learned leader cited the case of *Moore* v. *Rawson* (2) mentioned at page 71 of Peacock's Easement in British India, where the relevant part of the judgment of Littledale, J., is quoted. The principle stated there was, continuous, peaceable user of an easement of light and air for more than twenty years gave rise in England to a presumption that it existed with the consent of the owner of the servient heritage. This principle was applied by the Bombay High Court in *Pranjivandas* v. *Mayaram* (3) and in the Calcutta High Court in *Bagram* v. *Khettranath Karformah* (4) These cases, however, were decided in 1862 and 1869, that is to say, many years before the passing of the Easements Act. Long user may certainly with other circumstances, and in some cases even by itself, be good evidence of an agreement or grant. The finding of the lower Appellate Court as to the length of the user is, however, not very clear. The learned Judge in one place seems to find as a result of his own observation that the window at least was built with the house, which was 50 or 60 years old. On the evidence given in Court his finding seems to be that the window was built not more than ten years ago. But even its existence for 60 years could not by itself be held to prove, in the circumstances of this case, that there had ever been an agreement, tacit or otherwise, that the defendant would not interfere with the enjoyment of light and air through it at any time.

(3) The other point raised refers to the encroachment by the defendant on the plaintiff's property by building a portion of his own wall on the top of the plaintiff's wall at the point marked *Kha* in the map. The lower Appellate Court deals with this point in the following manner:- " The third ground of appeal relates to the wall on the plaintiff's bath-room. There is no evidence on plaintiff's side about this wall, *Kha*. The Judge of the lower Court, Mr. Nene, observes in his inspection note of this wall that the plaintiff's wall in question is pretty old and the damage it has received appears also to be of a pretty old time. He finds from observation that only a very small portion of it, if at all, rests on plaintiff's wall , so small that plaintiff ought not to complain about it. He says that it is most unlikely that the resting of that small portion on plaintiff's wall might have caused any damage to plaintiff's wall. Mr. Haksar in his inspection note finds that the wall *Kha* seems to rest on a portion of the plaintiff's wall because the wall is not visible from the top and it is covered by the defendant's superstructure. The finding given by the lower Court in its judgment is vague. It has not defined the extent of the burden found to have been caused by the wall *Kha* and it granted no relief in respect of it. I find that plantiff did not prove the extent of the encroachment by reliable data and so it is not proved that the defendant in building the wall

(1) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

(2) (1824) 3 B. & C. 332 at p. 340; 5 Dowl. & Ry. 234; 3 L. J. (O. S) K. B. 32; 27 R. R. 375; 107 E. R. 756.

(3) 1 B. H. C. R. O. C. J. 148 at p. 151.

(4) 3 B. L. R. O. C. J. 18.

made any appreciable encroachment or caused any damage to the plaintiff. Plaintiff gets no relief in respect of this and the third ground of appeal fails."

(4) It seems to me that it was entirely unnecessary for the plaintiff to prove the extent of the encroachment or the weight of the burden it had imposed upon him. He is clearly entitled to claim that any portion, however small, of defendant's wall that projects on his own property, that is to say, to the north of the southern surface of his own wall, shall be removed. As a result the decree of the lower Appellate Court in Civil Appeal No. 141 of 1920 will be modified by addition to the list of structures ordered to be removed by the defendant of that portion of the wall at or near *Kha* in the map which projects to the north beyond the southern surface of the plaintiff's south wall. The defendant-appellant will pay all the costs of both appeals and one-eight of the total costs incurred in connection with the cross-objections of the plaintiff-respondent. The latter will pay the remaining seven-eighths.

N. K. *Decree modified.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 3303 OF 1917.
July 10, 1922.
Present :—Mr. Justice Scott-Smith and Mr. Justice Brasher.
Musammat MALAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
KISHORE CHAND AND ANOTHER—PLAINTIFFS, *Musammat* JAWALA DEVI—DEFENDANT—RESPONDENTS.

Hindu Law—Mother—Properties given for maintenance—Estate taken—Property acquired from income, nature of.

When on the death of a Hindu his widows agreed to let his mother hold certain properties which were described as having been given for maintenance;

Held, that the words used did not indicate an intention to make over the properties to the mother as an absolute gift and that the mother was only entitled to use their income for purposes of maintenance. [p. 834, col. 2; p. 835, col 1.]

There is no necessary connection between the limited nature or the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited, but absolute, exclusive and separate, in every sense of the term and devolves as such. There is no presumption that savings or purchases with savings effected by a widow are increments to the *corpus* of the husband's estate and pass together with it. [p. 835, col. 2.]

Subramanian Chetti v. *Arunachelam Chetti*, 28 M. 1 (F. B.), relied upon

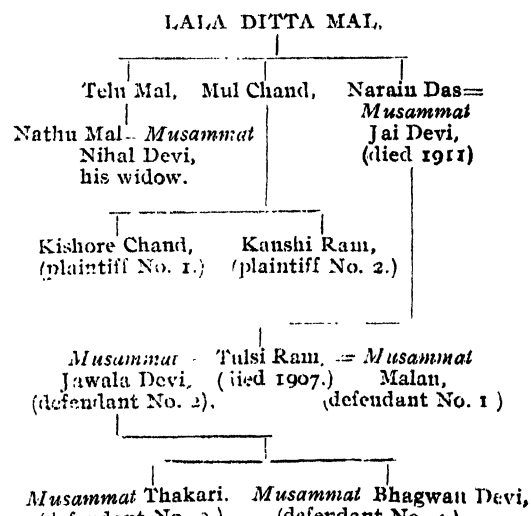
The same principles apply to a case where a Hindu female is given certain properties for the purpose of applying their income towards her maintenance. [p. 835, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the 30th August 1917.

Dr. *G. C. Narang*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The pedigree table of the parties to the suit out of which the present cross-appeals arise is given in the judgment of the learned Subordinate Judge and is as follows:—



The chief facts are as follows:—After Tulsi Ram's death his widows, *Musammat* Jawala Devi and *Musammat* Malan, defendants, drew up a mutual agreement dated the 26th of January 1908 printed in the supplementary paper-book which we have marked B. In accordance with this they laid down certain rules for the enjoyment of the property

of their deceased husband and allotted certain property to *Musammat* Jai Devi, the mother of the deceased, for her maintenance and to enable her to spend something on charitable purposes. Upon *Musammat* Jai Devi's death in 1911 the present suit was brought by Kishore Chand and Kanshi Ram, plaintiffs, for possession of property, moveable and immoveable, which they said was the *istridhan* of the deceased and which the two widows of Tulsi Ram had taken possession of. Out of the property claimed the lower Court decreed Rs. 1,800 cash which the defendants had realised on the redemption of a mortgage executed in favour of *Musammat* Jai Devi and it further gave the plaintiffs a declaration that *Musammat* Jai Devi's rights in Shankar Das' shop which were mortgaged to her for Rs. 2,000 vested in the plaintiffs as her successors. The remaining portion of the claim was dismissed. From this order both the parties have appealed. The widows have appealed as regards the decree granted to the plaintiffs. The plaintiffs in their appeal have asked for a further decree for possession of the lands of *Mauzas* Lakheke, Hamid and Bhura and for possession of two shops called Jethamalwali together with a *balakhana*. They also ask for a decree in respect of pawnee's right to gold bangles amounting to Rs. 300. The plaintiffs' claim is based upon the allegation that the immoveable property, namely, the land and shops claimed in their appeal was given to *Musammat* Jai Devi by the widows, defendants, as an absolute gift and in lieu of maintenance and that, therefore, it became her *istridhan* and that on her death they as reversioners were entitled to inherit it. The lower Court held, in accordance with *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (1), a Privy Council case that the property in question came to *Musammat* Jai Devi upon partition and, therefore, was not her *istridhan*. Under these circumstances, it held that the plaintiffs were not entitled to succeed thereto. As regards the pawnee's rights in gold ornaments it was of opinion that the proof adduced was insufficient. We note that the evidence as to this part of the case is extremely meagre and Counsel for the plaintiffs, after referring us to the evidence of Labhu Ram, see page 25 of the paper-book A, said he did not press the matter. We note, moreover, that the substantive evidence of Labhu Ram was given in another case and has not been printed in the paper-book in this case, and, therefore, the plaintiffs have no right to refer to it.

In support of his contention that the land was given to *Musammat* Jai Devi in lieu of maintenance as an absolute gift Dr. Gokal Chand Narang, the plaintiff's Advocate, refers us to the agreement, Exhibit D-1, printed in paper-book B. Paragraph 1 lays down that all the lands left by Tulsi Ram, deceased, belong jointly to both the widows, *Musammat* Jawala Devi and *Musammat* Malan, and mutation will be effected in the name of both of them except that the lands situated in *Mauzas* Lakhake, Hamid and Bhura, which have been given to *Musammat* Jai Devi for maintenance, will be mutated in her favour. Now the expression used is "*jo waste guzare ke di gayi.*" *Prima facie* we do not think that these words indicate that there was any intention of making over the lands to her as an absolute gift. In the second paragraph it is stated that *Musammat* Jai Devi will at all times be competent to give away the lands in charity, situated at *Mauzas* Lakhake, Hamid and Bhura which the widows had assigned to her. No doubt the statement in this paragraph that *Musammat* Jai Devi will be competent to give away the lands in charity is an indication that proprietary rights were given or were to be given to her, but, whatever the intention of *Musammat* Jawala Devi and *Musammat* Malan may have been at the time when they executed this agreement, the fact remains that mutation was never effected in the name of *Musammat* Jai Devi and there is no evidence to show that she ever received actual possession of these lands. There is some evidence, that of Banka Mal—see pages 41 and 102 of the paper-book A—to the effect that she enjoyed the produce of certain lands, but this is quite consistent with the theory that she was allowed to enjoy it by

(1) 14 Ind. Cas. 1006; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 341; 22 M. L. J. 462; 39 I. A. 121 (P. C.).

way of maintenance. As to the shops, it is admitted that she enjoyed the income of them. Paragraph 4 of the agreement recites that the two shops together with the *balakhana* shall remain in possession of *Musammat* Jai Devi, but it is not stated anywhere in the deed that they shall be her property or that she shall have any power of disposal over them. *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (1) is not on all fours with the present case, because there there had been a partition of joint family property between a mother and her sons. In the present case it is admitted that *Musammat* Jai Devi was not an heir of Lala Tulsi Ram and was not entitled to any share in his property and we do not think that the agreement of the 26th of January 1908 indicates that there was any partition of the property between the widows and *Musammat* Jai Devi. At the same time, there is, we consider, no evidence to show that the lands and shops in dispute were made over to *Musammat* Jai Devi as an absolute gift. We, therefore, hold that this property was not given to her in lieu of maintenance but that she might use its income for purposes of maintenance. The plaintiffs are, therefore, not entitled to the possession of this immoveable property after the death of *Musammat* Jai Devi.

As regards the defendants' appeal, the contention on the part of their Counsel is that *Musammat* Jai Devi acquired the mortgagee rights in the two plots referred to out of the Rs. 30 000 which she was allowed to draw from the joint shop in accordance with the agreement of the 25th of January 1908. The contention is that this Rs. 30,000 was made over to her for her maintenance in the same way as the immoveable property was made over. In other words, she was to enjoy the income of it and any part of it left over after her death would, therefore, not go to the heirs of Tulsi Ram. The defendants have produced evidence to show that *Musammat* Jai Devi spent a great deal of money, much more than Rs. 30,000, on pilgrimages and in charity. It is, therefore, quite clear, if this evidence is correct, that she had other money at her disposal in addition to this Rs. 30,000. She was the widow of a member of a very wealthy family and it cannot be supposed that she did not possess some *istridhan* even during her husband's lifetime. It is also admitted that under the agreement of the 26th of January 1908 she enjoyed the income of certain lands and shops. There can, therefore, be no initial presumption that she acquired these mortgagee rights out of the Rs. 30,000, and, in the absence of any evidence to the contrary, we consider the presumption to be that she acquired it out of other monies which she had with her. As pointed out in *Subramanian Chetti* v. *Arunachelam Chetti* (2), there is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. There is no presumption that savings or purchases with savings effected by a widow are increments to the *corpus* of the husband's estate and pass together with it. Applying the principle of this ruling, we hold that these acquisitions by way of mortgage which *Musammat* Jai Devi obtained are her *istridhan*, and, therefore, pass on her death to the heirs of her husband, *i.e.*, the plaintiffs. One other point was urged by Lala Jagan Nath in support of the widows' appeal, and that was that *Musammat* Jai Devi was not married to her husband in an approved form. This argument is based on the evidence of Ganda Singh, pages 47 and 48 of the paper-book A, who said that at the time of the marriage Rs. 500 were given to the father-in-law of Narain Das for the marriage expenses. The suggestion is that this Rs. 500 was the bride price. The evidence, however, of this is altogether too meagre and we note further that no issue was framed as to whether the marriage of *Musammat* Jai Devi was in an approved form or not. The argument, in our opinion, has no force.

The result then is that we affirm the decision of the lower Court on all points and dismiss both the appeals and direct

(2) 28 M. 1 (F. B.).

that the parties shall bear their own costs in this Court.

K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 148 OF 1919.
November 2, 1922.
Present:—Mr. Justice Rafique and Mr. Justice Lindsay.
Raja BIRJ NARAIN RAI—DEFENDANT—APPELLANT
versus
Babu KEDAR NATH AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale, involuntary—Right to pre-empt.

A pre-emptor cannot be deprived of his right by the fact that the sale was an involuntary sale. [p. 837, col. 1.]

Ghulam Mohiuddin Khan v. *Hardeo Sahai*, 58 Ind. Cas. 93; 42 A. 402; 18 A. L. J. 413, distinguished.

First appeal from the decision of the Subordinate Judge, Ghazipur, dated the 6th of January 1919.

Messrs. *S. M. Sulaiman* and *S. P. Sinha*, for the Appellant.

Messrs. *M. L. Agarwala* and *Haribans Sahai*, for the Respondents.

JUDGMENT.—The respondents to the present appeal are admittedly descended from a common ancestor. The defendants-respondents Nos. 3 to 7 were indebted to some one in Calcutta and at the instance of the creditors were declared insolvents in 1912. The insolvents were residents of Ghazipur and owned property in the District of Ballia. Under the orders of the Insolvency Court their property situate in the District of Ballia was made over to the Official Receiver. The latter disposed of the property by private sale in favour of defendant-appellant, Raja Birj Narain Rai, on the 22nd September 1916. The deed was registered on the 30th September 1916. The plaintiffs-respondents Nos. 1 and 2, who are minors, sued under the guardianship of their mother for the recovery of the said property on the ground of pre-emption.

They alleged that they and the insolvents were descended from a common ancestor and were co-sharers in the property in which the share of the insolvents was sold by the Official Receiver to the defendant-appellant. The claim was resisted on various pleas with two of which we are principally concerned in this appeal. It was urged on behalf of the contesting defendant that the plaintiffs had knowledge of the proposed sale and did not choose to purchase the property in suit and, therefore, they have lost their right of pre-emption. Moreover, the sale made by the Official Receiver in favour of the defendant Raja was an involuntary sale in respect of which the right of pre-emption would not prevail. The learned Subordinate Judge came to the conclusion on the evidence in the case that the plaintiffs had no knowledge of the proposed sale. He was also of opinion that the sale in favour of the contesting defendant, though made by an Official Receiver, did not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption.

In appeal before us it is contended strenuously on behalf of the defendant-appellant that the evidence shows that the plaintiffs had knowledge of the sale in question and that in any case the sale being an involuntary sale, *i.e.*, one under the orders of the Court, no claim can be urged on the basis of pre-emption. The evidence on the record with regard to the alleged knowledge of the plaintiffs shows that the Official Receiver published in the Calcutta papers, both Hindi and English, his intention of selling the property in suit. There is no evidence that the plaintiffs, who are minors now and who were minors at the time of the publication in the Calcutta papers, were old enough to read those papers or that anybody else read the said papers to them. In our opinion the learned Subordinate Judge was right in holding that the plea for the defence that the plaintiffs knew of the proposed sale has not been made out. The second objection based upon the allegation of the sale being involuntary has also not been established. It is based on the contention

that if a vendor does not sell the property himself but it is sold under the orders of a Court and, the sale takes place privately, no claim based on pre-emption can be brought in respect of that sale. We have been referred to the case of *Ghulam Mohiuddin Khan* v. *Hardeo Sahai* (1), and special stress is laid upon the passage at page 407.* We think that the facts of that case were quite different from the facts of the present case., The principal reason for the decision of that case is given at the bottom of page 407.* It was said in that case, "They had full notice of the intention of sale. They were publicly invited to the auction. One did not appear , the other appeared through an agent and made no attempt to purchase. This action on their part was, in our opinion, tantamount to a refusal to purchase, and if it was necessary for the Official Assignee to follow the custom laid down in the *Wajib-ul-arz*, he actually did follow that custom, for he publicly invited these co-sharers to purchase and they publicly refused to purchase." In the case before us the sale was not a sale in the sense of a public auction. It is a fact that notice was given of his intention to sell the property, but, as we have remarked above, the plaintiffs never knew of that notice and the sale was not a public sale. With regard to properties sold at Court-auctions there is a mode of pre-emption prescribed which is to be found in O. XXI, r. 28. In our opinion the plaintiffs cannot be deprived of their right by the fact that the sale was an involuntary sale. The appeal, therefore, fails and is dismissed with costs including fees in this Court on the higher scale.

There are cross-objections on behalf of the plaintiffs with regard to the sale price. We have examined the record and, in our opinion, there is no force in these objections. The objections are dismissed with costs. The plaintiffs will have a month from the date of this Court's decree to deposit the pre-emption money into Court and in case they fail to do so the suit shall stand dismissed with costs.

N. K.

Suit dismissed.

(1) 58 Ind. Cas. 93; 42 A. 402; 18 A. L. J. 413.

* Page of 42 A.—[*Ed.*]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 13 OF 1923.

June 8, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

KALLAN—DEFENDANT—APPELLANT

versus

JAWAHAR SINGH—PLAINTIFF AND *Syed* KARAR HUSSAIN—DEFENDANT —RESPONDENTS.

Landlord and tenant—Lease—Forfeiture on non-payment of rent—Penalty—Lessee, right of, to eject prior lessee—Notice.

Where a lease stipulates that on non-payment of rent on the day fixed for payment the interest of the lessee would be forfeited and the landlord would have a right of re-entry, the stipulation amounts to a penalty and is deemed to have been intended as a mere security for the payment of the rent. [p. 839, col. 2.]

Courts have power to relieve against a forfeiture incurred under such a clause. [p. 839, col. 2.]

Mussa Kutti v. *Ramachariar*, 8 Ind. Cas. 309; 5 M. L. T. 238, *Narayna Naika* v. *Vasudeva Bhatta*, 28 M. 380; 15 M. L. J. 208, distinguished.

The right of a lessee to eject a previous lessee whose lease has expired is not affected by the fact that the latter did not have proper notice of the lease in favour of the former. [p. 840, col. 1.]

Parbhu Ram v. *Tek Chand*, 53 Ind. Cas. 805; 1 L. 241, followed.

Second appeal from the decree of the District Judge, Delhi, dated the 6th December 1921, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 30th April 1921.

Lala *Mool Chand*, R. S., for the Appellant.

Lala *Sardha Ram Kapur*, for the Respondents.

JUDGMENT.—Two connected appeals will be disposed of by this judgment, as both of them arise out of the same suit. One Karar Hussain owns certain shops in Delhi, four of which had been let to one Kallan for several years. On 21st November 1919 the landlord gave a notice to Kallan to quit the shops by the 24th December 1919 or to pay enhanced rent. On the 29th January 1920 he leased these very shops to Jawahir Singh, the present plaintiff-respondent, for 10 years, by a registered lease, in which the latter was authorised to take possession by ejecting Kallan privately or through Court and to occupy the shops for the period stipulated on payment of rent of Rs. 16 per mensem on the first of every lunar month,

A condition was introduced in clause 8 of the lease to the effect that in case *na dehindi* (non-payment) of rent on the first of every lunar month the period of 10 years will be cancelled and the landlord will be entitled to evict the lessee at once and to re enter into possession. The rent for the first month was admittedly paid. The rent for the second month, which fell due on the 22nd February 1920, calculated according to lunar months, was not paid in time but was sent by money order on the 6th March 1920, *i. e.*, about a fortnight after the due date. In the meanwhile Karar Hussain had sent a notice, dated the 4th March 1920, to Jawahar Singh, informing him that the lease stood cancelled on account of his default in payment of rent at the proper time. Jawahar Singh thereupon brought a suit on the 26th March 1920, praying for a declaration that the lease had not been cancelled and asking also for possession of the shops by ejectment of Kallan. The Trial Court decreed the plaintiff's suit against Karar Hussain and also ordered the ejectment of Kallan. Both the latter appealed to the District Judge, who dismissed their appeals. Each one of them has now preferred a second appeal to this Court. Kallan is represented by Mr. Mool Chand and Karar Hussain by Mr. Moti Sagar, while *Lala* Sardha Ram appears on behalf of the respondent.

The case for the appellants has been argued before us by Mr. Mool Chand, who says that the interests of his client are identical with those of Karar Hussain, because the latter has now executed a fresh long lease in favour of Kallan.

The main question in this appeal is whether the Courts below were justified in coming to the relief of the plaintiff as Courts of Equity. In this connection the following points are worth consideration. It has been found as a matter of fact by both the Courts below that, according to a well known custom of Delhi, the plaintiff has paid the sum of Rs. 1,000 by way of *nazrana* to Karar Hussain before securing the lease in his favour. It has also been found by the Courts below that the bargain which Karar Hussain struck with the plaintiff was not an equitable one. The Trial Court expressed an opinion that the terms of the lease were "very severe, one-sided and unconscionable." Similarly, the lower Appellate Court has expressed an opinion that "the landlord's action in terminating the lease was in the circumstances fraudulent, oppressive, harsh and vindictive." We do not think it is necessary for us, in the face of such decided expressions of opinion by the Courts which were fully conversant with all the facts of the case, to add any comment of our own on the conduct of the appellant in this case. It strikes us that in all probability the lease executed by Karar Hussain in favour of Jawahar Singh, plaintiff, was intended as a sort of trap for him. It was pleaded by the plaintiff that the terms of the lease were not explained to him. The Trial Court held that the plaintiff did not fully realize the significance of the terms introduced in the deed. The lower Appellate Court, however, held that he must be presumed to know the terms of the contract and was bound by them, but that the eighth clause in the lease was penal and that it seemed to be against equity and good conscience to allow the defendant No. 1 to cancel the lease after having taken such a large sum as *nazrana*, simply on account of a few days' delay in payment of rent in a case where the lessee had not yet even succeeded in getting possession of the property he took on lease.

It is argued by Mr. Mool Chand that the stipulation involving forfeiture of the lease on default of payment of rent of any one month on the due date may seem to be harsh but was accepted by the plaintiff with his eyes open and defendant No. 1 was entitled to insist on cancelling the lease according to the said condition. He refers to a Madras decision published as *Mussa Kutti* v. *Rangacharlar* (1) in which it was held that where there is a covenant for re-entry on breach of the conditions of the lease, the non-payment of rent operates as a forfeiture of the lease. He relies also on *Naraina Naika* v. *Vasudeva Bhatta* (2) in which no relief against forfeiture for non-payment was given on the ground that the condition of forfeiture

(1) 8 Ind. Cas. 309 : 8 M. L. T. 238.
(2) 28 M. 389; 15 M. L. J. 208.

was not penal, as a period of grace was allowed. This last ruling has no application to the present case, as here there is no period of grace of any kind allowed and the condition is strictly penal. It is admitted by defendant No. 1 himself, in his statement in Court, that the object of this condition was to enforce payment of rent. The Madras case is also not very helpful, because, though there is provision for re-entry in the lease before us, the dispute has arisen before there can be any question of re-entry and is really due to the fact that the lessor has failed to give notice to his former tenant and has evidently intentionally refrained from helping his lessee in getting into possession of the property leased to him. Mr. Mool Chand says that if the plaintiff had got possession of the shops and if the defendant No. 1 was now suing to eject him on the ground of cancellation of the lease, possibly the principle underlying section 114 of the Transfer of Property Act could have given the Courts jurisdiction to help the lessee by permitting him to tender the unpaid rent with damages and to have his lease declared as valid and subsisting, but inasmuch as he had not yet got into possession he cannot claim any help under section 114 or rely on that section to justify the Courts in going against the express terms of the contract between the parties. We do not think this reasoning can help the appellants very much in a case where the fact that the plaintiff has not got possession is not due to any negligence or omission on his part. There is apparently some kind of collusion between defendant No.1 and his old tenant Kallan. It is pointed out by *Lala* Sardha Ram that the so-called notice of cancellation dated the 4th of March 1920, which Karar Hussain gave to his client, was not a *bona fide* notice at all, but was merely a counterblast against the notices dated 1st March 1921, which the plaintiff had given to Karar Hussain as well as to Kallan. He had asked Kallan to vacate the property and had asked Karar Hussain to help him in securing possession. The learned Vakil refers to paragraphs 1314, 1315 and 1316 of Story's well-known book on Equity (1920 Edition), parts of which may be quoted here. Paragraph 1314 says :—

"The general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof." The same learned author goes on to say in paragraph 1315: —

"The same doctrine has been applied by Courts of Equity to cases of leases, where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent."

The reasoning in favour of the equity jurisdiction of Courts in cases of this nature is given in paragraph 1316 as follows :—

"In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party."

This is exactly the principle which the learned District Judge has followed in upholding the decision of the Trial Court in this case, and we see nothing in the argument that has been addressed to us on behalf of the appellants to justify our interference with the discretion legitimately and judiciously exercised by the lower Appellate Court.

It is urged by Mr. Mool Chand that his client was not privy to the contract between Karar Hussain and Jawahar Singh and had not even been informed by the former of the lease executed in favour of the latter and he was, therefore, not liable to ejectment at the instance of Jawahar Singh. We think, however, there is no force in this plea. Jawahar Singh stepped into the shoes of the lessor by virtue of the lease dated the 19th January 1920, and the assignee of the owner was in a position to ask for ejectment of the previous tenant, whose original lease had expired and who was under a notice of ejectment at the time

when the lease in favour of the plaintiff was executed. As held in *Parbhu Ram* v. *Tek Chand* (3), the right of the plaintiff to eject the old tenant is not affected by want of a proper notice of the lease in favour of plaintiff, and, as we are holding that Jawahar Singh has been rightly relieved by the Courts below against the forfeiture of the lease and the lease is still subsisting, there can be no doubt that Kallan's ejectment has been correctly ordered and we uphold that order.

The last question which has been discussed before us is as to the compensation to which Kallan may be entitled on account of certain materials of his in the shops in dispute. Mr. Mool Chand insisted that the question of compensation should have been decided in the suit, instead of being left to be decided in execution proceedings, that it should be decided by this Court or order a remand on this point. We notice that no issue was framed by the trial Court on this point and it is noted by the Court in that judgment that perhaps it was given up to be settled in execution. The lower Appellate Court, therefore, could not go into this question and was apparently justified in leaving it to be decided in execution. It is also to be noted that Jawahar Singh has already deposited Rs. 500 in Court, which is the sum which Kallan claimed as compensation. The interests of Kallan, therefore, do not suffer in any way if this matter is not decided in the suit, because he can get any sum to which he may be found to be entitled against Jawahar Singh out of the sum deposited by the latter in Court. We, therefore, dismiss both the appeals with costs and uphold the decree of the Courts below, declaring that the lease has not been forfeited by the delay in payment of rent of one month and giving the possession of shops by ejectment of Kallan. We direct that the question of compensation due to Kallan for any materials that may be proved to be his, may be gone into by the Court executing the decree and it may allow any sum within the limit of Rs. 500 to Kallan, which it may find due against Jawahar Singh.

Z. K. *Appeals dismissed.*

(3) 53 Ind. Cas. 865; 1 L. 241.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1214 OF 1922.

January 2, 1923.

Present:—Mr. Justice Broadway.

NANHA—PLAINTIFF—APPELLANT

versus

SUNDA—DEFENDANT—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 4—Failure to produce certificate—Procedure—Certificate produced in appeal—Appellate Court, duty of.

Although section 4 of the Succession Certificate Act forbids a Court from passing a decree against a debtor of a deceased person for payment of a debt except on production of a certificate, there is nothing in the Act to prevent a Court from entertaining a suit and allowing time for the production of the necessary certificate. [p. 841, col. 1.]

Sayad Ahmad Shafi v. *Bunyadi Begum*, 88 P. R. 1891, followed.

Where a suit is dismissed owing to the non-production of a Succession Certificate and the Certificate is produced before the Appellate Court in appeal, the latter ought to accept it. [p. 841, col. 1.]

Maya Ram v. *Shib Das* 20 P. R. 1901; 64 P. L. R. 1901, *Ramanugrah Narayan Singh* v. *Chuni Lal*, 27 Ind. Cas. 822 and *Muralidhar Roy* v. *Mohim Mohan Kor*, 30 Ind. Cas. 510; 19 C. W. N. 794*note*, relied upon.

Abdul Sattar v. *Satya Bhushan Das*, 35 C. 767, distinguished.

Second appeal from a decree of the District Judge, Delhi, dated the 6th February 1922, affirming that of Munsif, First Class, Rohtak, dated the 11th June 1921.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—One Nanha instituted a suit against Sunda for the recovery of a debt due to a man named Behari, deceased. Nanha claimed to be related to Behari and as such entitled to recover the debt due to him. Various defences were raised, one of these being that the suit could not proceed in the absence of a Succession Certificate. The Trial Court framed an issue on this question and on the 11th June 1921 dismissed the suit holding that it could not proceed without a Succession Certificate.

The plaintiff thereupon preferred an appeal to the District Court alleging that time should have been allowed him to obtain the Succession Certificate, but the learned District Judge held that the decision of the Trial Court was correct and, no time having been asked for, the Trial Court was not bound to give any. In the interval between the decision by the Trial Court and the hearing of the appeal

the plaintiff applied for and obtained a Succession Certificate which he produced in the District Court. The District Judge, however, came to the conclusion that this did not affect the case. The order dismissing the suit having been maintained the plaintiff has come up to this Court in second appeal through Mr. Shamair Chand and I have heard Mr. Sagar Chand on behalf of the respondent.

My attention has been drawn to *Sayad Ahmad Shafi* v. *Bunyadi Begum* (1), *Maya Ram* v. *Shib Das* (2), *Muralidhar Roy* v. *Mohini Mohan Kor* (3) and *Ramanugrah Narayan Singh* v. *Chuni Lal* (4). In *Sayad Ahmad Shafi* v. *Bunyadi Begum* (1) it was held that, although section 4 of the Succession Certificate Act forbids the Court from passing a decree against a debtor of a deceased person for payment of his "debt" except on production of a certificate, there was nothing in the Act to prevent the Court from entertaining a suit and allowing time for the production of the necessary certificate. That decision was in a first appeal and the Trial Court was directed to allow the necessary time. In *Maya Ram* v. *Shib Das* (2) it was held that no certificate was necessary and further that there was nothing in the Succession Certificate Act precluding the Court from staying proceedings and directing the plaintiffs to take steps to procure a certificate. The case that is most in point, however, is *Muralidhar Roy* v. *Mohini Mohan Kor* (3). There at the trial of the case no Succession Certificate was produced. It was, however, tendered at the hearing of the appeal and a Division Bench of the Calcutta High Court held that the certificate should have been admitted at that stage. Mr. Sagar Chand has referred to *Abdul Sattar* v. *Satya Bhushan Das* (5), but the facts of that case are considerably different. It seems to me that the view taken by the Calcutta High Court in *Muralidhar Roy* v. *Mohini Mohan Kor* (3) is the correct one. There can be no doubt that the dismissal of the suit by the Trial Court was perfectly legal. At the same time it has to be borne in mind that the plaintiff was contesting his liability to be forced to obtain a certificate, and it would have been more in consonance with the procedure adopted by the Chief Court in the cases cited above if the Trial Court had, on coming to a decision adverse to the plaintiff on this question, allowed him a reasonable time within which to obtain the necessary certificate. The learned District Judge, however, should have admitted the certificate, making such order as to costs as was proper in the case, and I accordingly accept this appeal and remit the appeal to the learned District Judge for a re-hearing. The Succession Certificate is to be regarded as filed and the learned District Judge should dispose of the appeal in accordance with law. Costs in this Court will follow the event.

Z. K. *Appeal accepted.*

(1) 88 P. R. 1891.
(2) 20 P. R. 1901; 84 P. L. R. 1901.
(3) 30 Ind. Cas. 510; 19 C. W. N. 794 *note*.
(4) 27 Ind. Cas. 822.
(5) 35 C. 767.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2181 OF 1921.
February 17, 1922.
Present:—Mr. Justice Abdul Qadir.
SUBA SINGH—PLAINTIFF—APPELLANT
versus
GOPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Remote reversioner, whether can sue in presence of near collateral.

Where a male owner who has alienated ancestral property has sons living who are not minors, a remoter reversioner has no *locus standi* to challenge the alienation unless he can show that the sons have waived their rights or have consented to the alienation or have colluded with the alienor. [p. 842, col. 1; p. 843, col. 1.]

Harvans Singh v. *Harnam Singh*, 84 P. R. 1898 (F. B.), *Murad* v. *Jannat*, 67 P. R. 1900, referred to.

Second appeal from a decree of the District Judge, Jullundur, dated the 24th June 1921, reversing that of the Junior Subordinate Judge, Jullundur, dated the 21st March 1921.

Mr. *Kanwar Narain*, for the Appellant.
Mr. *Sham Lal*, for the Respondents.

SUBA SINGH *v.* GOPAL SINGH.

JUDGMENT.—Narain Singh, defendant No. 3, sold 13 *kanals* and 15 *marlas* of land situated in Jullundur District to Gopal Singh, defendant No 1, for Rs. 1,500. Suba Singh, a collateral of the vendor, brought a declaratory suit contesting this sale on the usual grounds and alleging that the vendor was *la-walad*. It was pleaded on the other side that Narain Singh had three sons from a wife with whom he was residing at Jamesabad in Sind where he had some land, and that in the presence of his sons a remoter reversioner, such as the plaintiff, had no *locus standi* to sue. The Trial Court held that the reversioner could sue if the vendor's sons did not sue and went into the merits and granted the decree prayed for, holding that Rs. 952 out of the sale money were proved to be for legal necessity and would be a charge on the land. On appeal by the vendee, Gopal Singh, the learned District Judge held that in the presence of a nearer reversioner a remoter reversioner had no *locus standi* to sue unless any waiver of his rights by the nearer reversioner or any collusion with the alienor was shown. He observed, "there was nothing in the statement of the son of Narain Singh (who was examined in Court) which would prove that he had waived his rights or abandoned them or that he had colluded in the alienation made by his father." He, therefore, dismissed the plaintiff's suit. The plaintiff has now come up to this Court in second appeal and the sole question raised by him is that he had a *locus standi*. I have heard Mr. Kanwar Narain on his behalf and Mr. Sham Lal for the respondent.

Mr. Kanwar Narain relies on *Harvans Singh* v. *Harnam Singh* (1) and a subsequent ruling of the Punjab Chief Court, *Murad* v. *Jannat* (2), and says that the circumstances of this case were such that an inference of collusion or waiver on the part of the son of Narain Singh should have been drawn by the lower Appellate Court, and it should have been held that the appellant had the right to bring a suit under those circumstances to contest the alienation made by Narain Singh. Mr. Sham Lal, on the other hand, replies that none of the circumstances mentioned in paragraph 67 of Rattigan's Digest of Customary Law, as entitling a remoter reversioner, in the presence of the nearest reversionary heir, to bring a suit to set aside an alienation, has been proved to exist in this case. He goes on to say that, so far from there being any proof that there were reasons justifying Suba Singh to institute a suit, there is even no allegation in his plaint that any such reasons existed, and that he had confined his case to the allegation that Narain Singh was sonless. I think there is considerable force in this contention. In a case where it has been found that the male owner, who has alienated ancestral land, has got three sons of whom the eldest has attained his majority, it is not open to a reversioner, whose rights would accrue after these three sons, to bring a suit until he can justify himself by bringing his case within the conditions laid down in paragraph 67 of Rattigan's Digest of Customary Law. This seems to be clear even from those authorities on which Mr. Kanwar Narain has relied. It was found in the Full Bench case that the nearest reversioner was alive but refused to join in the suit, and it was for that reason that the reversioner next to the one who refused to join in the suit was allowed to sue. Similarly, in *Murad* v. *Jannat* (2) it was found that the daughter, who was the possible next reversionary heir in that case, refused without sufficient cause to institute proceedings to challenge the alienation in question, and admittedly concurred in it, and that, therefore, the reversioner next to her was entitled to bring a suit. None of these circumstances has been shown to exist here. It is not alleged that Lal Chand, the eldest son of Narain Singh, has refused to join in the suit or refused to sue. It is pointed out by Mr. Sham Lal that when Lal Chand was in the witness-box no question was put to him whether he was going to exercise his right or not, which has not been waived. The alienation was made in 1920 and much time did not elapse between the sale and the suit, so that there is nothing to show that the son was not going to exercise his right to question the sale. I

(1) 84 P. R. 1898 (F.B.).
(2) 67 P. R. 1900.

think, under such circumstances, the conclusion arrived by the learned District Judge is correct, that in the presence of a son of the vendor, the plaintiff has no right to sue, as the son had not refused to exercise his right and that as two other sons of the alienor intervene between Lal Chand and the plaintiff, the latter has no *locus standi* to sue.

This appeal is, therefore, dismissed with costs throughout.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 46 OF 1920.

December 20, 1922.

Present:—Mr. Justice Das and Justice Sir John Bucknill, KT.

Babu DAMODAR PRASAD AND OTHERS —DEFENDANTS—APPELLANTS

versus

RAM SARUP KUMAR—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Fraud—Suit to set aside decree—Burden of proof —Service of summons—Presumption.

The test as to whether a suit lies to set aside a decree on the ground of fraud is whether there was fraud practised in relation to the previous proceedings in Court by which the party seeking to set the decree aside was prevented from placing his case before the Court. [p. 844, col. 1.]

In a suit to set aside a decree on the ground of fraud, if the Court comes to the conclusion that in the previous proceedings the summons was not in fact served upon the defendant it is at liberty to examine the evidence in that case with a view to find out whether there was any foundation for the previous suit. But that is only for the purpose of enabling it to decide whether the failure to serve the summons was accidental or deliberate. [p. 844, col. 1.]

But the onus is on the party seeking to set the decree aside to show that there was no foundation for the previous suit, and not on the opposite party to establish the validity of the decree obtained by him. [p. 845, col. 2.]

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendant a case of fraud is not established. [p. 845, col. 2.]

A Court must assume, until the contrary is proved, that a summons was in fact served in the mode stated in the report of the peon. [p. 845, col 1.]

Appeal from the decision of the Officiating Subordinate Judge, Monghyr, dated the 29th August 1919.

Messrs. *S. M. Mullick* and *S. N. Bose*, for the Appellants.

Messrs. *S. C. Mitra* and *S. Dayal*, for the Respondents.

JUDGMENT.

Das, J.—On the 29th January 1912 the defendants first party, who are the appellants before us, instituted a suit, being Suit No. 55 of 1912, for recovery of Rs. 4,065 as against one Bisheshar who is the defendant second party, and also against Ramsarup, the plaintiff-respondent. On the 9th May 1912 the defendants first party obtained a decree for the sum claimed by them as against Bisheshar and Ramsarup. On the 10th August 1918 the present suit was instituted by Ramsarup for a declaration that the decree obtained by the defendants first party in Suit No. 55 of 1912 was fraudulent and that it was not binding on them. The learned Subordinate Judge has come to the conclusion that the decree was a fraudulent one and he has accordingly set aside that decree and restored that suit to its file. On the facts found by the learned Subordinate Judge the order passed by him was far too favourable to the defendants first party, for, if the decree obtained by them was a fraudulent decree, they were not entitled to have the suit re-heard as against Ramsarup and Bisheshar.

The circumstances in connection with Suit No. 55 of 1912 are these: One Saudagar died leaving two sons, Sheodhari and Ramsarup, and a widow Bhojlo Kuar. On the 14th July 1907 Sheodhari took a *mustajiri* lease from the defendants first party of 49 *bighas* of land in Skindarpur. It is the common case that at the time when he took this lease Sheodhari was the *karta* and the manager of the joint family. Between January to August 1910 Sheodhari borrowed several sums of money from the defendants first party on *chitlis*. On the 27th January 1911 Sheodhari executed in favour of the defendants first party what purported to be a mortgage-bond for Rs. 5,000. It is undisputed that he purported to execute the document for himself and as guardian of Ramsarup. The document showed that there was due to the defendants first party Rs. 1,900 on the *chittis* and Rs. 2,100 as rent in respect of the lease. These debts were discharged by the execution of the mortgage-bond

and the bond on the face of it shows that Sheodhari took a cash advance of Rs. 998-14. But Sheodhari died soon after the execution of the bond and it is not denied that this sum of Rs.998-14 was not paid to Sheodhari, although it also appears that Rs. 64 was paid to him. The mortgage-bond could not be registered owing to the death of Sheodhari, and, as I have said, on the 29th January 1912 the defendants first party brought a money-suit for recovery of Rs. 4,065 as against Bisheshar, the son of Sheodhari, and Ramsarup, the brother of Sheodhari.

The learned Subordinate Judge has examined the evidence which has been recorded in this case with a view to find out whether there was sufficient evidence of legal necessity for the loan which was taken by Sheodhari and Ramsarup. He came to the conclusion that the defendants first party failed to prove that there was any legal necessity for the debt incurred by Sheodhari on behalf of the joint family. He also came to the conclusion that summons was not served upon Ramsarup. He thought that there was collusion between Bisheshar, the son of Sheodhari, and the defendants first party and he came to the conclusion that the decree was wholly inoperative so far as Ramsarup was concerned.

In my opinion the learned Subordinate Judge should not have considered the evidence recorded in the case before him in order to enable him to come to the conclusion that there was no evidence to support the decree in Suit No. 55 of 1912. As has been pointed out, the test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in Court by which the defendant in the original suit was prevented from placing his case before the Court. It is quite true that if the Court comes to the conclusion that summons was not in fact served upon the defendant he is at liberty to examine the evidence with a view to find out whether there was any foundation for the previous suit. But that is only for the purpose of enabling him to decide whether the failure to serve summons was accidental or deliberate. Now, in this case the learned Subordinate Judge threw the entire onus upon the defendants first party. It is quite true that in the suit in which the defendants first party were the plaintiffs, namely, Suit No. 55 of 1912, it was necessary for them to establish that there was legal necessity for the debt incurred by Sheodhari as the *karta* of the joint family; but the Subordinate Judge in Suit No. 55 of 1912 gave the defendants first party a decree as against Bisheshar and Ramsarup. That decree operates as *res judicata* between the parties. No doubt it is open to Ramsarup in this suit to show that the decree obtained by the defendants first party in Suit No. 55 of 1912 was a fraudulent decree. In order to establish that there was fraud in relation to the proceedings of the suit Ramsarup would have to show, if he could, that there was no foundation for the suit at all; but then the onus was upon Ramsarup to show that there was no foundation for that suit. There is no onus upon the defendants first party to establish the validity of the decree obtained by them. Now, this course was not adopted by the learned Subordinate Judge. He examined the evidence in the case with a view to find out whether the defendants first party in this case have established that there was legal necessity in respect of the debt incurred by Sheodhari. In my opinion the procedure adopted by the learned Subordinate Judge is wholly erroneous. It was for Ramsarup, the plaintiff in this action, to show that there was no foundation for Suit No. 55 of 1912. It was, therefore, for Ramsarup to establish that there was no legal necessity for the debt incurred by Sheodhari as the *karta* of the joint family.

The foundation of the judgment of the learned Subordiante Judge is that there was collusion between Bisheshar and Ramsarup. In order to see whether this finding is a legal finding it is necessary to examine the evidence in the record. Now, summons was undoubtedly served upon the defendants in the suit. Exhibit F-1 is the report of the peon, Mahbub Hussain, relating to the service of summons, and the report shows that as Bisheshar declined to take the summons and as Ramsarup was a minor he "hung up two of the summons with a copy of plaint on the house covered with tiles facing east." Apart from the general evidence given by Bhojlo Kuer,

the guardian of Ramsarup, the plaintiffs have not examined either the peon or the identifier or any person connected in any way with the service of summons to show that the statements in the report of the peon are untrue. We must assume, until the contrary is proved, that the summons was in fact served in the mode stated in the report of the peon, and, it was necessary for the plaintiffs to prove that the statements made in the report are untrue. It was, in my opinion, absolutely necessary for them to call either the peon or the identifier or any of the witnesses mentioned in the report of the peon. The evidence of Bhojlo Kuer is wholly unconvincing and for my part I can place no reliance upon it.

But there are materials in the record which to my mind show conclusively that Bhojlo Kuer was aware of the suit itself. On the 6th March 1912 Bhojlo Kuer entered appearance as the guardian of Ramsarup through a Pleader named Hito Roy. She is alleged to have given *vakalatnama* to Hito Roy to conduct the defence on behalf of Ramsarup. Now, there is no dispute that a *vakalatnama* was in fact given to the Pleader, but it is suggested by the plaintiff that the *vakalatnama* was given by Bisheshar without the knowledge of the authority of Bhojlo Kuer. The learned Subordinate Judge has found that the *vakalatnama* was given "on her behalf without her knowledge by Bisheshar" and, as the learned Subordinate Judge also came to the conclusion that the plaintiff's mother *Musammat* Bhojlo Kuer is a literate lady, he found as a fact that the *vakalatnama* was filed fraudulently by Bisheshar in the case. Now, I accept the finding of the learned Judge that the *vakalatnama* was given to the Pleader by Bisheshar on his behalf and on behalf of *Musammat* Bhojlo Kuer. But I am not prepared to accept his finding that because *Musammat* Bhojlo Kuer is a literate lady and because the *vakalatnama* was given by Bisheshar and not by *Musammat* Bhojlo Kuer that there was collusion between Bisheshar and the defendants first party. There is nothing else in the judgment of the learned Subordinate Judge from which it can be inferred that there was collusion between the defendants first party and Bisheshar Kuer. The learned Subordinate Judge says: "This one fact alone goes to show that the *vakalatnama* was filed fraudulently by defendants second party. We have evidence in this suit that defendants second party and defendants first party are in collusion with each other." Now, in my opinion, where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendant a case of fraud is not established. Now, what was the object of Bisheshar, who, it must be remembered, was a defendant in Suit No.55 of 1912, to collude with the plaintiffs in that action? The learned Subordinate Judge has found that at the date of the execution of the bond the family was joint. We have examined the evidence very carefully and in our view the evidence does not establish that there was a separation at any time between either Sheodhari or Ramsarup or between Bisheshar and Ramsarup. The case of the plaintiff on the question of separation has been entirely disbelieved by the learned Subordinate Judge. The case of the defendant is not, as the learned Subordinate Judge has erroneously supposed, that there was a separation between Bisheshar and Ramsarup at any time. It is quite true that one of the witnesses on behalf of the defendants says that they were messing separately for the last two years, but the witness himself explained that he does not suggest that the joint family properties have in any way been separated. Now, if that be so, and if the plaintiff's evidence as to separation is wholly disbelieved, then a case of separation has not been established between the parties. That being so, it must be assumed that Bisheshar and Ramsarup were joint not only at the time of the execution of the bond but also at the time of the institution of Suit No. 55 of 1912. Now, what reason prompted Bisheshar to collude with the plaintiffs in Suit No. 55 of 1912? If there was no motive at all to induce him to enter into a conspiracy with the defendants first party, who were the plaintiffs in that action, then, in my opinion, a case of fraud ought not to be found against him. He was a defendant to that action, so was Ramsarup. Now, the case of the plaintiff in this action

is that there was no legal necessity in respect of the debt incurred by Sheodhari. If there was no legal necessity for the loan, then it was obviously to the advantage of Bisheshar to put forward Ramsarup to to urge the point that there was no legal necessity for the loan. If it was established in that action that there was no legal necessity for the loan incurred by Sheodhari then obviously the plaintiffs in that action could not get any decree either against Ramsarup or against Bisheshar. Now, the positive case of the plaintiff in this action is that there was no legal necessity in respect of the loan incurred by Sheodhari. Now, if Bisheshar was aware of the fact that there was no legal necessity, then, as I say, it was to his advantage to put forward Ramsarup to put forward the plea that there was no legal necessity. If, on the other hand, there was legal necessity for the loan, then obviously there was no defence to the suit at all. In either case it would be to the advantage of Bisheshar to have Ramsarup to actively defend the action brought by the defendants first party. In my opinion there was absolutely no motive for Bisheshar to collude in the matter with the defendants first party, and if there was no motive at all, the act of Bisheshar in giving the *vakalatnama* on his behalf and on behalf of *Musammat* Bhojlo Kuer is explainable on the hypothesis that there was no fraud on his part. After all *Musammat* Bhojlo Kuer was a *parda-nashin* lady. The duty of defending the suit would fall entirely upon Bisheshar. It was purely a formal matter for him to go to Bhojlo Kuer and to get the *vakalatnama* signed by her. No doubt it was improper on the part of Bisheshar not to get the signature of Bhojlo Kuer on the *vakalatnama*, but the fact that Bisheshar was guilty of impropriety does not lead to the conclusion that he was colluding with the plaintiffs in that action. As I have said before, where the facts established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, a case of fraud will not be found by the Court. In my opinion the evidence does not establish that Bisheshar in any way colluded with the defendants first party. There are in the record of the suit, no less than two petitions ostensibly filed both on behalf of Bisheshar and on behalf of Ramsarup. It is impossible to find a case of fraud against the defendants first party without coming to the conclusion that Bisheshar was a party to the fraud, because both the petitions show that Bisheshar as well as Ramsarup were applying for time on the ground that there was a talk of settlement between the parties going on. Now, as I have said before, if there was no reason at all for thinking that Bisheshar would collude with the defendants first party in the matter there is no reason at all for finding a case of fraud as against Bisheshar, and, as I have also said before, it is impossible to find a case of fraud as against defendants first party without finding a case of fraud as against Bisheshar. In my opinion the evidence does not establish that Bisheshar in any way colluded with the defendants first party in Suit No. 55 of 1912. The summons was properly served on the minor. It is not suggested in the pleadings of the suit that the procedure laid down in O. XXXII was not complied with. The evidence shows that Bisheshar certainly entered appearance not only on his own behalf but also on behalf of the minor defendant and there is, in my opinion, no ground whatever for suggesting that the decree obtained in Suit No. 55 of 1912 was a fraudulent decree. I would accordingly allow the appeal, set aside the judgment and decree passed by the Court below and dismiss the plaintiff's suit with costs in both the Courts.

Bucknill, J.—I agree.

Z. K. *Appeal allowed.*

WAZIR *v.* GIRDHARI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1450 OF 1922.

January 17, 1923.

Present:-Mr. Justice Campbell.

WAZIR—PLAINTIFF—APPELLANT

versus

GIRDHARI AND OTHERS—DEFENDANTS —RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Mortgage—Redemption by co-mortgagor—Suit by co-sharer to recover his share Limitation—Adverse possession.

Art. 148 of Schedule I to the Limitation Act refers only to a suit against a mortgagee and has no application to a suit against a charge-holder. [p. 848, col. 2.]

A co-mortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co owners but becomes merely a charge-holder. A suit by one of the other co-owners to recover his share of the property on payment of his share of the charge is governed by Art. 144 and not by Art. 148 of Schedule I to the Limitation Act. [p. 848, col 2.]

The rule that, ordinarily, one co-sharer cannot hold adversely against another co-sharer proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers. This presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. [p. 848, col. 2.]

Murajalli Hunna Goundan v. *Ramasami Chetti*, 45 Ind Cas. 807; 41 M. 650, 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448, *Jai Kishen Joshi* v. *Budhanand Joshi*, 31 Ind. Cas. 244, 38 A. 138; 14 A. L. J. 41, *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee*, 45 Ind. Cas. 783; 46 C. 111, 22 C. W.N. 637, *Vasudev* v. *Balaji*, 26 B. 500; 4 Bom. L. R. 178, *Basanta* v. *Dhanna Singh*, 55 Ind. Cas. 450, relied upon.

Ashfaq Ahmad v. *Wazir Ali*, 11 A. 423; 6 Ind. Dec. (N. S.) 698, *Ashfaq Ahmad* v. *Wazir Ali*, 14 A. 1; A. W. N. (1891) 11; 7 Ind. Dec. (N.S.) 373, *Khiali Ram* v. *Tuk Ram*, 30 Ind. Cas. 452; 38 A. 540; 14 A. L. J 834, dissented from.

Second appeal from a decree of the Additional Judge, Rohtak, at Hissar, dated the 14th February 1922, reversing that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 4th March 1921.

Mr. *B. A. Cooper*, for the Appellant

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The suit from which this second appeal has resulted was described by the plaintiff as one for redemption of three-fifths of an undivided landed estate. The plaint alleged that on 10th July 1893, five persons, Shadi, Mannu, Bhondu, Sundu and Chuttan, had mortgaged the estate to one SheoBakhsh for Rs. 700, that subsequently the defendants Nos. 1 to 3, the sons of Ramji Das, had become the representatives of the mortgagee and had also purchased two-fifths of the estate from Shadi and Mannu, that the plaintiff and the remaining defendants were the representatives of the other mortgagors and that the plaintiffs whose actual share in the estate is one-tenth, was entitled to redeem from the defendants Nos. 1 to 3 the remaining two-fifths of the estate.

This statement of facts admittedly was incorrect. The real position, as elicited during the trial, was as follows:—

The mortgage to Sheo Bakhsh was transacted in 1875 and was for Rs. 165 without possession. In 1879 Sheo Bakhsh sued and obtained a decree for possession as mortgagee for the principal sum advanced and accumulated interest totalling Rs. 284-2. In 1893 the mortgagors sued for redemption. Sheo Bakhsh, the mortgagee, claimed Rs. 952-1 as the price of redemption. A compromise was effected on 10th July 1893 by which the mortgagors were to obtain possession by redemption after the *Rabi* harvest of 1894 on payment of Rs 700. A decree was passed in accordance with the compromise. Ramji Das then purchased the shares of Nanha, son of Ghannu, and Shadi, two-fifths of the whole, and applied for execution of the redemption decree. He obtained on 8th July 1895, possession of the whole estate on payment of Rs. 700 in the teeth of objection by Sheo Bakhsh that a further charge had been created by the mortgagors. Sheo Bakhsh then sued for recovery of possession as mortgagee on the ground that the mortgage had not been redeemed in full. It was found that a further charge of Rs. 99 had been created since the redemption decree by the mortgagor owners of the three-fifths not purchased by Ramji Dass. Sheo Bakhsh was given a decree for possession of this three-fifths conditional on Ramji Das not paying him Rs. 99-12 within three months. Ramji Das made payment within the period fixed and remained in possession. The Rs. 99-12 were received by Sheo Bakhsh on 20th February 1897. The present suit was instituted on the 2nd March 1920, and the plaintiffs were given

a decree in the Trial Court for possession by redemption of three-fifths of the estate on payment of Rs. 420. Two of the defendants, sons of Ramji Das, appealed successfully and the District Judge dismissed the suit on the grounds (*a*) that the mortgage on which the plaintiff sued did not exist and (*b*) that his suit was barred by limitation under Art. 144 of the Limitation Act, since the sons of Ramji Das were not mortgagees but charge-holders and the suit was brought more than twelve years after the latest possible date from which time could run, *i.e.*, 20th February 1897.

The plaintiff has preferred a second appeal and it is contended on his behalf that Ramji Das and his sons are in possession in the dual capacities of mortgagees and of co-sharers with the plaintiff, that the plaintiff is entitled to redeem at least his own share of one-tenth; that there is nothing in law to prevent his redeeming the whole three-fifths, and that in any case no possession by Ramji Das can be adverse to the plaintiff, a co-sharer.

No effective reply has been put forward to the first of the two grounds on which the lower Appellate Court has dismissed the suit, and *Sheo Prasad* v. *Lalit Kuar* (1) and *Anaragi Kunwar* v. *Kashi Rai* (2) are authorities which fully endorse the view taken by the learned District Judge that the suit is liable to fail, because the plaintiff sued upon a mortgage which admittedly had no existence.

The lower Appellate Court is supported in its second ground by rulings of the Madras, Allahabad, Calcutta and Bombay High Courts, *Murajalli Hunia Goundan* v. *Ramasami Chetti* (3), *Jai Kishen Joshi* v. *Budhanand Joshi* (4), *Purna Chandra Pal* v. *Barada Prasunna Bhattacharjee* (5) and *Vasudev* v. *Balaji* (6). The last named case is almost an exact parallel with the present.

To the contrary are certain decisions of the Allahabad High Court, *Ashfaq Ahmad* v. *Wazir Ali* (7), *Ashfaq Ahmad* v. *Wazir Ali* (8) and *Khiali Ram* v. *Taik Ram* (9). All these cases were considered in an appeal decided in this Court by Mr. Justice Wilberforce and reported as *Basanta* v. *Dhanna Singh* (10), where it was held that a co-mortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co-owners, but becomes merely a charge-holder, and that Art. 148 of the Limitation Act refers only to a suit against a mortgagee and has no application to a suit against a charge-holder.

Following this ruling and the authorities on which it is based I hold that the lower Appellate Court rightly decided that the suit was time-barred under Art. 144. Those same authorities furnish a reply to the contention that there can be no adverse possession against the plaintiff because the defendants Nos. 1 to 3 are co-sharers with him in a joint undivided holding. The rule that, ordinarily, one co-sharer cannot hold adversely against another co-sharer proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers. This presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 18 A. 403; A. W. N. (1896) 132; 8 Ind. Dec. (N. S.) 975.
(2) 25 Ind Cas. 197.
(3) 45 Ind. Cas. 867; 41 M. 650; 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448.
(4) 34 Ind. Cas. 241; 38 A. 138; 14 A. L. J. 41.
(5) 45 Ind. Cas. 783; 46 C. 111; 22 C. W. N. 637.
(6) 26 B. 500; 4 Bom. L. R. 178.
(7) 11 A. 423; 6 Ind. Dec. (N. S.) 698.
(8) 14 A. 1; A. W. N. (1891) 211; 7 Ind. Dec. (N. S.) 373.
(9) 36 Ind. Cas. 452; 38 A. 547; 14 A. L. J. 814.
(10) 55 Ind. Cas. 450.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 24 OF 1920.

August 29, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

UPENDRA NARAIN ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—Resumption and assessment of "added" lands—Burden of proof—Withholding of relevant papers—Presumption—Presumitur retro, *doctrine of*—*Pleadings—New point in appeal.*

Jurisdiction may be assumed on behalf of the Crown under the Bengal Alluvion and Diluvion Act, only if the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of the Statute; when that jurisdiction is challenged it is incumbent upon the Crown to establish that the disputed lands are "added" lands, that is, lands not included in the original assessment. If, in such circumstances, the relevant papers are withheld by the Crown, the Court cannot but draw an inference adverse to the case set up by the Crown. [p. 852, col. 1.]

Secretary of State v. *Jatindra Nath*, 58 Ind. Cas 778; 24 C. W. N. 737, *Secretary of State* v. *Fahamidannissa Begum*, 17 I. A. 40, 17 C 500; 5 Sar. P. C. J. 301; 8 Ind. Dec. (N. S) 033 (P. C.), *Secretary of State for India in Council* v. *Maharaja of Burdwan*, 67 Ind. Cas. 835; 48 I. A. 505; 35 C. L. J. 92; 42 M. L. J. 61; 4 U. P. L. R. (P. C.) 1; 20 C. W. N. 619; (1922) A. I. R. (P. C.) 6; 19 C. 103 (P. C.) and *Marugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi*, 30 Ind. Cas. 650; 14 I. A. 98; 40 M. 402; 25 C. L. J. 589; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 750; 22 C. W. N. 761; 19 Bom. L. R. 456; (1917) M. W. N. 487, (P. C.), referred to.

Proof of the existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption, within logical limits, that it exists at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant, must vary with each case—always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference. Briefly, a given fact or set of facts, whose existence at a particular time is once established in evidence, continue to exist as long as such facts usually exist. This inference of continuance, whether backwards or forwards, whether upwards or downwards, is an inference of fact and may, therefore, be rebutted. [p. 854, col. 1.]

Reg. v. *Willshire*, (1881) 6 Q. B. D. 366; 14 Cox C. C. 541; 50 L. J. M. C. 57; 44 L. T. 222; 29 W. R. 473; 15 J. P. 375, *Marine Investment Co.* v. *Haviside*, (1872) 5 H. L. 624; 42 L. J. Ch. 173, *Pickup* v. *Thames Marine Insurance*, (1878) 3 Q. B. D. 594; 47 L. J. Q. B. 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43 and *Doe d. Hopley* v. *Young*, (1845) 8 Q. B. 63; 70 R. R. 415; 15 L. J. Q. B. 9; 9 Jur. 941; 115 E. R. 798, referred to.

A Court of Appeal will not allow a new point to be raised, if it involves the determination of questions of fact. A new point may be allowed to be raised by a party for the first time in appeal or second appeal, if it is a pure question of law and does not take his opponent by surprise. But the position is very different when the new plea raises a question of fact or mixed question of fact and law. [p. 851, cols. 1 & 2.]

Basant Singh v. *Mahabir Pershad*, 19 Ind. Cas. 340; 40 I. A. 86; 35 A. 273; 17 C. L. J. 566; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 301 (P. C.), *Ram Kissen* v. *Pooran Mull* 56 Ind. Cas. 571; 31 C. L. J. 259; 47 C. 733, *Balaram* v. *Mangta Dass*, 34 C. 941; 6 C. L. J. 217; 11 C. W. N. 959, *Meenakshinaidoo* v. *Subramaniya Sastri*, 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.), *Connecticut Fire Insurance* v. *Kavanagh*, (1892) A. C 473; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21, *Narayana* v. *Chengalamma*, 10 M. 1; 3 Ind. Dec. (N. S.) 751 and *Sita Ram Nathmal* v. *Sushil Chandra Das & Co*, 63 Ind. Cas. 813; 43 A. 553; 19 A. L. J. 495, referred to.

Appeal against a decree of the Subordinate Judge, Faridpore, dated the 15th September 1919.

Babu *Dwarkanath Chuckerbutty*, Senior Government Pleader, (with him Babu *Surendra Nath Guha*), for the Appellant.

—The defendant is the appellant. The case for the plaintiff is that the lands in suit belonged to him in Zemindari right. The Government have wrongly assessed it with revenue as a new estate. The defence is that the lands have never been previously assessed with revenue, inasmuch they formed the bed of the river Padma at the time of the Permanent Settlement. The learned Subordinate Judge has decreed the suit. Hence the appeal by the Government. We have established our case with reference to Rennell's map prepared in 1764. The Subordinate Judge ought to have relied on it. From that map it is sufficiently

clear that the lands in dispute were at the time under the river-bed. See *Haradas Acharjya Chowdhuri* v. *Secretary of State* (1). The *mouzawari* Register of 1827 also supports our case. We are entitled to the presumption that the estate as shown in the Survey maps of 1854 produced by us, was in the same condition as at the time of the Permanent Settlement. See *Jagadindra Nath Roy* v. *Secretary of State* (2). The learned Subordinate Judge has failed to properly construe the documents produced by us. The learned Subordinate Judge has omitted to consider the most important point which he should have done, *viz.*, that the suit is barred by limitation under section 24 of Regulation II of 1819 under which the suit is to be brought within one year of the date of the Revenue Board's order. That order was made in January 1912. The present suit was instituted in November 1915. The suit should have been dismissed on that ground. See *Secretary of State for India* v. *Profulla Nath Tagore* (3), *Profulla Nath Tagore* v. *Secretary of State for India* (4).

Babu *Jogesh Chandra Roy* (with him Babu *Gopal Chandra Das*), for the Respondent.—As regards the plea of special limitation the point was never raised in their written statement, nor was it taken at the time of the agreement before the Court below. They have also not taken it in their grounds of appeal here. The point raises several questions of fact. It cannot be allowed to be taken now as it will entail a remand.

As regards the merits, I submit they have totally failed to make out their case and that the lands are added lands within the meaning of the Statute. They have deliberately withheld the necessary paper, which would have easily made out their case. On the evidence as is on the record the learned Sub-Judge is quite right in his decree. Rennell's map and the *mouzawari* register and the other papers relied upon are of no assistance. I submit on these circumstances the judgment of the learned Subordinate Judge must stand.

Babu *Dwarkanath Chuckerbutty* replied in brief.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council, who was the defendant in a suit instituted by the plaintiff-respondent with a view to test the legality of an assessment of revenue made under the Bengal Alluvion and Diluvion Act (IX of 1847). The case for the plaintiff is that the disputed lands, which have been constituted into a new estate and assessed with revenue, belonged to him by virtue of his Zemindari right in *Touzi* No. 105 of the Collectorate of Pabna. The plaintiff maintains that the assessment could not have been validly made under the provisions of Act IX of 1847, as the lands are not "added" lands within the meaning of that Statute, but are re-formations *in situ*. The plaintiff seeks, in addition, consequential relief by way of recovery of possession and mesne profits. The claim is resisted on behalf of the Secretary of State substantially on the ground that the disputed lands formed the bed of the river Ganges, locally known as Padma, at the time of the Permanent Settlement, and were not included in the estate settled with the predecessor of the plaintiff; the lands were thus not assessed with revenue at that time, nor have they been so assessed at any subsequent period. On these pleadings, the substantial question in controversy was formulated in the third issue in the following terms:

"Do the lands in suit appertain to estate No. 105 of the Pabna Collectorate, and were they assessed with revenue at the time of the Permanent Settlement of that estate? Did these lands form part of a large navigable river at that time?

The Subordinate Judge has, after an elaborate enquiry, answered this question in favour of the plaintiff in respect of considerable portion of the disputed lands and has declared his title thereto as re-form-

(1) 43 Ind. Cas. 361; 26 C. L. J. 590; 22 M. L. T. 438; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.).
(2) 30 I. A. 44; 7 C. W. N. 193; 30 C. 291; 5 Bom. L. R. 1 (P. C.).
(3) 58 Ind. Cas. 896; 24 C. W. N. 809.
(4) 58 Ind. Cas. 902; 24 C. W. N. 813.

ation *in situ* of his permanently settled villages Nandalalpore, Paranpore and Sibrampore, lying towards the north of a line S. R. drawn on the map of the Commissioner. The Subordinate Judge has also granted the plaintiff consequential relief on this basis. The correctness of the conclusion of the Subordinate Judge has been assailed in this appeal on behalf of the Secretary of State.

An additional point not taken in the memorandum of appeal, nor raised in the Court below, has been mentioned in the course of argument, namely, that the suit should have been dismissed as barred by limitation under section 24 of Regulation II of 1819. This point, in our opinion, cannot be taken by the appellant for the first time in the course of argument here. The case for the appellant is that as the final order of the Board of Revenue was made on the 25th January 1912 and the suit was not instituted till the 15th November 1915, that is, long after the expiry of the period of one year mentioned in section 24 of Regulation II of 1819, as interpreted in *Secretary of State for India* v. *Profulla Nath Tagore* (3) and *Profulla Nath Tagore* v. *Secretary of State for India* (4), the claim should be dismissed as barred by limitation. The substance of the matter, then, is that it is sought to be argued on behalf of the Crown that the suit is barred, not under Art. 14 of the Schedule to the Limitation Act, but by the provisions of section 24 of Regulation II of 1819. That point was not taken before the lower Court; it has not been taken in the grounds of appeal to this Court, nor has notice been given to the respondent of the intention of the appellant to ask the leave of the Court to take this additional ground. Apart from this, a Court of Appeal will not allow such a point to be raised, if it involves the determination of questions of fact. A new point may be allowed to be raised by a party for the first time in appeal or second appeal, if it is a pure question of law and does not take his opponent by surprise: *Basant Singh* v. *Mahabir Pershad* (5), *Ram Kissen* v. *Pooran Mull* (6), *Balaram* v. *Mangta Das* (7), *Meenakshinaidoo* v. *Subramaniya Sastri* (8), *Connecticut Fire Insurance* v. *Kavanagh* (9). But the position is very different when the new plea raises a question of fact or mixed question of fact and law: *Narayana* v. *Chengalamma* (10), *Sita Ram Nathmal* v. *Sushil Chandra Das & Co.* (?) (11). In the present case, the objection attempted to be taken involves at least three questions of fact, namely, (I) whether the decision of the Board was communicated to the respondent, if so, on what date; (II) whether there are any facts which bring the case within the proviso to section 24; and (III) whether there are any facts which make section 31 applicable. Consequently, if the point were allowed to be taken under O. XLI, r. 2, a remand would be inevitable. There is no explanation why the point was not taken in the lower Court or in the memorandum of appeal here; on the other hand, the respondent urges with good reason that a litigation which has already lasted for nearly seven years should not be further prolonged merely to enable the defendant to take a new point. We are of opinion that leave should not be granted under O. XLI, r. 2. We need not accordingly examine the reasoning whereon the decisions in *Secretary of State for India* v. *Profula Nath Tagore* (3) and *Profulla Nath Tagore* v. *Secretary of State for India* (4) are founded; and we shall now proceed to consider the case on the merits.

The Subordinate Judge has described in his judgment how the disputed lands have been subject to the action of the river in recent years, how the river has shifted its bed in 1876, 1881, 1896, 1911, and how the lands have re-formed and disappeared from time to time. This history does not bear directly on the question whether th disputed lands were dry lands at the time of the Permanent Settlement and were included in the estate granted to the prede-

(5) 19 Ind. Cas. 340; 40 I. A. 86; 35 A. 273; 17 C. L. J. 566; 17 C. W. N. 669; (1913) M. W. N. 481; 11 A. L. J. 469; 17 C. L. J. 566; 15 Bom. L. R. 525; 16 O. C. 136; 14 M. L. T. 64; 25 M. L. J. 501 (P. C.).

(6) 56 Ind. Cas. 571; 31 C.L. J. 259; 47 C. 733.

(7) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.

(8) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 541; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(9) (1892) A. C. 473; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21.

(10) 10 M. 1; 3 Ind. Dec. (N. S.) 751.

(11) 63 Ind. Cas. 813; 43 A. 553 (?); 19 A. L. J. 495.

cessor of the plaintiff, or whether the lands were at that time in the bed of a public navigable river and were consequently not only not assessed with revenue but were excluded from the permanently settled estate. The most valuable evidence for the solution of this problem would have been the papers relating to the Decennial Settlement and the Permanent Settlement of the estate. These are in the custody of the officers of the Crown and have not been brought before the Court, though every effort was made to secure their production. The quinquennial papers and the *hakikat chauhaddibandi* papers, which would have afforded valuable evidence of the condition of things shortly after the Permanent Settlement, have also been kept back on behalf of the Crown. We agree with the Subordinate Judge that this omission on the part of the officers of the Crown is a matter for legitimate comment. Jurisdiction may be assumed on behalf of the Crown under Act IX of 1847, only if the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of the Statute; when that jurisdiction is challenged, it is incumbent upon the Crown to establish that the disputed lands are "added" lands, that is, lands not included in the original assessment; see *Secretary of State* v. *Jatindra Nath* (12), *Secretary of State* v. *Fahamidannissa Begum* (13), *Haradas Acharjya Chowdhuri* v. *Secretary of State* (1) and *Secretary of State for India in Council* v. *Maharaja of Burdwan* (14). If, in such circumstances, the relevant papers are withheld, the Court cannot but draw an inference adverse to the defence set up by the Crown. In this connection, we may usefully re-call the emphatic disapproval, expressed by Lord Shaw in *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (15) of the practice, which has grown up in Indian procedure, of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof and failing accordingly to furnish to a Court of Justice the best material and the best assistance for its decision. We need hardly emphasise that if the carriage of a suit or conduct of a defence in this style by a private litigant merits such disapprobation, similar management of a judicial proceeding on behalf of the Crown cannot escape without equal condemnation. In the case before us, the Trial Court has been constrained to adjudicate on the rights of the parties on such materials as have been available, other than what would have been the primary and best evidence.

The earliest documentary evidence produced before the Court is the map prepared by Major Rennell on the basis of a survey of that part of the country made in 1764. The Subordinate Judge found it difficult to secure an accurate reproduction of the lines of the map and thought it extremely hazardous to rely upon that map as plotted in this case. The course followed by the Subordinate Judge is identical with that adopted by this Court in *Secretary of State* v. *Kalika Prosad* (16), where it was pointed out that it was impossible to determine with any approach to accuracy from Rennell's map the position, boundaries and size of the *mouzas* at the time of the Permanent Settlement. The decree in the case mentioned was, however, reversed by the Judicial Committee on appeal: *Haradas Acharjya Chowdhuri* v. *Secretary of State* (1). It was conceded that Rennell's map, owing to its difference in scale, to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey was made, was undoubtedly a map which it was hard to incorporate into a later survey. Yet the Judicial Committee proceeded to adopt the position of the river as shown on Rennell's map and to adapt that map as far as possible to the conditions now known to exist. We are of opinion that the Subordinate Judge might well have followed the course which commended itself to the Judicial Committee, and utilised

(12) 58 Ind. Cas. 778; 24 C. W. N. 737.
(13) 17 I. A. 40; 17 C. 590; 5 Sar. P. C. J. 305; 8 Ind. Dec. (N. S.) 933 (P. C.).
(14) 67 Ind. Cas. 835; 48 I. A. 505; 35 C. L. J. 92; 42 M. L. J. 61; 4 U. P. L. R. (P. C.) 1; 26 C. W. N. 610; (1922) A. I. R. (P. C.) 6; 49 C. 103 (P. C.).
(15) 39 Ind. Cas. 659 at p. 661; 44 I. A. 98; 40 M. 402; 25 C. L. J. 580; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 456; (1917) M. W. N. 487 (P. C.).
(16) 14 Ind. Cas. 609; 15 C. L. J. 281.

Rennell's map as far as practicable; that would only have confirmed the conclusion ultimately reached by him on the basis of the other evidence on the record. The course of the river, as shown on Rennell's map, and the situation of the villages as depicted thereon, though their boundaries are not stated, do not by any means support the contention that the locality where the disputed lands lie was at the time in the bed of the river. On the other hand, the indications are all in favour of the view that the river did not at that time flow over these lands. We see no sound objection to the use of Rennell's map in the manner and to the extent thus indicated. We find, in fact, that in 1896, Rennell's map was relaid by the Revenue Authorities and the report of the Collector forwarded to the Commissioner on the 3rd November 1896, shows that Rennell's map was used to determine the situation of the *mouzas* relatively to the course of the river. The same course had been followed in 1881, and there is no reason why the map should not be used for a similar purpose now as in 1881 and 1896.

The next document which has an important bearing on the question of the location of the *mouzas* initially comprised in the estate now held by the plaintiff, is the *mouzawari* register of 1827. This register shows the area and the boundaries of the villages at that time. It was kept apparently under Regulation V of 1816 which was extended to the entire Province by Regulation I of 1819. The document was in the custody of the Collector and its authenticity and probative value have never been questioned by successive Revenue Officers; indeed, some of them have thought that the register was of special value as probably based on the decennial papers. The entries in this register practically demolish the case for the Crown, and every effort that ingenuity could suggest was made by the legal advisers of the Crown in the Court below either to keep out the document or to cast doubt upon the meaning or accuracy of the entries. The Subordinate Judge has, however, correctly held that criticism of this character does not carry weight. On the other hand, the judgment of Mr. K. J. Badshah, Assistant Collector, dated 5th July 1881, shows that the register books of the Decennial Settlement were in existence at the time and furnished figures for the areas of the villages which are in agreement with the figures in the *mouzahwari* register. The entries in the register could have been contradicted in the present suit by the production of the papers of the Permanent and Decennial Settlement and also of the quinquennial papers and the *hakikat chauhaddibandi* papers. The Subordinate Judge has further held that the standard of measurement, when the *mouzahwari* register was framed, was a cubit of 21 and not 18 inches. The total area of the *Mouzas* Nandalalpore, Paranpore and Sibrampore, which, according to the plaintiff, includes the lands now claimed as re-formation *in situ*, was about 3,650 *bighas* or according to standard measurement 4,968 *bighas*. We shall see presently that the area had diminished when the survey operations were carried out about a quarter of a century later. The *thak* maps, which were prepared in 1849, show that large areas of these villages were diluviated, while the survey maps prepared in 1854 show that about 2,385 *bighas* had been swept away, leaving about 2,582 *bighas* as dry land. But it has been argued on behalf of the Secretary of State that we should presume that the estate was, at the time of the Permanent Settlement, in the same condition as at the time of Revenue Survey in 1854, and reference has been made in support of this proposition to the judgment of the Judicial Committee in *Jagadindra Nath Roy* v. *Secretary of State* (2). That judgment is clearly of no assistance to the appellant. Lord Lindley pointed out that it could not be maintained as a matter of law that the *thak* and survey maps constituted sufficient proof that what was part of the bed of the river at that time was included in the Permanent Settlement of 1793; and, no Court could properly act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court: See *Profulla Nath Tagore* v. *Secretary of State* (4). Indeed, if we are to apply the doctrine of *presumitur retro* enunciated by Lord Watson in *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (17),

(17) 11 C. 740; 14 I. A. 101; 11 Ind. Jur. 369; 5 Sar. P. C. J. 45; 7 Ind. Dec. (N. S.) 490 (P. C.).

and if we start backwards from 1854 and pass through 1849, our progress is arrested in 1827, when we find from the *mouzahwari* register that the lands of the *mouzas* were dry lands not yet diluviated. If, from that stage we proceed further backwards, we must apply the presumption that in 1789 and 1793 the condition of things was identical with that in 1827. If we proceed further backwards, we find affirmative evidence in Rennell's map that the condition in 1764 was the same as in 1827. The process of reasoning we have described is nothing beyond an application of the elementary principle that proof of the existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption, within logical limits, that it exists at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant, must obviously vary with each case—always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference. To put the matter concisely, it will be inferred that a given fact or set of facts, whose existence at a particular time is once established in evidence, continues to exist as long as such facts usually exist; see *Reg.* v. *Willshire* (18), *Marine Investment Co.* v. *Haviside* (19) and *Pickup* v. *Thames Marine Insurance Co.* (20). Reference may also be made to *Doe d. Hopley* v. *Young* (21) where Coleridge, J., said, "the inference may be carried upwards as well as downwards." This inference of continuance, whether backwards or forwards, whether upwards or downwards, is an inference of fact and may, therefore, be rebutted. In the light of these general principles, the position in the present case may be summarised as follows:—

Point No. 1—1764—Rennell's map—Dry land.

Point No. 2—1789—Decennial Settlement.

Point No. 3—1793—Permanent Settlement.

Point No. 4—1827—*Mouzawari* register—Dry land.

Point No. 5—1849—*Thack* map—land under water.

Point No. 6—1854—Survey map—land under water.

The unknown quantity for determination is the state of the *mouzas* at points Nos. 2 and 3. Points Nos. 1 and 4 are known quantities. The presumption is legitimate that the condition from 1789-93 was not different from what preceded in 1764 and what followed in 1827. It was open to the Crown to rebut the presumption of continuity by the production of the papers of the Decennial and Permanent Settlements and also of the quinquennial papers and the *chauhaddibandi* papers. That evidence has not been produced in rebuttal, and the argument is futile that the Court should presume that the conditions were identical in 1789 and 1849 when there is positive evidence of a contrary state of things in 1764 and 1827. We are consequently of opinion that the Subordinate Judge has correctly held that the lands specified in his decree were re-formation *in situ* of the estate held by the plaintiff and that the assessment imposed thereon by the Revenue Authorities was *ultra vires*.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. The hearing fee will be assessed at 15 gold *mohurs*.

B. N.

Appeal dismissed.

(18) (1881) 6 Q. B. D. 366; 14 Cox C. C. 541; 50 L. J. M. C. 57; 44 L. T. 222; 29 W. R. 473; 45 J. P. 375.
(19) (1872) 5 H. L. 624; 42 L. J. Ch. 173.
(20) (1878) 3 Q. B. D. 594; 47 L. J. Q. B. 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43.
(21) (1845) 8 Q. B. 63; 70 R. R. 415; 15 L. J. Q. B. 9; 9 Jur. 941; 115 E. R. 798.

MAGDOOM MAHAMAD *v.* BANSI LAL.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 88 OF 1921.

August 31, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice and Mr. Justice Wallace.

MAGDOOM MAHAMAD MARAKAYAR —DEFENDANT NO 2—APPELLANT

versus

BANSI LAL MINOR THROUGH HIS MOTHER AND NEXT FRIEND SUNDARA BAI AND ANOTHER PLAINTIFF, DEFENDANT NO. 1— RESPONDENTS.

Hindu Law—Joint family—Sale of family property—Re-purchase by one member, effect of.

The doctrine that where there has been a mortgage of joint family property or a wrongful dispossession of the joint family and the property is subsequently redeemed or re-purchased by one member of the family the redemption or the re-purchase must be deemed to have been for and on behalf of the joint family, irrespective of the fact whether the money paid for the redemption or the re-purchase was paid out of joint family funds or was the private money of the member paying it, is inapplicable to a case where joint family property which has been sold by a valid and voluntary sale is subsequently re-purchased byone member of the family with his own private funds. [p. 857, col. 2.]

Visalatchi Ammal v. *Annasamy Sastri*, 5 M. H. C. R. 150, distinguished.

Bajaba Bajirao v. *Trimbak Vishvanath*, 4 Ind. Cas. 255; 34 B. 106; 11 Bom. L. R. 1122, *Chokhu Raoji* v. *Tatya Nama*, 59 Ind. Cas. 569; 22 Bom. L. R. 1297, relied upon.

Where two brothers sold certain family property and subsequently went separately into insolvency and some time after the property sold was re-purchased by one of them in his own name with his private funds and was dealt with as his separate property by him and after his death by his widow to the knowledge of and without objection by the other brother or after him by his widow:

Held, that these facts indicated that there had been a division of status between the brothers prior to the re-purchase and that the property was the self-acquisition of the brother who had re-purchased it.

Appeal from the judgment of Mr. Justice Coutts-Trotter passed in the exercise of the Ordinary Civil Jurisdiction of this Court in Civil Suit No. 820 of 1919.

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Messrs. *V. Radhakrishnayya* and *P. V. Ramachandra Raju*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—I agree with the judgment of Wallace, J., which I have had the opportunity reading and have nothing to add.

Wallace, J.—The contest in this appeal concerns certain houses, Nos. 100, 101 Thambu Chetty Street Madras, purchased by one Kalluram Lal, now deceased, on 31st December 1909. The plaintiff is the minor son of Kalluram's brother, Rajaram Lal, also deceased. The first defendant is the widow of Kalluram and the second defendant an alienee from her. The chief point at issue is whether the property is joint family property, the whole of which the plaintiff alone would be entitled to on the death of his father and uncle, or the absolute and self-acquired property of Kalluram Lal to which his widow succeeded in absolute right. The Trying Judge has found in favour of the plaintiff and the second defendant appeals.

2. The property originally belonged to Kalluram and Rajaram as joint family property having been bought by their father in 1872. On 4th October 1894 both brothers sold the property to one Arni Perumal Mudaly. Shortly after that, each brother in turn separately went insolvent. Early in 1895 each got a personal discharge, but, so far as appears in this case, each did not get a final discharge until his death in 1918. On the same date as the sale to Perumal Mudaly, the latter mortgaged the property with possession to one Rangiah Chetty. Perumal Mudaly on 17th February 1897 created a further charge on the property in favour of his mortgagee, and later on borrowed various sums from him. For all that was owing up to 13th August 1900 Perumal Mudaly sold the property to Rangiah Chetty for Rs. 11,900. On 16th June 1904 Rangiah Chetty sold it to Rajagopal Chetty and Subbiah Chetty for Rs, 9,500 On the same date these two entered into an agreement with the maternal uncle of Kalluram and Rajaram to sell the property for the price paid by them, at any time within three years from that date. On 31st December 1909 Kalluram purchased the property from these two for Rs. 10,000, having borrowed Rs. 9,000 of this on an equitable mortgage, Exhibit II (c), over the property itself which was subsequently replaced by another, Exhibit II, dated the 19th January 1910. Kalluram mortgaged the property in 1910 and 1913, and he died in 1918. Thus the property which had originally

been the joint family property and was sold by both brothers in 1894 came in 1909 into Kalluram's possession by purchase.

3. The plaintiff was born in the interval in 1907. His case is two-fold, based on the common foundation that the brothers never divided. He claims, first, that the property never passed out of the possession of the family and that the series of transactions noted above between 1894 and 1909 never deprived the family of it; and, secondly, that, even if the family had lost it, Kalluram's purchase in 1909 was a purchase for and on behalf of the joint family. The defence case is, that Kalluram and Rajaram were divided in status at least from the date of their separate insolvencies, that there was no re-union before 1909, that the series of transactions was a genuine series which for the time carried the property wholly out of the possession of the brothers and, therefore, it ceased to be joint family property, and that the re-purchase by Kalluram was for himself alone with his own private funds and not with any joint family funds.

4. The real point for decision is whether before the birth of the plaintiff and at the time of Kalluram's purchase the brothers were or were not divided. It will be convenient to discuss first what was the real nature of the series of dealings with the property from 1894 to 1909. It is true that the plaintiff did not, in the plaint, put forth the contention that they were *benami* or colourable, but that is not important. They were produced as part of the defence and the plaintiff's business there was only to explain them away as far as as he could. They were, however, before the plaintiff when he called his evidence in Court, and I may note here that, except for a vague answer elicited from P. W. No. 2, which is not evidence, the plaintiff has not adduced any evidence about these documents. He relies entirely on inferences and suggestions and speculations drawn from the text of the documents. The initial assumption involved in his case is that the sale of 1894 to Perumal Mudaly was, since the brothers were on the verge of bankruptcy, *benami* for the joint family. Having this as a foundation the plaintiff's Pleader ingeniously built upon it the rest of his case, that the sale of Perumal Mudaly to Rangiah Chetty, the mortgagee, was not really a sale but a mortgage, that Rangiah Chetty and Subbiah Chetty had only the mortgage right, that the brothers thus continued throughout to retain the equity of redemption, so that when Kalluram Lal ostensibly purchased from the Chetties in 1909, he was taking his stand on the joint family right to the equity of redemption, and that in that view it matters not whether the money paid ostensibly for the purchase but really to discharge the mortgage was Kalluram's own private money or not, since his redemption of the mortgage would be, as laid down in *Visalatchi Ammal* v. *Annasamy Sastry* (1), for and on behalf of the family and thus the property would in the end be as it was in the beginning, joint family property.

5. Undoubtedly there are some matters unexplained in the case which would fit in with this theory. An impending insolvency is a likely motive for a fraudulent sale and for the concealment of the real ownership until all danger from creditors has been removed. The fact that the sale by Rangiah Chetty was for Rs. 2,400 less than he had bought the property for, might indicate that the figures were merely nominal and not real. The sale to Rajagopal Chetty and Subbiah Chetty was accompanied by a contemporaneous agreement to sell to the maternal uncle of the brothers, for whom Kalluram himself was eventually substituted. But I feel that this line of attack on these documents is too speculative, and that the attack has been developed since the date of the hearing of the suit in a manner which the defence cannot be expected to meet here. The case which the defendant was called on to meet by evidence in the Court was that raised in Issue No. 1, that is, the general question whether Kalluram and Rajaram were not divided in their lifetime before the birth of the plaintiff. The Trying Judge in his judgment so states the point for trial at page 18, line 25 of the printed papers. From a further remark at page 19, line 11, it would appear that it was only at the time of argument it was advanced that the whole series of transactions from October 1894 to December 1909 wa

(1) 5 M. H. C. R. 150.

colourable. This appears to be correct, as I find that the only hint in evidence of the present attack is the question to P. W. No. 2 noted above as to the nominal nature of the sale to Perumal. But, as he only came into the service of the brothers in 1901, he could not give any direct evidence, and I note that, the same man has attested the sale-deed to Rangiah Chetty and he was not asked a word about that. The learned Judge in his conclusion at page 25 line 18 assumes the documents to be genuine transactions but supposes they were 'to get the property out of the hands of Rajaram's creditors and possibly out of the hands of Kalluram's creditors.' But I feel sure that the attack of the plaintiff on these documents developed at the time of the argument and not in the evidence, has put the defendants at a disadvantage, of which they have reason to complain. Had the defendants had warning at the time of trial in the lower Court as to the particular points of the present attack, they might have been able to prove, for example, that the sale to Perumal Mudaly was merely the common dodge of the bankrupt for converting the immoveable property into cash, that the sale price to Rangiah Chetty was fixed at Rs. 11,900, because that was the sum total of the debts owing to Rangiah Chetty by Perumal Mudaly and Rangiah could not hope to get his money out of him otherwise, that no cash proceeded from Rangiah for that purchase. They might also have been able to show that the property had depreciated in value between Rangiah Chetty's purchase and the sale to Rajagopal Chetty and Subbiah Chetty and that the agreement of sale to the maternal uncle was the result of a genuine endeavour by the brothers to get a sort of right of pre-emption over the property to be exercised whenever financial circumstances permitted. It is a weak point in the plaintiff's case that no suggestion is made why these Chetties, one of them being a Professor in the Christian College, should oblige these bankrupt brothers and why it should be necessary to substitute Rangiah as the nominal purchaser in the place of a *benamidar* Perumal Mudaly who *ex hypothesi* was willing to oblige.

6. I think that the only sound conclusion is that Rangiah Chetty at least insisted on a sale and that the property passed to him, but that each brother was keeping an eye on the property, and, when it came to Rajagopal Chetty and Subbiah Chetty, one of them found a chance of recovering it. It may be further noted that though the agreement to re-convey was taken from Rajagopal and Subbiah Chetty, no similar agreement was obtained from Rangiah Chetty. I think the strong probabilities are that the sale to Rangiah Chetty was a genuine sale. On this point of the case I conclude that whatever grounds there may be for holding that the transfer to Perumal Mudaly was not a genuine one, there is no valid ground for holding that the sale to Rangiah Chetty was not what it purports to be and that the ownership of the brothers in the property passed by it. I will point out as worthy of notice that no creditor of either brother appears to have come forward at any time to claim that these alienations were nominal. This would indicate the public estimate of these transactions.

7. I conclude, therefore, that the property passed wholly out of the hands of the joint family, if not in 1894 when it was sold to Perumal Mudaly, then at least in 1900 when it was sold to Rangiah Chetty and that the latter sale was a valid sale. The doctrine laid down in *Visalatchi Ammal* v. *Annasamy Sastry* (1) is applicable to the case of a mortgage or to a wrongful dispossession of joint family property but will not apply to a case where the joint family disposed of the property by valid and voluntary alienation. See *Bajaba Bajirao* v. *Trimbak Vishvanath* (2) and *Chokhu Raoji* v. *Talya Nama* (3).

8. On the main question whether the brothers were divided at the time of Kalluram's purchase I will first take up the evidence as to the source of the purchase-money. Such evidence as there is, is all one way. Rs. 9,000 was borrowed on security of the property given by Kalluram alone and Rs. 1,000 in cash apparently came from some other source. The plaintiff's suggestion that the cash might have come out of the monies borrowed by the brothers

(2) 4 Ind. Cas. 255; 34 B. 106; 11 Bom. L. R. 1122.
(3) 59 Ind. Cas. 569; 22 Bom. L. R. 1297.

for joint trade on the *hundies*, Exhibit B, series, is apure surmise. On the other hand, in the mortgage-deed by Kalluram, Exhibit III, dated 6th April 1910, there is a statement by him that this Rs. 1,000 was his own money. This document is attested by Rajaram with the significant addition to his signature of the words "after having read the whole document." This note was obviously intended to fasten on Rajaram a knowledge of what Kalluram had said in the document. This is a document executed after the birth of the plaintiff and the effect of such a statement on the plaintiff's rights in the property as well as his own could not have been absent from Rajaram's mind. This admission against his own interest by Rajaram, while of course not an estoppel against the plaintiff, is, in the absence of other evidence, reasonable proof that the Rs. 1,000 came from Kalluram alone. The conclusion is strengthened, to my mind, by the fact that the pro-note and the equitable mortgage for Rs. 9,000, Exhibit II, was executed by Kalluram alone. The plaintiff argues, it was still at that time necessary for Rajaram to hide his interest in the property in order to conceal it from his creditors. But I fail to find any satisfactory evidence that he was then in any worse financial situation than Kalluram, while at the same time the two brothers were publishing to the business world and, therefore, to their creditors their jointnes in trade by jointly executing *hundies*, Exhibit B series, for trade purposes. The lender of Rs. 9,000 would in his own interest not have refrained from getting Rajaram's signature to bind the whole joint family. The more the joint trade of the brothers suggested jointness in status, the more likely is it that their lender would have insisted on Rajaram's signing the equitable mortgages, if the property was really joint family property. There is thus strong probability that it was Kalluram's own money alone which went for the purchase in 1909.

9. That is some indication that the brothers were then divided, and that inference is further strengthened in three ways, first, the probability that the brothers were divided at the time of the insolvency, secondly, the conduct of Rajaram himself, and, thirdly, the conduct of his widow after his death. As to the first point, the two brothers went into insolvency in 1895 separately, as if divided, with separate creditors and separate list of assets. We have looked into the schedules, but they do not throw any light on the question of division. We are not told that any creditors or Official Assignee attempted to amalgamate the two insolvents and the two estates. It is not necessary in this case to decide whether the presumption of separate insolvency petitions would in law be a sufficient declaration of an intention to separate and would constitute a partition The fact remains that in 1894 the brothers held themselves out to the world to be divided, and I see no good reason for supposing that this attitude did not represent the truth. The series of dealings with the property sebsequent to the insolvency does not conflict with a divided status even if I suppose that they were all *benami*. The existence of a joint trade must be admitted and has weiged much with the lower Court. but that again is not inconsistent with division, while there is some oral evidence which there is no reason to reject including that of the brother's clerk, P.W. No. 4, examined for the plaintiff, that the brothers each had also a separate trade. The fact that when Kalluram bought the property in 1909, the sale-deed was taken in his name alone, though the names of both brothers appeared on the original sale in 1894, by which the property left the family, is a point in favour of the status of the brothers being then a divided status.

10. In this connection also the conduct of Rajaram (point 2 noted above) becomes important. We see him at a time when his minor son was alive attesting with full knowledge of its contents, Exhibit III, dated the 6th April 1910, by which Kalluram mortgaged the property and in which Kalluram states "that none except myself has any kind of claim" in the property, and again attesting Exhibit IV, dated the 28th May 1910, a subsequent mortgage by Kalluram, in which Kalluram states that he is the absolute owner of the property. Then, after the death of Kalluram when if the family had remained joint, he became the manager of it, and when clearly it was imperative in his own interest as well as that of his son to put dealings regarding the property, which held out Kalluram as the

sole owner, in their true light, he did nothing at all, but let things remain as they were. Even in a Will written by him, but not produced by the plaintiff he is said by C.W. No. 8, a High Court Vakil who attested the Will, to have made no claim to any immoveable property. This is a document in which at any rate he need not have been afraid to set out the real state of affairs, since he could have kept the knowledge of it from his creditors. Further, he is stated by several witnesses to have been present when Kalluram's widow after her husband's death took rental agreements, Exhibits VII and IX series, in her own name from the tenants occupying the property and he again did nothing. Against this the plaintiff has nothing to set worth mentioning except the fact that in Raja Ram's diary there are entries that in 1918 he paid sums of money from time to time to Kalluram's widow for the repairs of the house, and once paid Rs. 5 for stamp agreements for this house. Again, I would note that this is the point which the defence has not been given any opportunity of rebutting. It is not impossible, for instance, that the widow being then in seclusion got him to look after rental agreements and repairs and financed him for that purpose, and that the diary entries are merely noted for his own information of what he had paid out. The plaintiff's suggestion that these rental agreements were nominal for Rajaram because the latter was still in financial difficulties is not supported by any satisfactory evidence. I regard this apathy by the father of a minor son in the face of the dealings with the property as her own absolute property by the sonless widow of his brother as a very strong proof that division had in fact taken place before his son's birth, and that the property when purchased by Kalluram, became his sole absolute property.

11. As to the conduct of the widow of Rajaram Lal after his death, it is significant that, though he died in November 1918, she did not send any notices to the tenants on the property who were attorning to Kalluram's widow to attorn to the plaintiff, although she published notices warning intending purchasers not to buy from Kalluram's widow. It is remarkable that she, examined as P. W. No. 1, nowhere says that she was told by her husband that he and the minor plaintiff had an interest in this property. Surely, at least when he was dying, Rajaram would have made her cognizant of the true state of affairs, so that she may look after her infant's interest. It is clear that Rajaram left no record, oral or verbal, to his immediate relations that his minor son had any interest whatever in this property.

12. The Trying Judge has decided the case in the plaintiff's favour on the footing that the family never was divided and that either the purchase by Kalluram was for the joint family, or the series of transactions from 1894 to 1909 were *benami*, and the property never passed from the family. The existence of a joint trade weighed most with him in deciding that there had been no division. I would lay more stress on the likelihood that the sale to Rangiah Chetty was a genuine sale and that the separate insolvencies indicated a real division of status, and on the fact that the consideration for the purchase came from Kalluram alone, and on the conduct of Rajaram and his widow after the death of Kalluram which are only consistent with the theory that they knew plaintiff had no right in the property bought by Kalluram. I consider that there is no evidence to show that throughout all the long series of transactions Rajaram was in such bad financial circumstances that we must presume that he was afraid to put forward in any quarter his claim or his son's claim to a share in this property.

13. For the above reasons, I would differ from the Trying Judge and hold on the first issue that at the time of Kalluram's purchase in 1909 the property had ceased to be joint family property, that the brothers had divided even before the plaintiff's birth and that plaintiff has had no right to any share in the suit property. My conclusion would be that the plaintiff's suit must fail *in toto*, as the property is self-acquired property of the first defendant's husband to which the plaintiff can have no manner of right, I would, therefore, reverse the decree of the lower Court and dismiss the plaintiff's suit with costs to the second defendant here and below.

V. N. V.

Z. K. *Appeal allowed.*

DHARNIDHAR *v.* SAKHARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 160-B OF 1919.

August 22, 1921.

Present :—Mr. Dhobley, A. J. C.

DHARNIDHAR AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

SAKHARAM AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Arbitration—Matter not referred determined—Award, validity of—Consent of parties—Reference by some only of parties concerned—Award binding on referring persons—Arbitration without intervention of Court—Civil Procedure Code (Act V of 1908), Sch. II, para. 1, applicability of.

Where, in the case of an arbitration, the arbitrators proceed to decide as well a matter that is not included in the reference, and the parties concerned take part in the proceeding and accept the award when it is made and act upon it, they must be deemed to have made a second submission in respect of that matter and cannot subsequently be allowed to repudiate the award. [p. 861, col. 2.]

Though some persons do not join in submitting a dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. It is binding on them especially when it has been acted upon. [p. 861, col. 2.]

Paragraph 1 of the Second Schedule of the Civil Procedure Code does not apply to a case when the reference to arbitration is made without the intervention of a Court. [p. 861, col. 2.]

Revision against the order of the Additional District Judge, Akola, in Civil Appeal No. 144 of 1919, dated the 11th September 1919.

Mr. *M. Gupta*, for the Applicant.

Mr. *Y. R. Oka*, for the Non-Applicant.

ORDER.—The above-named parties and one Govind Balkrishna carried on in partnership a commission agency and other business in the name and style of "Shankar Vittal Dixit," the shares of the partners in the business being fixed. After Govind's death, disputes arose between the remaining partners in connection with the accounts and they referred the dispute between them to the arbitration of certain persons under a written agreement. The arbitrators gave their award and the plaintiff Dharnidhar applied under Second Schedule, paragraph 20, Civil Procedure Code, to the Sub-Judge, Akola for that award being filed in Court. The application was opposed by the defendant No. 2 Sakharam alone, the defendant No. 1, Shankar, having no objection to the award being filed. The defendant Ambadas remained absent. Sakharam's objections were overruled and the learned Sub-Judge ordered the award to be filed and passed a decree in accordance with it. Sakharam appealed to the District Court and the learned Additional District Judge allowed the appeal, holding that the award was on a certain ground invalid and could not be filed in Court.

2. The grounds urged on Sakharam's behalf against the validity of the award and against its being filed were that one of the arbitrators had declined to act and that he had not been a party to the final award. It was also urged that as the legal representatives of the fifth partner, Govinda, had not joined in making the reference, the award given by the arbitrators was invalid and could not be given effect to. There was another firm carrying on cotton business going by the name of "Dharnidhar Balwant." In that business the partners were the partners of the firm of "Shankar Vittal Dixit" and also certain other persons. In making up accounts of "Shankar Vittal Dixit," the arbitrators went through and settled the accounts of the other firm too and the final accounts as between the parties were thus determined in respect of both the firms. The reference to arbitration did not include the accounts of the firm of "Dharnidhar Balwant." It was thus urged that the award was invalid, the arbitrators having decided questions not referred to them.

3. Both the Courts below have concurrently held that all the three arbitrators took part in the arbitration proceedings and that the award was the joint award of them all, though one of them had not signed it. According to the learned Additional District Judge, all the parties, including the contesting defendant, had accepted the award and had actually acted upon it, the latter taking the debtors and the debts assigned to him and realizing from them in his own name the debts due to the firm. As the dispute between the parties was in respect of partnership accounts, it was necessary that all the partners, including the legal representatives of Govinda, deceased, should have joined in the reference, and as this was not done the award was ineffectual. The view of the lower Appellate Court was that, notwith-

standing this defect in the award, the contesting defendant was equitably estopped from questioning its validity as he had accepted and acted upon it. The objection which prevailed in that Court was that the reference to the arbitrators did not include the accounts of the other firm and that all the partners in that firm had not joined in the reference and were not before the arbitrators.

4. The contesting defendant, Sakharam, had signed the award in token of his having accepted it and had also acted upon it by instituting suits in his own name and in realizing debts due from the firm's debtors, who had been assigned to him under the award. The arbitrator's proceedings were open and all the parties attended their sittings and took part in them. In the written statement filed by Sakharam as well as by other partners before the arbitrators, reference was made to the other firm and to its accounts. Though the two firms were separate, one from the other, inasmuch as there were some additional partners in the "Dharnidhar" firm and the extent of the shares held by the present parties in it were different from those held by them in the other firm, it cannot be denied that the two concerns were closely connected with each other. The accounts of both the firms were written in one and the same book, though at different places, and it appears that the accounts of one firm could not be finally settled without examining the accounts of the other. The arbitrators examined both the accounts and no objection was raised by Sakharam to their doing so. On the other hand, he willingly accepted the award, perhaps, because he wanted both the accounts to be settled. The question is whether he can now be permitted to question the finality of the award on the grounds raised by him. In my opinion he cannot be so allowed. Though the accounts of the "Dharnidhar" firm were not submitted to the arbitration for examination and settlement, the fact that the parties concerned permitted the arbitrators to do it and accepted their final award, would be taken to indicate that they had subsequently agreed to refer that dispute too for arbitration. All that was done with the concurrence of the parties who perhaps found that final accounts could not be made without examining and settling the accounts of the other firm also. Whatever it may be, Sakharam by taking part in the arbitration proceedings, during which the accounts of both the firms were examined with a view to settle both the accounts between the parties, and by accepting the final award and acting upon it, must be deemed to have made a second submission to arbitration in respect of the settlement of the accounts of the "Dharnidhar" firm. The cases of *Mukund Ram Sukal* v. *Salig Ram* (1) and *Sri Lal* v. *Arjun Das* (2), though not on all fours with the present one, support this view. Though there might be some defects, these have been cured by the acts and conduct of the parties. Having accepted and acted upon the award, the defendant, Sakharam, cannot be allowed to repudiate it. Though some of the partners had not joined in submitting the dispute to arbitration, the award did not become invalid or ineffectual as between the persons making the reference. It is binding upon them, especially when it has been acted upon. Paragraph 1, Second Schedule, Civil Procedure Code, 1908, (old Civil Procedure Code, section 506) and the reported cases on it are not applicable, as the reference to arbitration has in this case been made without intervention of the Court.

My opinion is, that the award ought to be allowed to be filed. The order of the lower Appellate Court is set aside and the order and the decree passed by the first Court are restored. The defendant No. 2, Sakharam, shall pay all the costs of the three Courts. Pleader's fees in this Court Rs. 50.

N. H. *Order set aside.*

(1) 2 C. P. L. R. 202.
(2) 27 Ind. Cas. 233; 18 C. W. N. 1325.

KARAM CHAND *v.* JINDA RAM.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 227 OF 1922.

May 3, 1922.

Present :—Mr. Justice Scot-Smith and Mr. Justice Campbell.

KARAM CHAND—PLAINTIFF—APPELLANT

versus

JINDA RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Adjournment granted owing to non-service of summons on witness—Procedure.

Where a party to a suit has paid the process-fee for the summoning of witnesses the Court and its officers are responsible for effective service, and the adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of O. XVII, r. 3 of the Civil Procedure Code. [p. 862, col. 2.]

Harjas Rai v. *Narain Singh*, 29 Ind. Cas. 938; 51 P. R. 1915; 98 P. L. R. 1916, followed.

If a Court is at any time of opinion that a party to the suit is obstructive and prevents witnesses from being served with summonses, it should record an order giving its reasons therefor and grant the party one more opportunity of producing its evidence under O. XVII, r. 3 of the Civil Procedure Code, on failure to do which the Court might proceed under that rule. [p. 862, col. 1.]

Order XVII, r. 3 of the Civil Procedure Code merely authorises a Court to proceed to decide the suit forthwith. It does not authorise it to dismiss it summarily. [p. 862, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, First Class, Montgomery, dated the 26th October 1921.

Lala *Badri Das*, R. B., for the Appellant.

Lala *Ram Chand Manchanda*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Senior Subordinate Judge, Montgomery, dismissing the plaintiff's suit under O. XVII, r. 3, Civil Procedure Code. The suit was one for dissolution of partnership and rendition of accounts and the issues of which the *onus probandi* was on the plaintiff were struck on the 13th July 1920. On the 18th August 1920 and on subsequent occassions some six witnesses for the plaintiffs were examined. For the 18th February 1921 Karam Singh and Hans Raj witnesses were summoned but were not served. On the 29th March there was an order postponing the hearing of the case on the ground that the record had gone to the High Court. On the 3rd August 1921 the record having come back, Karam Singh and Hans Raj were summoned for the 23rd October. Meanwhile on the 8th August 1921 the plaintiff applied for the summoning of two more witnesses, namely, Jugal Kishore and Lakhu Ram. On the 3rd October it was found that none of the plaintiff's witnesses had come to Court. In regard to Karam Singh the report was that he refused to accept service. Hans Raj had gone to Chichawatni and the summons was stuck on his door. Jugal Kishore had been served but did not attend. Lakhu Ram has not been served. The Court then passed an order fixing the 26th October for the next hearing and directing under O. XVII, r. 3, Civil Procedure Code, that the plaintiff must close his case on that date. On the 26th October none of the plaintiff's four witnesses was present. Karam Singh alone had been served. The Court then recorded a short judgment in which it dismissed the case under O. XVII, r. 3, Civil Procedure Code, but the Court did not in its judgment refer to the evidence of the witnesses whom the plaintiff had produced or say whether the *onus* of the issues had been discharged or not. Order XVII, r. 3, of the Code merely authorises a Court to proceed to decide the suit forthwith. It does not authorise it to dismiss it summarily as has been done by the Subordinate Judge here. Lala Ram Chand, who appears for the respondent, admits that the order of the lower Court is not sound and that the case should be remanded for re-decision in accordance with law. There is no suggestion on the record on behalf of the defendant, nor is there any finding by the Court that the plaintiff is to be blamed for the non-service of the summonses on the witnesses for the 26th October 1921. In *Harjas Rai* v. *Narain Singh* (1) it was held that where a party to a suit has paid the process-fee for summoning witnesses the Court and its officers are responsible fo effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not " amount to time granted to one party within the meaning of O. XVII, r. 3." In

(1) 29 Ind. Cas. 938; 51 P. R. 1915; 98 P. L. R. 1916.

our opinion, therefore, the Court had no jurisdiction for its order dated the 3rd October by which it directed that the plaintiff must complete his evidence by the 26th October 1921.

We accordingly accept the appeal and setting aside the order of the lower Court remand the case thereto for re-decision in accordance with law. The plaintiff should be given another chance to produce his evidence. If the Court is at any future time of opinion that either party is obstructive and preventing its witnesses from being served with summonses it should record an order giving its reasons therefor, and then it would be justified in granting one more opportunity under O XVII, r. 3, Civil Procedure Code.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 490 OF 1921.
October 18, 1922.
Present:—Mr. Batten, J. C.
MULLOO AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Seth KUNDANLAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Thekedar, *powers of*—*Creation of tenants in spite of prohibition*—*Damages, provision for, effect of.*

Normally, and unless there is something against it in the terms of the *theka*, a *thekedar* of proprietary rights has all the powers and privileges that a landlord has in respect of his tenants and in respect of creating tenants.

A *thekedar's* powers may be limited by conditions in the *theka.*

Ramji v. *Fakira*, 6 C. P. L. R. 71, *Lachman* v. *Nanhusing*, 8 C. P. L. R. 39, followed.

A distinct prohibition does not cease to be a prohibition because the person who acts against the terms of that prohibition is made liable for damages.

A person, who has been created a tenant by a *thekedar* in spite of the prohibition in the *theka*-deed against the creation of tenants cannot claim to be a tenant against the wishes of the proprietor simply because the lease-deed provides that if the lessor suffered in consequence of the action of the *thekedar* in creating tenants he might sue the *thekedar* for damages.

Appeal against the decree of the Additional District Judge, Saugor, in Civil Appeal No. 37 of 1921, decided on the 23rd July 1921.

Mr. *G. L. Subchdar*, for the Appellants.
Mr *K. V. Deoskar*, for the Respondents.

JUDGMENT.—The only ground on which the appellants claim to be tenants is that they were created tenants by the *thekedar*. The question is whether the *thekedar* had or had not the power to make them tenants. Normally, and unless there is something against it in the terms of the *theka*, a *thekedar* of proprietary rights has all the powers and privileges that a landlord has under the Tenancy Act in respect of his tenants and in respect of creating tenants. But the very rulings which lay down this proposition, namely, *Ramji* v. *Fakira* (1) and *Lachman* v. *Nanhusing* (2), also lay down that a *thekedar's* powers may be limited by conditions in his *theka*. In this case it was distinctly stipulated in the *theka* that the *thekedar* should not lease out land or create new tenants. It is argued that it is also provided that if the lessor suffered in consequence of the *thekedar's* action, he might sue the *thekedar* and that, therefore, the landlord's sole remedy is to sue the *thekedar* for damages and he must accept the appellants as his tenants. In my opinion a distinct prohibition does not cease to be a prohibition because the person who acts against the terms of that prohibition is made liable for damages. Such a provision may be superfluous in a case like the present but none-the-less there is a distinct condition in the *theka* that the *thekedar* had no power to create tenants. This being so, the appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 6 C. P. L. R. 71.
(2) 8 C. P. L. R. 39.

SHANKAR *v.* BAHADUR.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 553 OF 1919.

August 3, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice and Mr. Justice Abdul Qadir.,

SHANKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Pagwand *and* Chundawand —*Jats of* Mauza *Rajada, Tahsil and District Gurdaspur.*

The normal custom in the Punjab prescribes a division according to the *pagwand* rule, and the *onus* lies heavily upon the person who relies upon the *chundawand* rule.

Jats of *Mauza* Rajada in the Gurdaspur Tahsil follow the *pagwand* rule.

Chattar Singh v. *Hem Singh*, 62 P. R. 1885, *Charn Singh* v. *Sobha Singh*, 63 P. R. 1885 and *Ida* v. *Rahim Bakhsh*, 12 Ind. Cas. 857 ; 58 P. R. 1911; 45 P. L. R. 1912; 202 P. W. R. 1911, referred to.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 21st Decemaber 1918, affirming that of the Subordinate Judge, Gurdaspur, dated the 2nd April 1918.

Lala *Tirath Ram*, for the Appellants.

Mr. *Lal Chand Mehra*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the estate of one Kanda, a Jat of *Mauza* Rajada, in the Gurdaspur Tahsil, and the sole question for determination is whether the parties are in the matter of succession governed by the *pagwand* or the *chundawand* rule. Now, the normal custom in the Punjab undoubtedly prescribes a division according to the *pagwand* rule and the *onus* lies heavily upon the person who relies upon the *chundawand* rule. Not only is there a general presumption in favour of the division of property *per capita*, but we have two judgments of the Punjab Chief Court, reported as *Chattar Singh* v. *Hem Singh* (1), and *Charn Singh* v. *Sobha Singh* (2), relating to the Jats of the Gurdaspur Tahsil in which the rule of *chundawand* was held not to be proved and the rule of *pagwand* was followed in the matter of inheritance. In *Ida* v. *Rahim Bakhsh* (3) which related to Muhammadan Jats of the Gurdaspur Tahsil, the Chief Court held that, notwithstanding an entry in the *Riwaj-i-am* in favour of the *chundawand* rule, the *onus probandi* that this rule prevails among Muhammadan Jats of the Gurdaspur Tahsil is on the person asserting it, and that the *onus* had not been discharged.

We must, therefore, hold that the *onus* of proving the division of property *per stirpes* was clearly on the defendants who relied upon the rule of *chundawand*, and indeed, this proposition is not seriously disputed by Mr. Lal Chand Mehra who argued the case on their behalf. The learned Counsel, however, contends that there is a family custom applying to the parties which favours the *chundawand* rule, but the only evidence adduced in support of this unusual custom is the fact that in 1886 on the death of Daya, one of the sons of Kanda, his share in the joint *khata* was mutated in favour of his full brother Hira, and that in 1888 on the death of Ishar his share was recorded in the names of his two full brothers, Fakir and Arjan. It is beyond dispute that on Kanda's death his estate was mutated in favour of his five sons without any definition of shares, and considering that even after the mutations of 1886 and 1888 the plaintiffs have been holding possession of a larger area of land than they would be entitled to according to the *chundawand* rule, and that they have all along been paying land revenue assessed on the land in their possession, we do not think that these paper entries are sufficient to discharge the *onus*.

For the aforesaid reasons we hold that the parties are entitled to divide the joint *khata* according to the *pagwand* rule, and that the plaintiffs' share therein amounts to two-thirds. We accordingly accept the appeal and pass a declaratory decree in favour of the plaintiffs in the terms stated above. The defendants must pay the costs incurred by the plaintiffs throughout the litigation.

Z. K. *Appeal accepted.*

(1) 62 P. R. 1885.
(2) 63 P. R. 1885.
(3) 12 Ind. Cas. 857 ; 58 P. R. 1911 ; 45 P. L. R. 1912 ; 202 P. W. R. 1911.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 253 OF 1922.
July 25, 1922.
Present:—Mr. Justice Walsh.
ANGNOO SINGH AND OTHERS
—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 195—Habitual offenders, joint trial of—Sanction to prosecute—Public interest—Notice whether necessary—Revision—High Court, duty of—Evidence of either party equally good—Order whether quashed—Evidence—Witnesses, voluntary, value of—General repute, evidence of—Vague and indirect evidence.

Proceedings against a man for *badmashi* should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable. [p. 866, col. 1.]

It is the duty of a Judge to grant sanction to prosecute, if he thinks it is in the public interest, independently altogether of any future grievance or complaint which the alleged delinquent may think he has a right to make [p. 871, cols. 1 & 2.]

There is no statutory obligation upon any Judge to issue notice to the person proposed to be charged, before sanction for his prosecution is granted. [p. 871, col. 1.]

For purposes of revision, a High Court is not a Court of Appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant. [p 867, col. 1.]

Mharban Singh v. *Emperor*, 31 Ind. Cas. 821; 13 A. L. J. 1046; 16 Cr. L. J. 805, referred to.

If the evidence for the defence is equally good as that for the prosecution, a High Court may quash the order in revision. [p. 867, col. 2.]

Ganga Singh v. *Emperor*, 17 Ind. Cas. 404; 10 A. L. J. 383; 13 Cr. L. J. 772, referred to.

Witnesses, who voluntarily come forward, whether as friends or associates of an accused, to give him a good character, must not be brushed aside, unless they are discredited as regards their good faith and honesty just as witnesses in any other proceeding must be discredited before they are rejected by a Tribunal. [p. 867, col. 2.]

Rahu v. *Emperor*, 59 Ind. Cas. 547; 18 A. L. J. 1114; 43 A. 186; 22 Cr. L. J. 115, referred to.

Evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances, is not sufficient in itself to justify an order. [p. 867, col. 2.]

Kullu v. *Emperor*, 60 Ind. Cas. 1002; 19 A. L. J. 39; 22 Cr. L. J. 314, referred to.

Vague reputation, unaccompanied by direct evidence personally affecting each accused person or accompanied by direct evidence which breaks down is not sufficient in itself to justify an order. [p. 867, col. 2.]

Bisheshwar Dayal v. *Emperor*, 63 Ind. Cas. 452; 19 A. L. J. 668; 22 Cr. L. J. 660, referred to.

Application.

Mr. *S. N. Mukerji* (with him Messrs. *G. W. Dillon*, *J. M. Banerji* and *M. C. Vaish*), for the Applicants.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—This is one of the most remarkable cases under section 110 which has ever come under my notice. There are various reasons why I say that. In the first place, the procedure which has been adopted from first to last appears to me to be an abuse of the section. Twelve men were charged together, or notices were issued against them together, under this section, I will not say without anything upon the evidence seriously connecting them, but with a very superficial colouring of evidence and a vague, general and hearsay description connecting them together as partly ring-leaders of a gang, partly notorious dacoits and partly habitual receivers. The Police in support of this case called a variety of witnesses of every sort and description to establish the character which they sought to prove, amounting altogether to 76 in number, and having little or nothing in common except the fact to which most of them spoke: (*a*) that they lived at least 8 miles away from the village of the defendants, and (*b*) that they had no personal knowledge of them themselves. Indeed, it is impossible not to read the principal evidence for the prosecution which has been relied upon by the Magistrates in the Courts below without acquiring the impression that it was really a gang case which the Police was running on hearsay evidence under the guise of a *badmashi* charge under section 110. The witnesses who were put in the box were not disposed of at one hearing and each by one piece of evidence but they were scattered about and divided up in the most bewildering fashion, so that it is a work of considerable magnitude and one almost impossible of accomplishment by any Appellate Court without the assistance of somebody who has minutely studied the record to trace the sequence of statements of any particular witness. But, so far as I can tell, the result of this voluminous and chaotic recording of evidence was that the defence

evidence and the examination of the accused under section 364 was not even reached until the 9th of September 1921, fully two months after the hearing had been commenced. Apart from any other feature of this case, it seems to me very hard, almost oppressive, to any set of defendants to charge them together in this way, unless the whole of the evidence against all of them is precisely the same and they are to be dealt with on the same facts, and compel them to fight each his own individual battle during a prolonged enquiry, a great deal of which concerns for the moment only one out of the general body. I have myself upset orders under this section where the evidence against one person charged has been used in the judgment as evidence against another not mentioned by the particular witness. There is always a danger of that, and a danger of its unconsciously operating on the mind of the Tribunal, even though such operation does not manifest itself in the judgment, and if there were no other feature in the case, I should have been disposed to set aside the proceedings on that ground alone disregarding the merits, and directing the Magistrate to hold a further enquiry into the case of each accused separately or each batch of accused who could fairly be said to be classified under evidence common to each individual member of the batch. But that would be a great hardship upon the defendants, and there are many other points in this case which render the further consideration of this question superfluous except that I recommend these observations to the consideration of the District Magistrates in general without laying down any rule or consulting any section: common sense and common justice dictate that proceedings against a man for *badmashi* should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable.

A further objection based upon the same procedure, but entirely separate and independent, is the objection which, to my mind, arises out of the enormous mass of witnesses in this case on the prosecution side. There are seven defendants in all, and, although it may not be out of the way in a heavy gang case, it seems to me monstrous and to amount to something like persecution that each individual in a group of persons, supposed each in his own way to be a *badmash*, should be condemned to submit to and to employ Counsel for the examination and cross-examination of a number like 76 witnesses during a proceeding lasting over two months. If the Police cannot satisfy an experienced Magistrate with less than 76 witnesses or in less time than two months that a man is a *badmash*, the sooner they surrender the task at its inception the better for the interests of the public justice. It cannot be the good of anybody that such unheard of prolixity and waste of public time should be indulged in as was indulged in in this case. The Magistrate himself observed upon this feature saying: "if the reputation of a man cannot be proved by the evidence of 10 or 12 witnesses, it cannot be proved by 500." But a feeble protest of that kind is quite useless, and it is the duty of the District Magistrate, if he thinks that 10 or 12 witnesses are as a general rule sufficient for a case of this kind and he finds one of his Subordinate Officers permitting 76, to lay down some rule of common sense to guide his subordinates in the exercise of their discretion, not a caste-iron rule like the section of a Code, but something to enable them to guide their own proceedings within reasonable limits. The Magistrate's main complaint on this head seems to have been the heavy record which he says has taken him a long time to read, and digest. I have already taken a day and a half over this case, but I have not read, and have declined to read, the record to which the Magistrate refers. If he read it, it is very much to his credit, although it must have consumed an enormous amount of public time, but whether he ever digested it, is a matter which I shall proceed to consider in a few moments.

Naturally enough, the defendants confronted with this mass of voluminous evidence, or as one might describe it 'massed attack', resorted to the expedient of trying to defeat the prosecution at their own game. I am not impressed with the tactics which guided their decision nor with the result, but I cannot blame them and I do not quite know what they were to do unless they had somebody in charge of their case strong enough to protest against the public scandal of the prosecution proceedings, and to en-

treat the Magistrate to use his common sense and get a few selected and relevant witnesses put forward by each defendant. The result has been that in this case the total number of witnesses, so far as I can discover by a rough computation, and there is naturely considerable margin for error, amounts to 402, and the time spent on this proceeding before a Magistrate specially appointed to hear it, was no less than 6 months. I imagine that this proceeding is without parallel in the administration of this section. It seems to me to amount to a scandalous waste of public time and magisterial energy and to be a very serious infliction upon the defendants who have asserted continuously before me through their Counsel that these proceedings have practically exhausted their financial resources. As I have said before, if it is going to take the Police and the Magistrate anything like six months, or even more than a month, to prove *badmashi*, they had much better drop them altogether and devote one-tenth of their efforts to catching one of the miscreants in the accomplishment of the crime in which he is said to be daily engaged.

I recognise that it is a very serious matter to interfere with an order of this kind, especially one to which so much public time and energy has been devoted. I recognise also that the question in issue is in the main a question of fact, the finding on which this Court has no right in the ordinary way to interfere with or even to review. I recognise also that the District Magistrate who heard this case in appeal has managed to put his judgment into a form which suggests that he has given full consideration to the defendant's case and heard the appeal fairly and according to law. But I propose to state certain principles which, in my opinion, have been established in this Court by a series of decisions, explaining how this Court deals with such cases in revision. The High Court, it has been said, is not a Court of Appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant [*Miharban Singh* v. *Emperor* (1)].

Secondly, if the evidence for defence is equally good as that for the prosecution, the High Court may quash the order in revision [*Ganga Singh* v. *Emperor* (2)]. Thirdly, witnesses who voluntarily come forward whether as freinds or associates of the accused to give them a good character, must not be brushed aside, unless they are discredited as regards their good faith and honesty just as witnesses in any other proceeding must be discredited before they are rejected by the Tribunal [*Rahu* v. *Emperor* (3)].

Fourthly, evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances, is not sufficient to justify an order [*Kallu* v. *Emperor* (4)] and, lastly, vague reputation unaccompanied by direct evidence personally affecting each accused person or accompanied by direct evidence which breaks down, is not sufficient in itself to justify an order. [*Risheshwar Dayal* v. *Emperor* (5)].

In the light of these authorities I have listened to the very able criticism of Mr. Saila Nath Mukerji and Mr. Dillon, only of those witnesses whom the Appellate Court, following the Trial Court, has vouched for as having satisfied his conscience in deciding upon this mass of complicated and general evidence that the conclusion reached was correct. Any one reading the District Magistrate's judgment would suppose that he had read through the record with great care and that the witnesses whom he cited were beyond cavil. I have already pointed out that a great number of these witnesses are so dealt with that their evidence is split up and scattered over the record. It is a remarkable fact that, looking through the record in this case, which runs into hundreds and hundreds of pages and which I believe to be the same which the District Magistrate had before him, I do not find one single passage from beginning to end which has been

(1) 31 Ind. Cas. 821; 13 A. L. J. 1046; 16 Cr. L. J. 805.

(2) 17 Ind. Cas. 404; 10 A. L. J. 383; 13 Cr. L. J. 772.

(3) 59 Ind. Cas. 547; 18 A. L. J. 1114; 43 A. 186; 22 Cr. L. J. 115.

(4) 60 Ind. Cas. 1002; 19 A. L. J. 39; 22 Cr. L. J. 314.

(5) 63 Ind. Cas. 452; 19 A. L. J. 668; 22 Cr. L. J. 660.

marked with the pencil of the learned Magistrate with a view to assisting his memory. After a very long experience both at the Bar and on the Bench, I am able to say that it is humanly impossible to read through and remember such a record as this, split up into different pieces as this has been split up and to carry it in one's head. It is conceivable that the learned Magistrate read the evidence-in-chief of the witnesses whom I am going to mention in a moment and never reached their cross-examination at all. If so, it is an unfortunate instance of oversight on the part of an Appellate Tribunal. If, on the other hand, he did read the cross-examination to which I am going to refer, his failure to comment upon it or deal with it or even mention its existence when he was acting upon the positive evidence of the witnesses in question, is equally unfortunate to the mind of a fair minded person. Very little reference has been made by Counsel for the applicants to the positive evidence for the defence. Out of 326 witnesses they have not referred me, I think, to more than three. At any rate, I am not going to cite more than three, but these witnesses give evidence which in itself was almost sufficient to secure the acquittal of at least one of the accused, and so far from the Magistrate having dealt with the evidence and dismissed it as not worthy of credit, he has in one case entirely ignored it and in the other case, namely, that of the Sub-Divisional Officer, while describing it as unimpeachable, so misstated it that I find it difficult to believe that any man, let alone a person occupying the position of a District Magistrate, could state it so unfairly, and it is impossible not to ask one's self whether the learned Magistrate really tried to state it correctly at all.

As regards Nawab Singh, the learned Magistrate cites 7 or 8 witnesses. Having been taken carefully through their evidence and their admissions in cross-examination, I do not hesitate to say that nobody ought to act upon the evidence of a single one of these witnesses in taking away the character of another person. The first, Chaube Jagdish Rao, who is a young man of 22 and lives 8 miles away from Nawab Singh, failed to recognise any of the accused, merely repeating hearsay what had been repeated to him, alleging that they belonged to a gang and admitted being engaged in unfriendly litigation with the family of Nawab Singh. Qasim Ali, the next to whom I will refer, relied upon by the District Magistrate, is the *karinda* of a local Raja who in a recent election was engaged on the opposite side to that with which the accused are connected. This man by his own confession in the witness-box was a dishonest witness, and I propose to sanction his prosecution for perjury in this proceeding. His evidence-in chief is almost contemptible. He stated: "It is heard that they are habitual receivers but I have no direct knowledge." He did not know what their cultivation was. He did not know their affairs, and, in spite of this, he alleged airily that dacoity was their chief source of income, and he first denied, and then under pressure of cross-examination admitted, having written the *hukamnama* (Exhibit H) calling his principal tenants to come and give evidence. The next man, Harbilas, spoke generally of a gang but he knew nothing about the defendants' sources of income, and the only piece of definite evidence which he gave was that Nawab Singh consorted with a bad character named Maula. As there was no evidence that Maula was a bad character and the witness himself in cross-examination admitted that his information was derived from a man named Jwala Prasad who himself was a bad character and whose information had been acquired from general hearsay, it is remarkable how the learned District Magistrate persuaded himself that this witness was worthy of credit as one of the principal pillars of the Police prosecution. The next, Debi Singh, came from the town of Etawah, 8 miles distant from the defendant's village. He said that his belief was that the accused were regular dacoits, but up to that moment the case had been that they were regular receivers. He admitted that he saw nothing with his own eyes, that he had been a witness in previous section 110 cases but did not know how many. There seems reason to suspect that this witness is a professional witness whom the Police have utilised more than once and who, if he is not careful, will find himself before long in Jail, for the class of evidence which he appears to be

ready to give in these cases. The next witness, Gyan Singh, lives 12 miles away. He admitted that he had no direct personal knowledge but says that he hears generally that the accused are habitual dacoits, not habitual receivers, as was the principal evidence against them by one or two of the earlier witnesses. This man admitted owing Rs. 5,000. He admitted that the Police had that year become his best customers for cloth. He admitted having given evidence for the Police in other cases and he rendered himself liable for prosecution for perjury by first denying and then admitting that he knew that Raja Ram and Angnoo Singh had purchased a certain share in a village. If this man is not careful he also will find himself in Jail for perjury before very long. Budhoo Singh, the next witness whom I propose to deal with and relied upon by the Magistrate, said that, although he did not recognise anybody in particular, they had been dacoits for ten years. He did not know as much about Nawab Singh or Angnoo Singh or Raja Ram as to be able to say whether they were Zemindars or tenants, and although he had sworn that he had seen the gang of Nawab Singh and Babu Ram together, he admitted in cross-examination that in a recent case in Gwalior State he had sworn exactly the contrary. The last, Kirpal Singh, lives 12 miles away, and he, although speaking of the general public believing these men to be habitual dacoits, admitted that he had no personal knowledge on the subject, that he was a tenant of Chaube Jagdish Rao whom I have already mentioned, not in itself a great matter, but his memory would appear to be unreliable if it be true, which is difficult to believe, that he cannot to-day remember whether he was ever fined in a Criminal Court on some previous occasion. There are very few people living who cannot remember an incident of that kind when they are asked to do so. Whether the Magistrate, as I have said above, was aware of the exhibition that these seven witnesses made of themselves under cross-examination I do not know, but I am at a loss to understand if he read the record, as he said he did, with intelligent appreciation of the fact that this isolated piece of cross-examination had a direct bearing on the examination-in-chief, how he could have omitted to refer to it in his judgment. But I do not hesitate to say that a finding of fact such as the Magistrate arrived at "that it was impossible" to ignore the sworn testimony of such men as "these," amounts to a miscarriage of justice. He goes on to say that he has only named a few of the prominent men against Nawab Singh. The Assistant Government Advocate has had nothing to say in respect to this criticism. It is true that Mr. Saila Nath Mukerji has in one sense had it all his own way and has drawn my attention to selected passages from the evidence, but in this respect he has been scrupulously fair, because these selected passages are relevant to the prominent witnesses whom the District Magistrate accepted, and if the rest of the witnesses have said anything really worthy of being cited, the learned District Magistrate has not drawn attention to them and it is difficult to see what the Assistant Government Advocate could have said, if he had been here, more than what has been said by the Magistrate in his judgment. I have dealt with these topics up to this moment in the same order as that in which they were pressed upon me in the course of the hearing. Naturally, having formed the opinion which I have formed about the matters already dealt with, I come to the consideration of the case of Angnoo Singh and Raja Ram who were represented by Mr. Dillon with a mind pre-disposed in their favour. I decline to express any opinion upon Mr. Dillon's contention as to the genesis of this attack upon these two men. It may well be that it is due to the escape of Babu Ram and to the belief on the part of the Police that these two men assisted Babu Ram in escaping. It might also be that these two men did assist Babu Ram in escaping. I express no opinion about that whatever, but if they did and the Police have any reason for thinking so, they could have been charged with that offence, and it clearly had no bearing upon the question of evil livelihood and was no justification for starting these proceedings if that was the real reason as they themselves believed. But it is impossible for any fair minded man to read the evidence of Bishamber Singh, the principal Police Officer concerned, who had been at a *Thana* 40 miles away,

who only came into this Circle in December 1920, who had never made any report, who had never received any report against these applicants, who admitted that the Superintendent of Police and the Sub-Divisional Officer had directed these proceedings to be taken, who could not remember the date of the Superintendent of Police's order, who admitted that Angnoo Singh was still on the list of assessors and that when he, the Station Officer, visited his village at night he was always present, without agreeing with Mr. Dillon that some explanation was required, and no explanation has been forthcoming in this case why suddenly after the failure to arrest Babu Ram in June, this attack supported by a mass of witnesses going back for many years, should suddenly have been let loose upon the accused. A case of this nature grows by slow degrees with unfavourable reports of things of that kind corrobrated by witnesses, increasing as the critical moment when the Police decide to strike approaches. It is a just observation in this case that there is a marked contrast between the alleged prolongation of the evil livelihood for a long period of years and the suddenness with which the knowledge of it seems to have reached the Police.

I now come to the last point relating to the case of these two men specially made by Mr. Dillon. The Sub-Divisional Officer, Saiyid Ainuddin, whom the District Magistrate describes as unimpeachable, swears that during his three years from 1917 to 1920 he never heard any complaint or report of any evil conduct on the part of Angnoo Singh, although he did know that he was the uncle of Babu Ram. I regret to say that the Magistrate makes no reference to this important piece of evidence. The Magistrate says that this Officer represents Angnoo Singh and Babu Ram as generally figuring together. That phrase is a distortion of the Sub-Divisional Officer's evidence. His evidence is quite clear, that before 1919 the public complained of the influence of these two men Angnoo Singh and Babu Ram, that after a certain compromise had been reached in 1919 Babu Ram helped the enemies of Angnoo Singh and that the two men were on opposite sides. This unimpeacheable witness further swore that in May 1921 Babu Ram, the peg upon which the prosecution tried to hang the whole of this circumstantial evidence of notoriety against the others, came to him, Saiyid Ainuddin, and said he was giving up his evil life. If the Magistrate believed this unimpeachable witness, the omission of all reference to this piece of evidence is unexplained.

Prem Shanker, another witness called for the defence, is in Government employment as the Superintendent of the Agricultural Farm in Etawah on a salary of Rs. 160 per mensem. He is a man of position whose evidence is at least worthy of notice and is corroborated in a way in which no single witness for the Police was corroborated. He gives evidence not merely of the good character of Angnoo Singh and Raja Ram but of their general respectability and systematic occupation in substantial agricultural operations. He gives the figures of their dealings in grain, cattle and sugarcane. He has seen their houses and beleives them to be men of honesty and substance. This sort of thing is, of cousre, just possible and not always, even in my short experience, dissociated from nefarious practice in dacoities, but it is wholly inconsistent with the sort of case which the prosecution started out to make, and its further significance to my mind is this: that, assuming it to be true, as the Magistrate must have done, there is no explanation of the total silence on the prosecution side of this part of the defendant's life which is consistent either with honesty or with their real acquaintance of the persons about whom they speak. It is one thing to say I know so and so; it is quite true he keeps cattle and grows corn, but I have seen him calling on notorious *badmashes*, I have seen him with fire-arms, I have seen him with the proceeds of loot and I know that he is leading a bad life from what I have seen; but to say generally about a man, that you do not know him by sight, that you do not know what his occupation is, when he is in fact extensively engaged in agricultural occupation, and that you can only say that the general public regard him as a robber, is either to write one's self down as a dishonest person or as a very inefficient detective agent and an unreliable collecter of general information. I am quite satisfied that, in dismissing the

appeal upon the grounds which he did, the District Magistrate has totally ignored or hopelessly misunderstood the salient features of the evidence. However lamentable such a feeble result from such a voluminious proceeding may be in the public interest, none-the-less there has been a grave miscarriage of justice and the whole proceedings must be set aside and the bonds, if entered into, discharged in the case of all the applicants.

On the application of Mr. Saila Nath for Nawab Singh, I have no hesitation under section 195 of the Criminal Procedure Code in sanctioning the prosecution of Qasim Ali, son of Basharat Ali, for having sworn on the 7th of August 1921 at the hearing of the case against Nawab Singh under section 110 before the Magistrate Saiyid Zamir-ud-din Khan, while under cross-examination, that he had not written any part of the *hukamnama*, Exhibit H, which was shown to him and that it was not in his handwriting, and within a minute or two afterwards that he had written it and that it was in his handwriting.

It has been generally supposed and sometimes ruled by single Judges that before sanction is granted notice should be issued to the person proposed to be charged. There is no statutory obligation upon any Judge to do anything of the kind. There is no authority binding upon him in this Court compelling him to issue notice unless he thinks it is a case in which notice ought to be issued. In this case if the record which is before me is correct, this man who must certainly have some education and who has acted for many years as a *karinda*, must have known perfectly well, whether he had issued written orders to his tenants or whether he had not. He must also know his own handwriting. He must know that it is wrong and dishonest and grossly unfair to an accused person when giving evidence in a criminal case, to deny what you know is true. Granting sanction merely removes the statutory bar which otherwise prevents Nawab Singh taking steps to prosecute Qasim Ali Khan for this alleged falsehood. It is the duty of the Judge to grant sanction if he thinks it is in the public interest independently altogether of any future grievance or complaint which the alleged delinquent may think he has a right to make.

He may have an answer on the merits but that has nothing to do with me. I grant sanction with the hope that it will not be used to put pressure upon Qasim Ali or for any other purpose except taking fair and proper steps for prosecution, but I should grant it just the same and on the same terms whether Qasim Ali was represented by 100 Counsel and I, therefore, regard issuing notice at him as a sheer waste of public time. I sanction the prosecution of Qasim Ali for the statement abovementioned for an offence punishable under section 193 Indian Penal Code. Nawab Singh to take necessary steps for such prosecution within 6 weeks from to-day, otherwise the sanction to lapse, with liberty to apply to me for extension of time.

N. K. *Proceedings set aside; Prosecution sanctioned.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 11 OF 1922.
February 14, 1922.
Present:—Mr. Justice Jwala Prasad.
MAHADEO DUTT AND ANOTHER—2ND PARTY—PETITIONERS
versus
J. N. SARKAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Magistrate, whether restricted to property mentioned in Police report—Mines and minerals, proceedings whether applicable to.

A Magistrate taking action under section 145 of the Criminal Procedure Code is not restricted to the letter of the Police report or information on which he takes action. He should consider as a whole the Police report or information given to him and satisfy himself as to the real subject-matter of the dispute between the parties. [p. 874, col. 1.]

If a party under a mining lease is in actual possession of the mines and minerals it cannot only enforce its possession by a Civil suit but can claim to be maintained in its possession by an order under section 145 of the Code of Criminal Procedure. [p. 875, col. 2.]

But the question whether a proceeding under section 145 is appropriate must be determined with reference to the circumstances of each case. [p. 877, col. 1.]

MAHADEO DUTT *v.* J. N. SARKAR.

Indian Iron and Steel Co. v. *Banso Gopal Tewari*, 59 Ind. Cas. 403; 32 C. L. J. 54; 22 Cr. L. J. 99, *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited*, 23 W. R. Cr. 45, distinguished.

Andrew Yule v. *A. H. Shone*, 49 Ind. Cas. 647; 4 P. L. J. 154; 20 Cr. L. J. 199, *Sunder Mall* v. *Jhari Lal*, 41 Ind. Cas. 132; 2 P. L. W. 54; 18 Cr. L. J. 756; 2 P. L. J. 637, relied upon.

Application against an order of the Magistrate, Giridih.

Messrs. *Asghar* and *Harihar Prasad Sinha*, for the Petitioners.

Messrs. *P. K. Sen* and *Atul Krishna Roy*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Magistrate of Gridih passed under section 145 of the Code of Criminal Procedure in favour of the 1st party. The Magistrate has recorded the following order: "I am satisfied on a consideration of all these points that the 1st party were in actual possession of mica mines and mica deposits within Bishun Tikar village on the day and prior to it when these proceedings were started. I accordingly order that the 1st party is entitled to possession of the aforesaid mica mines and mica deposits and forbid their disturbance of such possession until evicted therefrom in due course of law." The order is objected to by the 2nd party. It is said that the original proceeding drawn up was with respect to specific plots Nos. 1, 2, 3 and 1083 situate in the aforesaid village Bishun Tikar and the order in question passed by the Magistrate relates not only to those plots but to all the mica mines and mica deposits within the village. It is said that there was neither any report of the Police as to there being any dispute likely to cause a breach of the peace with respect to the mica mines in the entire village, nor as a matter of fact was there any such dispute.

Upon an information lodged to the Police on the 4th of August, the Police went to the spot and found that work in the aforesaid plots Nos. 1, 2, 3 and 1083 was going on in the mountains and jungle on behalf of the 2nd party from 1st of June 1921 and that on behalf of the 1st party "there was an interference" and that consequently "there was the probability of a riot between the parties."

The Sub-Inspector deputed some constables to keep a watch so that there might be no breach of the peace, and requested the Magistrate to issue notices against both the parties under section 144 of the Code of Criminal Procedure. The Magistrate accordingly by his order of the 20th of August issued notices against both the parties under section 144 fixing the 5th of September for cause being shown as to why the order should not be made absolute.

On the 5th of September the Magistrate, on hearing the parties, came to the conclusion that the dispute was with regard to a particular area in the village from which both parties alleged that they were taking mica, and he directed proceedings under section 145 to be instituted, fixing the 22nd of September for filing written statement. On that day a petition was filed on behalf of the 1st party praying for an amendment of the proceeding by including the entire village as the subject-matter of dispute. The proceeding was, by the order of the Magistrate, amended. The amended proceeding related to "the possession of whole village Bishun Tikar (mica mines)."

In the meantime, on the 21st of August, the Police had submitted another report in which the Police stated that the danger to a breach of the peace was accentuated and that it could only be prevented by attaching the subject-matter of the dispute. In the amended proceeding, the Magistrate referred to the Police report as a source of his information upon which the proceeding was founded. The report referred to must be the latter report of the 21st of August.

On the 24th of October both the parties filed their written statements. The 2nd party in its written satement (paragraph 7) stated that there was never any likelihood of a riot or breach of the peace on behalf of the 2nd party, nor did it want to commit any riot. Upon these facts it is said that there was no likelihood of a breach of the peace with respect to any mica mines in the village, far less with respect to all the mica mines therein. Consequently, it is urged that the proceeding is without jurisdiction, and, even if there was any danger to a breach of the peace, it was with respect to the specific plots referred to above and that the proceeding of the 21st of August and the order of the

Magistrate declaring the possession of the 1st party with respect to the mica mines in the entire village is without jurisdiction.

As regards the first contention, which is directed against the entire order of the Magistrate, it is sufficient to state that the parties did not at any stage of the trial contend that there was no dispute leading to a breach of the peace as set forth in the proceedings of the Magistrate. No evidence was directed upon this point by any of the parties. Both the Police reports were clear upon the point that the danger to the breach of the peace was imminent, and, in spite of the deputation of the constables, no party was desisting from asserting their rights of possession over the subject-matter of dispute. In the second report the matter came to a head so much so that the Police wanted an immediate action to be taken by attaching the property in order to prevent a breach of the peace. The plea taken in the written statement of the 2nd party (paragraph 7) referred to above only shows that the 2nd party was not going to commit any riot. The written statement does not say that there is no danger to a breach of the peace on behalf of the 1st party. The plea set forth in the written statement of the 2nd party is one of innocence so far as that party is concerned. That does not show that there was no danger to a breach of the peace. The proceeding drawn up under clause (1) of section 145 must be considered to be conclusive of the existence of a breach of the peace, unless it were shown that the information upon which the proceeding is based does not in fact disclose any danger to a breach of the peace. The proceeding in this case, as shown above, was passed upon the Police reports which clearly showed that there was a danger to a breach of the peace. The proceeding, therefore, was not without jurisdiction. It would, however, be dropped subsequently under clause (5) by a party showing to the Magistrate that there was in fact no danger to a breach of the peace. The parties in the present case did not give any evidence disputing the correctness of the statement made in the proceeding with respect to the existence of danger to a breach of the peace. This contention is, therefore, without any substance and must be overruled.

The next contention, which attacks the proceeding so far as it comprises all the mica mines in the village, stands more or less on the same footing. The Police report disclosed the reason of the dispute between the parties. Each of them was claiming the right to work the mines in the whole village. No doubt at the particular moment the specific plots of mica mines mentioned above were being worked out. The Magistrate was well within his jurisdiction to include within the proceeding drawn up under section 145 what he upon the Police report and on hearing the parties on the 5th of September 1921 thought was the real subject-matter of dispute between the parties which endangered the peace. The written statements filed in the case by the parties clearly show that the mica mines in the entire village were in dispute: *vide* paragraphs 2 and 3 of the written statement of the 1st party and paragraphs 5, 8 and 9 of that of the 2nd party. In fact, the whole tenor of the claim set forth in the written statements relates to the possession of the mica mines in the entire village. The 2nd party alleged that "they were in possession and occupation of the entire Mouza Bishun Tikar and of the surface and sub soil rights from a long time by virtue of a *mokarari* lease held from the time of their ancestors etc." Again, the second party states that the 1st party had never any concern with the village nor had they worked any mica mines in the said *mouza*. Similarly, the 1st party stated in its written statement that the mica mines and the deposits in Mouza Bishun Tikar was being worked by it from a long time. The evidence was also laid by both the parties claiming the exclusive right of possession over the mica mines in the entire village. Therefore, it is idle to contend that only the specific plots mentioned above were in dispute between the parties, and not all the mica mines in village Bishun Tikar. The Magistrate construed the Police report as disclosing dispute over the entire village and the view taken by him does not seem to be so perverse as to entitle this Court to hold that the proceeding with respect to the mica mines in the entire *mouza* was without juris-

diction. The Magistrate is not bound by the letter of the Police report or other information. He is to consider as a whole the Police report and the information given to him and to satisfy himself as to the real subject-matter of dispute between the parties. In this case he was satisfied that the dispute was with respect to mica mines in the entire village. We have no reason to quarrel with the Magistrate for the construction put by him upon the Police report and the pleadings of the parties. He heard the parties on the 5th of September and that also afforded to him the ground upon which he drew up the proceeding with respect to the mica mines in the entire village. The proceeding, therefore, in the present case does not seem to be at all illegal or irregular, or beyond the jurisdiction of the Magistrate.

The next contention of Mr. Asghar is not only subtle but full of difficulty. His contention is that the order in question is too vague and general to come within the scope of section 145 of the Code. He says that the 1st party claimed their right to work mica mines in the village on the strength of a temporary lease granted by the proprietor of the village, whereas his clients (the 2nd party) claimed to be in possession of the entire village, both surface and sub-soil rights, from a long time so far back as 1858, as *mukararidars* of the village. He says that the Criminal Court, and particularly enquiry under section 145, is not the proper forum where the intricate question relating to the rights of the parties as to the sub soil in the village can be determined. In short, his case is that he is a man on the spot admittedly in possession of the surface rights in the village and he is asserting his right to work out the mines. He has a right to prevent the Zemindar of the village from coming in and disturbing his possession of the surface in order to work out the mines below the surface in other words, he says that the dispute between him and the Zemindar and the lessee of the Zemindar must be determined by a Civil Court, and so long as the rights of the parties are not settled the Magistrate should not force upon him a stranger to the village who holds only a lease of mining rights. In support of his contention Mr. Asghar has relied upon the case of *Indian Iron & Steel Company* v. *Bhuso Gopal Tewari* (1) and the case of *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited* (2). In the latter case, the right claimed was to sink coal pits upon a part of the village named Nimcha on the strength of the lease which gave right to sink coal pits in the entire village. On a construction of the leases set up by the contending parties, Jackson, J., recorded the following finding: "Therefore, the matter in dispute here being the right of the opposite party the lessee under the second *pottah* to sink coal-pits upon a part of the village of Nimcha, which, as far as we can see from the papers, is not situated within the limits of the 800 *bighas* of *danga patect jumee* on which the Bengal Coal Company are working, all that the Magistrate had to see was whether the complainants or the opposite party were in possession of the subject of dispute. It appears to us that the possession in regard to which the Magistrate's jurisdiction under section 530 should be exercised must be of a real and tangible character. We think that, when a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged rights in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a Civil suit, is not of itself a sufficient possession on which the Magistrate's order under section 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession, though at variance with the right The Magistrate observes that the Coal Company could not be expected for the purpose of maintaining their rights to dig pits over very few acres when they are not presently wanted for mining purposes. Certainly they could not, because, if they did so, and extended the range of their work, they would make themselves liable for the payment of additional rent under the stipulations of the *pottah*. It seems to

(1) 59 Ind. Cas. 403; 32 C. L. J. 54; 22 Cr. L. J. 99.
(2) 23 W. R. Cr. 45.

us that there was no ground for the contention that the Bengal Coal Company was in actual possession of that portion of the village of Nimcha, whether as to underground rights or otherwise in which the acts complained of took place, so as to entitle the Magistrate to interfere under the provisions of section 530. It appears to me that the *pottah* in this case is one upon which the Magistrate should not have put what he calls 'summary interpretation'." Then his Lordship proceeds and holds that the construction put upon the *pottah* by the Magistrate was erroneous. His Lordship concludes the judgment in the following words. "The whole village was not given to them, but the landlord settled the right to dig for coal with them, subject to all sorts of rights which are stated in the *pottah*. I have carefully abstained from offering any sort of opinion as to whether the terms of the *pottah* are such as restrain the landlord from assigning over the right to dig coal to anybody else. This, I think, is abundantly clear that, if the landlord, in giving such right to the 2nd party under the *pottah* lately granted, has derogated from the rights of the Bengal Coal Company, their remedy is perfectly clear and open, for they are at liberty to bring a suit against the landlord and the party deriving title from him, and may, on showing sufficient grounds, have an injunction from the Court restraining the latter from taking coal The Magistrate's, I think, was not the proper forum to which they ought to have gone. I think, therefore, that the Magistrate's order was made without jurisdiction and on a misconception of the facts, and that, consequently, it ought to be quashed."

This case was largely relied upon by Sir Asutosh Chaudhuri, J., in the case quoted above: *Indian Iron Steel Company* v. *Bunso Gopal Tewari* (1). It would, however, appear that both the contending parties in that case were claiming upon the leases granted to them by the landlord. The construction of those leases was the matter of dispute between the parties and the Court clearly came to the conclusion that the leases granted to the Company restricted them to a certain area, and the fact that they dug coal mines in that particular area did not give them constructive possession over the entire village. That case is not an authority for the proposition that under no circumstance the right to dig coal mines can come within the purview of section 530 of the old Code of Criminal Procedure 1872, corresponding to section 145 of the present Code. On the other hand, if the right was exercised with respect to the particular area to which the lease extended, Jackson, J., in the case of *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited* (2) would probably have held that the Magistrate had jurisdiction to maintain the possession under section 145 of the Code. Sir Asutosh Chaudhri was perfectly right in his observation that it may be difficult to extend possession over other areas covered by mines and minerals from the fact of actual possession over the particular area and that when the question involves a consideration of what is meant by possession in such matters and the difference between actual and constructive possession in the case of mines and minerals, the proper forum is the Civil Court. His Lordship also makes a distinction between a prospective license and a lease to dig minerals. In that case the actual disputants did not "hold mining leases but merely prospecting licenses". That case also is no authority for the proposition that mines and minerals or the right to dig mines and minerals cannot be the subject-matter of an enquiry under section 145 of the Code of Criminal Procedure. This is clear from the following observation of his Lordship :—

"Nor does it confer any estate or interest in the minerals before they are actually gotten. A license to dig minerals, coupled with a grant to carry them away, is a *profit a prendre*, an incorporeal hereditament lying in grant, and if exercised by an actual taking of possession it may be the subject-matter of use and occupation; and (if exclusive) may be, and (if even non-exclusive) probably may be, the subject-matter of an action to recover possession." Now, I may add that if a party under a mining lease is in actual possession of the mines and minerals, a *profit a prendre*, they can enforce their possession not only by a civil suit, but can claim to be maintained in their possession by an order under section 145 of the Code of Criminal Procedure,

Whatever difficulty might have been felt in the construction of the corresponding section in the Code of 1878 as to whether section 145 can comprise a dispute relating to mines and minerals, it is clear that the present section provides an explanation so as to remove any doubt whatsoever upon the point. Land or water has been defined in clause (2) of section 145 to include "buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property." The Explanation was added with a view to remove doubts thereon upon the construction of the former Act as to whether incorporeal rights can in any circumstance come within the purview of section 145. It used to be said under the old Act that section 145 can deal only with tangible property. Therefore disputes relating to a *profit a prendre* or other incorporeal rights were not brought under the scope of section 145 with the result that danger to a breach of the peace could not be averted by a summary decision as to the right of possession of lands and the profits arising therefrom; whereas disputes with respect to such rights are more usual than the disputes relating to the possession of land or water in the abstract.

Now, no doubt is entertained upon the point that mines and minerals and the right to take mines and minerals can well be dealt with by an order under section 145, *vide Andrew Yule* v. *A. H. Skone* (3) and *Sunder Mall* v. *Jhari Lal* (4). Very recently my learned brother, Bucknill, J., in the case of *Maharaj Kumar Jagat Mohan Nath Shah Deo* v. *Messrs. Burn & Company* (Criminal Miscellaneous Case No. 21 of 1921) held that section 145 can very well be invoked and applied in the case of prospecting leases in order to find out and ascertain whether any minerals are to be found in a particular area. His Lordship observes: "Now, section 145 contemplates, it will be observed, a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof and by sub-section (2) the expression 'land or water' was, by what I understand is an amendment of the law at a later date, made to include buildings, markets, fisheries crops, or other produce of land, and the rents and profits derivable from such profits. But behind all this rests the fundamental idea in connection with section 145 of positive physical possession."

"Now, one may very well imagine that the right of prospecting may be at many periods merely an incorporeal right; that is to say, that it does not involve any physical or actual possession of any part of the property over which the right of prospecting is given; as for example, supposing that an individual is given the right to prospect for oil over a very large area of country, it could not for one moment be said that his right gave him any possession over that area which was contemplated by section 145 save in so far as it could be said with truth that he was exercising over any part of the area substantial acts of possession. On the other hand, it is equally easy to understand and to contemplate that where in the case of certain minerals, such as coal, prospecting and research and investigation have begun, (for example, an engine driving a diamond drill) that coal-sheds and habitation for the workmen have been erected in certain places, and, as I have myself seen, they have been enclosed with a palisade or fence, then in cases such as that I can well understand that in connection with the area or locality where the prospector is actually engaged in his operations it may well be said that such would be a typical instance of positive possession of land or of possession following the incorporeal right which would be typical of inclusion within the purview of section 145. Cases have been quoted to me in the course of this hearing in which it has been suggested that possibly in connection with mining rights section 145 was not altogether the best section which could be utilised for dealing with disputes in connection with those rights. But I cannot help feeling that, although there is also some contrary opinion to the fact that section 145 can be brought into play, in each case regard must be had as to whether there is any actual question of possession in dispute." In that case it appears from

(3) 49 Ind. Cas. 647; 4 P. L. J. 154; 20 Cr. L. J. 199.
(4) 41 Ind. Cas. 132; 2 P. L. W. 54; 18 Cr. L. J. 756; 2 P. L. J. 637.

the order of the Magistrate that the dispute related to the rights of prospecting for coal and other minerals in villages Pindre Kone and Jalla, Thana Balumath, and the order of the Magistrate was made declaring that the first party in that case was in actual possession in respect of carrying on prospective operations for underground minerals in the aforesaid villages.

The question as to whether section 145 is appropriate must be determined in the circumstances of each case. Now, whether in this particular case there was a dispute as to the actual possession of the mica mines and mica deposits within village Bishen Tikar. Undoubtedly some of the mica mines were actually being worked, particularly those in plots Nos. 1, 2, 3 and 1083. The Magistrate held that the first party was in actual possession of the mica mines and had been in such possession for a considerably long time under several temporary leases, the last lease being of 1916. Upon the evidence of this actual physical possession over the mines in the village the Magistrate passed his decision in favour of the first party and declared their possession. The mica mines, which were dealt with in this case, are said to be the only mica mines which are at present being worked, and the order of the Magistrate relates evidently to those mica mines. The possession of the first party over the mica mines at present in existence in the village, and which are being worked, might lead to an inference in their favour of their right to dig mica mines elsewhere in the village; but those are not the mica mines which are at present before us and we do not know what claims not only the contending parties but others might make with respect to them. We cannot anticipate any dispute with regard to things not in existence. Therefore, to construe the order of the Magistrate with regard to the existing facts it must be held that all the mica mines at present worked in the village are in the possession of the first party and the declaration under section 145 of the Code of Criminal Procedure in their favour is with respect to the actual physical possession of those mines. I, therefore, think that there is no question of any misapprehension in the present case and the order made by the Magistrate is proper and unassailable in revision.

We affirm the order and dismiss the application.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 553 OF 1921.
(CRIMINAL REVISION PETITION No. 431 OF 1921.)
February 1, 1922.

Present :—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Krishnan.

In re NARAMBAN AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s 391—Dacoity—Robbery with violence—Criminal Procedure Code (Act V of 1898), s. 209—Discharge of some accused—Reasons not recorded before end of trial of others—Irregularity

Taking the words of section 391 of the Penal Code in the most literal sense and strongly in favour of the Crown, they point to a robbery with violence by five or more persons. [p. 878, cols. 1 & 2.]

Where there is no evidence that five or more persons combined together to rob the complainant with violence, and the evidence merely shows that three of the accused stood by and encouraged three others who were making a sort of raid on the complainants' property, and, when the latter tried to re-take what was taken from him, tried to prevent him from re-taking the property, there is no *prima facie* case to go to a Jury on a charge of dacoity and an order of commitment to the Sessions on such evidence is illegal. [p. 878, col. 2.]

Ponniah Thirumali Vandaya Thevar, In re, 65 Ind. Cas. 993; (1922) M. W. N. 13 & 45; 30 M. L. T. 72; 42 M. L. J. 49; 23 Cr. L. J. 209, 16 L. W. 400, *Damappa Pulai, In re*, 23 Ind. Cas 471; 15 Cr L. J. 373, relied on.

Where, during the course of a trial of several accused, some of them are discharged by the Magistrate, the discharge is not illegal merely because the reasons for discharge are not recorded till the end of the trial. [p. 878, col. 1.]

Per Krishnan, J :—A Magistrate is not bound to frame a charge of dacoity merely because there is evidence, if he thought that portions of that evidence essential for such a charge were not reliable. He has a discretion to weigh the evidence and discredit it when it is unacceptable. [p. 879, col. 1.]

Petition, under sections 435 and 439, of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the District Magistrate, Chingliput, in Criminal Revision Case No. 13 of 1921, presented against an order of the Court of the Stationary Sub-Magistrate, Poonamalle, in Calendar Case No. 398 of 1921.

In re NAPAMBAN.

Mr. *C. Narasimhachariar*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.

Schwabe, C. J.—In this petition the District Magistrate has ordered the committal of all the seven accused to the Sessions on a charge of dacoity. He also held that the trial of the three accused against whom the Sub-Magistrate has framed charges of theft and violence is void. He also says that all the proceedings before the Sub-Magistrate are vitiated, because he did not record his reasons for the discharge of the accused, as is required by section 209, Criminal Procedure Code. As regards this latter objection, as I understand, it is not the practice to record the reasons for the discharge of different accused, who are discharged during the trial until the end of the trial. This seems an unobjectionable practice and in this case apparently was going to be adopted by the Sub-Magistrate, and in fact, has now been adopted. It is true that at the time the application was made to the District Magistrate no such record existed. But that might be a ground for his calling for the record but is no ground, in my view, for saying that the whole proceedings before the Sub-Magistrate are vitiated.

But the really important point in this case is that the Sub-Magistrate having held that there was no case of dacoity against any of the accused, the District Magistrate has said that there is a clear *prima facie* case against them all. Whether, if it were so, he had the power to commit them all on that charge to the Sessions seems a matter which may some day require argument, but, in view of the finding that this Court is about to make, that point is unnecessary for decision at the present time. The crime of dacoity is one of the most serious crimes known to the law of this country and is punishable with transportation for life or rigorous imprisonment which may amount to ten years. That those who framed this Statute ever intended facts of the kind in this case to be included in the crime of dacoity I cannot believe. But taking the words of the section in most literal sense and strongly in favour of the Crown they seem to me to point to a robbery with violence by five or more persons. Now, in this case, there is not, in my view, any evidence that five or more persons combined together to rob the complainant with violence. As far as accused Nos. 4, 5 and 6 are concerned, the case against them at the most, as I understand, is, that they stood by and encouraged accused Nos. 1, 2 and 3 who were making a sort of raid on their brother's property or what their brother claims as his property and when he tried to re-take what his brothers had taken from him (I use the word brothers to include other relatives of theirs) two of them, the younger ones, probably instigated by accused No. 4, tried to prevent the complainant from re-taking his property. I do not see a shred of evidence that accused Nos. 4, 5 and 6 were any party to any robbery, or that they could in any sense be called robbers or dacoits, and I am quite convinced that if this case came before the Sessions Judge on that charge on that evidence, he would direct the jury to acquit all of them on the charge of dacoity. That being so, I do not agree with the view taken by the District Magistrate that there is a *prima facie* case here to commit the accused because, as I have said, I do not think there is.

The result is, that the order he has made should be set aside and the matter must be remitted back to him to take such steps as he thinks proper with that direction before him. It will be for him to consider again whether accused Nos. 4, 5, 6 and 7 have or have not been properly discharged by the Sub-Magistrate, and it will be for him to consider whether any and which of these accused ought to be charged and before whom.

Krishnan, J.—This is an application to revise an order of the District Magistrate of Chingiput directing all the seven accused in this case to be committed to the Sessions on charge of a dacoity under section 395, Indian Penal Code. Whether, in view of the fact that the first three accused have not yet been discharged but charges have been framed against them by the Sub-Magistrate under sections 379 and 323, Indian Penal Code, and they are still under trial before him, the District Magistrate could have directed their committal to the Sessions is a point that

was raised before us, but, not being fully argued, it is not necessary to give a definite opinion on it, as on other grounds I have come to the conclusion that the charges of dacoity cannot be sustained against any of them and the order of committal must be set aside. One reason given by the District Magistrate for his order is that the Sub-Magistrate in discharging accused Nos. 4 to 7 altogether has not given any reason for his action, as required by section 209, Criminal Procedure Code. It was rather premature, I think, to take that point, because it was open to the Sub-Magistrate to have given his reasons before the close of the trial. The trial not having been closed, the action of the Sub-Magistrate in not recording his reasons at once cannot be treated as an irregularity.

The District Magistrate has also stated in his order that he thinks that a *prima facie* case has been made out on evidence against all the accused of having committed an offence under section 395, Indian Penal Code. He has not discussed the evidence at all and we have considered that evidence and we are unable to find any reliable evidence to justify that statement. The learned Chief Justice has dealt with this point fully and I do not think I need expatiate on it further. I agree with the learned Chief Justice that no case of dacoity is made out at all. No doubt, there is some evidence on which, if it is accepted *in toto*, a case of technical dacoity perhaps may be made out, but the Sub-Magistrate was not bound to make a charge of dacoity merely because there is evidence if he thought that portions of that evidence essential for such a charge were not reliable. See *Ponniah Thirumuli Vandaya Thevar, In re* (1) and *Damappa Pillai, In re* (2). It cannot be said that the Magistrate who holds a preliminary enquiry has no kind of discretion to weigh the evidence and to discredit that evidnce when it is of such a nature that it is not likely that any Court would accept it. In this case the Sub-Magistrate, in an order that he passed on the 19th September last, has given his reasons for discharging accused Nos. 4 to 7. Though those reasons might not be altogether satisfactory as justifying their discharge of all offences, I think that they are enough to show that no case of dacoity has been made out against them. When the charge of dacoity goes, the case is no longer one exclusively triable by a Court of Session and there is then no necessity for a committal to the Sessions and the order of the District Magistrate should be set aside. But as to what further steps should be taken in the case, I think, it should be left to the District Magistrate to decide again on a further hearing of the petition before him, whether he should set aside the discharge to any extent and order further enquiry as regards accused Nos. 4 to 7 and whether because of the opinion expressed by him that a major offence or robbery has been split into two minor offences of theft and simple hurt, which in my view is right, the case should not be sent to a First Class Magistrate for trial. These are matters which the District Magistrate will consider.

I agree to the order proposed by the learned Chief Justice that the case should be remitted to the District Magistrate for further disposal according to law.

V. N. V. *Case remitted.*
N. H.

(1) 65 Ind. Cas. 903; (1922) M. W. N. 13 & 45; 30 M. L. T. 72; 4 M. L. J. 49; 23 Cr. L. J. 209; 16 L. W. 466.
(2) 23 Ind. Cas. 741; 15 Cr. L. J. 373.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 359 OF 1922.

June 17, 1922.

Present:—Mr. Justice Broadway.

MUHAMMAD AFZAL AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106—Penal Code (Act XLV of 1860), s. 342—Wrongful confinement, conviction for—Order for security, whether can be made.

MUHAMMAD AFZAL *v.* EMPEROR.

An order under section 106 of the Criminal Procedure Code can only be made where a person is convicted of one of the offences specifically mentioned in the section or an offence of which a breach of the peace is in law a necessary ingredient.

Abdulla v. *Emperor*, 63 Ind. Cas. 869; 2 L. 279; 22 Cr. L. J. 709, followed.

It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement, and, therefore, an order under section 106 of the Criminal Procedure Code cannot be passed where a person is convicted of the offence of wrongful confinement.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Additional Sessions Judge, Ferozepore, dated the 23rd February 1922, affirming that of the Magistrate First Class, with powers under section 30, Criminal Procedure Code, Ferozepore, dated the 3rd February 1922.

Sheikh *Iftikhar Ali*, for the Petitioners

Mr. *C. H. Carden Noad*, for the Respondent.

JUDGMENT.—The petitioners in this case, Mohammad Afzal and Shera, have applied, under section 439, Criminal Procedure Code, for revision of an appellate decision of the Additional Sessions Judge of Ferozepore dated 23rd February 1922. They have been convicted of an offence under section 342, Indian Penal Code, and sentenced to eight months' rigorous imprisonment and Rs. 50 fine or in default to two months' rigorous imprisonment. In addition they have been called upon under section 106, Criminal Procedure Code, to furnish security in a sum of Rs. 500 to keep the peace for one year on the expiry of their sentences.

Mr. Iftikhar Ali on behalf of the petitioners has raised two points; (1) that the evidence did not warrant the conviction and (2) that the order under section 106, Criminal Procedure Code, is bad in law. I have carefully studied the judgments of the two Courts. As remarked by Rossignol, J., in his admitting order, the judgment of the Appellate Court is not satisfactory. At the same time that of the First Court is comprehensive and clear, and I assume that it is because of that that the learned Additional Sessions Judge contended himself with dealing with the points raised as briefly as he has. I have also examined such of the evidence as was necessary in order to ascertain how far the learned Vakil's contentions were correct. After giving my careful consideration to the case I have no doubt in my mind that the Courts below are right in thinking that the petitioners have committed an offence under section 342, Indian Penal Code, and I consider that the sentences are appropriate.

The applicability of section 106, Criminal Procedure Code, is, however, of considerable doubt. It has been held by the various High Courts that section 106, Criminal Procedure Code, can only be applied when the person concerned has been convicted of an offence involving a breach of the peace. It has been held that in such cases the offence must be one of which a breach of the peace as in law a necessary ingredient, (see the cases cited at page 107 of Boy's Criminal Procedure Code, Volume II). In *Abdulla* v. *Emperor* (1) the same view was adopted by Martineau, J. In section 339 wrongful restraint is defined as follows :—

"Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."

While wrongful confinement is defined in section 340 in the following terms :-

"Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person."

Although the matter is not quite clear it seems to me that it cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement and, therefore, the order in this case under section 106, Criminal Procedure Code, must be regarded as illegal.

I, therefore, accept this petition in so far as to set aside the order under section 106, Criminal Procedure Code but maintain the conviction and sentences in all other respects.

Z. K. *Petition partly accepted.*

(1) 63 Ind. Cas. 869; 2 L. 279; 22 Cr. L. J. 709.

JAI KRISHNA *v.* BIBI SOGHRA.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 77 OF 1920.

December 15, 1922.

Present:—Mr. Justice Das, and Justice Sir John Bucknill, KT.

JAI KRISHNA AND ANOTHER—DEFENDANTS NOS. 3 AND 5—APPELLANTS

versus

Musammat BIBI SOGHRA—PLAINTIFF, AND *Musammat* BIBI LADLI BEGUM AND OTHERS—DEFENDANTS NOS. 1, 2, 4 AND 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57, O. XLI, r. 27—Execution of decree—Time granted for payment by decree-holder—Application dismissed—Attachment, whether ceases—Appeal—Additional evidence, when to be admitted.

Where in execution of a decree the decree-holder accepted a payment made by the judgment-debtor towards the satisfaction of the decree and agreed to grant time to the judgment-debtor for payment of the balance, and the Court thereupon dismissed the execution proceedings on part satisfaction:

Held, that the decree-holder by agreeing to grant time to the judgment-debtor having disabled himself from proceeding with the execution of the decree, the dismissal was due to his default and under O. XXI, r. 57 of the Civil Procedure Code operated to release the property attached under the decree from attachment. [p. 882, col. 1.]

Valiakath Puthiah Malivakkal Mammi Kutti Haji v. *Manakkal Parameswaran Nambudri*, 35 I d. Cas. 240; 3 L. W. 601, distinguished.

There is no jurisdiction in an Appellate Court to admit additional evidence unless upon examining the evidence as it stands some inherent *lacuna* or defect becomes apparent. [p. 882, col. 2.]

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 401; 17 M. L. J. 347; 2 M. L. T. 435; 34 I. A. 115 (P. C.), followed.

Appeal from a decision of the Subordinate Judge, First Court, Patna, dated the 22nd December 1919.

Mr. *S. M. Mullick*, for Mr. *Ragho Prasad*, for the Appellants.

Messrs. *Sultan Ahmed* and *Shib Narain Bose*, for the Respondents.

JUDGMENT.

Das, J.—On the 23rd of February 1915, one Jai Krishna, who was cited as defendant No. 3 in the suit out of which this appeal arises, and who is the appellant before us, obtained a money decree for Rs. 9,373-3-0 against *Musammat* Noorjahan Begum. On the 9th of June 1915, Jai Krishna started proceedings to enforce the decree of the 23rd of February 1915 and he attached a house belonging to *Musammat* Noorjahan Begum. We are concerned in this appeal mainly with the question whether *Musammat* Noorjahan Begum had any title to execute a mortgage in respect of this house subsequent to the attachment of the 9th of June 1915. On the 20th of July 1915 the Court directed the house to be sold in execution of Jai Krishna's decree and fixed the 20th of September 1915 for the sale of the property. On the 11th of September 1915, the following order was passed by the Court: "Judgment-debtor files petition stating that she has paid Rs. 250 to the decree-holder and prays for four months' time. Decree-holder consents to the time given. Ordered dismissal on part satisfaction." On the 29th of November 1915 *Musammat* Noorjahan Begum and *Musammat* Nasiran Bibi joined in executing a mortgage of the house, with which we are mainly concerned in this appeal, and another property in favour of *Musammat* Bibi Soghra. The important question which we have to determine in this appeal is, did the attachment cease because the execution case was dismissed on part satisfaction on the 11th of September 1915? *Musammat* Bibi Soghra was the plaintiff in the action and her suit was a suit to enforce the mortgage executed in her favour on the 29th of November 1915. The appellant resisted the suit on three grounds; first, on the ground that the mortgage executed by *Musammat* Noorjahan Begum and *Musammat* Bibi Nasiran on the 29th of November 1915 was subject to the attachment of the property effected in the previous suit and that, accordingly, the title of *Musammat* Bibi Soghra to the mortgaged property is subject to the claim of the appellants as against *Musammat* Noorjahan Begum; secondly, on the ground that the mortgage conveyed no interest in the house to *Musammat* Bibi Soghra; and, lastly, on the ground that the transaction of the 29th of November 1915 was a collusive and a fraudulent transaction for the purpose of defeating the claims of the creditor of *Musammat* Noorjahan Begum. The learned Subordinate Judge has answered all these questions in favour of the plaintiff.

So far as the first point is concerned, the position is this: On the 11th of September 1915 *Musammat* Noorjahan Begum seems to have paid Rs. 250 to the appellants and

to have asked for four months' time. The decree-holders consented to give time whereupon the Court dismissed the execution case on part satisfaction. O. XXI, r. 57, Civil Procedure Code, runs as follows: "Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease." It has been pointed out that the object of the rule is to put an end to the doubts which have arisen from time to time as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings" from the file for which there was no justification under any of the earlier Codes. The provision contained in O. XXI, r. 57, Civil Procedure Code, is a new provision and it appears to me that the dismissal of an application for execution involves this result that the attachment comes to an end by reason of such dismissal. No doubt the Court has no power to dismiss the application for execution unless there is default on the part of the decree-holder, but, as has been held more than once, default means a failure to do what one is legally bound to do. The position is this: On the 11th of September 1915, the decree-holder put it out of his power to proceed with his execution. There was, in my opinion, a default on his part and the learned Subordinate Judge was entitled to dismiss the application on the ground that there was a default on the part of the decree-holder. That being so, the attachment came to an end. Mr. Sushil Madhab Mullick, appearing on behalf of the appellants, strongly relies upon the case of *Valiakath Puthiah Maliyakkal Mammi Kutti Haji* v. *Manakkal Parameswaran Nambudri* (1). In that case after the respondents had got the property attached the sale was stayed by an appeal preferred by the judgment-debtors. Thereupon the District Munsif dismissed the application. Clearly, that was not a case where there was any default on the part of the decree-holders, for they in no way consented to the order staying the sale. They had not put it out of their power to proceed with the execution case and accordingly the Madras High Court came to the conclusion that the order of dismissal did not involve the removal of the attachment. Now, in this case, as I have already said, the facts are entirely different, the order of the 11th of September 1915 passed by the learned Subordinate Judge being a consent order. The decree-holder was not bound to consent to the application made on behalf of the judgment-debtor. By consenting to that application he put it entirely out of his power to proceed with the execution of his decree. That being so, the learned Subordinate Judge was right in dismissing the application for default; and, if he was right in dismissing an application for default, there is no doubt that upon such dismissal the attachment ceased. Mr. Sushil Madhab Mullick argues before us that it is impossible to understand the order of the 11th of September 1915, unless we have the petition upon which the order was made before us, and he tendered the petition in evidence before us. This document was not filed in the Court below, and, under the decision of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (2), there is no jurisdiction in the Appellate Court to admit additional evidence unless on examining the evidence as it stands some inherent *lacuna* or defect becomes apparent. Now, there is no inherent *lacuna* or defect apparent in the evidence. That being so, it is impossible to receive the document tendered by Mr. Mullick in evidence in this Court. The document is accordingly rejected.

It was next argued that the mortgage executed by *Musammat* Noorjahan Begum and *Musammat* Bibi Nasiran conveyed no interest in the house to *Musammat* Bibi Soghra. The point arises in this way. By a deed of sale executed on the 14th of October 1912 *Musammat* Noorjahan Begum conveyed this house to *Musammat* Bibi Nasiran. Upon the attachment of the house by the appellants

(1) 35 Ind. Cas. 240; 3 L. W. 601.

(2) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L. T. 435; 35 I. A. 115 (P. C.).

in execution of their decree against *Musammat* Noorjahan Begum, *Musammat* Bibi Nasiran put in a claim to the house. That claim was disallowed. *Musammat* Bibi Nasiran thereupon brought a title suit, being Suit No. 133 of 1917, and it appears that her suit has been dismissed not only by the Court of first instance but by this Court. Upon these facts Mr. Sushil Madhab Mullick argues that *Musammat* Bibi Nasiran had no title to the house which she purported to mortgage in favour of *Musammat* Bibi Soghra. Now, in my opinion, it is not open to the appellants to raise this point at all. In the mortgage-bond of the 29th of November 1915, *Musammat* Noorjahan Begum makes an admission that the house belongs to Bibi Nasiran. Now, that admission may be a true admission or a false admission; but, unless the appellants have some title or interest in the house itself by virtue of some transaction to which Noorjahan Begum is a party, there is clearly no right in them to object to any statement that might have been made by *Musammat* Bibi Nasiran and *Musammat* Noorjahan Begum in the mortgage-deed. The whole question is, is the attachment effected by the Court in the appellants' execution proceedings a subsisting attachment ? If that attachment still subsists, no doubt it is open to the appellants to argue that this Court ought not to rely upon the admission made by *Musammat* Noorjahan Begum in the mortgage-deed. But if the attachment has ceased, then clearly it is of no importance to the appellants whether *Musammat* Bibi Nasiran or *Musammat* Noorjahan Begum mortgages the property. But apart from any other consideration it seems to me that the point does not arise. The critical passage in the bond is as follows: "As security for the said loan, principal and interest and compound interest we have mortgaged and hypothecated the whole and entire 16-annas of the house, rooms and two storied *pacca katra* consisting of several *kitas* of houses together with all materials appertaining to the house and land situate at *Mahalla* Gazai appertaining to *Thanah* Khajekallan, one of the quarters of Patna City, belonging to and occupied by me, the executant No. 1, as my dwelling house and constituting my purchased property under a registered deed of absolute sale, dated the 14th October 1912, executed by me, *Musammat* Noorjahan Begum executant No. 2, and which is owned and possessed by me, the executant No. 1, without the co-partnership and interference on the part of any other individual." Now, the mortgage is undoubtedly by the two ladies, although Bibi Nasiran states that she alone has a title to the house and *Musammat* Noorjahan Begum agrees with that statement. The argument of Mr. S. M. Mullick is that the mortgage is only by Bibi Nasiran who had no title to the house and accordingly the mortgage executed by her conveyed no title whatever in the house to *Musammat* Bibi Soghra. In my opinion this argument is not correct, for the document shows that the mortgage was both by *Musammat* Bibi Nasiran and by *Musammat* Noorjahan Begum. I must accordingly overrule the argument on this point by Mr. Mullick.

The last point argued before us is, that the transaction by which *Musammat* Bibi Nasiran and *Musammat* Bibi Noorjahan Begum mortgaged the house to *Musammat* Bibi Soghra is a fraudulent and a collusive transaction and did not operate to convey any interest in that house to *Musammat* Bibi Soghra. The mortgage was undoubtedly executed by the two ladies in favour of *Musammat* Bibi Soghra. There was accordingly an apparent transaction by which a title has been created in favour of *Musammat* Bibi Soghra, and we must assume that the apparent transaction was the real transaction until the contrary is established by the appellants. Now, the mortgage document shows that the ladies borrowed Rs. 6,000 from *Musammat* Bibi Soghra in order to pay Rs. 3,777 to *Mahant* Ram Kishun Das, who was a creditor of the ladies and Rs. 1,000 to Shah Gope Saran Saheb who appears to have had a decree against *Musammat* Noorjahan Begum. Noorjahan Begum appears to have taken before the execution of the document Rs. 500 for the expenses of the *Mohurrum* and Rs. 723 appears to have been paid to her in cash on the date of the execution of the mortgage. What happened was that Rs. 3,777 was paid to *Mahanth* Ram Kishun Das by *Musammat* Bibi Soghra and *Mahant*, Ram Kishun Das remitted Rs. 300 which accordingly was paid to *Musammat* Noorjahan Begum. The

evidence of Adit Prasad is that after remission he got Rs. 3,400 from Hyder Khan. Hyder Khan, it may be mentioned, is the husband of *Musammat* Bibi Soghra, and Muhammad Hyder giving evidence says that Rs. 3,777 was given to *Mahant* Ram Kishun Das on account of mortgage-debt of which Rs. 3,000 was principal and that the *Mahant* remitted Rs. 300. Exhibit 2 is an entry in the account book of *Mahant* Ram Kishun Das. The entry runs as follows :—

> "Credited to Noor Jahan Begum, widow of Syed Mohammad Hassan Khan *alias* Mohammad Nawab, deceased, and Bibi Nasiran, daughter of Sheikh Amir Jan, deceased, resident of Goodri Masoom Khan, on account of bond, through Sogbra and Haider Ali Khan, husband of *Musammat*, returned the bond and the deed of sale .. .. Rs. 3,000."

This is an entry of Rs. 3,000 and then there is an item of Rs. 400 which appears to have been entered in the book as payment on account of interest after deduction of remission. The entry, Exhibit 2, strongly supports the case of the plaintiff and establishes conclusively that Rs. 3,777 was in fact paid by *Musammat* Bibi Soghra to *Mahant* Ram Kishun Das. As regards the payment of Rs. 1,000 to Gopi Saran Shah, the petition of satisfaction filed in Shah Gopi Saran's execution case appears to me to be conclusive on this point. That petition after stating that it was necessary for the judgment-debtor to pay Rs. 1,000 that day goes on to say as follows: "So on receipt of Rs. 1,000 in notes as per details given below from Muhammad Haider Khan, husband of *Musammat* Bibi Soghra, your petitioner, judgment-debtor, paid it to the decree-holder, the receipt of which is acknowledged by the decree holder on the back of this petition. It is, therefore, prayed that the entry of payment of the said sum of Rs. 1,000 may be made; and it may be ordered in terms of the said petition that your petitioner-judgment-debtor's property will be sold on the sale day in January for the highest bid including the bid of the decree-holder." There is no reason to doubt that at any rate Rs. 4,777 was paid by *Musammat* Bibi Soghra on behalf of *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begam to *Mahant* Ram Kishun Das and to Gopi Saran Shah in satisfaction of their debts to them. There then remains the question of balance, *viz.*, Rs. 773. With regard to this amount we have only the oral evidence, but there is no reason to doubt the evidence, especially as we accept the evidence adduced on behalf of the plaintiff that Rs. 3,777 was paid to *Mahant* Ram Kishun Das and Rs. 1,000 was paid to Gopi Saran Shah. The plaintiff has, then, established that the mortgage upon which the suit has been brought was a real transaction and not a collusive transaction. The appellants, on the other hand, have given evidence to show that the transaction was not a real one and that *Musammat* Bibi Soghra did not pay the consideration for the bond and that it was purely a fraudulent device in order to defeat the creditors. But the witnesses upon whom Mr. S. M. Mullick relies are themselves witnesses to the transaction and their case is that they signed this document in order to save the house which belonged to *Musammat* Noor Jahan Begum. In my opinion, it is quite impossible to place any reliance upon the testimony of these witnesses. When we are considering a question such as this, the important point is, did *Musammat* Bibi Soghra have any fund out of which she could have lent Rs. 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum. Now, Exhibit 5 is a sale-deed executed by *Musammat* Bibi Soghra in favour of Babu Matukdhari Singh. This document shows that *Musammat* Bibi Soghra acquired the property sold under a *Tamliknamah* executed by her mother in her favour and that by sale of the property she received Rs. 15,000 in cash from Babu Matukdhari Singh and a mortgage-bond for Rs. 5,000. The evidence is that out of this money she lent Rs. 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum. Now, there is no reason to doubt that *Musammat* Bibi Soghra did in fact have a property which she sold and there is no reason to doubt that she got Rs. 15,000 in cash by the sale of this property. This transaction took place on the 25th of February 1915 and the mortgage in suit was executed on the 29th of November 1915. In my opinion it has been established that *Musammat* Bibi Soghra had a fund out of which she could

have advanced Rs 6,000 to *Musammat* Bibi Nasiran and *Musammat* Noor Jahan Begum.

The decree passed by the learned Subordinate Judge is right and ought to be affirmed. I would accordingly dismiss this appeal with costs.

Bucknill, J.—I agree. I consider it was perhaps rather unfortunate that the order of September the 11th, 1915, was passed. I am inclined to think that if I had been the Subordinate Judge I should probably have adjourned the case. But one cannot say that, as it stands, it is a wrong order or illegal in any way or one which the Subordinate Judge had no jurisdiction to make. It is quite clear what it means. The petition for execution was dismissed on part satisfaction. No objection was taken by the decree-holder to this order. There is indeed evidence that he started fresh execution proceedings in 1917. If he had thought that the old execution proceeding was alive he would presumably have proceeded under that. In this order it is stated that the judgment-debtor is said to have prayed for four months' time and to have paid Rs. 250 and that the decree-holder agreed to the time being granted. But nothing was done at the end of four months so far as we know. If the decree-holder wished to object to the plain terms of the order of the 11th of September 1915, he should and could have done so in that proceeding but he did not. It is difficult to say how in this collateral matter the decree-holder could object to the terms of that order; but, it is argued whilst not actually objecting to its terms, that order must be construed properly as keeping the attachment alive notwithstanding that the petition is stated to be dismissed; as a dismissal, unless under the provisions of O. XXI, r. 57, Civil Procedure Code, does not, it is argued, release the attachment. But even if one can properly enquire into the intention of the order (which seems doubtful here) there is nothing whatever to show that there was the least intention in the minds of the Judge or parties that the order meant to keep the attachment alive. On the contrary, everything points to the opposite conclusion and the fact remains that the decree-holder consented not to proceed with his execution at that time but prayed for time. Having done so, he naturally takes his risk. He was in no way bound to agree to the judgment debtor's application and his agreement to waive his right to proceed is, one cannot but think, in a sense a failure within the meaning of the language used in the provisions of O. XXI, r. 57, Civil Procedure Code. Then, subsequently, as against the mortgagee, he is, with his decree, in no strong position and his claim is presumably subject to the mortgage. It was further suggested that the mortgage was fraudulent, but there is no satisfactory proof of any such allegation. The Subordinate Judge does not believe the evidence which, certainly flimsy, was brought forward in the endeavour to support the suggestion. Considering it myself I can see no ground for differing from the conclusion at which he arrived.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2693 OF 1921.

June 16, 1922.

Present:—Mr. Justice Scott Smith.

SARDAR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDULLA KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Execution of decree—Formal possession delivered—Judgment-debtor in actual possession—Limitation, operation of.

The mere delivery of formal possession of immoveable property to a decree-holder in execution of a decree cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupation of a tenant or other person entitled to occupy the same. [p. 886, col. 2.]

Mahadev Sakharam Parkar v. *Janu Namji Hatley*, 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115, *Jang Bahadur Singh* v. *Hanwant Singh*, 63 Ind. Cas. 212; 43 A. 520 at p. 523; 19 A. L. J. 460 (F. B.), relied upon.

Juggobundhu Mukerjee v. *Ram Chunder Bysack*, 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979 (F. B.), distinguished

Second appeal from a decree of the District Judge, Attock at Campbellpur,

dated the 22nd August 1921, affirming that of the Munsif, First Class, Campbellpur, dated 11th May 1921.

Mr. *Nanak Chand*, for the Appellants.

Mr. *M. S. Bhagat*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge, Attock, confirming the order of the Trial Court dismissing the plaintiff's claim for possession of a site in a village as barred by time. The plaintiff obtained a decree for possession on the 26th May 1908, and on the 10th November 1908 made an application for execution. On the 4th February 1909 the bailiff reported that possession had been given, and the decree-holder, Zardad Khan, put in a *dahkl nama* and the proceedings were consigned to the record-room. The present suit was brought for possession of the same land on the ground that the plaintiffs had obtained possession in execution, and that they were subsequently dispossessed by the defendants-judgment-debtors. The Courts below have held on the evidence that the defendants never gave up possession and that the plaintiffs never obtained actual possession in execution of the decree. The learned District Judge went further and said that the bailiff's report and the plaintiff's receipt filed in the execution proceedings were false documents which misrepresent the facts. He held that it was most improbable that the defendants would quietly give up possession of the disputed land, and on the evidence he held as a fact that they did not. From this order a second appeal has been filed in this Court.

The finding that the plaintiffs never obtained possession of the land decreed appears to be a finding of fact which cannot be contested in second appeal. Mr. Nanak Chand, however, refers to *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) as an authority for the proposition that formal possession, if given to a decree-holder, is sufficient to give the plaintiff a fresh starting point of limitation. Now, the case reported in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) was one, as pointed out in *Jang Bahadur Singh* v. *Hanwant Singh* (2) relating to *zemindari* property which was in possession of tenants, and of which actual possession could not be delivered. Such a case is provided for by O. XXI, r. 36 of the Civil Procedure Code, and in such a case only symbolical possession can be given. In the present case the judgment-debtor was in actual possession, and actual possession, therefore, had to be given in accordance with O. XXI, r. 35 of the Code. In *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (3), which was a case in which possession had to be given under O. XXI, r. 95, it was held that the merely formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other person entitled to occupy the same.

Now, O. XXI, r. 95 corresponds with O. XXI, r. 35, and the procedure for delivery of possession is the same in both. Similarly, the procedure is the same under rr. 36 and 96, and, therefore, the authority cited is applicable to the present case. In *Jang Bahadur Singh* v. *Hanwant Singh* (2), also a Full Bench case, the ruling in *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (3), was approved of and that in *Juggobundhu Mukerjee* v. *Ram Churder Bysack* (1) was distinguished. I agree with the decisions in those two Full Bench cases, and hold that it was necessary for the decree-holders to get actual possession of the land decreed to them. It was found as a fact that they never got possession, and that the defendants-judgment-debtors never gave up possession.

The appeal accordingly fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 8 Ind. Dec. (N. S.) 979 (F. B.).

(2) 63 Ind. Cas. 212; 43 A. 520 at p. 523; 19 A. L. J. 469 (F. B.).

(3) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115.

JAGERNATH DAS *v.* JANG BAHADUR RAI.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 223 OF 1919.

December 21, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Jowala Prasad, KT.

Mahant JAGERNATH DASS—PLAINTIFF—APPELLANT

versus

JANG BAHADUR RAI *alias* SITA-RAM DAS—DEFENDANT—RESPONDENT.

Charitable endowments—Muth, *hereditary*—*Succession.*

In the absence of proof of a special custom, on the death of the presiding *Mahant* of a *mourosi* or hereditary *muth*, his principal *chela* is entitled to succeed to him. [p. 893 col. 1.]

Mohunt Rama Nooj Doss v. *Mohunt Debraj Doss*, (1839) 6 S. D. A. Beng. 262, relied upon.

Appeal from a decision of the Subordinate Judge, Additional Court, Darbhanga, dated the 11th April 1919.

Messrs. *Shoroshi C. Mitter* and *S. Deyal*, for the Appellant.

Messrs. *Manohar Lal* and *H. P. Sinha*, for the Respondent.

JUDGMENT.

Miller, C. J.—The suit which is the subject of this appeal arises out of a dispute between the plaintiff and the defendant as to the right to succeed to the *Mahantship* of the Satlakha *Asthan* in *Mauza* Satlakha in the Muzaffarpur District of this Province on the death of the late *Mahant* Manohar Dass who died in June 1915.

The learned Additional Subordinate Judge of Darbhanga, before whom the suit came for trial, found in favour of the defendant and dismissed the plaintiff's claim. From that decision the plaintiff has preferred this appeal.

According to the appellant's case *Mahant* Manohar Dass, who was admittedly the last incumbent of the office, appointed the appellant his *chela* in March 1898, since when he has acted in that capacity performing the *puja* and faithfully carrying out the duties of a *chela*, and up to the date of his death in 1915 Manohar Dass appointed no other *chela*. Upon the death of his *Guru* the appellant, as his heir and successor, performed the *sradh* and *bhandara* and was presented with the *pagri* and *chadar* of *Mahantship* by the *Mahants* and *Sewaks* of the neighbouring *Asthans* and entered into possession of the *Asthan* and the properties appertaining thereto until he was dis possessed by the defendant in February 1916.

It appears that the respondent, the defendant in the suit, applied for registration of his name in the Collectorate in place of the late *Mahant* Manohar Das. The appellant entered an objection and the case was decided by the Deputy Collector on the 11th February 1916 in favour of the respondent. On that occasion the respondent produced a document which has been referred to as a Will and which purports to be executed by the late *Mahant* and attested by several witnesses appointing the respondent his successor. The Deputy Collector was not satisfied with the evidence of either party as to possession of the property appertaining to the *Asthan* but considered that the respondent was in possession of the *Asthan* itself and he relied upon the so-called Will executed by Manohar Dass in the respondent's favour. He accordingly ordered the respondent's name to be entered in the register. About the same time proceedings under section 145 of the Criminal Procedure Code were instituted by the respondent against the appellant and were heard on the 16th February 1916. The Sub-Divisional Officer considered that the question of possession had been decided by the previous order of the Deputy Collector and made no order under section 145, but as he considered that the attitude of both parties was such that a serious breach of the peace was likely to occur he passed orders under section 144 of the Criminal Procedure Code directing the appellant not to commit a breach of the peace by interfering with the possession of the respondent. The appellant has accordingly instituted the present suit claiming a declaration of his rights and possession of the property.

The appellant contends that by the custom and usage of the Satlakha *Asthan* the *chela* of a deceased *Mahant* succeeds him in his office. He denies that the respondent was ever appointed a *chela* of the last *Mahant*, but pleads that, even

if he was, the custom is that where there are a number of *chelas* the eldest is entitled to succeed and the respondent being many years junior to him can claim no right of succession, nor has the *Mahant* for the time being any power of appointment.

He further disputes the authenticity of the Will which is dated the 27th February 1915, that is, about 4 months before the death of Manohar Dass, and says that at that time and for many months before his death he was not physically fit to execute, or to understand the contents of, such a document. He alleges that it was a fraudulent and spurious document got up by the respondent's relations, and that one of the attesting witnesses whose name appears thereon was not alive at the time. He further says that the respondent is not a *bairagi*, a person who has renounced the world, but *girhast* and still lives and dines with his mother and brothers and eats food cooked by *girhasts* and is a man of bad character and quite unfitted for the spiritual duties of a *Mahant*.

The respondent, on the other hand, denies every material allegation made by the appellant. His case is that the appellant never was the *chela* of Manohar Dass but was a cook in the service of the *Mahant* of Basuara, an old enemy of the Satlakha *Asthan* at whose instigation the suit has been brought. He denies the custom as to the order of succession alleged by the appellant and says that, where there are more *chelas* than one, the custom is for the *Mahant* during his lifetime to appoint his successor, but failing such appointment during his lifetime then after his death the *Mahants* and *Sewaks* present at the *bhandara* appoint the *chela*, or, where there are more than one, the most deserving *chela* of the late *Mahant* as his successor. He denies that the appellant performed the *sradh* and *karaj* and asserts that he himself performed those ceremonies and the *bhandara* on the late *Mahant's* death He denies that the late *Mahant* was ill or incapacitated for several months before his death and says he was ill for 10 days only and continued to work and remained in possession of all his faculties up to the day of his death. He contends that the Will was a genuine and valid instrument and relies on the fact that it was duly registered on the 27th April 1915.

In this mass of contradictions it is perhaps not easy to ascertain on which side the truth lies The difficulty of arriving at any confident conclusion is increased by the fact that a great number of witnesses on either side, many of them apparently respectable, have deposed to the facts alleged on behalf of the rival claimants for whom they respectively appear. Nor is it in any way diminished by the fact that, apart from the Will already referred to, no documents of much importance and no records of the *Asthan* which have been in existence for some seven generations have been produced, and there is nothing except the oral evidence of the witnesses from which we can come to a conclusion as to the rules or customs regulating the succession to the *Mahantship*. The respondent is admittedly in possession of the records and in so far as their non-production affords any presumption it must raise a considerable amount of suspicion as to the genuineness of the respondent's case when he asserts that the existing *Mahant* has power to appoint his successor during his lifetime.

Three issues only were framed for determination by the Trial Court. They are as follows :—

(1) Whether the plaintiff or defendant is the *chela* of Manohar Dass ?

(2) What is the custom of succession to the *Mahantship* of Satlakha *Asthan* ?

(3) Whether the Will is genuine or fraudulent ?

Whether Manohar Dass had the right to execute it ?

These issues were considered together by the learned Additional Subordinate Judge. He arrived at a conclusion by a process of reasoning which leaves much to be desired. He considered that the whole case depended upon the question of whether the Will executed by the late *Mahant* in favour of the respondent was genuine. He further considered that the story put forward by the appellant that he was the only *chela* of Manohar Dass was greatly discredited by the fact that he also pleaded that, where there were more than one *chela*, the senior *chela* succeeded as

Mahant according to the custom of the *Asthan*. He says that this demolishes his story that he was the only *chela* of the *Mahant*, and that the appellant should have shown a bold front by one definite prayer and clear evidence of his being the only *chela* of Manohar Dass. I can see no reason why the appellant's story should be suspected merely because he pleads that he was the only *chela* and, even if the respondent was at a later time appointed *chela*, the custom of the *Asthan* provides that the senior *chela* should succeed. It must be remembered that the respondent only claims to have been appointed *chela* some 9 months before the death of Manohar Dass. The appellant contended that the respondent was never a *bairagi* but always continued to live with his family and to eat food prepared by *girhasts*, and, further, that the ceremony whereby the respondent was appointed the *chela* was not orthodox and that he was not appointed on *Ramnomi* day, the most propitious day in the year when all *chelas* are appointed, but on *Janmasthami* day, which is quite irregular, and that his head was not shaved nor were other necessary ceremonies carried out. He knew before the suit was instituted that the respondent was claiming to be a *chela* and further that his case was that the *Mahant* had the power of appointing his successor. In these circumstances, it is difficult to see why the appellant's case should be discredited merely because he pleaded that even if the respondent were in fact a *chela* he was not entitled by the custom of the *Asthan* to succeed. The same suspicion might equally be applied to the case of the respondent who pleads not only that he was the sole *chela* but also that, where there are more than one, the *Mahant* may during his lifetime appoint his successor and, failing this, the successor is appointed after his death at the time of the *bhandara* by the *Mahants* of the neighbouring *Asthans* and the *Sewaks* present at that ceremony. He then considers the facts relating to the execution of the Will and comes to the conclusion that it was a genuine document and, having arrived at this conclusion, adds that the late *Mahant* had a right to execute it, as no law had been shown by the appellant that the *Mahant* cannot appoint a successor by registered deed. He does not deal in detail with the facts which would go to show whether the appellant was ever a *chela* of *Mahant* Manohar Dass or not, but states simply that "the plaintiff is proved not to be the *chela* of the late *Mahant* at all." He accordingly dismissed the suit.

The evidence with regard to the execution of the Will is of a most unsatisfactory character throughout. It is not a Will in the proper sense of the term. It is in fact an appointment by Manohar Dass of his successor with a schedule of the properties of the *Asthan* attached. It directs that the respondent shall, after his death, be installed on the *gadi* and made the *Mahant* in his place and take possession of the moveable and immoveable properties according to the details given in the schedule and that he shall get his name registered in his place. It is important, as bearing upon the credibility of the respondent's case, to notice that it begins by stating that the executant always remains ill and has become about 70 years old. It further states that he has one disciple only, namely, the respondent, and gives as a reason for executing the document that it is generally seen that after the death of the *Mahant* there is always a dispute as to who will succeed him and in order to guard against any such dispute in the future he wishes to make some arrangement. In this connection it should be appointed out that, according to the respondent's case, the *Mahant* was in perfectly good health until about 10 days before his death in June 1915. The Will is dated the 27th February 1915 and the recital that he now remains always ill supports the appellant's case and is entirely at variance with that put forward by the respondent. Again, if in fact he had only one disciple, namely, the respondent, it is not easy to appreciate why there should be any fear as to the appointment of his successor. It is the case of both parties that if there is only one *chela* he, and he alone, has any right to succeed. The one fact which appears to arise, with any reasonable certainty, out of the mass of contradictory evidence is that the appellant was in fact

appointed *chela* of Manohar Dass in March 1898 having gone to the *Asthan* in the previous year. If the respondent's case that the appellant never was the *chela* of Manohar Dass is to be believed it would follow that from 1898 up to 1914 when the respondent says he was appointed *chela* the late *Mahant* never had any *bairagi chela* at all. It is not suggested that any person other than the appellant was the *bairagi chela* during those years. It is difficult to believe that such a state of affairs could have existed and I am satisfied, on the evidence, that the appellant was in fact appointed and acted as *chela* from 1898 up to the time of Manohar Dass's death. There are also documents in existence executed by the appellant, according to his case on behalf of *Mahant*, in which he describes himself as the *chela* of Manohar Dass. Exhibit 5 is a mortgage-bond dated the 30th June 1910. The scribe of this document was one Rup Lal Das who was at that time the *Patwari* of Manohar Dass. The appellant is openly described therein as a *bairagi* and the *chela* of Manohar Dass. It is difficult to believe that he would have so described himself in a document written by the *Patwari* of the *Mahant* if it were not the fact, as at that time no dispute as to his right of succession had arisen and there was no object in giving a false description of his status. This document and one other of a similar nature were produced by the appellant himself, all the other documents being in the possession of the respondent. It was argued that the fact of these documents having been retained by the appellant showed that they were not transactions executed on behalf of the *Mahant* but related to his own private affairs. A *bairagi chela* who has renounced the world is not in a position to lend money on his own account and I must accept the appellant's statement that these documents were executed by him as a *benamidar* on behalf of the *Mahant*. The loans had been re-paid and the documents returned to the lender. The importance of them, however, is that they describe the appellant as the *bairagi chela* of Manohar Dass at a time when there was no reason for giving a false description, and I have no doubt, upon the evidence as a whole, that the appellant was, as he says, the *bairagi chela* of the late *Mahant*. It may be that the respondent was also appointed in 1914, although the ceremonies attending his appointment appear to have been somewhat unorthodox. The respondent was closely related to the late *Mahant*. He was in fact his nephew, and it may be that his relations, as alleged by the appellant, were primarily responsible for bringing about the execution of the document of the 27th February 1915 in favour of the nephew. It is possible also in the circumstances that the late *Mahant* was not an unwilling party to this document but the evidence with regard to it is so unsatisfactory, as I shall presently show, that I am not prepared to accept it as proof that *Mahant* Manohar Dass executed the document with full knowledge and appreciation of its contents. Nor does the document alone, if genuine, prove that the *Mahant* for the time being had any power of appointment with regard to his successor.

The evidence relating to the execution of the document is such as to cast the greatest discredit upon the evidence generally produced in support of the respondent's case. It is needless to say that no Probate has hitherto been obtained of this document as a Will nor is it proposed to do so. Its object appears to have been merely to provide support for the respondent's claim to succeed to the office occupied by his late uncle. The document contains a recital by the scribe, Nand Kishore Lal Das, that he read out the contents of the deed to the executant. Nand Kishore Lal Das was not called as a witness, but one of the attesting witnesses to the Will, Ram Chandra Thakur, called on behalf of the respondent, says that Nand Kishore did not read out the deed to the *Mahant*. He also states that he and all the other attesting witnesses, of whom there were 16, signed in the presence of the *Mahant* and the *Mahant* signed in their presence. It is quite obvious, however, from the evidence of other witnesses who were called on behalf of the respondent that this document was not executed and attested at one time but that several of the attesting witnesses appended their signatures at

the date of registration on the 27th April 1915. In fact it appears from the evidence of the Sub-Registrar, whose disinterestedness there is no reason to doubt, that he first went to the *Asthan* for the purpose of having the Will registered on the 26th April but was told on that occasion that the deed was incomplete. He says that he saw the deed and the attestation was not complete and execution also was not complete. He, therefore, went away and came back again the next day. On the first occasion he says the *Mahant's* signature was not on every page but on the following day all the *Mahant's* signatures were made before him. He then says that he is not very sure about the *Mahant's* signatures on the first page and other pages, whether they were made before him. He also says that the *Mahant* was about 50 years of age at the time of registration. He was weak on account of illness and spoke in a low voice. He did not know the identifier and had never seen the *Mahant* before. The person who identified the *Mahant* on that occasion before the Sub-Registrar has not been called, and, although the Sub-Registrar himself read a portion of the Will it does not appear from his evidence that it was ever read over to the *Mahant* at the time of registration. No explanation has been given for the non-appearance of the identifier.

The respondent at the trial said that the *Mahant's* first signature on the Will was made in his presence and that all the attesting witnesses signed it in his presence in the afternoon. This was in direct conflict with his evidence given earlier before the Deputy Collector in the registration proceedings. On that occasion he said that the *Mahant's* first signature was not made in his presence and that the attestation was not made by the witnesses in his presence. The respondent also says that on the first occasion when the Sub-Registrar came he saw no one except the *Mahant* and that they sat together on the same *durrie*. The Sub-Registrar's account is that he tried to see the *Mahant* on that day but failed and was informed by the servant that the deed was incomplete. I have already referred to Ram Chandra Thakur's evidence of execution and attestation. The next attesting witness to the Will who was called at the trial by the respondent is Bhup Narain Jha. He says that he attested the Will in February and that the other witnesses signed in his presence and the *Mahant* signed it on every page first, which again is at variance with the Sub-Registrar's account. Later on in his evidence the witness says that only 7 witnesses signed in his presence. He repeats that the *Mahant* signed all the pages first. Finally in re-examination on the following day he said that all the witnesses signed in his presence. Baiju Jha, another attesting witness, was also called and said at first that all the witnesses signed in his presence but afterwards in cross-examination admitted that only 7 or 8 witnesses did so. The only other attesting witness who was called was Baldeo Das, a *Fakir* and *Mahant* of Bhora *Asthan*, and he says that all the witnesses attested on the same day in his presence. This witness could sign his own name but otherwise was illiterate and could not read. It is clear from the Sub-Registrar's account that the Will was not complete in so far as attestation is concerned and that it contained only one signature of the *Mahant* when he first went to register it some two months after its alleged execution by the *Mahant*, and the discrepancies in the evidence of the other witnesses show that for some reason or other they were prepared to make out a much better case with regard to the Will than that which they must have known to be the actual truth Each and all of the respondent's witnesses who claimed to have any knowledge in the matter assert definitely that the *Mahant* was ill for 10 days only before his death. This is clearly contradicted by the recital in the document itself. Why they should have made this statement, unless it were to bolster up the authenticity of a document which they knew to be doubtful, it is difficult to conceive, and I am not satisfied upon this evidence that even if *Mahant* Manohar Dass appended his signature to the Will he was aware of, and appreciated, the contents. Ram Chandra Thakur, who was the second witness for the respondent, having stated that Nand Kishore

did not read out the Will to the *Mahant*, some of the later witnesses stated that Haldar Das, described as a very old man and alleged to have been a *Patwari* of the *Mahant*, read out the Will to him. Haldar Das, however, was not called to support this story and I am not prepared to believe it. It is the appellant's case, and one which is supported by a number of witnesses, that the *Mahant* was an old man of about 80 when he died and that for many months before his death was quite incapable of transacting business. They even go so far as to say that he was not in his senses, although I regard this as probably an exaggeration. I am satisfied, however, that in the main the story told by the appellant and his witnesses as to the state of the *Mahant's* health is true and I am not satisfied that even if the Will were in fact signed by him he was fully aware of its nature and contents. Further the respondent's witnesses who were in a position to know go the length of saying not only that the appellant was not a *chela* of any sort of the late *Mahant* but that they had never seen him about the *Asthan* at all. This story is, to my mind, palpably untrue and merely goes to show the length to which these witnesses were prepared to go in support of the party on whose behalf they appeared.

On the other hand, I am not sure that the appellant and many of those who depose on his behalf did not go to greater lengths than the truth would appear to justify. The appellant himself unhesitatingly states that no Will was ever signed by Manohar Das, that no witnesses ever went to the *Asthan* to attest it and that none of the *Mahants* whose names appear as attesting witnesses (there were four in all) ever went to the Satlakha *Asthan*. Other witnesses who had not the same opportunity of knowing also state in terms that Manohar Das never executed the Will, their reason being that he was not in a fit state of health to do so for some months before his death. These witnesses also state that the respondent was never made any kind of *chela* by Manohar Das and that he is a bad character and not a *bairagi* but a *girhast*. The truth appears to me to be that both parties were *chelas*. The respondent was at first a *girhast chela* and afterwards was appointed a *bairagi chela* about nine months before the *Mahant* died. Three or four witnesses called on behalf of the appellant were *girhast chelas* of *Mahant* Manohar Das. They were well qualified to know whether the appellant was the *bairagi chela* or not and they all depose in his favour in this respect. They also gave evidence of the custom of the *Asthan* as to the rule of succession alleged by the appellant. There seems no reason to doubt their evidence as to the status of the appellant. I am satisfied on the evidence that the appellant was appointed *bairagi chela* of the late *Mahant* in 1898 and that the respondent was also appointed in 1914, and I further find that the document of the 27th February 1915 cannot be accepted as an effective appointment of the respondent as the successor of the late *Mahant* Manohar Dass.

The question as to what was the custom of succession in the Satlakha *Asthan* remains to be considered, I have already found that the authenticity of the Will is not satisfactorily proved and must be rejected. But I further consider that the evidence of the custom given on behalf of the appellant is preferable to that of the respondent and should be accepted. The evidence on the point on each side is entirely oral and is supported by no documents. Both sides are agreed that seven *Mahants* in all have presided over the *Asthan* since its institution many years, probably more than a century ago. They also agree as to their names, although the second and third names given by the appellant are reversed in the order given by the respondent. It is the appellant's case that in each instance the senior *chela* succeeded his *Guru* and the names of the *chelas* are given. The respondent alleges that in three instances a junior *chela* succeeded, the last instance being that of Manohar Dass himself who, it is claimed, was the junior *chela* of his predecessor. It is admitted that the documents and records relating to the *Asthan* are in the respondent's possession and it is reasonable to suppose that they would afford some evidence of the custom prevailing. If a junior *chela* were appointed by the

Mahant in his lifetime as his successor by Will or deed, such an important document would undoubtedly be preserved and I can only presume that the absence of all documents is due to the fact that, if produced, they would not support the respondent's case. It is admitted by the respondent that Satlakha is a *mourosi Asthan* that is to say, one in which the office of *Mahant* is hereditary and, apart from custom, devolves upon the chief disciple of the existing *Mahant*. If, therefore, the respondent wishes to prove that some other mode of devolution is customary the onus rests on him to prove it. The question of the devolution of the *Mahantship* in a *mo rosi muth* was decided as long ago as 1839 when the case of *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss* (1) came before the Suddar Dewani Adaulat in Bengal. In the case the Court directed the *Pundit* to state what was the law of the *shastras* in regard to the appointment of the presiding *Mahant* of a *mourosi muth*; whether the principal disciple of the last *Mahant* should succeed or whether the existing *Mahant* was competent to appoint whom he pleased among the body of his disciples. The reply of the *Pundit* was: "Under the circumstances stated in the question, the principal *chela* or pupil is entitled to succeed on the death of the presiding *Mahant* of a *mourosi* or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the *shastras*, are sufficient for such disqualification, then in that case the presiding *Mahant* should, during his lifetime, select one properly qualified from among his pupils to succeed him

"The person so selected will succeed."

No doubt different customs prevail in different *muths*, and, where such are proved to exist, they must govern the order of succession. But I apprehend that in the absence of proof of any special custom we should follow the general rule laid down in 1839 with regard to *mourosi* or hereditary *muths*. The respondent has, in my opinion, for the reasons already given, failed to prove the custom as to devolution which he alleges and has admitted that the Satlakha *Asthan* is one of the description known as *mourosi*. For this reason also, apart from the fact that I consider the evidence of the appellant's witnesses more reliable as to custom, I think the appeal should be allowed and the decree of the Additional Subordinate Judge set aside.

It will accordingly be decreed and declared that the appellant is entitled to succeed the late *Mahant* Manohar Das as *Mahant* of the Satlakha *Asthan* and that the document of the 27th February 1915 purporting to be executed by the *Mahant* Manohar Dass is of no force and effect and that by the rules of the said *Asthan* the senior *bairagi Chela* on the death of the *Mahant* is entitled to succeed to the *Mahantship* and that the appellant is entitled to possession of the said *Asthan* and the properties appertaining thereto.

The appellant is entitled to his costs against the respondent here and in the Trial Court.

Jwala Prasad, J.—I agree to the order proposed.

Z. K. *Appeal allowed.*

(1) (1839) 6 S. D. A. Beng. 262.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1430 OF 1919.
June 30, 1922.

Present:—Mr. Justice Harrison and Mr. Justice Martineau.

ALLAH DIN—PLAINTIFF—APPELLANT
versus
SHANKAR SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 7, 16 (secondly)—Custom—Sub-division of town—Chuni Mandi, Multani Mohalla, Lahore City—Sale of site—Owner of building, right of, to pre-empt.

If in a definite *Mohalla* or sub-division of a town the custom of pre-emption exists it must be treated as existing throughout the whole of the sub-division. [p. 895, col. 1.]

Sohava Mal v. *Chattu Mal*, 154 P. R. 1882, *Ali Bakhsh* v. *Mahya*, 52 P. R. 1903; 169 P. L. R. 1903 and *Muhammad Nawaz Khan* v. *Bobo Sahib*, 44 P. R. 1903; 75 P. L. R. 1903, referred to.

ALLAH DIN *v.* SHANKAR SHAH.

Chuni Mandi is a part of the Multani Mohalla of the Lahore City and a custom of pre-emption exists in that *Mohalla*. [p. 895, col. 1.]

Where the site of a building is sold the owner of the building has a right of pre-emption under section 16 (secondly) of the Punjab Pre-emption Act irrespective of the fact whether the site is a shop or a house. [p. 895, cols. 1 & 2.]

Second appeal against an order of the District Judge, Lahore, dated the 16th April 1919, reversing that of the Sub-Judge, First Class, Lahore, dated the 18th January 1919.

Mr. *Dev Raj Sawhney*, for the Appellant.

Lala *Moti Sagar*, R. S., and Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—The facts of this are that on the 10th September 1910 one Karim Bakhsh executed a mortgage in favour of Allah Din of two portions of land adjoining each other, which may be described as A and B. They are situated in the Chuni Mandi of the Multani Mohalla of Lahore City. A was vacant and the term of the mortgage was a period of six years, after which it could be redemeed on payment of Rs. 400. Regarding B the deed recited that the plaintiff had erected a building upon it aparently during an earlier lease and that this portion could be redeemed at any time on payment of the mortgage charge provided three months' notice had been given to the mortgagee, Allah Din, to enable him to remove his materials.

The sites both A and B were sold by the sons of Karim Bakhsh to one Shankar Shah, and on the 2nd April 1918 he served the plaintiff with notice to remove his *amla*. In May 1918 he brought a suit for redemption of portion A, that on which no building was standing. On the 6th June 1918 Allah Din brought this suit for pre-emption of the whole plot. On the 24th June 1918 a decree was given for the redemption of A. On the 15th August 1918 a suit was instituted for the redemption of B which was decreed on the 9th December 1919. On the 15th January 1919 an appeal was presented from that decree. On the 18th January 1919 the suit for pre-emption was decreed by the Trial Court. On the 4th June 1919 a compromise regarding the plot B was made by which Allah Din agreed to remove the materials in three months. In the meantime on the 16th April 1919 the District Judge of Lahore accepted an appeal in the pre-emption case, and a second appeal was presented to this Court. The suit was dismissed by the District Judge on the ground that the custom of pre-emption does not exist in the Chuni Mandi, although it does exist in the *Mohalla* of which it forms a part, and that, in spite of the clear wording of the deed to the contrary, the property sold included a shop.

The whole of the plaintiff's claim for pre-emption depends on the existence of his building, inasmuch as he depends on section 16 (2) and not on section 16 (4) of the Pre-emption Act. On this ground he obtained an injunction restraining the vendee-decree-holder in the redemption case from executing his compromise decree. The findings of the learned District Judge are to be found on page 11 of the printed book and are as follows:—

(*a*) that the Chuni Mandi is a part of the Multani Mohalla;

(*b*) that the Multani Mohalla is a recognised sub-division of the town of Lahore, and

(*c*) that the custom of pre-emption existed in the Multani Mohalla at the time when the Act came into force.

The site in question is bounded on one side by Chuni Mandi, as is shown by the map, but, in spite of finding that the Chuni Mandi is not only a part of the Multani Mohalla but is the main street in the Multani Mohalla, and although the learned District Judge concedes as a "sound proposition of law" that one street of a *Mohalla* cannot be taken into consideration or excluded where a custom of pre-emption is held to prevail throughout the *Mohalla* in which it is situated, still because or in spite of the fact that this street (the Chuni Mandi) is by far the largest, most important and most homogeneous part of the *Mohalla* and "seems to be in the nature of an enclosure," he excludes it, makes it into a sub-division and holds that the custom of pre-emption does not exist within it. To the rulings quoted by the learned District Judge and opposed to this finding may be added *Muhammad Nawaz Khan* v. *Bobo Sahib* (1), *Sohava Mal* v. *Chattu Mal* (2) and *Ali Bakhsh* v. *Mahya* (3), and if there is one thing which is clearly

(1) 44 P. R. 1903; 75 P. L. R. 1903.
(2) 154 P. R. 1882.
(3) 52 P. R. 1903; 169 P. L. R. 1903.

established in pre-emption law it is that if in a definite *Mohalla* or sub-division of a town the custom of pre-emption exists, it must be treated as existing throughout the whole of the sub-division. Here the learned District Judge has not held that in an outlying portion but that in the main artery the custom does not exist. He has pointed out earlier in his judgment that there are a great number of houses in this portion of the city of which it would be very difficult to say definitely that they are or are not in the *Mohalla*, and in dealing with such houses on the irregular fringes of this *Mohalla*, it would be hard to lay down whether the custom exists or not. There is, however, one definite area concerning the whole of which there is no shadow of doubt that it lies within the *Mohalla*. This is the Chuni Mandi and because it is an enclave—in what sense exactly is not explained nor indeed is there any evidence on the subject—it is held that this street is to be treated as a separate sub-division in flat contradiction of all the authorities and against all the principles which the District Judge has himself laid down. We find that inasmuch as the property in suit is in the Chuni Mandi and the Chuni Mandi is a part of Multani Mohalla where the custom of pre-emption exists, the custom of pre-emption applies to the land in dispute.

The next point to be decided is, whether the land is or is not a shop, the finding of the District Judge being that it is. The house of the plaintiff adjoins the site, and what is proved is that he has built an oven on a portion of the land and that his wife there cooks food of the neighbours on payment in cash or in kind. It has been held that *Bhamba Ram* v. *Allah Bakhsh* (4) does not govern this case and that, although the deed recites the sale of land only, a shop also was included. The plaintiff seeks to pre-empt in virtue of owning the building, whatever the nature of it may be, which exists upon the land, and there can be no doubt that if he can establish under section 6 (2) that he is the owner of the building, he has the first and the best right to enforce his right to purchase the land on which it stands and it matters not at all what the nature of that building may be. But, it is contended for the respondents, he must retain the statutory qualification unimpaired until he gets his decree, and because the suit for redemption had been decreed before the suit for pre-emption, although the decree had not been executed, it is urged that he must be held to have lost his right in the buildings on which his suit depends. His rights in the house exist until such time as the materials have not been removed and as the materials are still standing his rights still subsist. Counsel has put the matter in the form of a dilemma; he says the land is not a shop but the property which it is sought to pre-empt is equal to a shop if the materials can be maintained; and, if they cannot be maintained, the plaintiff has no right of pre-emption. The answer to this position is that the plaintiff has a right of pre-emption of the site so long as the buildings subsist and when he has established his right to pre-emption, the right of the defendants to redeem and to insist on the removal of the building will disappear, inasmuch as he, the mortgagee, having taken the place of the vendee, will in fact become his own mortgagor. The learned District Judge has held that, although he owns the materials which he himself placed upon this site, he does not own the building because he does not own the site. There is no force in this view and Counsel has not seriously attempted to defend it.

We, therefore, accept the appeal and restore the decree of the Trial Court. The costs of the plaintiff will be paid by the defendants throughout.

Z. K.

Appeal accepted.

(4) 31 Ind. Cas. 191; 69 P. R. 1915; 156 P. W. R. 1915.

UTTAM CHAND *v.* MUHAMMAD BAKHSH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1535 OF 1921.

June 30, 1922.

Present:—Mr. Justice Abdul Raoof.

UTTAM CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD BAKHSH, PLAINTIFF AND NIAMAT, DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 25—Issue remitted for trial to lower Appellate Court—Remission by latter to Trial Court, legality of.

Where an issue is remitted by the High Court for trial to the lower Appellate Court under O. XLI, r. 25 of the Civil Procedure Code, the latter has no power in its return to remit it to the Trial Court. The lower Appellate Court must itself comply with the order of the High Court. A delegation of its duty to the Trial Court renders the entire proceedings after the remand *ultra vires*.

Lahore Bank, Limited v. *Lakhi Ram*, 19 Ind. Cas. 970; 105 P. R. 1913; 242 P. L. R. 1913; 144 & 215 P. W. R. 1913, *Sabri* v. *Ganeshi*, 14 A. 23; A. W. N. (1891) 205; 7 Ind. Dec. (N. S.) 387, relied upon.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 27th April 1921, affirming that of the Munsif, Second Class, Hoshiarpur, dated the 15th December 1920.

Lala *Fakir Chand*, for the Appellants.

Dr. *Shuja-ud-Din*, for the Respondents.

ORDER.—By my order dated the 8th December 1921 I remitted certain issues to the lower Appellate Court under O. XLI, r. 25, Civil Procedure Code, for trial. That Court in its turn remitted those issues to the Court of a Munsif, First Class, and directed it to record evidence and forward it with its opinion. The Court of the Munsif in accordance with the direction of the learned District Judge recorded the evidence of certain witnesses and came to certain findings upon that evidence. The learned District Judge, however, after receipt of the findings went into the evidence himself and came to a different conclusion from that arrived at by the learned Munsif. On receipt of this finding certain objections were filed on behalf of the respondent after the period fixed by me.

On the case coming up for hearing before me Dr. Shuja-ud-Din for the plaintiff-respondent has raised the following contention, namely, that the lower Appellate Court had no power to delegate its duties to the Munsif and that, therefore, the Munsif had no authority to record the additional evidence in the case, or express any opinion upon it. In support of this contention the learned Counsel has relied upon *Lahore Bank, Limited* v. *Lakhi Ram* (1) and *Sabri* v. *Ganeshi* (2). In both these decided cases the findings recorded by the First Court were accepted by the lower Appellate Court, and it was held by the High Court that all the proceedings were *ultra vires*. In this case there is this distinction that the lower Appellate Court has not accepted the opinion of the First Court, but in principle it is not possible to distinguish the case from the reported cases relied upon. If the lower Appellate Court had no power to remit the issues to the Court subordinate to it for trial, all the proceedings must be held to be *ultra vires*. The objection taken is highly technical, but being bound by the Division Bench ruling I must give effect to it. I accordingly remit the issues again to the lower Appellate Court for trial according to law.

Z. K. *Issue remitted.*

(1) 19 Ind. Cas. 970; 105 P. R. 1913; 242 P. L. R. 1913; 144 & 215 P. W. R. 1913.

(2) 14 A. 23; A. W. N. (1891) 205; 7 Ind. Dec. (N. S.) 387.

DALPHEROO MIAN *v.* BANGALI MALI.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1040 OF 1920.

December 15, 1922.

Present:—Mr. Justice Adami.

DALPHEROO MIAN, AND AFTER HIM HAFIZ MIAN, SON OF DALPHEROO MIAN, DECEASED—DEFENDANT—APPELLANT

versus

BANGALI MALI—PLAINTIFF AND SHAM LAL SUNDERHORA AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Delivery of possession.

In order to complete a gift under Muhammadan Law the donor must, even if only for a time, abandon possession of the property gifted in favour of the donee. [p. 898, col. 2.]

Azim-un-nissa Begum v. *Clement Dale*, 6 M. H. C. R. 455, *Bava Saib* v. *Mahomed*, 19 M. 343; 6 Ind. Dec. (N. S.) 944, *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*, 29 B. 408; 7 Bom. L. R. 443, relied upon.

Where, however, the donor and the donee are present on the premises and an intention on the part of the donor to transfer has been unequivocally manifested, no formal entry by the donee or actual physical departure of the donor is necessary to complete the gift. [p. 898, col. 2.]

Shaik Ibrahim v. *Sheik Suleman*, 9 B. 146; 5 Ind. Dec. (N. S.) 98, relied upon.

Appeal from a decision of the District Judge, Shahabad, dated the 30th July 1920, modifying a decision of the Munsif, Buxar, dated the 17th July 1919.

Messrs. *A. B. Mukharji* and *B. B. Mukharji*, for the Appellant.

Mr. *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.—The plaintiff in the suit out of which this second appeal arises sought for declaration of title and recovery of possession in respect of a house in *Mouzah* Barahampur. According to his case *Musammat* Panna received the house from her father and in 1905 made a gift of the house to her daughter's son, Noor Mohammad, and after Noor Mohammad's death, his uncle, Sardar Mian, inherited the properties. The plaintiff claimed to have purchased the house from Sardar Mian in 1918.

The defence was, that the house formed the joint property of *Musammat* Panna's husband, Ajaeb, and Wali Mohammad, and that, after Ajaeb's death, *Musammat* Panna and Wali's son, Dalpheroo, sold a portion of the house to the defendants in order to pay off a mortgage-debt. The allegation of the gift by *Musammat* Panna to Noor Mohammad was denied by the defendants.

The Munsif dismissed the plaintiff's suit; he held that the plaintiff's case that *Musammat* Panna received the house as a gift from her father was false and that the house was the property of Ajaeb and Wali Mohammad. He found, too, that the case of a gift had not been made out, inasmuch as *Musammat* Panna and Dalpheroo had, so soon after the alleged gift, mortgaged the house. He disbelieved the allegation that Sardar Mian had been in possession of the house; in fact, he found that the plaintiff had not proved the exclusive title of Panna, that Dalpheroo had been in possession, that Noor Mohammad had never been in exclusive possession, and that Sardar had never been in possession; and, finally, that the deed of gift had been practically revoked by a transfer to their creditors by Dalpheroo and Panna.

In appeal the learned District Judge has agreed with the Munsif that the house was in the joint possession of Ajaeb and Wali. In his opinion, however, the gift to Noor Mohammad by *Musammat* Panna was a valid gift, and he held that, as Noor Mohammad was living with *Musammat* Panna, delivery of possession by vacation of the house or otherwise need not be proved. As he had found, however, that Panna could only inherit her husband's half share of the house, he held that the plaintiff could obtain under the gift to Noor Mohammad only a half share in the house. He, therefore, decreed the plaintiff's suit to the extent of a half share in the house.

After the case had been heard by the Munsif a petition was put in by the plaintiff, asking that the plaint might be so amended as to show a claim only to such share as *Musammat* Panna had in the house. But the Munsif, I think, rightly refused to grant the petition at that stage, inasmuch as it altogether changed the basis of the plaintiff's suit.

The first contention by Mr. Abani Bhusan Mukharji on behalf of the appellant is that the learned District Judge is mistaken in finding that, under the Muhammadan Law,

Musammat Panna as widow of Ajaeb would be entitled to the whole share which belonged to her husband. It is pointed out that under the Muhammadan Law the widow, if a child was living, would be entitled only to a one-eighth share of her husband's property, while a half share would go to her daughter, if living, and the residue would go to the brother, Wali; so that in no case could *Musammat* Panna have gifted to Noor Mohammad more than her one-eighth share if her daughter was living. If the daughter was living, Noor Mohammad would be able to claim a half share of Ajaeb's property as being his mother's share: so that out of the eight-annas share of the house belonging to Ajaeb, the five-annas share would fall to Noor Mohammad through *Musammat* Panna and his mother, and the other three-annas share of the eight-annas would come to Wali.

Mr. Parmeshwar Dayal, on behalf of the respondents, admits that such would be the shares and that the District Judge is not correct in finding that Ajaeb's widow would be entitled to a half share of the whole house. If, on the other hand, at the time of Ajaeb's death, the daughter of Ajaeb were no longer living, the widow, *Musammat* Panna, would be entitled to a quarter share in the house and the residue would go to Wali, the brother, so that at the most *Musammat* Panna could only have transferred by gift a quarter share of her husband's half share in the house. It is quite clear that the District Judge was mistaken in his reckoning of the share falling to *Musammat* Panna which she would have a right to gift to her daughter's son.

Another point taken by Mr. Mukharji is, that the learned District Judge is incorrect in his view that it was not necessary to show that there was actual delivery of possession in order to complete the gift. Mr. Macnaghten in his Precedents of Muhammadan Law, in Case No. 19 at page 233, shows that a gift by a woman to her grandson is legal and valid and cannot be revoked; and in Case No. 22, on page 231 of the same work, it is said: "In books of law it is expressly stated that if a person disposed of by gift a house to another, and continue himself to inhabit it, or even keep some part of his property therein, the gift is void from the circumstance of complete delivery and possession not having been established." Exception is made in that case to the gift of a house by a wife to her husband in which the parties continue both to reside and also exception is made in a case of the transfer by a father of his house to his son while himself continuing to occupy it; and the only exceptions to the rule that there must be actual delivery of possession seem, according to that case, to be the gift of a house by a wife to a husband or a husband to a wife, and a gift to sons by parents. This case has been upheld in the case of *Azim-un-nissa Begum* v. *Clement Dale* (1). In the case of *Bava Saib* v. *Mahomed* (2) it was held that where a Muhammadan woman made an oral gift of her husband's house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house, the gift was null and void, as there was no entire relinquishment of the house of the donor and the case did not fall within the exception allowed by the Muhammadan Law. In the case of *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* (3) it was held that a temporary abandonment of possession of a house by the donor would be sufficient to show delivery of possession in order to complete a gift, and it is shown in that case that, for the completion of the gift, abandonment even for a short time by the donor would be necessary. It seems, then, settled that in the present case the gift of the house to Noor Mohammad could not have been made complete, unless *Musammat* Panna, for a time at least, abandoned possession in favour of Noor Mohammad; and it is not shown that in this case there was any such vacation of the house by the lady. In the case of *Shaik Ibrahim* v. *Shaik Suleman* (4) it was held that for the purpose of completing a gift of immoveable property by delivery and possession, no formal entry or actual physical departure is necessary; it is sufficient that the donor and the donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested.

In this case, beyond the written deed of gift, there is no such unequivocal intention

(1) 6 M. H. C. R. 455.
(2) 19 M. 343; 6 Ind. Dec. (N. S.) 944.
(3) 29 B. 408; 7 Bom. L. R. 443.
(4) 9 B. 146; 5 Ind. Dec. (N. S.) 98.

manifested; on the contrary, the donor, *Musammat* Panna, soon after her deed of gift, joined in mortgaging the house which, according to the plaintiff, was wholly hers, though she had already executed the deed of gift. This action of her would tend to show that there was no such intention expressed as would render unnecessary the vacation of the house by her.

These are the two chief points in the Muhammadan Law which I think form good ground for finding that the decision of the learned District Judge was not correct.

It remains to be considered whether the plaintiff would be entitled in this suit to recover possession of any part of the house as being his share. The plaintiff's case was that the whole house had been *Musammat* Panna's property under a gift from her father and this case has been found to be false. The plaint rests the claim wholly on the gift by *Musammat* Panna to Noor Mohammad and makes no claim on account of the interest inherited by Noor Mohammad or Ajaeb. It is impossible to decide what share Noor Mohammad would be entitled to, if any, for there is no finding whether Noor Mohammad's mother, the daughter of Ajaeb, was alive at the time of Ajaeb's death. The fact of the daughter's existence at the time of Ajaeb's death would make a considerable difference to the share to which Noor Mohammad would be entitled; in fact if she were not alive he would not be entitled to anything as a share in Ajaeb's property. It is impossible to allow the plaintiff to change his case altogether from the case made in the plaint and depend on the case of the defendants for relief.

Having found that the gift by *Musammat* Panna to Noor Mohammad was not completed by such delivery of possession as is required by the Muhammadan Law, and having no satisfactory evidence on which to decide the share, if any, which Noor Mohammad would have acquired, I am of opinion that the plaintiff's case must fail and the appeal must be allowed.

The decree of the lower Appellate Court is, therefore, set aside and that of the Munsif restored. The appeal is allowed with costs.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 25 OF 1922.

August 3, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

THE BANK OF MULTAN, LIMITED, IN LIQUIDATION, THROUGH MR. N. D. SETHI—OFFICIAL-LIQUIDATOR—APPELLANT

versus

HUKAM CHAND—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), s. 235—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 36—Application by Liquidator to recover compensation from Directors for misfeasance—Limitation.

Section 10 of the Limitation Act applies to cases of express trust only. It has no application to the cases of Directors of Companies, as they are not persons in whom the property of the Company is vested within the meaning of that section. [p. 901, col. 1.]

Kathiawar Trading Company Limited v. *Virchand Dipchand*, 18 B. 119; 9 Ind. Dec. (N. S.) 588, relied upon.

Section 235 of the Companies Act of 1913 gives no new rights, but simply provides a summary mode of enforcing rights which must otherwise have been enforced by suit. [p. 901, col. 1.]

Kumarpuram Sheshadri Doraswamy v. *Pestonjee Jamesjee Padshah*, 5 Bom. L. R. 633, *Canadian Land Reclaiming and Colonizing Co., In re, Coventry and Dixon's Case*, (1880) 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775, relied upon.

An application under section 235 of the Companies Act of 1913 to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance or breach of trust is, by virtue of clause (3) of the section, governed by Art. 36 of Schedule I to the Limitation Act, and is barred unless made within two years of the act complained of. [p. 901, col. 2.]

Ramasami v. *Streeramulu Chetti*, 19 M. 149; 6 Ind. Dec. (N. S.) 809, *Connell* v. *Himalaya Bank, Limited*, 18 A. 12; A. W. N. (1895) 136; 8 Ind. Dec. (N. S.) 712, distinguished.

Letters Patent Appeal from an order passed by Mr. Justice Martineau, on the 11th January 1922, printed as 69 Ind. Cas. 25, in Miscellaneous First Appeal No. 1167 of 1921.

Mr. *B. R. Puri*, for the Appellant.

Babu *S. K. Mukerji*, for the Respondent.

JUDGMENT.

Abdul Qadir, J.—This judgment will dispose of four connected appeals under section 10 of the Letters Patent against the order of Mr. Justice Martineau in Chambers. The question for determination in

all these appeals is, whether they are barred by time or not, under Art. 36 of the Limitation Act, or whether any other Article is applicable. The facts briefly are, that the Bank of Multan, Limited, went into liquidation on the 14th April 1918, and a Liquidator was appointed by Court. He applied in August 1920, under section 235 of the Indian Companies Act, VII of 1913, against Lala Hukam Chand, formerly manager, and the others, formerly Directors, of the said Bank, claiming from them various sums on the ground that they have been guilty of misfeasance or breach of trust. The defendants denied their liability on facts and also pleaded that the applications were barred by time, as they had not been brought within two years of the respective dates of the alleged acts of misfeasance. The learned District Judge who decided these applications, held that the applications were governed by Art. 120 of the Limitation Act and were within time. He also held that the period of limitation should commence to run from the date of liquidation, as the winding up brought into existence new rights which the Liquidator was entitled to enforce. He, therefore, decreed certain sums against the defendants above-mentioned. The defendants preferred appeals to this Court against the decrees of the District Judge, and the learned Judge in Chambers came to the conclusion that the applications were barred by time, under Art. 36 of the Limitation Act, which was applicable to these cases. He, therefore, accepted all the appeals.

The Liquidator has now appealed against the said orders, dated the 11th January 1922, through Mr. Bhagat Ram Puri, who has addressed this Court at length on his behalf, while Mr. S. K. Mukerji has argued the case on behalf of the respondents.

Mr. Bhagat Ram contends that section 235 of the Indian Companies Act, VII of 1913, confers on a Liquidator the right of recovering damages against delinquent Directors or promoters of a Company and is meant to safeguard the interests of the investing public against acts of misfeasance or breach of trust committed by such Directors or promoters. He says that if the view taken by the learned Judge in Chambers was to be accepted as a sound exposition of the law on this subject, its effect would be to make section 235 practically a dead letter, because it would be impossible to catch hold of any delinquent who had been guilty of any misfeasance or breach of trust in relation to the Company "more than two years before the date of the application made against him." This immunity, it is added, would encourage dishonest promoters of Companies in their wrong doings and would lead to serious consequences. It must be remembered, however, that the adoption of the view advocated by the learned Counsel would also lead to equally serious consequences in reviving claims, however old, against persons who may be dead or gone out of the Company.

It is further argued that it cannot be reasonably supposed that the Legislature could have intended that time should begin to run against a Liquidator even before he was appointed. Reference is made to *Ramasami* v. *Streeramulu Chetti* (1), where an application by a Liquidator praying that the Directors be ordered to pay over to him a sum of money improperly distributed by them among the share-holders, was held to be not barred by limitation though made three years after the appointment of the Liquidator. *Connell* v. *Himalaya Bank, Limited* (2) is also referred to in the same connection. These decisions, however, cannot help the appellant because they were passed under the old Companies Act which contained no clause corresponding to the present clause (3) of section 235, which makes the Indian Limitation Act expressly applicable to an application under this section, "as if such application were a suit." The reason expressly given in *Ramasami* v. *Streeramulu Chetti* (1) for the view that Art. 36 did not apply to an application under section 214 of the old Companies Act of 1882, (which corresponded to section 235 of the present Act), was that Art. 36 referred only to suits and not to applications and it was to remedy this very difficulty that clause (3) was added to section 235, at the time when the Companies Act was being amended. These applications are now in the same

(1) 19 M. 149; 6 Ind. Dec. (N. S.) 809.
(2) 18 A. 12; A. W. N. (1895) 136; 8 Ind. Dec. (N. S.) 712.

position as suits for the purposes of the Law of Limitation.

Mr. Bhagat Ram next contends that, assuming that Art. 36 does apply to cases of misfeasance, it cannot, in view of section 10 of the Limitation Act, apply to cases of breach of trust. He argues that managers and Directors of a Company, incorporated under the Companies Act, are in the position of trustees and if they are guilty of any breach of trust, their fraud could be exposed and punished whenever detected, regardless of the time which has elapsed since such breach of trust was committed. This argument does not appear to me to be sound and appears to be substituted for another argument advanced at a previous stage of the case as to the applicability of Art. 120, which is not now pressed. It has been laid down in *Kathiawar Trading Company Limited* v. *Virchand Dipchand* (3) that section 10 of the Limitation Act does not apply to Directors of Companies, as they are not persons in whom the property of the Company is vested, as is contemplated by section 10. This section has been held to apply to cases of express trusts only, and I do not think Mr. Bhagat Ram can successfully invoke the help of this section in the present case.

On the main question Mr. Mukerjee cites *Kumarpuram Sheshadri Doraswamy* v. *Pestonjee Jamasjee Padshah* (4), a decision by Sir Lawrence Jenkins, C. J., and Mr. Justice Batty of the Bombay High Court, in which the learned Judges have held that section 214 of the Indian Companies Act, 1882, gives no new rights, but simply provides a summary mode of enforcing rights which must otherwise have been enforced by suit. With these remarks I entirely agree and they are absolutely in accord with what has been laid down under section 165 of the English Companies Act, 1862. The case of *Canadian Land Reclaiming and Colonizing Co., In re, Coventry and Dixon's case* (5) is also referred to in this connection. This case is reported at page 660 of Law Reports, Chancery Division, Volume XIV, and lays down that "section 165 creates no new rights, but merely provides a summary mode of calling Directors to account for acts of impropriety for which they are liable to an action." It has nowhere been laid down that section 235 is intended to review any rights that have already become barred by time, and it is only reasonable that the powers of a Liquidator under section 235 should extend to those actions only regarding which it can be shown that there is a subsisting right or liability. I see no reason, therefore, to take a different view of these cases from that taken by the learned Judge in Chambers, and dismiss these appeals with costs.

Shadi Lal, C. J.—On the 12th August 1920, the Liquidator of the Bank of Multan made an application under section 235 of the Indian Companies Act (VII of 1913) for the recovery of a certain sum of money from an officer of the Company in respect of a certain misfeasance commited by him in 1910 when he was manager of the Bank. The crucial question for determination is, whether the application is barred by limitation. Now, I may say at once that if an action had been brought for compensation against the officer of the Company it would have been barred by time under Art. 36 of the Indian Limitation Act, because the act of misfeasance, which caused damage to the Company, took place ten years ago. The learned Counsel for the Liquidator invokes section 10 of the Indian Limitation Act which obviously has no application to the case. It is beyond dispute that the rule laid down in that section, restricts the saving portion of the Statute to express trusts, and it has been repeatedly held, *vide, inter alia, Kathiawar Trading Company, Limited* v. *Virchand Dipchand* (3) that the Directors of a Company are not express trustees as the Company's property is not vested in them within the meaning of the aforesaid section, much less can the officers of the Company be described as trustees as contemplated by the section.

I am, therefore, quite clear that a suit instituted for recovering compensation would be barred under Art. 36, and subsection (3) of section 235 of the Indian Companies Act lays down that, for the purposes of the Indian Limitation Act, an application under that section shall be treated

(3) 18 B. 119; 9 Ind. Dec. (N. S.) 588.
(4) 5 Bom. L. R. 633.
(5) (1880) 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775.

as if it were a suit. The learned Counsel for the appellant, however, contends that on the winding-up of a Company the Liquidator is clothed with new rights and is entitled to make an application under that section within two years from the date of the commencement of the liquidation. To this proposition I cannot assent. It must be remembered that section 235 does not create any new rights or liabilities but simply provides a summary mode of enforcing rights which might otherwise have been enforced by suit. If any authority is needed on the subject I would refer to the judgment of James, L. J., in *Canadian Land Reclaiming and Colonizing Co., In re, Coventry and Dixon's case* (5) which deals with the corresponding section of the English Companies Act. It is to be observed that section 235 does not take away the remedy by suit but provides an alternative remedy by which the Liquidator may enforce rights in expeditious manner without incurring the expenses entailed by a regular suit.

If I were to accept the contention of the appellant I would have to hold that an act of misfeasance which was committed a hundred years ago, could be raked up by the Liquidator after the expiry of a century simply because the Company has gone into liquidation. There is absolutely no warrant for an absurd position like this, and I have no hesitation in holding that section 235 does not in any way extend the period of limitation prescribed for the recovery of damages caused by an act of misfeasance, and it is immaterial whether an action is brought to enforce the claim or an application is made under section 235.

For the aforesaid reasons I must dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 36 OF 1920.

January 9, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Maharaja KESHO PRASAD SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

Babu PARMESHRI PRASAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 19, 20, 21, 22, 120—Evidence Act (I of 1872), s. 8—Zerait land, proof of—Relevant evidence—Occupancy rights, whether can be created by grant—Land purchased by landlord from tenant, character of.

In order to establish that certain land is his *zerait* land within the meaning of section 120 of the Bengal Tenancy Act a landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March 1883 or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such, though it may be that such evidence standing by itself will be of small value and will not induce the Court to hold that the land claimed as proprietor's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under section 120 of the Bengal Tenancy Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd of March 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land, although it is open to the Court to take that evidence into consideration in coming to the conclusion whether the land claimed as *zerait* is in fact *zerait* land. [p. 905, cols. 1 & 2.]

Nilmoni Chuckerbutty v. *Bykant Nath Bera*, 17 C. 466; 8 Ind. Dec. (N. S.) 850, dissented from.

Bhagtu Singh v. *Raghu Nath Sahai*, 1 Ind. Cas. 571; 13 C. W. N. 135; 9 C. L. J. 15, approved.

Section 19 of the Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. [p. 909, col. 2; p. 910, col. 1.]

An occupancy right is inherent in the status of the *raiyat* and is not the landlord's to grant. [p. 910, col. 2.]

There is nothing in either section 20 or section 21 or in any other section of the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. [p. 910, col. 1.]

Obiter.—There is no indication in the Bengal Tenancy Act that if, as a result of the bounty of the landlord, a person acquires a right of occupancy

KESHO PRASAD SINGH *v.* PARMESHRI PRASAD SINGH.

in the *zerait* land, there is, as a consequence of such bounty, the conversion of the *zerait* land into *raiyati* land. [p. 910, col. 2.]

Whenever a question is raised as to the character of any land purchased by a landiord from a tenant, the enquiry must be directed to ascertain the original character of the land. If it was initially *raiyati* land, the landlord in getting *khas* possession cannot treat it as his *zerait*, for to permit him to do so would be to allow him to increase his stock of *zerait* land, which it was the object of the Bengal Tenancy Act to prevent. But where it is proved that the land was *zerait* land within the meaning of section 120 of the Bengal Tenancy Act, the land, on coming into the *khas* possession of the landlord, regains the character which it once possessed. [p. 911, col, 1.]

Appeal from a decision of the Subordinate Judge, Second Court, Shahabad, dated the 27th August, 1919.

Messrs. *P. K. Sen*, *A. Sen* and *Nirsu Narayan Sinha*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *Rai Bepin Bihary Sharan*, for the Respondents.

JUDGMENT.

Das, J.—This was a suit by the appellant to recover possession of certain lands at present in the possession of defendants and for mesne profits. The disputed lands admittedly lie within the plaintiff's Zemindari, and it is the plaintiff's case that they are his *Zerait* lands in which the defendants could not in law, and have not in fact, acquired a right of occupancy. The defendants resisted the plaintiff's suit on the ground that they have acquired such a right in the disputed lands. It is not disputed that the Raj, of which the plaintiff is the proprietor, settled the disputed land with Babu Kesho Prasad Singh, the father of the defendants, for seven years, from 1309 to 1315, by a lease dated the 25th November 1902. It is also not disputed that upon the expiry of the lease the lands were again settled with the defendants by a lease dated the 8th December 1908 from 1316 to 1324. The defendants have, accordingly, been in possession of the disputed lands for over 12 years and have undoubtedly acquired a right of occupancy therein, unless the plaintiff is right in his contention that the disputed lands are the proprietor's private lands within the meaning of section 120 of the Bengal Tenancy Act. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to prove the *zerait* character of the lands and has accordingly dismissed his suit.

In order to succeed it is necessary for the plaintiff to prove either that the disputed land was cultivated by the proprietor himself as *zerait* with his own stock or by his own servants or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act, or that the land is recognised by village usage as proprietor's private land. It is not the case of the plaintiff that he or his predecessors-in-title cultivated the disputed lands as *zerait* lands with his own stock, or by his own servants, or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act. But the plaintiff contends that the disputed lands are recognised by village usage as proprietor's private land. The Bengal Tenancy Act has laid down certain rules for the guidance of the Revenue Officers for the determination of the question whether the lands claimed as proprietor's private lands are in fact proprietor's private lands. These rules are to be found in section 120, paragraph 2 of the Bengal Tenancy Act and are as follows:—

"In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the seconddday of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown."

In paragraph 3 it is provided that, "if any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in section 120 for the guidance of Revenue Officers."

It has been the subject of some controversy in our Courts whether the circumstance that a landlord has, subsequent to the second day of March 1883, specifically let out the land as his private land can at all be regarded by the Courts as relevant evidence as coming within the words "any other evidence that may be produced." In *Nilmoni Chuckerbutty* v. *Bykant Nath Bera* (1), it was held by the Calcutta High

(1) 17 C. 466; 8 Ind. Dec. (N. S.) 850.

Court that such evidence is wholly irrelevant and should not be considered by the Court. Their Lordships in the course of their judgment state as follows :—

"It seems to us that in enacting that sub-section, the Legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the Legislature, as asserted in the Draft Bill laid before the Council for consideration, to extend the occupancy rights of tenants before the measures then declared to be in contemplation became law; and, therefore, the particular date, the 2nd day of March 1883, the date on which the Draft Bill was published in the Gazette, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on the part of Zemindars to assert their private rights, so as to prevent the accrual of special tenant rights. It was accordingly declared that it was a material point, in the consideration of such a matter as is now raised in appeal before us, whether the particular lands were before the second day of March 1883, specifically let as the proprietor's private lands. From this, we may take it, that it was intended that regard should be had to any declaration made before that date by the landlord and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land. In this view, we think that the following words in that sub-section 'any other evidence that may be produced' must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date."

In my opinion, there is nothing in section 120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in section 120, paragraph 2 of the Bengal Tenancy Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between landlords and tenants subsequent to the 2nd day of March 1883, it should have expressed that intention in more clear terms. As section 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as *zerait* was in fact *zerait*. The Evidence Act deals with the question what evidence is relevant evidence; and, in my opinion, there is no power in the Court to reject any evidence as irrelevant evidence, if the landlord offers evidence, and the Evidence Act says that it is relevant evidence. This was the view which was taken by Mr. Justice Mitter in the case of *Bhagtu Singh* v. *Raghu Nath Sahai* (2). He was definitely of opinion that section 120 does not exclude evidence which under the Evidence Act is relavant evidence. But it is suggested that, quite apart from the question whether Mr. Justice Mitter was right in the view which he expressed in the case of *Bhagtu Singh* v. *Raghu Nath Sahai* (2) the Legislature by the subsequent amendment of the Act, has specifically stated that such evidence is not to be regarded by the Courts as relevant evidence on the question whether the land claimed as *zerait* is in fact *zerait*. This amendment has been carried out by enacting a new paragraph in section 120 of the Bengal Tenancy Act, paragraph 2A, which runs as follows :—

"Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud a Revenue Officer shall not regard any land as a proprietor's private land, unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2)."

Now, it seems to me that a demise on the footing that the land demised is the proprietor's private land is hardly an agreement or compromise within the meaning of the terms as used in paragraph 2A; but quite apart from any other consideration, it seems to me that the agreement or compromise which the Revenue Officer is not to regard is an agreement or compromise made before the Revenue Officer in a proceeding connected with the Record of Rights; and, but for the difficulty arising from the comma being placed after the word "compromise"

(2) 1 Ind. Cas. 571; 13 C. W. N. 135; 9 C. L. J. 15.

and not after the word " decree," I should feel inclined to hold that before a Revenue Officer disregards an agreement or compromise, he must be satisfied that it was obtained by collusion or fraud. The object of the new sub-section was, as the report of the Select Committee on the Bill of 1907 makes clear, to assert the principle that agreements or compromises made before a Revenue Officer should not be held to affect the rights of third parties. It was thought that the question whether the land is proprietor's private land affects not merely a tenant for the time being but also all future occupants of the lands, and the Legislature considered it desirable to safeguard their interests as far as possible. But it is one thing to frame rules for the guidance of Revenue Officers, it is another thing to tell the Civil Courts that they are not to regard as evidence that which is evidence under the Evidence Act. The last paragraph of section 120 undoubtedly says that the Civil Court is to have regard to the rules laid down in section 120 of the Bengal Tenancy Act for the guidance of the Revenue, Officers whenever any question arises in a Civil Court as to whether land is or is not a proprietor's private land, but there is nothing in section 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and which they are bound to regard under section 120 paragraph 2 of the Act. In my opinion, the landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March 1883 or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such, though it may be that such evidence standing by itself will be of small value and will not induce the Courts to hold that the land claimed as proprietpr's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under the Bengal Tenancy Act; but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March 1883 that evidence will not be conclusive on the question whether the land claimed as *zerait*, is in fact *zerait* land, although, as I suggest, it is open to the Court to take that eivdence into consideration in coming to the conclusion whether the land claimed as *zerait* is in fact *zerait* land.

The dealings of the plaintiffs or his predecessors-in-title with the disputed lands are as follows:-

In or about the year 1843, the Raj settled certain lands, including the lands set out in Schedule A annexed to the plaint, with the Government for the purposes of a stud. There is evidence that the Government through its officers used to grow oats on the lands demised and was in possession of about 30 years. In 1873, the Government surrendered these lands to the Raj. In the same year the Raj settled the Schedule A lands with one Mr. Fox by a lease from 1873 to 1884. In 1884 the Raj granted another lease to Mr. Fox from 1884 to 1892. Sometime in 1891, in consideration of valuable services rendered by Mr. Fox to the Raj, the Raj conferred occupancy rights in the lands demised upon Mr. Fox. In 1895, the Raj brought a suit, being suit No. 10 of 1895, against Mr. Fox for arrears of rent from 1299 to 1302. The Raj recovered a rent decree as against Mr. Fox and in execution of that decree caused the lands in dispute to be sold, and purchased the lands at the auction sale held on the 2nd of March 1896. The Raj then settled the Schedule A lands with one Akhouri Ram Adaraj Singh from 1897 to 1901. Meanwhile the Schedule B lands had come out of the water, and had become fit for cultivation; and in 1902 the Raj settled the disputed lands with Kesho Prasad Singh, the father of the defendants, for seven years from 1902 to 1908, and in 1909 the Raj executed another lease in favour of the defendants which expired in 1324.

Now, it will appear that though the Raj has not been in actual cultivating possession of the lands from 1843, it has always let out the lands for terms of years, and that though the Government was in possession under the leases for about 30 years, it was not suggested that any right of occupancy was acquired in the disputed lands by the Government. In the earlier documents the

lands are described as *diara* lands; and though *diara* lands are not by operation of law *zerait* lands, there is sufficient in the literature connected with the Bengal Tenancy Act to indicate that there were local customs in various parts of Bihar under which *diara* lands were recognised as *zerait* lands. Indeed the papers which have been published under the authority of the Government relating to the Bengal Tenancy Act establish that the Bihar Zemindars pressed before the Government the importance of saving such local customs as recognised lands as proprietor's private lands, and the provisions in the Act saving the local customs was a concession to the Bihar Zemindars, who contended that local customs would in many places support their claim where they might otherwise fail to establish the *zerait* character of the land. The Bengal Tenancy Act has certainly conferred special privileges on the landlords in regard to the *diara* lands, and it seems to me that, apart from any other consideration, the community may regard the *diara* land as the proprietor's private land, since it is not land in which any tenancy rights have ever been exercised. I am, of course, not considering the case where such land is identifiable with previous existing tenancy lands, and, of course, I am not suggesting that such land, where it is not identifiable with previously existing tenancy lands, is by law proprietor's private lands. All that I suggest is that it is likely that local customs may give such land to the landlord as his *zerait*, if it is not identifiable with previously existing tenancy land. I do not regard the history of the dealings of the disputed lands by the Raj prior to the passing of the Bengal Tenancy Act as establishing the case of *zerait*; but I think that it makes the case of the plaintiff a probable one. It is quite certain that certainly up to the passing of the Bengal Tenancy Act no one had claimed a right of occupancy in these lands, although they were constantly let out to tenants. Mr. Fox himself was in possession of these lands from 1873 to 1896. In 1891, the Raj solemnly conferred upon Mr. Fox a right of occupancy in these lands. Now, it will be noticed that in 1891 Mr. Fox has already been in possession of the disputed lands for over 12 years, and if a right of occupancy could be acquired in these lands, Mr. Fox had certainly acquired it. Now, if Mr. Fox was aware of the fact that the lands were not the proprietor's private lands, it is certainly remarkable that he should have asked the Raj to confer a right of occupancy upon him in these lands. I shall have to consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy tenant, and whether such recognition had the effect of converting the *zerait* lands into *raiyati* lands, but it is necessary at this stage to point out that the transaction between the Raj and Mr. Fox makes the case of the plaintiff antecedently probable.

I now come to the actual evidence produced by the plaintiff to establish the *zerait* character of the lands. The evidence consists of certain *kabuliyats* executed in favour of the Raj and of the proceedings in certain suits instituted by the defendants against Parbhu Upadhya and others. Exhibit 5 is the *kabuliyat* executed by Mr. Fox in favour of the Raj on the 21st June 1883. By this document Mr. Fox covenanted with the Raj that on the expiry of the lease the Raj would be entitled to the land as its *seer zerait*. In my opinion, the declaration made by Mr. Fox before the passing of the Bengal Tenancy Act is important evidence in favour of the Raj; though the covenant would have been conclusive if the demise had taken place on or before the 2nd day of March 188. The learned Subordinate Judge thought that the document was not properly proved, as only a certified copy was produced, and neither the record-keeper nor the *mohirrir*, who made a search for the original, was called to prove the loss of the original document; but the learned Subordinate Judge did not reject the document when it was tendered. P. W. No. 5 has given some evidence in support of the plaintiff's case that a search was made for the document. The objection of the learned Subordinate Judge is to the mode of proof and not to the relevancy; and, in my opinion, it was the duty of the learned Subordinate Judge to reject the document if he thought that the proof was insufficient. If he had rejected the document on the ground that there was no proof as to the loss of the original, it would

have been open to the plaintiff to adduce proper evidence to prove the loss of the original document. That course was not adopted by the learned Subordinate Judge, and, in my opinion, the document having been admitted, it is not open to the defendants to contend that it was not properly admitted in evidence. The next document is a *kabuliyat* executed by Kesho Prasad Singh, the father of the defendants, on the 25th November 1902. By this transaction the lands were specifically let out as ***zerait*** lands, and the tenant acknowledged the demised lands to be the ***zerait*** lands. The other *kabuliyat* was executed by the defendants through their mother on the 8th December 1908. Here again the lands were specifically let out as ***zerait*** land. In my opinion all these *kabuliyats* are undoubtedly evidence in favour of the plaintiff; though I quite agree that if these *kabuliyats* stood by themselves and if there was nothing else in the case, they would be quite insufficient for the purpose of establishing the plaintiff's case.

I now come to the most important evidence in favour of the plaintiff. In 1910 the defendants had to institute certain suits against certain persons who were undoubtedly the tenants of the Dumraon Raj and who had encroached upon portions of the disputed lands and asserted a right of occupancy in these lands. There were various criminal proceedings preliminary to the civil suits, and it appears that in a proceeding under section 107, Criminal Procedure Code, the present defendants were defeated. They accordingly filed suits to eject these persons from the disputed lands, and they alleged in their plaint that the lands were ***zerait*** lands and were recognised as such by village custom. It was argued before us that it was wholly unnecessary for the defendants, who were the plaintiffs in those suits, to make a case that the lands were recognised by village custom as ***zerait*** lands, and that in any case an admission made on behalf of the defendants, who were then minors, ought not to bind them in this suit, and it was strongly insisted that a guardian can make no admission so as to bind the minors, if the admission is prejudicial to the interests of the minors. In my opinion, the allegation was a necessary allegation and was essential to the case of the defendants. It must be remembered that the persons against whom those suits were brought were undoubtedly the tenants of the Raj, and were actually in possession of the disputed lands. Their case was that they had been properly inducted into the lands, and that they had acquired a right of occupancy in the lands. The defendants, the plaintiffs in those suits, were in this difficulty that if those persons proved their settlement, the judgment of the Court would undoubtedly be in their favour, unless it could be shown that the rights of occupancy could not be acquired in those lands. It was, therefore, necessary for them to allege and prove that the lands were ***zerait*** lands in which rights of occupancy could not be acquired. Nor do I look upon the allegations as admissions which should not bind the minors. An admission which ought not to bind a minor is an admission suggesting an inference which prejudices the case of the minors in the proceedings in which the admission is made. But though the allegations made in those suits are undoubtedly prejudicial to the defendants in this suit, they were made in their interests in those suits, and, as I have said, they were essential to the success of their suits

It was then suggested that those allegations were introduced into the plaints in the interest of the Raj by Brahamdeo Singh, who was the Tahsildar of the Raj and was the *karpardaz* of the defendants. Not only is there not an iota of evidence in support of this allegation, but the surrounding circumstances are wholly in favour of the plaintiff The Raj was then in the charge of the Court of Wards, and it is improbable that the Collector should have entered into a fraudulent conspiracy with Barhamdeo Singh for the purpose of establishing the ***zerait*** character of the land. In my opinion, the allegations made by the defendants in those suits strongly support the case of the plaintiff that the disputed lands are recognised by village custom as proprietor's private lands.

Exhibit 7 is the judgment of the Subordinate Judge in those suits and it shows, not only that an issue was raised on the question whether the lands claimed in those

suits were *zerait* lands, but that the Court held that "at the time of the stud and before that the lands were strictly *zerait*." No doubt that the Court also held that Mr. Fox had acquired a right of occupancy in those lands; but the finding of the Court is definite that the lands were initially *zerait* and were undoubtedly *zerait* at the time of the passing of the Bengal Tenancy Act. I shall presently consider the effect of the transaction by which the Raj recognised Mr. Fox as an occupancy tenant; but it is necessary to point out at this stage that not only did the defendants make the definite case that the lands were the *zerait* of the Raj, but that the Court found in favour of the defendants and gave them a decree for possession on the footing that the lands were initially the *zerait* of the Raj. In my opinion, the plaints filed by the defendants in those suits, Exhibits 6, 6A, 6B, and 6C, the judgment delivered by the Subordinate Judge in those suits, Exhibit 7, together with the *kabuliyats*, Exhibits 2, 3 and 5, are sufficient for the purpose of establishing the plaintiff's case that the disputed lands are the proprietor's private lands in which the defendants could not acquire a right of occupancy.

Now, how do the defendants meet the case of the plaintiffs? They have adduced no evidence whatsoever, either oral or documentary; but they contend that the transaction by which the Raj conferred the status of occupancy tenant on Mr. Fox operated as a conversion of the *zerait* land into the *raiyati* land, if the land was ever the *zerait* land of the proprietor's, which, of course, they dispute. They strongly rely upon the act of the Raj in conferring the status of an occupancy tenant upon Mr. Fox and upon the fact that the Raj sued Mr. Fox as an occupancy tenant; and they contend that the whole transaction, ending with the purchase of the occupancy holding by the Raj, shows that the Raj lost its title to the land as *zerait* land by treating it as *raiyati* land.

Mr. P. K. Sen, to whom we are much indebted for his very interesting argument, contends, on the other hand, that an occupancy right is the creature of Statute and that such right could not be conferred on Mr. Fox and that the transaction was wholly ineffectual so as to bring that right into existence. He also contends that there is no foundation for the argument that the Raj by its conduct threw the *zerait* land into the stock of *raiyati* land, and that, assuming that the transaction was valid in so far as it conferred a right of occupancy in the lands upon Mr. Fox, its effect was not to convert the land into *raiyati* land, though it may be that Mr. Fox and all persons claiming through him might have defended their title as occupancy tenants against any attempt on the part of the Raj to eject them. The argument raised the question whether a grant by the landlord is recognised by the Statute as one of the modes by which occupancy rights are brought into existence. The Regulations of the Bengal Code dealt with only two classes of *raiyats*, the *khud-kasht* and *paikasht*. The *khud-kasht raiyat* of the Regulations was a cultivator who held lands as an agriculturist in the village in which he had his fixed residence. It is unnecessary to enter into an investigation as to the origin of these *raiyats*: but it is more or less accepted now that a *khud-kasht raiyat* was a member of the community comprising the village, cultivating land of the village, having his homestead in the village. It is quite certain that his rights were not acquired by the contract between him and the landlord, but were inherent in his status, and that the status was acquired by residence and not by any grant. A *paikasht raiyat*, on the other hand, was a tenant who held the land in one village residing in another. His rights were such as were conferred on him by contract. He had no status, and the Bengal Regulations did not attempt to afford any protection to him and he was liable to be ejected at the end of any agricultural year, or at the termination of his lease. This was the position when Act X of 1859 came into operation. It abolished the distinction between *khud-kasht* and *paikasht raiyats*, and brought into existence three classes of tenants, namely (1) *raiyats* holding at fixed rents from the time of the Permanent Settlement, (2) *raiyats* holding land for periods exceeding 12 years who for the first time were called occupancy *raiyats*, and (3) non-occupancy *raiyats* holding for periods of less than 12 years. The *khud-kasht raiyats* fell

within either the first or the second class, but it is obvious that the Lagislature having deliberately made up its mind not to apply the test of residence, the Act operated as a great hardship on *raiyats* who were undoubtedly resident *raiyats* but who had not completed their 12 years of residence or who had been shifted from holding to holding so as to prevent them from acquiring the status of occupancy tenants. But even under Act X of 1859 the rights of occupancy were the incidents of status, the status acquired by cultivating the land for 12 years and paying the rent payable on account of the same. There is no suggestion in Act X of 1859 that such a status could be conferred by grants and indeed in the long and careful investigation that took place preliminary to the introduction of the Bengal Tenancy Act, it was ascertained that "the law", that is to say, the law up to the passing of the Bengal Tenancy Act, "was silent as to the acquisition of such rights by contract", (see paragraph 36 of the Rent Commissioners' report). It is important to remember that provision was made in section 48 of the Draft Bill of Sir Ashley Eden for acquisition of occupancy rights by grants, but that the Act as finally passed did not contain such a provision. In this connection it is interesting to turn to the letter No. 972T, dated the 27th September 1883, from the Officiating Secretary to the Government of Bengal, Revenue Department, to the Secretary to the Government of India, Legislative Department. This letter will be found at page 215 of the "Selection from Papers relating to the Bengal Tenancy Act, 1885," published by the Bengal Secretariat Press, and the passage which I am reading will be found in paragraph 12 of the letter at page 228. Dealing with section 48 of the Draft Bill and with the objection to the retention thereof in the Statute book, the Bengal Government said as follows:-

"With regard to section 48, the Government of India will perceive from the local reports that some officers oppose the retention of the section in the Bill, because, for instance, it might be made the means of depreciating the value of an estate sold for arrears of revenue. To this view by itself the Lieutenant-Governor does not attach much importance, because the establishment of a substantial peasant proprietary should enhance, and not depreciate the value of an estate. There are risks, however, connected with the concession of such a power, inasmuch as it might be used as a means of bargaining by Zemindars with parties whom they wished to favour on receipt of valuable consideration, and of defeating accrual of the right of occupancy of the rightful cultivator who may have been in possession for 10 or 11 years. Mr. Rivers Thompson agrees with the Hon'ble Mr. Reynolds in thinking that the occupancy right, being inherent in the status of the *raiyat*, is not the landlord's to grant; and further, that no necessity has been made out for introducing into the Bill a principle which is foreign to the law of Bengal."

I now come to the Bengal Tenancy Act and in dealing with the relevant sections of the Bengal Tenancy Act, it will be necessary to bear in mind that the acquisition of occupancy rights by grant was, up to the passing of the Bengal Tenancy Act, foreign to the law of Bengal. Section 19 of the Act runs as follows:—

"Every *raiyat* who, immediately before the commencement of this Act or the Bengal Tenancy (Amendment) Act, 1907, has, by the opreation of any enactment, by custom, or otherwise, a right of occupancy in any land, shall, when that Act or the Bengal Tenancy (Amendment) Act, 1907, comes into force, have a right of occupancy in that land."

This section does no more than save and preserve such rights of occupancy as were already acquired either by the operation of any enactment, or by custom or otherwise and it certainly does not provide a new mode for acquisition of such rights. It was contended before us that the use of the word "otherwise" is sufficient to show that, in the view of the Legislature, there existed modes for acquisition of occupancy rights other than by the operation of any enactment or by custom. The argument, in my opinion, ignores the method universally adopted by the Legislature when it has to save and conserve rights already acquired before a particular legislation is introduced. The Bengal Tenancy Act does not pretend to enumerate the different modes by which

rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. If such rights had been acquired by any person by grant at the time when the Bengal Tenancy Act came into operation, they were undoubtedly saved by section 19; but in order to determine whether such a right could be acquired by grant, we have to go to the law as it existed prior to the passing of the Bengal Tenancy Act, and I think that I have shown that acquisition of occupancy rights by grant was wholly foreign to the law of Bengal.

Section 19, as I have said, saves and preserves such rights as were in existence at the time when the Bengal Tenancy Act came into operation. Sections 20 and 21 are an attempt to re-habilitate the *khudkasht* or resident *raiyat* of the Bengal Regulations. Section 20 brings into existence a new *raiyat* called the settled *raiyat* and it provides that "every person who, for a period of 12 years, whether wholly or partly before or after the commencement of this Act, has continuously held as a *raiyat* land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled *raiyat* of that village." The different paragraphs of section 20 made great changes in the Rent Law as it existed at the time when the Bengal Tenancy Act came into operation; but it is necessary to remember that it is the occupation of the land in the village for 12 years, whether by himself or by his heirs, that conferred upon the person the status of a settled *raiyat*. Section 21 provided that "every person who is a settled *raiyat* of a village within the meaning of section 20 shall have a right of occupancy in all land for the time being held by him as a *raiyat* in that village. Now, there is nothing in either section 20 or section 21 or in any other section of the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract. It was insisted that it is part of the general law that a person may make a grant of his property if he chooses, and we were asked to consider whether there is anything in the Bengal Tenancy Act which takes away from the landlord the right to make a grant of his property in favour of a tenant. The reply is that a grant can only operate on property in existence and that until the right itself is acquired there is no property in the contemplation of law on which the grant can possibly operate. In my opinion, an occupancy right is inherent in the status of the *raiyat* and is not the landlord's to grant.

In this view the transaction between the Raj and Mr. Fox did not operate to bring into existence in favour of Mr. Fox a right of occupancy in this land; but conceding that the status could in law and was in fact conferred on Mr. Fox, I do not think that there is any warrant for the view that by such grant the character of the land was changed. There is certainly no warrant for this view in the Bengal Tenancy Act. The argument proceeds, as it must proceed, on the admission that the disputed land was initially *zerait* and was *zerait* at the time when the Bengal Tenancy Act came into operation. The whole object of the Bengal Tenancy Act was to prevent the landlord from increasing the stock of *zerait* land in existence at the time the Bengal Tenancy Act came into operation; but there is no indication in the Act itself that if, as a result of the bounty of the landlord, a person acquires a right of occupancy in the *zerait* land, there is, as a consequence of such bounty, the conversion of the *zerait* land into *raiyati* land. It was argued that the Raj purchased the land as *raiyati* land in execution of its decree against Mr. Fox. That may be so, but the effect of acquisition of Mr. Fox's right by the Raj was that the entire interest of the Raj and of Mr. Fox in the disputed land became united in the Raj, and under section 22 (1) of the Act the Raj would have no right to hold the land as a tenant but could only hold it as a proprietor. It is quite true that, ordinarily, when a landlord purchases occupancy holdings of the tenants he holds them, not as *zerait*, but, to use a term well-known to the Revenue Officers, as *bakasht*; but that is because the landlord is unable to show that the lands were at any time the proprietor's private land; and the law does not permit him to increase his stock of *zerait* land. But the case is entirely different where the lands were initially *zerait*. It may be that for a time they were

severed from the parent stock; but there is no reason whatever why the land should not come back to the original stock when the proprietor recovers those lands. In my opinion, whenever the question is raised as to the character of the land purchased by the landlord from the tenant, the enquiry must be directed to ascertain the original character of the land. If it was initially *raiyati* land, the landlord, in getting *khas* possession, cannot treat it as his *zerait*; for to permit him to do so would be to allow him to increase his stock of *zerait* land, which it was the object of the Bengal Tenancy Act to prevent. But where it is proved that the land was *zerait* land within the meaning of section 120 of the Bengal Tenancy Act, the land, on coming into the *khas* possession of the landlord, re-gains the character which it once possessed. In my opinion, the transaction by which the Raj conferred occupancy rights in the disputed lands did not have the effect of converting the *zerait* lands into *raiyati* lands. That being so, the defendants have not acquired the right of occupancy in these lands, as it is conceded that their tenancy began with a lease for years.

I would accordingly allow this appeal, set aside the judgment and decree passed by the Court below, and give the plaintiff a decree for possession of the disputed lands with mesne profits and costs throughout.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION NO. 369 OF 1922.

January 18, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Rai Bahadur HARIHAR PRASAD SINGH —PETITIONER

versus

Maharaja KESHO PRASAD SINGH—OPPOSITE PARTY.

Accounts, suit for—Duty of Court—Directions as to manner of accounting—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Geo. V, C. 61), s. 107—Interlocutory order—Revision—Superintendence, powers of, when to be exercised.

In all cases in which accounts are directed to be taken it is desirable that before ordering an account to be taken the question of principle involving the measure of liability of the defendant should be decided by the Court. [p. 913, col. 2.]

It is always permissible to a Court which has directed the taking of an account to vary or modify the directions already issued by it, if it is satisfied that some mistake has been made. [p. 913, col. 2.]

Where there is a right of appeal from the final order or decree which may be passed in a proceeding the High Court will not interfere with an interlocutory order passed in the proceeding in the exercise of its powers of revision or superintendence unless its interference is necessary on the ground of avoiding irreparable loss. [p. 914, col 2.]

Appeal against an order passed by the District Judge, Shahabad, on the 17th November 1922.

Messrs. *P. C. Manuk, B. B. Lal, P. C. Rai, S. Dayal, P. Dayal,* and *M. Prasad,* for the Petitioner.

Messrs. *C. R. Das, S. M. Mullick, N. N. Sinha* and *R. G. S. Prasad,* for the Opposite Party.

JUDGMENT.

Miller, C. J.—This is an application on behalf of the defendants asking us to interfere under our powers of revision or superintendence with an order of the District Judge of Shahabad, dated the 17th November 1922. The matter has been before the Court on a previous occasion when a somewhat similar application was made asking the Court to interfere with an order made by the predecessor of the learned District Judge and the facts of the case are set out in the order then made which was dated the 1st August 1921. It is unnecessary, therefore, for me to repeat what was stated in the previous order. I may mention, however, shortly that the petitioner is the defendant in a suit instituted by the Maharaja of Dumraon to recover back a large estate in Burma and also the rents and profits of the estate for a period of something like 20 years. The trial occupied many months, hundreds of witnesses, I understand, were called and thousands of documents were put in evidence and one of the main points for decision in the

suit was whether the estate belonged to the Maharaja of Dumraon and whether the defendant was merely his agent or trustee for the purpose of managing that estate or whether the estate belonged to the defendant. It was found by the learned Judge that the plaintiff's contention was right. The defendant was ordered to deliver up the estate and to render an account of his dealings with the property over a number of years. The parties applied to the District Judge sometime in the early part of last year for certain direction as to the manner of taking the account. Various sums belonging to the defendant himself or his father, his predecessor-in-interest, were spent in developing this estate and were put into the property. These were ordered to be credited to him in taking the account. Various rents and profits were received by the defendant in the ordinary course of his duties as manager or agent or trustee, whatever you call him, of this estate. Most, if not all, of these rents were received in kind and from time to time they were converted into money by sale of the paddy or other produce paid by way of rent and one of the questions for determination in taking the account was whether the defendant was liable to the plaintiff merely for the cash equivalent of the produce rents at the date when they were received from the tenants or at the date when actual sales were made. The determination of this question would, no doubt, depend upon considerations of what were the actual terms of the trust or the terms of the defendant's employment as manager or agent. It was contended, on the one hand, that this duty ended when he had collected the rents and he had no further obligation in the matter. It was contended on the other hand, that it was, part and parcel of his business as an agent of the plaintiff in Burma not merely to collect the rents and send the cash equivalent home but to sell the produce and for a time at all events to re-invest the price so obtained in further development of the property.

When the matter came before the learned Judge upon the application for directions he ordered that the Commissioner in taking the account should ascertain the actual quantity of produce rent received from the *jumabandi* accounts kept by the defendant, but in arriving at the cash equivalent he should take the sales of the produce found in what has been called the cash account-books and that he should not ascertain the liability of the defendant by taking the actual market price upon the day upon which the produce was actually received from the tenants. With regard to certain payments made or expenses incurred by the defendant in managing the estate and which apparently he paid out of his own pocket the learned Judge, having directed that he was entitled to recover them, was confronted with the problem as to how the expenses for certain years 1904 to 1909 should be arrived at, because there were no books showing the actual expenses incurred during those years. He, therefore, directed that in taking the account the expenses for those years should be taken at Rs. 34,400, because that was the expenditure shown for the next preceding year before the period during which there was a gap in the account-books, and the next succeeding year apparently did not show any larger sum spent in expenses at that time. So far as this matter is concerned, it has been contended before us that this direction of the Judge really has the effect of shutting out evidence, and if there is any further evidence upon the record apart from the evidence of the actual expenses for previous years, that ought to be taken into account by the Commissioner in arriving at a proper figure for those years. The question is obviously a difficult one in the absence of any direct evidence and in any case can only be arrived at by some rough and ready method of calculation; but in order to meet any difficulty or any grievance that the defendant may have in this matter Mr. Das on behalf of the plaintiff has very properly consented to allow the Commissioner in taking the account to refer to any further evidence there may be at present on the record and if the Commissioner can from that evidence arrive at any more satisfactory method of determining the expenses for the years in question he shall be at liberty to do so. We were further asked to say that the defendant should also be entitled to have an adjournment of this enquiry in order to get further documents from Burma which, it was said,

might and probably would throw some further light on the question. Speaking for myself and having regard to the course which this case has taken, I should certainly have been disinclined even if I had the power to make any such order as that, because it appears that on previous occasions applications were made for further and better discovery of documents in the defendant's possession. Orders were made and finally an order was passed that the account should be taken upon the documents then upon the record. That was after the defendant himself had sworn in an affidavit or after an affidavit had been sworn on behalf of the defendant that there were no more documents in his possession. But the learned Counsel for the plaintiff has gone further and he has stated that he will not object to a letter written from Burma by Lalla Ram Pande to the Deputy Commissioner of Taungoo dated the 16th May 1908 being used by the Commissioner for what it is worth in arriving at a decision upon this question of the expenses, just as if it were one of the documents already on the record. That is, I understand, the main document which the defendant wished to procure from Burma. It will not be necessary, of course, to prove the document formally. It will be taken as if it had been written by the person who wrote it but whether, even assuming it proved, it is of any evidentiary value or not, or to what extent, will be a matter entirely for the Commissioner to decide.

The only other question is that which I have already intimated which relates to the defendant's liability to account, that is to say, whether he is liable to pay as the cash equivalent of the produce, rents their value at the time when they were actually collected or at the time when the grain was sold. On the previous occasion, where exactly the same question came before us, we refused to interfere in revision mainly upon the ground that it could not be said that the learned Judge had in any way refused to exercise a jurisdiction or had exercised a jurisdiction with any material irregularity. But in considering the question of whether we ought or ought not to interfere under our powers of superintendence we pointed out that, whereas in ordinary circumstances the liability of an agent or trustee might be to account only for the value of the produce at the date at which it was received, there might be in the particular circumstances of this case a liability to account for the actual sums which had been received by the sale of the produce rent at a later period, and, therefore, we were not satisfied upon the evidence before us that the learned Judge had arrived at a wrong conclusion upon this matter. It was intimated at that time that the evidence would in fact show that the liability of the defendant was the larger liability, that is to say, the liability to account for the actual sums received for the produce rent. We pointed out at the same time that not only in this case but in all cases it is desirable that, before ordering an account to be taken, the question of principle involving the measure of liability of the defendant should always be decided and whether the learned Judge in this particular case had given his attention to this particular point or not was not very clear upon the judgment. At all events he had not specifically mentioned it. We further pointed out that it was always permissible to the learned Judge to vary or modify the directions already given if he should be satisfied that some mistake had been made, but we expressly refrained from interfering either under our powers of revision or under our powers of superintendence. It is perhaps quite unnecessary to add that if any mistake has been made in the present case it can be set right upon appeal, but I am not satisfied upon the material placed before me, nor do I think upon that material we could come to any satisfactory decision, that the learned Judge was wrong in estimating the liability of the defendant. At that time when the previous order was made the account had not taken place and, although we refrained from interfering under our powers of superintendence, we were certainly impressed by the fact that if it could be clearly shown that the learned Judge had gone wrong, which we did not think had been proved in the case before us, but if it could be proved, then there might perhaps be some ground for interfering under our powers of superintendence, because a long and expensive enquiry would take place which, if the Judge were wrong, would necessarily be entirely thrown away and would have to take place again.

In the present case this application arises out of a subsequent petition placed before the successor of the learned District Judge asking him in effect to re-consider the matter and alter the directions given by his predecessor. The learned Judge, as appears from his judgment, had before him exactly the same arguments as had been urged before his predecessor and, whilst he considered that he had authority to issue directions of a supplementary character or to modify or revise previous directions where the alteration involved no change of principle or in cases where it could be shown that the directions were obviously based upon some misapprehension of fact or were defective in other respects, nevertheless declined to interfere, and one of the main grounds no doubt which influenced him in refusing to interfere was the ground that no fresh argument had been adduced before him in addition to those which had been urged before his predecessor. It did not appear to him that his predecessor in making the order which he had made had been influenced by any misapprehension of fact. Had it been so, it is quite possible that the learned Judge might have interfered. He further took the view that it would be wrong at that stage to interfere, because, as matters stood, the Commissioner who had been engaged upon this task since the previous May (the order was made in November) was at that time approaching the completion of his task and he refused to interfere. It is quite clear further from the learned Judge's decision that the point was argued before him as to the proper method of assessing the cash value of the produce rents. It does not appear from that judgment nor has anything been said in argument before us to the effect that any further evidence was placed before the Judge in order to show that his predecessor, Mr. James, had misapprehended the scope of the defendant's duties, that is to say, so far as they affected his liability to account not merely for the cash value of the produce at the date of receipt but for the cash value at the time of the actual sales. It was open to the parties, had they chosen when they went before the learned Judge on the second occasion, to put before him such evidence as there might be available on the record to show that Mr. James, the predecessor of the learned District Judge, had misapprehended the situation, but apparently nothing of the sort was done.

We are now asked in the present application to set aside or vary or modify that decision. As already stated, we refused on the last occasion to interfere in any way in revision; nor did we think that our powers under section 115 of the Civil Procedure Code entitled us to do so in the particular circumstances of the case. The only question, as I have stated, was whether we ought to interfere under our powers of superintendence, but not being satisfied that the learned Judge was wrong we, therefore, refrained. But in the present application not only has it not been shown by anything further which has been brought to light that the learned Judge was wrong but the circumstances are now such that if we were to interfere and order the account to be taken upon an entirely different basis it seems to me that we should be bringing about that very evil which by an order made under our powers of superintendence we ought to endeavour to obviate. There is no reason now why we should interfere on the ground that any irreparable loss will be incurred by the parties if the Commissioner is allowed to go on and take an account On the previous occasion this was urged. On the present occasion it has also been urged in the ground set out in the petition for our interference but in fact the account has practically come to a termination and, therefore, having regard to the fact that where there is a right of appeal the Court, even if it thought that the order complained of was not right, would not interfere unless its interference were necessary on the ground of avoiding irreparable loss. it follows that the whole foundation upon which the defendant's case rests no longer exists. It was urged, however, by Mr. Manuk on behalf of the defendant that, apart altogether from this question of avoiding unnecessary delay and expense, there is another aspect of the case which ought to be taken into consideration. His contention, one which by the way is not urged as one of the grounds upon which we ought to interfere, is this, that if the account is taken according to the method laid down by the learned Judge then he will have to pay or rather he will be liable to pay a very much larger sum

amounting to some lakhs of rupees than he would be liable for if the account is taken according to the principle for which he contends, and, therefore, that if he should wish to appeal from the decision eventually come to he will have to give security for a very much larger sum than would otherwise be the case. He even goes so far as to suggest (about this we have no means of coming to any definite conclusion) that the result would be that his client would be ruined and, therefore, would be entirely unable to find funds for prosecuting his appeal. As already stated, this is not one of the grounds upon which he relied in his petition and it is not one which commends itself to me as a reason for interfering and exercising our powers of superintendence even in a case where he should hold the opinion that the learned Judge had arrived at a wrong conclusion. My reason for saying that is, that it would be quite improper to lay down any such rule because in every case or in nearly every case exactly the same principle would apply. Wherever a Judge goes wrong the result always is that one party or the other against whom his decision may operate incurs in the end a larger liability than he otherwise would, and I confess that I have never heard of any such argument being put forward in a case of this nature nor is there any decision which, in my opinion, would entitle us to take this matter into consideration. Moreover, before we arrive at a point at which this consideration becomes necessary at all, we must be satisfied that the learned Judge was wrong in arriving at his conclusion as to the extent of the defendant's liability. As already stated, I am by no means satisfied upon the materials which have been put before us that the liability of the defendant in this case was merely to account for the actual market cash value of the produce rent at the date when he received it. That is a matter which will have to be determined upon consideration of possibly many documents and much evidence which is not now before us and it is a matter which could be considered in the event of an appeal, when the matter comes before the Court in appeal and all the documents and all the evidence are before it which will place the Court in a position to arrive at a definite conclusion upon this matter. It is sufficient to say that at present I am not satisfied that the foundation of any case has been made which would entitle us to interfere either under our power of superintendence or under our powers of revision.

One point I ought to notice before concluding my judgment is this that it was stated that neither Mr. James nor Mr. Kingsford had really given his mind to the legal aspect of the case and, therefore, the matter ought to be sent back to be re-heard by the lower Court with directions to consider this question of the liability of the trustee in the particular circumstances of the case. I do not think that it has been shown that either of these judgments, although they do not state in precise terms the legal proposition as it has been argued in this Court, are defective by reason of any failure to deal with the questions which were placed before the Judges. The plain issue between the parties was whether the liability was for the value of the produce rents at the date when they were received or for the cash equivalent at the date when they were sold and this matter was clearly argued on both sides. It was prominent in the minds of the learned Judges on both occasions and, although they do not deal in terms with the legal principle involved or do not say that they determine exactly what the nature of the liability is in all respects, they do not arrive at a conclusion that the liability was to pay according to the cash actually received by the sales and I am not satisfied, although on the previous occasion I had some doubt as to whether this matter had been prominent in the mind of the learned Judge when he came to his decision, that the matter was not in fact dealt with by them. They have decided it, and if they have decided it wrongly that is a matter which could be set right in appeal and no ground, in my opinion, has been made out for interfering in revision.

We were asked to order that an alternative account should be taken. I can see no reason why we should order such an account. Even if an alternative account may be useful in the event of the decision being overruled in appeal, still we should never order an alternative account to be made in anticipation of an appeal being successful. When that occasion arises and

when the appeal is determined there will then be plenty of time to consider the question of an alternative account or accounting in a different manner, should the Court consider that the present account is wrong. In my opinion this application should be dismissed with costs. Hearing fee Rs. 200.

Foster, J.—I agree.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 96 AND 168 OF 1919.

January 3, 1923.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

Maharajadhiraj SIR RAMESHWAR SINGH BAHADUR OF DARBHANGA—PLAINTIFF—APPELLANT

versus

NARENDRANATH DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Suit for damages—Suit for recovery of money—Suit for accounts—Agent and his representatives, liability of—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 62, 89, 90, 115.

The representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs [p. 920, col. 1.]

If, however, the principal can prove that he has suffered loss owing to the defalcation or breach of duty of the agent, the heirs would be liable to the extent of the assets of the deceased agent in their hands for the loss occasioned to the principal. The burden of proof in such a case rests upon the principal. [p. 920, col. 1.]

A suit against the representatives of a deceased agent to recover damages for loss occasioned to the plaintiff by reason of a breach of duty by the deceased agent is governed by Art. 115 of Schedule I to the Limitation Act, and limitation begins to run from the date of the alleged breach. [p. 920, col. 1.]

A suit against the representatives of a deceased agent to recover monies received by the latter on behalf of the plaintiff and not accounted for is governed by Art. 62 of Schedule I read with section 2 of the Limitation Act. [p. 920, col. 2.]

Ram Hari Kapali v *Rohini Kanta Chakravarty*, 67 Ind. Cas. 943; 35 C. L. J. 536; (1922) A. I. R. (C.) 492, approved.

A suit by a principal against his agent for the recovery of monies received by the latter on behalf of the former and not accounted for is governed by Art. 89 of Schedule I to the Limitation Act. Where the agency is continuous limitation for such a suit commences to run from the date on which the agent refuses to account for the monies. [p. 921, col. 1.]

A suit by a principal against an agent to recover damages for loss occasioned to the principal by the negligence or breach of duty of the agent is governed by Art. 90 of Schedule I to the Limitation Act, and limitation for such a suit commences to run from the date when the neglect or breach becomes known to the principal. [p. 921, col. 1.]

Articles 89 and 90 of Schedule I to the Limitation Act do not apply to suits by a principal against the representatives of a deceased agent. [p. 920, col. 2.]

Appeals from a decision of the Additional Subordinate Judge, Darbhanga dated the 22nd March 1919.

Messrs. *Sultan Ahmad*, *P. N. Sinha* and *Murari Prasad*, for the Appellant.

Mr. *C. C. Das*, for the Respondents.

JUDGMENT.—These two appeals, numbered respectively 96 of 1919 and 168 of 1919, arise out of two suits which were tried together before the Additional Subordinate Judge of Darbhanga and dismissed by him on the 22nd March 1919. Appeal No. 96 arises out of Suit No. 470 of 1917 and Appeal No. 168 arises out of Suit No. 471 of 1917.

The plaintiff, who is the appellant in each case, is the Maharajadhiraja of Darbhanga. The defendants in the first suit are Narendranath Das and his seven brothers who are sued as the heirs and legal representatives of their deceased father Kishundhan Das who, during his lifetime, practised as a Pleader and was for 30 years the appellant's retained Pleader at Madhupura and had the conduct and management of the appellant's law suits in that Sub-Division.

The claim in the first suit is to recover a sum of Rs. 6,150-14-9 together with interest from the assets of their deceased father in the hands of the defendants on account of the neglect, misconduct and breach of duty of their father and for an account of the amount misappropriated by him and the losses occasioned to the plaintiff by such neglect, misconduct and breach of duty, and for payment by the defendants of the said sum of Rs. 6,150-14-9

or such other sum as the Court may think fit.

The defendant in the second suit is Narendranath Das, the eldest son of Kishundhan Das, who, on his father's death in August 1913, succeeded him as retained Pleader to the plaintiff at Madhupura. The nature of the claim in this case is similar to that in the other except that the negligence, misconduct and breach of duty alleged are those of the son himself during the time when he was the plaintiff's Pleader and the amount claimed is Rs. 4,363-12-9.

The claim in each case is divided into two heads, the items of which are set out in detail in Schedules 1 and 2 of the plaint in each case. The claim under the 1st schedule is based upon the allegation that certain sums payable to the plaintiff under decrees obtained by him in rent-suits against his tenants were realised or withdrawn from Court by the Pleader in the ordinary course of his duties and were not accounted for in the accounts rendered by him. The claims falling under the second Schedule are based on the allegation that certain other decrees obtained by the plaintiff against his tenants were allowed to become time-barred by reason of the neglect of the Pleader to present in time applications for their execution.

The defence is practically the same in each case. It is admitted that the Pleader in each case was engaged under a general retainer and paid a monthly salary by the plaintiff, but it is denied that he was the plaintiff's agent as alleged. It is further pleaded that one Tarini Prasad Das was the plaintiff's law agent at Madhupura and that it was he who received all monies out of Court or from the judgment-debtors, and that it was his duty to remit them to the plaintiff's sub-manager at the various circle offices concerned, and that the duty of keeping the accounts rested with the law agent. It is denied that the Pleader had any duty to realise or receive such sums or to remit them to the circle officers or that such sums were in fact ever realised by him or that he undertook any duties other than those of a Pleader. It is denied that the Pleader had any liability in connection with the execution of decrees except in cases where he was instructed to apply for execution and that, in such case, a verified petition was sent to him for that purpose and whenever that was done the petition was duly presented. The liability to submit accounts is denied and it is pleaded that if the Pleader was ever liable to submit accounts such accounts have been duly rendered. The alleged loss to the plaintiff is denied and it is pleaded that if any loss occurred, as alleged, it was due to the negligence, default or misappropriaton of the said Tarini Parsad Das and other servants of the plaintiff. It was further pleaded in each case that the claim is barred by limitation.

The learned Additional Subordinate Judge, before whom the case came for trial, in a careful and lucid judgment considered at length the evidence and dealt with all the issues. Most of the issues were common to both cases and he dealt with them together but where they related to one of the suits only he dealt with them separately. With regard to the first suit, in which the heirs of Kishundhan Das were defendants, he found that they, as representatives of their father, were not liable to render accounts. He also found that, in so far as that suit was one for monies received or for damages for negligence, it was governed by the three years' rule of limitation under Art. 115 of the First Schedule of the Limitation Act and was time-barred, having been brought more than three years after the death of Kishundhan Das, who died on the 20th August 1913, the suit having been instituted on the 2nd August 1917. He further held that in both suits the Pleader incurred no liability for failure to institute execution proceedings whereby decrees became time-barred, as the institution of such proceedings was not a matter in which the initiation rested with the Pleader, but was with the plaintiff or his authorised agents in that behalf. He also found that proper accounts in both cases had been duly rendered and the defendants could not be called upon to render fresh accounts. As to the sums claimed under Schedule 1 of the plaint in each case for monies received by the Pleader for the use of the plaintiff, he found that the claim had not been proved. On the question of limitation in the second suit, he found that Art. 89 of the Limitation Act governed the claim arising under Schedule 1 of the plaint and that it was not time-barred

He also found that Art. 90 of the Limitation Act governed the claim arising under the second schedule of the plaint. He further found upon the evidence that the plaintiff, or his officers who had responsibility in the matter, had knowledge that the decrees became time-barred as soon as that event happened in each case, and, therefore, under Art. 90 of the Limitation Act, the claim was barred in respect of any alleged negligence or misconduct in failing to execute decrees which took place more than three years before the institution of the sut.

The plaintiff has appealed in both cases. The questions which have been raised for decision on appeal are, (1) whether the claim in either of the suits is barred by limitation and which of the Articles in the First Schedule of the Limitation Act apply, (2) whether the defendants in either suit are liable to render accounts, (3) whether the defendants in either suit are liable in damages for negligence of the Pleader in allowing decrees to become time-barred, (4) whether the Pleader in either case actually received the sums or any of them set out in the first Schedule of the plaint for the plaintiff's use, (5) whether, assuming there was no actual receipt of the money by the Pleader, he was nevertheless responsible for the due transmission of the sums received by Tarini Parsad Das to the plaintiff's circle offices, and (6) whether any sums so received were not remitted to the plaintiff's circle offices.

Before dealing with these questions in detail it is desirable to state shortly some of the circumstances under which the claims arise. Kishundhan Das, the father of the defendants, was for 30 years, until his death on the 20th August 1913, the retained Pleader of the Darbhanga Raj at Madhupura Sub-Divisional head-quarters and was paid a monthly salary of Rs. 40 for his services. He was succeeded by his son Narendranath Das whose appointment was confirmed on the 30th August 1913. The professional work entrusted to the Pleaders consisted mostly in rent-suits. The Sub-Division of Madhupura was divided into 4 circles: Naredigar, Jahanjharpur, Birnagar and Ahirns. For each of these circles there was a circle office in charge of a sub-manager of the Raj assisted by a law clerk. The Pleader carried on his business in a room rented by the Raj for that purpose. This room happened to be in a house belonging to the Pleader but not at his residence. A Raj *muharrir*, appointed and paid by the Raj, was provided to act as the Pleader's clerk. The scope of the duties of the Pleader and the *muharrir* is a matter in issue in the suit. During the period with which these suits are concerned the *muharrir* under the Pleader was Tarini Prasad Das. All monies realised in the suits instituted by the plaintiff, which were very numerous, were remitted from the Pleader's office to the office of the circle whose business it was to receive them. Sometimes decretal money was paid out of Court by the tenant defendant but more usually the suit proceeded to execution and the decree-holder's dues were either deposited in Court or realised by sale. When money was deposited in Court by the judgment-debtor an application for a payment order signed by the Pleader was presented to the Court by Tarini Prasad. A payment order directing the Treasury to pay the amount deposited was then issued by the Munsif to Tarini Prasad who obtained thereon the signature of the Pleader acknowledging receipt from the Treasury. Armed with this order, signed by the Pleader, it was Tarini Prasad's business to present it at the Treasury and draw the money. It was also his business to enter in the account-books kept by him such sums as were so withdrawn. From time to time, generally about once a month, sometimes more often, the sums realised either by withdrawal from Court or from the judgment-debtors out of Court were sent to the circle office concerned together with a *chalan* in duplicate showing the details of the sums received during the previous month or whatever the period may have been since the last remittance. One of the *chalans* was kept at the circle office, the other was signed by the sub-manager or the officer responsible and returned to the Pleader's office as an acknowledgment of the receipt of the money. These *chalans* were kept i triplicate and it was the business of Tarini Prasad to keep them. They were printed forms kept in a book, the first one being retained in the book as a counterfoil and the other two detached and sent to the circle office when filled up as already stated. In addition to the *Chalan* Register, a register of cash account was also kept at the Pleader's office. This

cash account appears to have been concerned primarily with the different items of expenditure made by the Pleader out of sums sent to him from time to time for defraying out of pocket expenses in connection with suits in which he was engaged. Under the rules laid down for the guidance of law officers and others it was the Pleader's business to keep the cash account as appears from r. 6 (See Exhibit A and Schedule F attached thereto). It was also the duty of the *karpardaz* attached to the Munsif's Court to keep a monthly register of cash account circle by circle. This appears from r. 7 and Schedule G of the rules. Although Tarini Prasad Das has been referred to as a *muharrir*, there was no other *karpardaz* attached to the Munsif's Court at Madhupura and he appears to have carried out the duties assigned by the rules to the *karpardaz* there. It is not very clear whether two cash accounts were kept or only one, but, however this may be, the accounts were in fact kept by Tarini Prasad. It is not suggested that the remittances sent to the Pleader for the purpose of making disbursements in the cases conducted by him were not all properly accounted for and no question arises with regard to such sums. The monies received out of Court, however, or otherwise paid by the judgment-debtors to Tarini Prasad, appear to have been entered in the cash account already mentioned and this was periodically countersigned by the Pleader on being presented to him by Tarini Prasad. It is the defendants' case that he signed this book merely because the disbursements for which he was responsible were entered therein, and that his signature was not necessary for, and had nothing to do with, the entries relating to sums received out of Court or from the judgment-debtors, a matter which he contends was entirely in the hands of Tarini Prasad. In addition to signing the cash register, it appears that the Pleader from time to time, as the *chalans* for money received from the judgment-debtors were forwarded to the circle office, signed a certificate to the effect that all monies received during the past month had been duly forwarded to the circle office. The plaintiff contends that the signing of this certificate cast a duty upon the Pleader to see that all monies actually received by Tarini Prasad from the judgment-debtors or out of Court were duly forwarded.

When it was necessary to apply to the Court for execution of a decree the circle officers concerned with the matter would send to the Pleader's office a verified application for execution bearing the signature of the sub-manager. On receipt of this at the Pleader's office it was countersigned by the Pleader and presented in Court to be filed by Tarini Prasad. It is not the plaintiff's case that any such applications sent were not duly presented but it is contended that it was the Pleader's business to remind the plaintiff's agents at the various circle offices that a decree was about to become time-barred and that an application for execution should be sent to him for filing.

On the 8th May 1915 Tarini prasad, who was then under orders of transfer to another place, disappeared. Certain officers of the Raj were deputed to make an enquiry and the whole of the accounts of the *sherista* were overhauled. The result of this was that on the 29th June 1915 Abdul Wajid, a circle law clerk of the plaintiff. was deputed by the Raj to lodge a petition of complaint against Tarini Prasad charging him with misappropriation. Tarini Prasad surrendered and was committed to the Sessions. In the meantime his duties as *muharrir* at the Pleader's office were taken over by Jang Bahadur. Tarini Prasad was tried in December 1915 and was acquitted in January following. The prosecution having failed, Narendranath Das, the defendant, on the 20th July 1916 was called upon to submit accounts. On the 31st July he refused to do so disputing his liability to account and stating that all the accounts had been duly rendered and were in the possession of the Raj. It appears that a few days earlier, on the 15th July 1916, Narendranath Das had tendered his resignation as Raj Pleader but he in fact continued to act until the 30th January, 1917 when his office terminated. Both the present suits were instituted on the 2nd August 1917.

With these preliminary observations we propose to deal with the points raised in the order mentioned above.

The first point relates to the question of limitation. With regard to the claim in the first suit the defendants are sued as

legal representatives of their deceased father. It is, we think, well established that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so and this was not disputed by the learned Government Advocate on behalf of the appellant in argument before us. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. This does not mean, however, that the heirs must necessarily escape liability altogether for the defalcation or breach of duty of the agent if the principal can prove that he has suffered loss thereby. The suit is so framed as to include a claim for sums received by the agent for the use of the plaintiff, and for the loss occasioned to the principal by reason of the defalcation and breach of duty of the agent and, to the extent of the assets of the deceased agent in their hands, the heirs would be liable. The burden of proof, however, in such a case, rests upon the plaintiff. It is unnecessary, however, for the purposes of the first suit to consider to what extent, if at all, the plaintiff may have made out such a case, because, even assuming that such a case could be established, in our opinion any cause of action which the plaintiff may have had became time-barred by limitation before the suit was instituted. It is conceded by the appellant that the claim for damages for breach of duty by reason of allowing the decrees to become time-barred is covered by Art. 115 of the First Schedule of the Limitation Act which prescribes a limitation period of 3 years from the date of the breach of contract. As the breach alleged in the first suit must have occurred during the lifetime of Kishundhan Das, it follows that the suit having been instituted more than 3 years after his death the claim cannot now be enforced. This covers the items set out in the Second Schedule of the plaint. But it is contended that the claim for monies received by Kishundhan Das and not accounted for is not covered by any specific Article in the Limitation Act and, therefore, comes under the residuary Art. 120 which governs suits not otherwise provided for and allows six years from the date when the right to sue accrues. If the three years' period applies it is conceded that the suit is barred. It is contended by the appellant, and not disputed by the respondents, that Arts. 89 and 90 of the Limitation Act which relate to suits by a principal against his agent do not apply to suits against the representatives of a deceased agent and those Articles need not be considered. The respondents, however, contend that either Art. 62 or Art. 115 is applicable. Both these Articles provide a three years' period of limitation, and if either of them applies the suit is barred, as Art. 120 would in that case have no operation. Art. 62 is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and the period of 3 years begins from the time when the money is received. If the commencement of the period is to be taken as the date when Kishundhan Das received the money, assuming he ever did receive it, or even at the date of his death, when the defendants succeeded to their father's estate, in either case, the claim became time-barred before the suit was instituted. The appellant argues that Art. 62 can have no application, as the suit against the defendants is not for money received by them for the plaintiffs' use at all, they having received it as part of the assets of their father's estate and not for the use of any one except themselves. In other words, they never received it at all in the sense intended in the Act. If the Article had stood alone we think there would have been some force in this argument, but section 2 of the Limitation Act provides that, unless there is anything repugnant in the subject or context, "defendant" includes any person from or through whom a defendant derives his liability to be sued. Read in the light of section 2 Art. 62 would include a claim against the present defendants for money received for the plaintiff's use by them or their father through whom they derived their liability to be sued and we consider that this Article applies. This was the opinion taken by Mr. Justice Greaves of the Calcutta High Court in *Ram Hari Kapali v. Rohini Kanta Chakravarty* (1), where certain decisions of the Allahabad High Court to the contrary effect were either distinguished

(1) 67 Ind. Cas. 943 ; 35 C. L. J. 330 ; (1922) A. I. R. (C.) 499.

or not followed. In our opinion the decision of Greaves, J. was right. We further consider that, even if Art. 62 should not be applicable, the case is covered by Art. 115, which provides for a suit "for compensation for the breach of any contract, express or implied, not in writing, registered and not herein specially provided for." The liability to remit the sums received arose out of contract and the failure to do so, if any, was a breach of contract and it is for that breach that the suit is brought. It follows, therefore, that in our opinion, Appeal No. 96 of 1919 is time-barred and for this reason, if for no other, the appeal should be dismissed with costs.

With regard to the second suit, No. 471, in our opinion, Art. 89 applies to that part of the claim which falls under Schedule 1 of the plaint. That Article provides for a suit for a principal against his agent for moveable property received by the latter and not accounted for. The application of this Article is not disputed. The only question argued before us was when the period began to run. The learned Counsel for the respondents argued that each case in which the sums were received was a separate subject of agency, because a separate *vakalatnama* was given to the Pleader in each case, but it is common ground that the defendant was appointed to the post of Raj Pleader, which his father held before him, in August 1913. It seems to us that the appointment involved a continuous and comprehensive agency and the *vakalatnamas* that passed from time to time from the plaintiff to the defendant were merely incidental to that agency and the period began to run from the 31st July 1916 when the defendant refused to render accounts and the suit is not time-barred.

With regard to the claim arising under the second Schedule of suit No. 471, this appears clearly to be covered by Art. 90 of the Limitation Act which provides for other suits by principals against agents for neglect or misconduct, and the period of three years runs from the time when the neglect or misconduct becomes known to the plaintiff. Here again the application of this Article was not disputed, the only point at issue being a question of fact, namely, at what time the plaintiff had knowledge of the misconduct of the Pleader. Upon this question the appellant's contention was that he first obtained such knowledge on the 7th January 1916. This contention appears to us to rest upon no foundation of fact. It has not been explained what happened at that particular time to bring the defendant's neglect to the knowledge of the plaintiff. The learned Additional Subordinate Judge has shown that the plaintiff had ample means, of knowledge, if not at the time, at least very shortly after each of the alleged delinquencies. The respondent points to what we consider conclusive evidence showing that the agents and officers of the appellant had exactly the same information as the Pleader as to when decrees had lapsed by failure to apply for execution. They had duplicate Rent Suit Registers which showed the progress of every case under trial, appeal or execution. The accounts were sent in at least once a month accompanied by a tabular statement in the form of a *chalan* showing details of the cases in which the money had been paid. The accounts of the Pleader's office were subject to regular periodical checking and the circle law agent had the duty of comparing at frequent intervals the circle accounts with the accounts and records of the Pleader's office. Moreover, the sub-manager had estate officers in every village under his control and would surely hear of any delay in realisation of rent-decrees by execution. It is unnecessary to pursue this question further. The evidence amply convinces us that the appellant's authorised agents would know that an execution of a decree had become time-barred practically as soon as that event happened. It follows, therefore, that in our opinion, all claims in the second Schedule for negligence arising more than three years before the date of suit are barred. This question is not of material importance, however, having regard to our findings on the third point which will be referred to presently.

The second question is, whether the defendants in either suit are liable to render accounts. In dealing with the question of limitation we have already held that the defendants in the first suit are not liable to render an account as the representatives of their father. With regard to the second suit it appears from the judgment of the Trial Court that the point was abandoned

by the learned Vakil, who then appeared for the plaintiff and who conceded that the evidence of his own witnesses showed that the Pleaders had all along submitted accounts month by month, not only of the advances received by them from the circle offices, but also of the sums received in Court and outside the Court on the plaintiff's account. It was further conceded that the only claim which the plaintiff could put forward was to recover the amounts mentioned in the respective Schedules of the plaint, and the suit, as pointed out by the learned Judge, is not one for accounts strictly so-called but for recovery of monies received for use of the plaintiff and for damages for negligence. It was further forcibly pointed out by the learned Judge of the Trial Court that the plaintiff who had all the accounts in his possession, not only those rendered by the Pleaders, but those kept by his own servants and agents, had failed to produce the most material documents which might have been expected to substantiate his case. In our opinion no case has been made out for ordering a fresh account to be taken.

The third point is, whether the defendants in either suit are liable in damages for negligence of the Pleader in allowing decrees to become time-barred. In the earlier part of this judgment we have referred to the practice in vogue when the plaintiff desired to take out execution of a decree. Admittedly, until the verified application for execution of a decree was received at the Pleader's office he had no authority to initiate execution proceedings. Accordingly, if any decrees became time-barred it is not easy to appreciate how the Pleader could be held responsible, provided he did not neglect to present the applications for execution when sent to him for that purpose. It is not shown that he was negligent in that respect. Further, it is admitted that the plaintiff's officers at the various circle offices had their own Rent-Suit Registers which were frequently compared with the register kept by the Pleader and that they had full information as to the dates when execution of the various decrees would become time-barred. It is also shown from the evidence of the plaintiff's own witnesses that the duty of initiating such proceedings rested with those officers and not with the Pleader. It was contended before us, however, that the Pleader had a duty to remind the circle officers and other agents of the plaintiff if it should appear that they were allowing the time to run short before initiating proceedings. Throughout the evidence which is unusually voluminous in this case there is nothing whatever to show that there was any express duty cast upon the Pleader to remind the plaintiff or his servants that they were not properly conducting their business and no document has been produced to show either that the Pleader ever attempted to interfere in this manner or that his conduct was ever called in question for failing to do so. Indeed the evidence was overwhelming to show that it was the duty of the circle officers, and their duty alone, to ascertain what progress had been made in any particular case, and the law registers at the circle offices showed exactly what realisations had been made and it was the duty of the law clerk to report upon such matters to the sub-manager. Nor are we able to find that any implied obligation can, in the circumstances, arise out of the terms of the Pleader's employment. His business was to conduct the plaintiff's cases as and when he was instructed and not to instruct the plaintiff or his servants that they ought to take proceedings against their tenants in cases in which, for aught he knew, there might be the best of reasons for refraining from such a course. In our opinion the claim for damages for negligence in allowing decrees to become time-barred fails.

The fourth point for consideration is, whether the Pleader in either case actually received for the plaintiff's use the sums or any of them set out in the first Schedule of the plaint. The sums withdrawn from Court were undoubtedly taken out upon the applications signed by the Pleader, but in every case the payment orders were received by Tarini Prasad Das, the *muharrir*, and it was he who cashed the same at the Treasury. Likewise, there is nothing to show that any one except the *muharrir* ever received the sums paid by the judgment-debtors out of Court. The only sums actually received by the Pleader were the law advances for meeting necessary disbursements and no question arises as to these. We hold, therefore, that the Pleaders did

not in any case receive the sums claimed into their actual possession.

The fifth question relates to the liability of the Pleader for the remittal of the sums received by the *muharrir* to the plaintiff's circle offices. Various arguments were adduced before the Trial Court in respect of the Pleader's liability. It was contended, first, that Tarini Prasad was the Pleader's clerk and servant and that the Pleader was responsible for his acts; secondly, that the Pleader should not have allowed Tarini Prasad to receive these sums and, thirdly, that it was the Pleader's duty to see that the amounts so received were entered in the accounts and promptly remitted to the circle offices. The judgment of the Trial Court deals at length with each of these arguments and dismisses them. With regard to the first two of these points no argument has been urged before us in support of them and indeed it would be difficult in the face of the evidence to show either that Tarini Prasad was the Pleader's servant or that the procedure followed whereby Tarini actually received the sums was not authorised and assented to on behalf of the plaintiff. It is urged, however, that the Pleader was bound to see that the amounts realised by the *muharrir* were entered in the accounts and promptly remitted to the circle offices concerned and that the neglect of this duty resulted in a loss to the plaintiff. The view taken by the learned Additional Subordinate Judge was that, in so far as the claim for the items comprised in the first Schedule was concerned, it was a claim for misappropriation of sums received by the Pleader, and not a claim for damages for negligence and that the plaintiff ought not to be allowed at that late stage to make a new case. He further considered that Tarini Prasad, although called *muharrir*, was really the Raj *karpardaz* at Madhupura and that under the rules already referred to (Exhibit A), it was his duty to keep accounts of all sums received by him as well as the register of triplicate *chalans* for the monies remitted to the circle offices and that the practice followed by him had the approval of the plaintiff's officers. He thought that in these circumstances the Pleader could not be blamed or made responsible for not having foreseen the possibility of defalcation by the *muharrir* and that if anybody was responsible besides the *muharrir* himself it was the circle submanager and not the Pleader. On referring to the rules laid down for the guidance of all law officers of the Raj it appears that by r. 6 District Court and Munsifs' Court Pleaders must keep the register in Schedule F in English where clerks have been given to them and, where no clerks have been given, in the vernacular. The only documents in Schedule F which are material and which the Pleader had to keep are the register of rent-suits and the register of cash account. The register of cash account would, no doubt, include such amounts as were periodically sent to the Pleader to meet the disbursements in cases under his charge. There is nothing to show, however, that it would include any sums not actually received into his hands. The register of rent-suits would or ought to show all transactions in connection with such suits and would presumably include monies received out of Court or from the judgment-debtors direct. In a circular letter dated the 20th September 1910 (Exhibit 3) sent by the general manager to all submanagers, agents, factory managers and Treasury Officers and which the defendant's father is proved to have received, it is stated: "I have to remind you that the Raj rules clearly make out that Pleaders and *Mukhtars* are responsible for remittances made to them from different offices, for monies received by them from judgment-debtors (the *raiyats* and others) and for monies drawn by them from Courts and I trust you deal with them accordingly and shall always so deal with them in future. Please explain their duties in this respect afresh to the Pleaders and *mukhtars* and others having monetary transactions and let me have their assurances that they do understand them." In so far as this refers to monies drawn by the Pleaders from Court or received from judgment-debtors, it may well be that such monies were actually received by them into their own custody on occasions, as when the *muharrir* or *karpardaz* was ill or on leave, but there is nothing to show that it had reference to all monies received out of Court or from judgment-debtors even by the *karpardaz* himself in accordance with the practice recognised by the Raj. By clause 7

of the Rules the *karpardazes* attached to the District and Munsifs' Court have, amongst other duties, to keep the registers marked in Schedule G in the vernacular. Schedule G, amongst other registers, includes the monthly register of cash account circle by circle, the register of triplicate *chalans* for money sent and the register of rent suits. These documents were in fact kept by Tarini Prasad, and it is the opinion of the Judge of the Trial Court that, although referred to as a *muharrir*, he did in fact act as *karpardaz* of the Munsif's Court. At all events he kept the documents which it was the duty of the *karpardaz* to keep and there seems to be no reason to quarrel with his finding in this respect. It is true that the triplicate *chalans* and the cash account were signed by the Pleader and he was in the habit also of signing a certificate when the *chalans* were sent to the circle office to the effect that all monies received during the past month had been remitted. To this he appended his signature when the certificate was presented by Tarini Prasad, and he, no doubt, relied upon the latter's word for its accuracy. If it referred merely to amounts received by the Pleader himself its accuracy can hardly be questioned, as he in fact received nothing. It does not appear to have been part of the duty of the Pleader to keep any account of the sums received from the judgment-debtors or withdrawn from Court, and for the accuracy of the *chalans* he, no doubt, had to rely upon the word of Tarini Prasad. In connection with this matter it is not unimportant to consider certain documents prepared on behalf of the plaintiff in the criminal proceedings against Tarini Prasad. In the complaint lodged in that prosecution (Exhibit J) it was stated that one of the accused's duties was to remit to the circle offices the decree monies after having realised the same, and the law clerk Abdul Wajid in his evidence stated that it was Tarini Prasad's duty, amongst others, to realise decree monies either from Court or from judgment-debtors and to remit the amounts so realised to the sub-manager of the circle concerned. These proceedings were taken and the petition of complaint filed after serious consideration between the law clerk the Raj manager and the sub-manager of the Naredigar Circle, and the correctness of the statement then made has not been disputed. The only question is, assuming the point to be open to the plaintiff on the pleadings, whether by certifying when the *chalans* were sent that all money received had been duly remitted he has rendered himself liable to a suit for damages for negligence. The question is not free from difficulty, but, having regard to the fact that the plaintiff's sub-managers and other officers at the circle offices had the same knowledge or means of knowledge as the Pleader for checking the accounts of Tarini Prasad, we are on the whole of opinion that the plaintiff has suffered no loss by reason of any neglect of duty on the part of the Pleader in this matter.

The sixth and last question is, whether it has been made out that any of the sums received by Tarini Prasad were not remitted to the plaintiff's circle offices. In view of the findings on the fifth point it might not be necessary to determine this question, but even if our opinion upon the last point should be wrong we consider that it is not sufficiently proved that any of the items claimed in the first Schedule were not remitted to the circle offices concerned. In connection with this question it is significant that from the opening of this litigation the plaintiff has been reducing his claim. The plaint as originally filed was amended by striking out a large number of the items claimed. Many more were abandoned in the Trial Court and others were also struck out before us. Of those which remain some were proved to have been duly paid to the Raj from the plaintiff's own documents and in respect of others there was no evidence to show that the amounts were drawn out of Court. In the end out of the numerous details in schedule No. 1 in the two cases only Items Nos. 3 and 23 in the first Schedule of the second suit were urged as being supported by the requisite sequence of evidence showing receipt of the money and failure to remit. The appellant seeks to prove his case by production of certain records from the Munsif's Court showing that money was paid out to Tarini Prasad and pointing to the fact that such sums found no place in the *chalans* showing remittal of the sums at or about the period when they were withdrawn. The *chalan* counterfoils are not produced and the

chalans themselves are admittedly imperfect in that some only of them have been produced. The suit registers have not been produced and the cash account books kept either at the Pleader's office or at the circle offices, with a few unimportant exceptions, are not forthcoming, and such documents as are produced refer only to the accounts of one of the circles in question. These documents would have shown beyond all doubt whether the sums claimed were in fact remitted to the circle offices concerned, and, as the defendants have no accounts of their own, it is impossible for them to deal adequately with this issue. Again, it appears from the evidence that at times monies used to be sent to the circle offices without accompanying *chalans*. In dealing with this question we cannot do better than quote somewhat fully from the judgment of the learned Additional Subordinate Judge. After dealing with the question of the onus of proof in cases where the accounts had already been rendered and finding that it lay upon the plaintiff, he proceeds thus: "That being so, it was quite incumbent upon him (the plaintiff) to produce these accounts in Court, but, curiously enough, the primary papers are not forthcoming, though the defendants raised the point specifically and stated that as all the papers, books and records necessary for the adjustment of the accounts asked for were with the plaintiff, he could not be equitably and legally called upon to render any accounts (*vide* paragraph 21 of the written defence in Suit No. 471). Heaps of papers and documents have been produced in Court on behalf of the plaintiff, but not a single copy of the suit registers is forthcoming and excepting three cash account books (*vide* Exhibits 14 to 14*b*) the bulk of those important papers have also been withheld. The first, *viz.*, Exhibit 14 is for 1912, the second, Exhibit 14 (*a*), for 1907 to 1908 and the third, (Exhibit 14 (*b*), from July 1910 to April 1911, and the first and the second refer to trust *mehals* only. Thus, practically speaking, there are no cash account registers forthcoming in respect of the *Mal* villages of the four circles appertaining to the Madhupura Civil Court. Those cash account Registers have an intrinsic value of their own, as they contain item by item and case by case the sums remitted from the Pleader's office to the several circle offices, and the evidence on the record shows that separate cash account registers have all along been kept for each circle. Some *chalans* have, no doubt, been produced, but it has not even been attempted to make out that they make up the whole quantity of such documents received from the Pleader's office and the value of these documents is somewhat diminished from the fact, as disclosed in evidence, that at times moneys used to be sent without such *chalans*. And again the cash account registers and the *chalans* would have been sufficient checks one upon the other." In a later passage he states: "manyand numerous are, no doubt, the documents and papers produced by the plaintiff in these cases, but all through the tendency of his officers was to withhold such papers as were in any way helpful to the defendants, and I cannot but observe that the deliberate policy of the plaintiff's officers and *amlas* was not to produce documents which might have thrown any light on the real point at issue." It further appears from the evidence that in some cases amounts received by Tarini Prasad were not credited in the subsequent monthly account but found a place in *chalans* of a later date. Apart from the documentary evidence which is defective as already shown, there is not a single witness who states that any monies received at the Pleader's office were not duly remitted to the circles concerned. It is impossible, in our opinion, in this unsatisfactory state of the evidence upon this vital matter to differ from the findings of the Trial Court upon this issue. In our opinion these appeals should be dismissed with costs.

Z. K. *Appeals dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 105 OF 1922.

December 18, 1922

Present:—Mr. Justice Adami.

Mir DIDAR ALI AND OTHERS—PETITIONERS

versus

Thakurain KUSUM KUMARI AND ANOTHER—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 174—Application to set aside sale—Cost of copy of decree obtained by decree-holder and stamp on vakalatnama,

DIDAR ALI *v.* KUSUM KUMARI.

whether to be deposited—Shortage in amount to be deposited—Judgment-debtor misled by mistake of clerk and order of Court—Admission of shortage after expiry of time.

It is not incumbent on a judgment-debtor who applies to set aside a sale under section 174 of the Bengal Tenancy Act to include within the costs to be deposited by him the amount spent by the decree-holder in obtaining a copy of the decree or the value of the stamp on a *vakalatnama* filed by the decree-holder, inasmuch as a separate *vakalatnama* is not necessary in execution proceedings. [p. 928, col. 1.]

Raghubar Dayal Sukul v *Jadu Nandan Missir*, 13 Ind. Cas. 365; 16 C. W. N. 736; 15 C. L. J. 80, relied upon.

An Executing Court is lacking in the due discharge of its duty in entertaining an application to set aside a sale under section 174 of the Bengal Tenancy Act until it has satisfied itself that the statutory conditions laid down in the section have been fulfilled. [p. 928, col. 2.]

It is the duty of the Executing Court, in such a case, before entering in the order-sheet that the full decretal amount with costs and compensation has been deposited, to satisfy itself as to the correct amount which it was necessary for the judgment-debtor to deposit. [p. 928, col. 2.]

A judgment-debtor who fails to deposit the full amount required to be deposited under section 174 of the Bengal Tenancy Act cannot claim relief on the ground that he has been misled by information given by a clerk of the Court, it is only when the information is given by the Court itself that the judgment-debtor is entitled to rely on that intimation as correct. [p. 928, col. 2; p. 929, col. 1.]

Sarjoo Prasad Missir v. *Nanoo Rai*, 35 Ind. Cas. 779: 1 P. L. J. 459; 3 P. L. W. 48, referred to.

A judgment-debtor made an application to set aside a sale under section 174 of the Bengal Tenancy Act and deposited a certain sum, which, according to information supplied to him by a clerk of the Court, was sufficient to cover the decretal amount, costs and compensation. Thereupon the Court made an order that he had deposited the full amount required under the section. On the date on which this order was made the time for making the deposit had not expired. It was subsequently discovered that the costs had been wrongly calculated by the clerk and consequently the amount deposited by the judgment-debtor was short by a small sum. It was found that the Court had not calculated the amount of the costs which the judgment-debtor was required to deposit:

Held, that the judgment-debtor having been misled not merely by the mistake of the clerk but also by the failure of the Court to calculate the costs and the order of the Court recording that the full amount had been paid, this was a fit case in which the judgment-debtor should be allowed to deposit the deficiency and that the sale should be set aside on such deposit. [p. 928, col. 2; p. 929, col. 1.]

Chundi Charan Mandal v. *Banke Behary Lal Mandal*, 26 C. 449; 3 C. W. N. 283; 13 Ind. Dec. (N. S.) 890 (F. B.) and *Sarjoo Prasad Missir* v. *Nanoo Rai*, 35 Ind. Cas. 779; 1 P. L. J. 459; 3 P. L. W. 48, distinguished.

Appeal from the decision of the Munsif, Bhagalpur.

FACTS appear from the following Order of Remand made by Mr. Justice Adami, on 16th June 1922:—

"In execution of a decree obtained against him the lands of the judgment-debtor were put up for sale and purchased by a third person on the 20th July 1921. On the 18th August the petitioner filed a petition for permission to deposit the full decree money and compensation and he was permitted to do so and on the same day an order was passed to this effect: 'Judgment-debtor deposited full decree money with costs and compensation. Put up on the date fixed for orders.' On the 22nd August, however, the decree-holder filed a petition declaring that the petitioner had not deposited the full decree money and compensation, and in consequence the judgment-debtor's Pleader prayed for time till the 24th August for consideration of the matter. On the 24th August the petitioner stated that he had paid the full amount and costs of the decree but that he had then come to learn that Rs. 10 was still due, he prayed that he might be permitted to deposit that amount now. On the 24th August the period of thirty days after the sale had elapsed. In course of time the question whether the sale should be set aside on receipt of the extra sum of Rs. 10 was considered and as a result the Executing Court found that the deposit had not been made in time within the provisions of section 174 of the Bengal Tenancy Act, and, therefore, the sale could not be set aside under that section. There was an application for review, but the Munsif disallowed it relying on the case of *Sarjoo Prasad Missir* v. *Nanoo Rai* (1). There was then an appeal to the District Judge but the District Judge held that no appeal lay and refused to interfere.

"Here the chief and only substantial point which is taken is that there was no finding by the Munsif or by the District Judge that the amount deposited in the first instance by the petitioner was in fact short of the amount required to be deposited under section 174. It is also argued that

(1) 35 Ind. Cas. 779; 1 P. L. J. 459; 3 P. L. W. 48.

having accepted the deposit on the 18th of August and entering in the order that it was the full decretal money with costs and compensation, the sale must be taken to have been set aside from the moment that that order under section 174 was passed. It seems that the petitioner obtained his information from the executing clerk and from a statement of the amount to be paid made by the execution *moharrir* on the back of the decree-holder's application for execution. It is plain on the face of that account that there was a mistake of Rs. 10, and it may be that the petitioner was misled by that account, but it has been held often both in the case on which the Munsif relied and in many other cases—(perhaps the last case is a decision of Bucknill, J. in this Court in Civil Revision No. 32 of 1922)—which show that a judgment-debtor cannot claim relief on the ground that he has been misled by information given by a clerk of the Court; it is only when the information is given by the Court itself that the judgment-debtor is entitled to rely on that intimation as correct, and in fact, now it is not contended that the relief ought to be given because the judgment-debtor was misdirected by the office as to the amount. The whole point of the petitioner's argument now is that as a matter of fact the right amount was deposited in the first instance and that the Courts below have not troubled to enquire into the question whether there really was a shortage of the amount. I cannot find from any papers on the record that the Courts have enquired as to the sufficiency of the first deposit, and, in my mind, it was quite necessary before the petitioner's application could have been rejected to determine whether in fact there was a shortage. The learned Vakil for the petitioner has sought to point out from the entries on the back of the execution petition that, as a matter of fact, the amount deposited was correct but the entries on the execution petition are not very explicit; the same abbreviation is apparently made to cover two separate kinds of payments, the same abbreviation being used both for poundage-fee and process-fee and it is impossible to make out how much was entered as the amount due on account of process-fees. I think, therefore, it is only just that the case should go back to the Executing Court for an enquiry whether the amount paid on the 18th of August was the full decretal amount with costs and compensation. If it is found that it was the full decretal amount, then, I think the petitioner would be entitled to have the sale set aside, otherwise under the decisions of this Court the petitioner can have no relief on the ground of any excuse for the payment of the full amount beyond the time allowed by section 174 of the Bengal Tenancy Act. The case will, therefore, be kept pending till a report on the inquiry to be made by the Executing Court as directed above is received."

Mr. *S. M. Mullick*, for the Petitioners.

Mr. *Rai T. N. Sahai*, for the Opposite Party.

JUDGMENT.—The facts of this case have been detailed in my order remanding the case for report by the learned Munsif. It is only necessary to state that the judgment-debtor had time up to the 20th of August to deposit the decretal amount with costs in order to set aside the sale. On the 18th of August he put in a petition asking the Court to receive the said deposit in order that the sale might be set aside. On that date the Court granted him permission to deposit the full decree money with compensation and the judgment-debtor then deposited Rs. 390-13-6, and the Executing Court entered in the order-sheet "Judgment-debtor deposited full decree money with costs and compensation; put up on the date fixed for orders." The date fixed for orders was the 21st of August which had been fixed for the confirmation of the sale. On the 22nd of August the decree-holder filed a petition stating that the full decree money and compensation had not been deposited and thereupon the judgment-debtor asked for time until the 24th August. On the 24th of August the judgment-debtor petitioner stated that he had paid the full amount and costs but that he had come to learn that Rs. 10 was still due and asked for permission to deposit that amount. Thereafter, the learned Munsif considered the question whether the sale could be set aside on receipt of the extra sum of Rs. 10; he came to the deci-

sion that, as the full deposit had not been made within the time prescribed by section 174 of the Bengal Tenancy Act, the sale could not be set aside under that section.

When the case first came before me, there was uncertainty whether in fact the amount deposited on the 18th August by the petitioner was insufficient and the Munsif was asked to report after making enquiry. His report has been received and he shows that the amount was short by Rs. 9-0-3. It is argued that the Munsif has been mistaken in entering certain items in his account of the costs. The case of *Raghubar Dayal Sukul* v. *Jadu Nandan Missir* (2) has been relied on, and that shows that it was not incumbent on the judgment-debtor to include within the costs the amount spent by the decree-holder in obtaining a copy of the decree and that a separate *vakalatnama* was not necessary in execution proceedings. It is clear under that ruling that the Munsif wrongly included the amount of Re. 1-9-0 for obtaining a copy of the decree and Re. 0-8-3 in respect of the *vakalatnama*, but, even so, the deduction of these amounts would not bring the sum deposited up to the amount of the other items in the account. It is clear then that when the deposit was made, the amount required by the provisions of section 174 of the Bengal Tenancy Act was not paid in. But I think in the present case one must look to the general circumstances of a case. The judgment-debtor, when permitted to deposit the decretal amount with costs and compensation, went to the execution *moharrir* who drew up an account and showed that the amount paid in by the judgement-debtor petitioner was correct and it was on the basis of that account that the sum of Rs. 390-13-6 was deposited. It is true that the petitioner could not protect himself by a mistake made by the execution *moharrir*, for the execution *moharrir* was not authorised to officially acquaint the judgment-debtor with the amount to be paid. As I mentioned in my previous order, there are many cases, both of this and other Courts, to the effect that a judgment-debtor cannot claim a relief on the ground that he has been misled by information given by a clerk of the Court. But in the present case no order had been passed by the Court as to what the costs were, the judgment-debtor came well within the time allowed for the deposit and obtained the permission of the Court to deposit the amount and not only that, he obtained an order in the order-sheet from the Court that he had deposited the full decree money with costs and compensation. He was, therefore, permitted to believe he had paid the full amount until after the time allowed for the deposit had elapsed, when the decree-holder came forward and pointed out that the amount was not sufficient. Now, an Executing Court is lacking in the due discharge of its duty in entertaining any application to set aside a sale until it has satisfied itself that the statutory conditions provided by section 174 of the Bengal Tenancy Act have been fulfilled. This has been laid down. It was the duty of the Executing Court, before entering in the order sheet that the full decretal amount with costs and compensation had been deposited, to satisfy itself what were the costs to be paid by the judgment-debtor and it appears that the Court took no trouble to find out what those costs should be before making its order. Owing to this neglect of duty, the petitioner was lulled into security; the amount short was not very great, and had a proper inquiry been made, the judgment debtor would have been able to make up the deficit within the time allowed. Jenkins, J. in the case of *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3) said: "In my opinion it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake which had been made is attributable to that act;" and I think that in the present case it has been established that the petitioner judgment-debtor was prejudiced by the neglect of the Court to let him know that the amount he had deposited was insufficient. It was clearly the duty of the Court to announce what the costs were. The case of *Sarjoo Prasad Missir* v. *Nanoo Rai* (1) has been

(2) 13 Ind. Cas. 365; 16 C. W. N. 736; 17 C. L. J. 89.

(3) 26 C. 449; 3 C. W. N. 283; 13 Ind. Dec. (N. S.) 890 (F. B.).

relied on, but that case is distinguishable in this that there the judgment-debtor had failed altogether to deposit the 5 per cent. on the purchase-money which is required by the Act. It was not a mistake of figures; it was a mistake in one of the component parts of the deposit. It was pleaded in that case that the non-inclusion of this 5 per cent. was due to a mistake made by the execution clerk and it was found that the petitioner in that case could not rely on a mistake of an execution clerk as an excuse for not paying the 5 per cent. deposit. In the present case the execution clerk had made a mistake in reckoning up the costs, and the petitioner had nothing to go upon except the account given him by the execution clerk, the Executing Court itself not having stated what the amount of costs were.

I think that, in all justice, the application of the petitioner should be granted and that the sale should be set aside. I, therefore, direct that the sale be set aside, the petitioner depositing the amount still in deficit.

Z. K.

Application allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 177 OF 1919.

June 13, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Maharaja GURU MAHADEO ASRAM PRASHAD SAHI BAHADUR—PLAINTIFF—APPELLANT

versus

Musammat JAGATRAJ KUER AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 30—Jagir—Life grant—Presumption—Resumption of life jagir, *suit for—Limitation—Evidence Act (I of 1872), s. 42—Judgment deciding question of adoption, whether admissible between third persons.*

Unless clear words indicating a different intention appear in the instrument, a *jagir* grant conveys only an estate for life. [p. 930, col. 2.]

Gulabdas Jagjivandas v. *Collector of Surat*, 3 B. 186; 6 I. A. 54; 3 Sar. P. C. J. 889; 2 Ind. Dec. (N. S.) 125 (P. C.), *Ram Narayan Singh* v. *Ram Saran Lal*, 50 Ind. Cas. 1; 46 C. 683; 29 C. L. J. 332; 36 M. L. J. 344; 17 A. L. J. 398; 21 Bom. L. R. 597; 23 C. W. N. 866; (1919) M. W. N. 518; 26 M. L. T. 207; 46 I A 88 (P C), *Pratap Udainath Sahi Deo* v. *Ganesh Narain Sahi*, 70 Ind. Cas. 232; (1921) Pat. 369, relied upon.

A suit for the resumption of a life *jagir* must, under Art. 130 of Schedule I to the Limitation Act be brought within twelve years of the death of the grantee. [p. 930, col. 1.]

A judgment of a Civil Court deciding a question of adoption is not admissible between third parties as evidence of the truth of the matters decided therein. [p. 933, col. 1.]

Kanhya Loll v. *Radha Churn* 7 W. R. 338, *Yarakalamma* v. *Anakala Naramma*, 2 M. H. C. R. 276, relied upon.

Appeal from a decision of the Subordinate Judge, Chapra, dated the 31st May 1910.

Mr. *Harnarain Parshad*, for the Appellants.

Messrs. *Sambhu Saran* and *K. Sahai*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decree of the Subordinate Judge of Chapra, dated the 31st May 1919, dismissing the plaintiff's suit.

The suit was instituted by the Maharaja of Hatwa claiming to resume certain lands situated in three *mauzas* within his *zamindari* which are now said to be in the possession of the first two defendants, the widows of the grantees. It is the plaintiff's case that the lands in suit were granted by his father, the late Maharaja, to two brothers, Deonarayan Singh and Brij Nandan Singh, the husbands of the first two defendants, for their lives as *hazribashi jagir* in lieu of salary and on condition of rendering services as physicians to the grantor. The original grant has not been produced by the plaintiff, but a *patta* or *sanad* book containing what purports to be a copy of the document as well as copies of a number of other deeds of the same and a later period has been produced by the plaintiff and is relied on as evidence of the grant. It is dated the 25th *Assin* 1286 F., corresponding to the 6th October 1878 A. D. If this document is reliable and if it can be proved that the grant was then made to Deonarayan and Brijnandan there can be no

doubt that what was conveyed was a life-estate only and the Maharaja would be entitled to resume the lands on the death of the grantees. The late Maharaja died in 1896, his son, the present plaintiff, being then a child of about 3 years of age. Brijnandan, one of the grantees, survived his brother, Deonarayan, and died in 1901. Under Art. 130 of the First Schedule of the Limitation Act the period during which a suit for resumption can be brought is 12 years from the date when the right to resume accrues and would consequently expire in the ordinary course in 1913. The plaintiff, however, attained his majority only in July 1914 and the present suit was instituted within 3 years of that date, *viz.*, on the 14th May 1917, and as against the widow of Brijnandan and his brother the suit is not barred by limitation.

It is the case of the defendants that the grant relied upon by the plaintiff was never in fact made or accepted by the grantees. They claim the lands under grants of an earlier date made by the father and grandfather of the plaintiff in favour of the ancestors of their husbands alleging that an estate of inheritance was created under the earlier grants, or, if the interest was a life interest, that the lands were never resumed and descended from father to son, the right of resumption being now extinguished. The plaintiff does not dispute that the earlier grants of the lands in suit relied on by the defendants were made to the ancestors of Deonarayan and Brijnandan but contends that they also were *jagir* grants conveying a life interest and that the lands were resumed in 1878 and re-granted by the instrument of that date to the two brothers whose father and grand-father before them had been acting as physicians to the father and grandfather of the plaintiff.

The villages in which the lands are situated are named respectively Pipra Khas, Swareji, and Harkhouli. The earlier grants relied on by the defendants are three in number. The first in order of date is said to have been made in 1252 F., corresponding to 1844 or 1845, A. D. This grant has been lost but it is not disputed that it conveyed the lands now claimed in *Mouza* Pipra Khas as *jagir* to Hakim Sheo Prasad Singh, the grandfather of Deonarayan and Brijnandan, who was at that time physician to the grantor, the grandfather of the present plaintiff.

The second in order of date has been produced. It is dated the 10th *Assin* 1254 F., corresponding to September 1846, A. D. It related to the lands in *Mauza* Swareji. The grantor and the grantee are the same as in the earlier one. It recites that the lands have been gifted away by the grantor as rent-free *jagir* to the grantee on condition of loyalty, and directs that he shall ever remain faithful in the discharge of his duties.

The third is dated the 28th *Kartick* 1277 F., corresponding to the 6th November 1869, A. D. It relates to the lands in *Mauza* Harkhouli which were granted by the plaintiff's father to Hakim Ram Anugrah Singh, the son of Sheo Prasad Singh and father of Brijnandan and his brother. It recites that the lands have been granted as *jagir* on the occasion of the Maharaja's recovery from illness and it directs that the grantee shall ever remain faithful in the discharge of his duties.

The defendants contend that the grants so made conveyed an absolute estate of inheritance and could not be resumed on the death of the grantee. There can be not doubt, however, in my opinion, that *jagir* grant, unless clear words indicating a different intention appear in the instrument, conveys only an estate for life. The effect of grants of this nature has been considered on more than one occasion by their Lordships of the Judicial Committee. I need only refer to the cases of *Gulabdas Jagjivandas* v. *Collector of Surat* (1) and *Ram Narayan Singh* v. *Ram Saran Lal* (2). In the former, decided in 1878, it was held that a *jagir* must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary. In the latter, decided in 1918, the earlier decision was referred to and followed, and it was further laid down that the terms which will make the grant of a *jagir* a grant of an estate of inheritance must,

(1) 3 B. 186; 6 I. A. 54; 8 Sar. P. C. J. 889; 2 Ind. Dec. (N. S.) 125 (P C).

(2) 50 Ind. Cas. 1; 40 C. 683; 29 C. L. J. 332; 36 M L. J. 344; 17 A. L. J. 398; 21 Bom. L. R. 597; 23 C. W. N. 866; (1919) M. W. N. 518; 26 M. L. T. 207; 46 I A 88 (P. C.).

if they are to be considered alone, be terms which are not ambiguous, and must clearly show whether it was intended by the grantor that the right of inheritance should be general or should be confined to a particular class of heirs. Further, by clause 15 of Bengal Regulation XXXVII of 1793 which relates to *Badshahi* grants, it is provided that *jagirs* are to be considered as life tenures only, and that all life tenures are to expire with the life of the grantee unless otherwise expressed in the grant. It has also been laid down in this Court in the case of *Pratap Udainath Sahi Deo* v. *Ganesh Narain Sahi* (3) that the interest of a *jagirdar* is ordinarily that of a life tenant.

The learned Subordinate Judge who tried the case was of opinion that the grants in question conveyed an estate of inheritance and the lands were not resumable. He was influenced in coming to this opinion by the fact that the lands conveyed in the first two grants had descended without any attempt at resumption to the son of the original grantee. There is no direct evidence as to when Sheo Prasad, the original grantee of the lands in Swareji and Pipra Khas, died but it is conceded that it must have been not later than 1869 when the grant of the lands in Harkhouli was made to his son Ram Anugrah. It is likewise conceded that Ram Anugrah died in or before 1878 and that Brijnandan and Deonarayan, his sons, were in possession of the whole of the lands from that date until their death.

As already stated, I cannot accept the earned Subordinate Judge's view that a grant of a *jagir* conveys more than a life interest, and if it is proved that the lands were in fact resumed in 1878 and reconveyed as *jagir* to the sons of Ram Anugrah under the alleged grant of that date the plaintiff would be entitled to resume as against the widows of the grantees.

The learned Subordinate Judge, however, refused to accept the evidence of the plaintiff as to the resumption and re-grant in 1878. He rejected the copy of the alleged grant in 1878 as a spurious document. It recites that the grant was made to Deonarayan and Brijnandan for their lifetime, in lieu of salary. There was evidence on the part of the defendants that Deonarayan and Brijnandan were in fact being paid a salary of Rs. 30 per month, and the plaintiff's witnesses admitted that there were accounts in the *serishta* of the Maharaja showing payments made to the servants of the Raj, both Raj servants and *derohi* servants, and that for each set of servants separate registers and bill *bahis* were in existence for the period in question. These, however, although called for, were not produced and from this the learned Subordinate Judge drew the inference, which was a legitimate inference to draw, that these books, if produced, would have supported the defendants' allegation that Deonarayan and Brijnandan were in fact paid a salary for their services during their lifetime, a fact which, if established, was quite inconsistent with the terms of the alleged grant. He further considered from the internal evidence of the *patta* or *sanad* book itself that it was not a document which could be relied upon. Some of the documents in the book contained a copy of the signature of the late Maharaja in English, others contained what purported to be and were sworn to be his initials presumably appended by himself after the copies had been made, and in some cases it was pointed out before us that the copies were not in chronological order but entered after others of a later date. The book itself has not the appearance of being very old and the initials said to be those of the late Maharaja are apparently all made with the same kind of ink, although they extend over a period of many years. I am not prepared to hold that the book itself was a spurious document prepared for the purposes of this case, although there are circumstances which raise some suspicion as to its authenticity. The evidence, however, as to the resumption of the lands in 1868 and the re-grant thereof to the two brothers is not of a very convincing description. It consists of that of certain servants of the plaintiff who were also in the service of his father and who state in general terms that in the year in question the lands were under attachment for 2 or 3 months during which time the tenants were instructed not to pay rents to Brijnandan and his brother after which the lands were re-granted to them in lieu

(3) 70 Ind. Cas. 832 ; (1922) Pat. 369.

of salary. The evidence is not altogether consistent. It is stated by Debi Lal, the *Patwari* of Harkhouli, that the two brothers had been in possession for a year or two when the lands were resumed on account of some displeasure, whereas Sunder Lal, who says he was the *Raj Amin* since 1875, says the attachment was not on account of any fault of Deonarayan and his brother but by way of management. It is further conceded by the plaintiff's witnesses that no rents were ever paid to the Maharaja during the period of attachment but that the two brothers never ceased to collect the rents throughout. Further, there is no documentary evidence produced, such as *parwanas* to the *patwaris* and others of the villages, indicating that a resumption had taken place. It is further nowhere suggested that when Sheo Prasad, the grantee of the lands in Swareji and Pipra Khas, died any attempt was then made to resume. On the contrary, his son, Ram Anugrah, came into possession of the lands granted and was given a further grant of lands in Harkhouli. A further important fact is that the *sanads* granted to the father and grandfather of Brijnandan, were never returned to the Maharaja in 1878 but remain up to the present day in the possession of the descendants of the grantees. The learned Subordinate Judge rejected the plaintiff's evidence partly on the ground that it was confined to the statements of ill paid servants of the plaintiff's whose living depended upon the good wishes of their master. This consideration, although entitled to some weight where the evidence, as here is contradicted, is certainly not in itself a sufficient ground for rejecting the evidence. It is admitted that no written orders were sent to the *patwaris* or *tahsildars* of the villages to resume the lands and no proceedings took place in Court with that object. There is also nothing except the verbal statement of some of the witnesses to show that Deonarayan and Brijnandan ever accepted the alleged grant of 1878. It is highly improbable that they, having succeeded to the lands granted to their grand-father and held by their father without opposition, would give them up and accept a life interest only without a struggle, and, in the absence of more convincing evidence than that adduced by the plaintiff, I am not prepared to differ from the findings of the Subordinate Judge that the lands were not in fact resumed and re-granted in 1878. if proof of this grant fails, as I held it must, it follows that the suit not having been instituted within 12 years from the date when the cause of action arose, *viz.*, in 1878 at latest it is now barred by limitation and must be dismissed.

A further point was raised by the defendants which may be mentioned here, although in view of the findings I have arrived at it is unnecessary to decide it. The suit was originally instituted against the first two defendants alone on the 14th May 1917. By their written statement. which was filed on the 4th June 1918, they alleged that *Musammat* Chanderma Kueri, the defendant No. 2, with the authority of her late husband, Brijnandan Singh, adopted a son, *Hakim* Chandra Sekhar Prasad Singh, in *Baisakh* 1323 F. corresponding to April 1916 and that he, as heir of his adoptive father, was alone in possession of all the lands in suit and that the suit was not maintainable against them but only against the adopted son. The plaintiff apparently was not aware of the alleged adoption until he received the written statement of the widows in June 1918, by which time the period of limitation as against the adopted son had expired even assuming that the grant of 1878 could be proved. The adopted son was, however, added as a party by an order of the Judge of the Trial Court on the 19th December 1918. In April 1919 he filed a written statement pleading, *inter alia*, that the suit was barred by limitation. If in fact his adoption was valid which is not admitted by the plaintiff it would appear that there is no answer to this plea. At the date when the judgment was delivered by the Trial Court in May 1919 a suit to set aside the adoption had been brought by the reversioners of Brijnandan against *Musammat* Chanderma Kueri and her adopted son and judgment had been delivered in that suit by the Subordinate Judge of Saran declaring against the validity of the adoption. An appeal, however, from that decision was pending to the High Court and on the 24th January last the appeal was allowed, the decree of the Subordinate Judge being set aside and the suit dismissed.

From that decision an appeal is now pending to his Majesty in Council. In the present suit no evidence was given either as to the fact of adoption or as to its validity, but the learned Judge assumed that if the appeal then pending to the High Court in the adoption suit should succeed the present suit would be time-barred as against the defendant No. 3. During the hearing of this appeal the respondents presented a petition with a certified copy of the judgment of the High Court in the adoption suit and asked us to admit it as evidence of the adoption. That judgment, however, was not a judgment in a suit between the parties to the present case and cannot be regarded as *res judicata*. Nor is it, in my opinion, a judgment *in rem* binding upon all the world. See *Kannya Loll* v. *Radha Churn* (4) and *Yarakalamma* v. *Anakala Naramma* (5). Moreover, in this country by section 41 of the Evidence Act judgments, orders or decrees which are conclusive proof of the legal character of a person are confined to those of a competent Court in Probate, Matrimonial, Admiralty, or Insolvency Jurisdiction. They do not include judgments of the character now relied upon. Further, in my opinion, the judgment relied upon being *res inter alios judicata* and not relating to matters of a public nature is not even admissible as evidence in the present case of the truth of the matters therein decided. It is, however, in view of the findings already arrived at, unnecessary to determine this question. In my opinion this appeal should be dismissed with costs.

Mullick, J.— I agree.

Z. K.

Appeal dismissed.

(4) 7 W. R. 338.
(5) 2 M. H. C. R. 276.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 11, 1922.

Present:—Lord Atkinson, Lord Sumner, Lord Parmoor, Lord Carson and Mr. Ameer Ali.

RAM BUJHAWAN PROSAD SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NATHU RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by karta—Necessity—Interest, rate of—Burden of proof.

It is incumbent on a person, supporting a mortgage made by the manager of a joint Hindu family, to show not only that there was necessity to borrow but that it was not unreasonable to do so at the rate and terms contained in the mortgage. [p. 935, cols. 1 & 2.]

Nawab Nazir Begam v. *Rao Raghunath*, 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 (P. C.), relied on.

Hurro Nath Rai Chowdhri v. *Randhir Singh*, 18 I. A. 1; 18 C. 311 (P. C.); 5 Sar P. C. J. 642; 15 Ind. Jur. 34; 9 Ind. Dec. (N. S.) 207; *Nand Ram* v. *Bhupal Singh*, 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294 *Manna Lal* v. *Karu Singh*, 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652 (P. C.), referred to.

Appeal against the decision of Mr. Justice Coutts and Mr. Justice Das, in First Appeal No. 162 of 1916, dated the 8th August 1919, reported as 52 Ind. Cas., 964, varying the decree passed by the Sub-Judge, First Court, Patna, dated the 30th August 1916.

Messrs. *Dunne, K. C.* and *B. Dube*, for the Appellants.

Mr. *J. K. Roy*, for the Respondents.

JUDGMENT.

Lord Parmoor.—This is an appeal from a decree of the High Court of Judicature at Patna which varied a decree of the Judge of the Subordinate Court. Hari Charan Mahto, the father of the first of the defendants (appellants), was head and *karta* of a Hindu joint family governed by Mitakshara Law. He borrowed a sum of Rs. 1,000, secured with interest at 36 per cent. per annum with quarterly rests by hypothecation of certain immoveable properties of the joint family, and executed a deed of mortgage

on the 16th July 1903, the rights in which are now vested in the plaintiffs (respondents). Hari Charan Mahto died on the 18th January 1911, without redeeming the deed of mortgage. At the time of the institution of the present suit to enforce the mortgage bond, it was claimed that there was a sum due on the mortgage for principal and interest of more than Rs. 50,000, after making an allowance for payments which had been made during the lifetime of the mortgagor. The actual claim in the suit was for Rs.32,000. the plaintiffs stating that they had reduced the amount of their claim on the ground that the mortgaged property was not worth the whole sum due for principal and interest.

In their plaint the plaintiffs (respondents) pleaded that Hari Charan Mahto had borrowed the sum of Rs. 1,000, at the above rate of interest. in order to defray some necessary household expenses of the joint family, and that as security for the bond money, principal, with interest and compound interest, he had mortgaged, hypothecated and made liable his *milkiat* right in certain scheduled properties, which it is not necessary especially to designate. In answer to this claim the first of the defendants (appellants) pleaded, among other things :—

"That the necessities mentioned in the bond in suit are wrong and baseless. This defendant's father never took a shell from the plaintiffs for the requirements and the benefit of the family, nor was there any necessity for the same.

"That the mortgaged property is the ancestral property of the joint family, and is not at all liable for the payment of the amount claimed. Nor can the property be sold for the payment of the same.

"That the rate of interest and compound interest and the period for payment of compound interest are altogether invalid and are by way of penalty. Such an invalid contract and such severe terms, which are by way of unconscionable bargain, cannot be given effect to or put into operation. The account of compound interest and the manner it has been calculated are also wrong. The plaintiffs are not, in any case, entitled to compound interest on the interest."

It has been necessary to set out these pleas at length, since the judgment of the High Court has largely turned on a point of pleading. In the written statements, filed on behalf of the other defendants (appellants) the same defences are raised, and in the issues filed before trial, in accordance with Indian practice, 3 and 5 are relevant to the questions argued on the appeal before their Lordships. The third issue raises the question whether the defendants (appellants) are bound to pay the debt. Were they benefited by the loan ? Can the defendant raise his objection ? The fifth issue raises the question whether the stipulation in the bond for payment of compound interest is penal and unconscionable.

The Judge of the Subordinate Court found that the bond in suit was genuine and for consideration, and that the amount of Rs. 1,000 had been borrowed for family necessity to enable Hari Charan Mahto to defend himself against a criminal charge of rioting. On a cross-appeal filed on behalf of the defendants (appellants) to the High Court, it was argued that a *karta* was not entitled to defend himself against a criminal charge at the cost of a joint family, and that there was no proof that the joint family property had been hypothecated for any legal necessity of the joint family. The High Court, however, confirmed in this respect the judgment of the Subordinate Court, and the Counsel for the defendants (appellants) did not ask their Lordships to review the concurrent findings of the two Courts, or to reverse this portion of the decree of the Subordinate Court.

The Judge of the Subordinate Court further found that the stipulation in the bond for payment of interest at 3 per cent. per month, and to pay compound interest with three monthly rests, was penal, and he allowed simple interest at 1 per cent. per month. This finding appears to have been based, not on the conditions which attach when a security is given which purports to hypothecate joint family property, but on the provisions of section 16 of the Indian Contract Act, 1872. It was set aside by the High Court, which held that section 16 of the Contract Act did not relieve the debtor by reducing the rate of interest, except when the Court had been satisfied that the lender was in a position to dominate the will of the borrower, and that the bargain was unconscionable within the meaning of the section. It is not necessary on the present appeal that their Lordships should express

any opinion on the respective judgments of the Subordinate Court and of the High Court on this issue. The case of the defendants (appellants) was not argued before their Lordships on the terms of section 16 of the Contract Act, but on the nature of the obligations created where money has been borrowed by a *karta* on the security of the joint family property. If, howevere it is permissible to accept the finding of the Judge of the Subordinate Court that simple interest at the rate of 1 per cent. per mensem is a fair commercial rate in the absence of special circumstances justifying a higher rate, and to calculate the interest on the loan of Rs. 1,000 at this rate, then, after allowing for payments made, a decree in favour of the plaintiffs (respondents) would, as ascertained on this basis, amount to the sum of Rs. 236-5-6, the decretal amount inserted in the decree of the Subordinate Court.

It will be convenient, in the first instance, to consider the nature of the right which a mortgagee of an ancestral joint family property is entitled to enforce against such property where he has proved that there was legal necessity for borrowing the principal sum, but it is not proved that there was necessity to borrow at the rate of interest contained in the mortgage-deed. The question whether the defendants-appellants are entitled to raise this question in the present instance will be considered at a later stage. This Board in the recent case of *Nawab Nazir Begam* v. *Rao Raghunath* (1) determined the principles applicable in a case of this character, and it is not permissible for any Court to restrict or curtail the principles affirmed in that case. After referring to the earlier cases of *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (2) and *Nand Ram* v. *Bhupal Singh* (3) the judgment proceeds:—

"It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand.

"This principle being established, the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance. No evidence, it is true, was given on either side, but the thing spoke for itself. It remains, therefore, that there was necessity, and in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority."

In this case the defendants pleaded that the condition relating to interest was very hard, unconscionable and inequitable, but it is stated in the judgment that this allegation did not seem to have been intended as a substantive plea in itself, but rather as introducing a plea of undue influence which failed, and then the judgment proceeds:—

"However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived."

This decision was applied by the Board in the later case of *Manna Lal* v. *Karu Singh* (4), in which judgment was delivered on the 29th July 1919.

Applying this principle to the present case, the consideration arises whether the authority of Hari Charan Mahto, being an authority to borrow on reasonable commercial terms, was exceeded in the promise to pay interest at the rate of 3 per cent. per

(1) 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49 (P. C.)

(2) 18 I. A. 1; 18 C. 311 (P. C.); 5 Sar P. C. J. 642; 15 Ind. Jur. 34; 9 Ind. Dec. (N. S.) 207 (P. C.).

(3) 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294.

(4) 56 Ind. Cas. 766; 1 P. L. T. 6; 13 L. W. 652 (P. C.).

month with three monthly rests. Assuming that this question is raised in the pleadings, a matter considered later, the onus of establishing that there was a necessity to pay a rate of interest in excess of the ordinary commercial terms is on the plaintiff, and no proof of this necessity appears to have been given at the trial. The first defendant (appellant) does state in his evidence that there was no necessity to borrow money at such interest. There is some evidence that the property mortgaged provided ample security for a loan of Rs. 1,000, but, in their Lordships' opinion, if there was absence of evidence on either side, the case speaks for itself, and it has not been proved that it was within the scope of the authority of the *karta* to borrow on the terms fixed in the mortgage-deed. Their Lordships have the assistance of the Judge of the Subordinate Court in determining the reduction which should be made in the rate of interest, and are of opinion that the rate of interest adopted by him may be safely followed. Indeed it was not argued before their Lordships that this rate should not be applied if it was held that the rate fixed in the mortgage-deed cannot be allowed to stand.

The High Court of Patna decided in favour of the plaintiffs (respondents) that they were entitled to recover the amount of interest fixed in the mortgage-bond, on the security of the joint family property, on two grounds:—

(1) That the question of excessive interest had not been sufficiently raised in the defence of the defendants (appellants.)

(2) That, even assuming this question was sufficiently raised in the defence, the plaintiffs (respondents) were entitled to succeed owing to an admission made in the terms of a compromise of the 10th February 1911 referred to in the decree of the 12th February 1911.

The defence that there was no legal necessity for the loan on the security of the joint family property was raised and determined in favour of the plaintiffs (respondents), but the High Court held that this defence did not sufficiently raise the further question that the rate of interest was excessive and to this extent was outside the authority of the *karta*. The High Court based their decision partly on the terms in which the plea of the defendants (appellants) that there was no legal necessity for the loan at all, was raised and stated in the written statement of the defendants (appellants), and partly on the ground that the written statement contains a special plea as to interest, contained in paragraph 10 of the defence and in paragraph 5 of the written statement. It is not possible to say, after the decision of the Board in the case of *Nawab Nazir Begam* v. *Rao Raghunath*(1), already referred to, that a plea of no legal necessity for a loan, and that the property is not at all liable for the payment of the amount claimed, does not open the door for a defendant to say that the rate of interest is excessive, and place on the plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made. The defendant in such a case does not lose his right to raise this defence by adding the additional plea that, apart from the conditions which attach when a *karta* mortgages the joint property, the stipulation in the bond for payment of interest, and compound interest, is in itself penal and unconscionable. In view, however, of the recent decision of this Board, the matter is concluded and no longer open to question.

It becomes necessary, therefore, to consider the second question on which the judgment of the High Court was founded, namely, whether the plaintiffs (respondents) were entitled to succeed, owing to the admissions made in the terms of the compromise of the 10th February 1911. It is necessary to state shortly the relevant facts. On the 19th December 1903 Hari Charan Mahto executed a further mortgage bond in favour of the plaintiffs (respondents), who instituted a suit against him and his son, defendant No. 1, to enforce this mortgage bond. Hari Charan Mahto died after the institution of this suit, and his son, defendant No. 1, in the present suit, settled the matter. The arrangement was embodied in a consent decree of the 12th February 1911 and was in part carried out by the execution of a sale-deed of the 10th February 1911, in which sale-deed there is a passage, "Be it known that the bond dated 16th July 1903 stands good as before, after payment of Rs. 1,000 as principal, besides interest and compound interest." The con-

sent decree provides as follows : "Besides the amount claimed, Rs. 1,000, as principal and interest and compound interest due under the mortgage bond dated the 16th July 1903 executed by Hari Charan Mahto is due from me under the bond. Only Rs. 1,487 out of interest and compound interest entered on the back of the bond has been realised. The bond is allowed to stand good as before—*i.e.*, the principal, interest and compound interest will remain due from me." The High Court of Patna held that this was a clear admission of liability on the part of defendant No. 1 in respect of both principal and interest and compound interest, and that, though it was not in any sense a ratification of what was done by Hari Charan Mahto, it was presumptive proof of a justifying family necessity, and that hence, if it is necessary to come to a conclusion on the question whether there was any necessity to raise the loan on such onerous terms, it would be sufficient to say that the subsequent consent of defendant No. 1 to the transaction was evidence of such necessity which had not been rebutted, and that, so far as defendant No. 2 is concerned, the question did not arise, as he was not in existence either at the date of the original transaction or at the date when the compromise was made.

On the construction of the words "the bond is allowed to stand good as before, *i.e.*, the principal, interest and compound interest will remain due from me," their Lordships are of opinion that they constitute no more than a reservation of the rights whatever they may be, under the mortgage bond of the 16th July 1903, and that they do not constitute an admission of a legal necessity either to the principal amount or of the rate of interest or compound interest. The mortgage bond which it was sought to enforce in the suit was executed subsequently to the mortgage-bond on which the present action is founded, and it would be a reasonable precaution to insert words of reservation in order to ensure that there was no interference with the security of the prior bond. In the present suit the question of legal necessity for the principal of the loan was considered in both Courts, quite apart from the terms of the compromise, although if the terms of the compromise are proof as to the necessity of the rate of interest they would be proof to the same extent of the necessity of the principal of the loan. This is sufficient to determine the matter in favour of the defendants (appellants). Assuming, however, that the construction adopted by the High Court is correct, and accepting the view expressed in the judgment of the High Court that there was not in any sense a ratification of what was done by the father of defendant No. 1, their Lordships are unable to accept the conclusion that the compromise terms would constitute such proof of a justifying family necessity as would be sufficient to discharge the plaintiffs (respondents) from the onus of proving that there were special circumstances which entitled Hari Charan Mahto to pledge the family joint property on excessive terms of interest, or compound interest. The passage is, in any case, nothing more than an admission, for what it is worth, made by defendant No. 1, and if it were necessary to draw a conclusion of fact their Lordships could not agree in the conclusion of the High Court.

Their Lordships will humbly advise His Majesty that the appeal succeeds on the question of interest or compound interest, that the decree of the High Court be set aside and the case be remitted with a direction that the rate of interest be reduced to simple interest at 1 per cent. per mensem and that the plaintiffs (respondents) pay the costs of this appeal and in the High Court.

N. K. *Appeal accepted.*

Solicitors for the Appellants.—Messrs. *Barrow Rogers & Neville.*

Solicitor, for the Respondents.—Messrs. *Box & Co.*

PATNA HIGH COURT

APPEAL FROM ORIGINAL ORDER No. 226 OF 1921.

December 19, 1922.

Present.—Mr. Justice Jwala Prasad and Mr. Justice Ross.

T. BARCLEY—PETITIONER—APPELLANT

versus

Musammat DHONDAI AND ANOTHER DECREE-HOLDER—RESPONDENTS.

Execution of decree—Default in payment—In

BARCLEY v. DHONDAI.

Interest, liability to pay—Waiver—Appropriation of payments—Contract Act (IX of 1872), ss. 60, 61.

Where a date is fixed for payment of a sum and default is made in payment, the creditor is entitled to interest by way of compensation, even if there is no express agreement to pay interest from the date of default under the Interest Act. [p. 939, col. 2.]

Execution of a decree is only a mode of realisation and where interest is payable under a decree if default is made in payment of the decretal amount by a certain date, the failure of the decree-holder to execute the decree on default, does not disentitle him to get interest from the date of default. Nor does the fact that the decree-holder has accepted sums paid to him in part payment of the decree after the date of default show that he has waived his right to claim interest from the date of default. [p. 939, col. 1.]

The rule that, in the absence of a stipulation to the contrary, the creditor is entitled to appropriate payments made to him first towards interest, and the balance, if any, towards principal, applies to payments made towards satisfaction of a decree, whether the decree is an ordinary decree or an instalment decree, provided interest is payable under the decree. [p. 939, col. 2.]

(Case-law discussed.)

Appeal from an order of the Subordinate Judge, First Court, Muzaffarpore, dated the 8th June 1921.

Mr. *P. C. Ray*, for the Appellant.

Messrs. *Rai Guru Saran Prasad* and *Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of an order passed by the Subordinate Judge of Muzaffarpore, dated the 8th June 1921. The judgment-debtor filed an application under O. XXI, r. 2 of the Civil Procedure Code, stating that the entire decree was satisfied and that there was nothing due under the decree to the decree-holders. The decree-holder opposed the application and submitted an account stating that Rs. 258-6-11 was still due to them. The learned Subordinate Judge held that Rs. 248-8-3 was still due to the decree-holders, and to that extent he refused the application of the judgment-debtor. The judgment-debtor has now, therefore, come to this Court in appeal.

The decree in question was a mortgage-decree and was passed in terms of a compromise petition filed by the parties. Under the terms, which were incorporated into the decree, the entire decretal amount was fixed at Rs. 9,625, out of which Rs. 4,000 was to be paid to the plaintiffs, the decree-holders, by the defendant 1st party appellant within two months from the date of the decree: This sum was paid off and we are not concerned with it. As to the balance of Rs. 5,625 which was stated as being due by the defendant 2nd party to the defendant 1st party, the terms settled were as follows :

"The defendant 1st party will see that the said sum is deposited in Court by the defendant 2nd party in the name of the plaintiffs in satisfaction of a portion of the decretal amount in this suit within one month from this date (the date of the decree) and on failure of the defendant 1st party to deposit as aforesaid the said amount of Rs. 5,625 within the said period of one month, the defendant 1st party will himself pay the said amount to the plaintiff within the said period of two months from this date."

The compromise-decree is dated the 30th March 1920 The defendant 2nd party did not deposit the amount within the period mentioned above, and, t erefore, under the aforesaid clause the defendant 1st party was liable to pay to the plaintiffs, the decree-holders, the said sum of Rs. 5,625 within the period of two months from the date of the decree. On the 30th of September 1920, the defendant 1st party paid to the plaintiffs, the decree-holders, Rs. 4,841-5-1, and on the 21st of February 1921 he paid Rs. 784. These two payments make up Rs. 5,625 which was payable by the judgment-debtor appellant within two months from the date of the decree. The decree-holders, however, claim interest at the rate of one rupee per cent. per mensem from the date of default after the expiry of two months of the date of the decree, within which period the entire amount had to be paid. The judgment-debtor disputes the right of the decree-holders to claim interest. The question for determination, therefore, is whether the decree-holders are entitled to any interest. Now, the 5th clause of the compromise petition runs as follows :—

"That until the payment of the entire decretal amount the said annuity will remain attached. That if any portion of the decretal amount remains unpaid at the expiry of the said period of two months it will be open to the plaintiffs to execute the decree for the unrealised amount with interest at the rate of Re. 1 per cent. per

month from after the date of expiry of the said period of two months."

Now, there was a fixed date within which the full amount of Rs. 9,625 was to be paid. This was not done. The decree-holders are, therefore, entitled to compensation for the loss caused to them on account of the default of the judgment-debtor in the payment of the said amount within the time fixed for payment. Under the 5th clause of the compromise petition quoted above, it is clear that the decree-holders were entitled to execute the decree after two months of the expiry of the date of the decree, with interest at the rate of Re. 1 per cent. per mensem, if the entire sum was not paid off. There was clearly the intention of the parties that the unpaid balance after two months will carry interest at the rate aforesaid. The execution is a mode of realisation and the failure to execute does not disentitle the plaintiffs to get interest from the date of default. The fact that the decree-holders accepted amounts paid to them in part payment of their decree does not show that they waived their right to claim interest after the default made by the judgment-debtor. From the account submitted by them it appears that they appropriated the payments first towards interest due on date of payment and the balance towards principal. There is nothing to show that they waived their right to interest. They did not even file satisfaction petition in the Court, apparently because they thought that they were entitled to interest. They kept their right to the interest alive after the date of default. The authorities quoted by the learned Vakil on behalf of the appellant are not on all fours with the present case. *Thaithottathil Pokkar* v. *Ramachandra Shenoy* (1), *Chagan Chunilal* v. *Suka* (2), *Mumford* v. *Peal* (3), *Sakhawat Husain* v. *Gajadhar Prasad* (4), and *Radha Prasad Singh* v. *Bhagwan Rai* (5). On the other hand, the modified decree passed by the High Court of Allahabad in the case of *Sakhawat Husain* v. *Gajadhar Prasad* (4) shows that interest was allowed to the decree-holder on two *kists* in respect of which default had occurred from the date fixed for payment of the same. The case seems to be governed by the principles deducible from the following authorities :— *Murlidhar* v. *Mulchand* (6), *Mala yappaiyar* v. *Pichai Asari* (7) and *Ghumandi Lal* v. *Kanhaya Lal* (8) and *Rahas Behari Lal* v. *Bachchu Singh* (9). The principle seems to be that when a date is fixed for payment of a sum, the creditor is entitled to interest by way of compensation even if there is no express agreement to pay interest from the date of default under the Interest Act, and from the 5th clause of the compromise petition quoted above it is clear that there was in the present case a clear intention to charge interest at the rate of Re. 1. The charge of Re. 1 per cent. per mensem is not unreasonable compensation with regard to the circumstances of the case, as was observed in the case of *Murlidhar* v. *Mulchand* (6). The decree-holders had a right under clause 5 of the compromise petition to realise it summarily by execution of the decree instead of by a separate suit or any other proceeding, and consequently they had a right to appropriate part payments after the due date, first, towards interest, and the balance, if any, towards principal. This is the general rule of appropriation, *vide Parr's Banking Co.* v. *Yates* (10). The rule has been adopted in India from the earliest time; *Vide Goverdhun Das* v. *Waris Ali* (11), *Bamundoss Mookerjea* v. *Omeish Chunder Raee* (12), *Luchmeswar Sing Bahadur* v. *Syad Lutf Ali Khan* (13), *Gooroo Doss Dutt* v. *Ooma Churn Roy* (14), *Maharaja of Benares* v. *Har Narain Singh* (15), *Biswanath*

(1) 26 Ind. Cas. 124; 16 M. L. T. 478.
(2) 12 Ind. Cas. 384; 35 B 511; 13 Bom. L. R. 891.
(3) 2 A. 857; 1 Ind. Dec. (N. S.) 1091.
(4) 28 A. 622; 3 A. L. J. 469.
(5) 5 A. 289; A. W. N. (1883) 33; 3 Ind. Dec. (N. S.) 277.
(6) 52 Ind. Cas. 953.
(7) 28 Ind. Cas. 195; 2 L. W. 236; (1915) M. W. N. 208.
(8) 52 Ind. Cas. 320.
(9) 23 Ind. Cas. 871; 1 O L. J. 50.
(10) (1898) 2 Q. B. 460 at p. 466; 67 L. J. Q. B. 851; 47 W. R. 42; 79 L T 321.
(11) (1827) 4 Sel Rep 330; 7 Ind. Dec. (O. S.) 246.
(12 6 M. I. A. 289; 1 Sar. P. C. J. 542; 19 E. R. 108
(13) 8 B. L. R. 110; 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461.
(14) 22 W. R. 525.
(15) 28 A 25; A. W. N. (1905) 167; 2 A. L. J. 585.

Bhattacharjee v. *Sameswar Sarma* (16), *Meka Venkatadri Appa Row Bahadur Zemindar Garu* v. *Raja Parthassrathy Appa Row Bahadur Zemindar Garu* (17) and *Nemichand* v. *Radha Kishen* (18) and sections 60 and 61 of the Indian Contract Act. This is so whether the decree be an ordinary decree or an instalment decree, as in the present case, provided the interest is payable under the decree. We have already seen that under the terms of the decree interest was payable though the right for realizing it by execution proceedings was mentioned in the decree for the benefit of the decree-holders.

There is no substance also in the contention of the appellant that the calculation of interest is unreasonable or that compound interest was charged in the account. Such a calculation was upheld in the aforesaid case of *Biswanath Bathacharjee* v. *Someswar Sarma* (16).

For all these reasons we dismiss the appeal with costs.

Ross, J.—I agree.

Z. K. *Appeal dismissed.*

(16) 41 Ind. Cas. 348; 21 C. W. N. 1055.
(17) 61 Ind. Cas. 31; 26 C. W. N. 33; (1921) M. W. N. 347, 19 A. L. J. 465; 33 C. L. J. 447; 40 M. L. J. 549; 23 Bom. L. R. 644; 3 U. P. L. R. (P. C.) 27; 44 M. 570; 14 L. W. 25; 30 M. L. T. 36; (1922) A. I. R. (P. C.) 233 (P. C.).
(18) 63 Ind. Cas. 904; 26 C. W. N. 153; (1921) M. W. N. 411; 14 L. W. 391; 30 M. L. T. 39; 48 C. 839; (1922) A. I. R. (P. C.) 26 (P. C.)

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 26 OF 1920.

January 2, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Babu JAI PRAGASH SINGH—DEFENDANT NO. 17—APPELLANT

versus

Srimati RUPMANJAR DASI AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS, RAM BAHADUR AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Mortgage—Subrogation—Intention—Principles applicable.

Where there is nothing on the record to show that a subsequent mortgagee who paid off a prior charge on the property intended to keep it alive for his benefit, the prior charge must be deemed to have been extinguished on payment. [p. 941, col. 2.]

In a Court of Equity, it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, Equity will, in the absence of any declaration of intention, destroy it, but if there be any reason for keeping it alive, such as the existence of another incumbrance, Equity will not destroy it. [p. 941, col. 2.]

Mohesh Lal v. *Mohant Bawan Das*, 9 C. 961; 13 C. L. R. 221; 10 I. A. 62; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424, 4 Ind. Dec. (N. S.) 1291 (P. C.), *Adams* v. *Angell*, (1877) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334, referred to.

Appeal from a decision of the Officiating Subordinate Judge, Second Court, Arrah, dated the 2nd June 1919.

Mr. *Siv Saran Lal*, for the Appellant.

Mr. *S. C. Mitra*, the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant No. 17 against the decree of the Officiating Subordinate Judge of Arrah, dated the 2nd June 1919, and the only question raised in the appeal is as regards the right of priority between the different mortgagees. The suit is based on four mortgage-bonds executed by the mortgagors-defendants in favour of the plaintiffs. Three of these bonds are dated the 17th November 1904 and the fourth is dated 18th November 1904. The appellant's bond is dated 5th April 1902 and the appellant contends that he has got a right of priority over the plaintiffs inasmuch as his money went to pay off a prior bond, dated the 26th April 1890, of Kashi Nath Chaudhary. The learned Subordinate Judge has found that the appellant has failed to prove that the money advanced by him went to satisfy the previous mortgage of 1890 and, further, that there is nothing to show that there was any intention on the part of the appellant to keep the prior mortgage of 1890 alive. It appears that the money advanced under the plaintiffs'

first bond of 17th November 1904 went to satisfy three bonds dated 6th January 1902, 4th February 1902 and 4th March 1902 in favour of one Mangar Ram and that advanced under their bonds, Exhibits 1A and 1B, of 1904 went to satisfy another mortgage of one Ram Prasad Chaudhury dated the 5th May 1893. In the plaintiffs' bond there is a distinct recital that these prior bonds of Mangar Ram and Ram Prasad Chaudhury were kept alive and the learned Subordinate Judge has held that, as the money advanced by the plaintiffs went to pay off the prior mortgages of 1893 and 1902, the plaintiffs have got a right of priority over the defendant No. 17.

It has been contended by the learned Vakil for the appellant that there is evidence on the record to show that the money advanced by the appellant went to satisfy the bond of 26th April 1890 and in support of this contention he relies upon Exhibit C1, certified copy of the bond; Exhibit D, judgment in the suit on the above bond, Exhibit E, certified copy of the decree passed on that judgment and Exhibit F, certified copy of the Register of Civil Suits, which shows that a sum of Rs. 7,500 was paid in full satisfaction of the bond of Kashi Nath Chaudhury. Now, none of these documents goes to show that the sum of Rs. 7,200 advanced by the the defendant No. 17 went to pay off the debt of Kashi Nath Chaudhury. It has been contended that, although execution was taken out for the realisation of a sum of Rs. 7,500, on the date on which the appellant's bond was executed, a sum of Rs. 7,200 only was due upon Kashi Nath Chaudhury's bond and the money advanced by the appellant went to completely satisfy that prior bond. But the documents relied upon are not sufficient to come to this conclusion; nor is the oral evidence of any value to show that the money advanced by the appellant went to satisfy the whole of the debt due upon Kashi Nath's bond. I, therefore, agree with the learned Subordinate Judge in his finding that the evidence is not sufficient to come to a finding that the prior debt was paid off by the money advanced by the appellant. All that can be said upon the evidence is, that it is likely that a sum of Rs. 7,200 went to partly satisfy the prior debt, but that is not sufficient to subrogate the defendant No. 17 into the position of the prior mortgagee, Kashi Nath Chaudhury. Then, there is no evidence on the record to show that the defendant No. 17 was even aware of the prior mortgages in favour of Mangar Ram and other persons which were satisfied by the debts advanced by the plaintiffs, and, that being so, there could be no intention on the part of the defendant No. 17 to keep the prior mortgage of Kashi Nath Chaudhury alive. The position, therefore, is that we have nothing on the record to show that there was any intention on the part of the appellant to keep the mortgage of Kashi Nath alive and, therefore, he has no right to be substituted in the place of Kashi Nath. In this connection, I may refer to the observations of the Privy Council in the case of *Mohesh Lal* v. *Mohant Bawan Das* (1), where their Lordships, quoting from the judgment in the case of *Adams* v. *Angell* (2), observed: "In a Court of Equity, it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance, for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, Equity will, in the absence of any declaration of intention, destroy it, but if there be any reason for keeping it alive, such as the existence of another incumbrance, Equity will not destroy it." Here we find no reason disclosed upon the evidence from which an intention could be presumed on the part of the appellant to

(1) 9 C. 901; 13 C. L. R. 221; 10 I. A. 62; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 (P. C.).

(2) (1877) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334.

keep alive the prior bond of Kashi Nath Chaudhury and, therefore, by the satisfaction of the decree obtained by Kashi Nath the mortgage in his favour was extinguished and it was not kept alive for the benefit of the appellant.

Another point has been taken by the learned Vakil for the appellant to the effect that the learned Subordinate Judge ought to have determined the several liabilities as between the defendants Nos. 15 and 16 and the appellant. It appears that only two properties were mortgaged to the appellant, whereas some other properties also were mortgaged to the plaintiffs, and the defendants Nos. 15 and 16 are interested in the other properties, and the contention was that the extent of the several liabilities of the defendants Nos. 15, 16 and 17 ought to have been distinctly found by the learned Subordinate Judge. But that is a question of contribution between the several subsequent mortgagees and is a question which is foreign to the present suit. It would be open to the appellant, if he satisfies the whole of the decree of the plaintiffs, to institute a properly framed suit for contribution and in such a suit the several liabilities will have to be determined. The appeal is, therefore, dismissed with costs.

Das, J.—I agree.

Z. K. & N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 116 OF 1921.
January 17, 1922.
Present:—Mr. Hallifax, A. J. C.
SHANKER—PLAINTIFF—APPELLANT
versus
RANGUBAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Appeal, second—Acquiescence—Question of fact or law,

The findings of a lower Appellate Court are final upon the facts from which acquiesence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found.

Beni Ram v. *Kundan Lal*, 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.), followed.

Second appeal from a decree of the Additional District Judge, Nagpur, dated the 16th October 1920, in Civil Appeal No. 123 of 1920.

Mr. *A. N. Chorghade*, for the Appellant.
Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—The finding of both the Courts below appears to be that the plaintiff and his servants constantly complained verbally to the defendants, while the latter were building their new house, that they were encroaching on his land, but he never pointed out the exact extent of the encroachment, which was in every case less than one foot, and never sent them a written notice of objection till after their building was finished, and, therefore, he "acquiesced" in it and "stood by quietly." This is nothing short of a contradiction in terms. The decision, however, even if it were reasonably possible, would not be binding on this Court. As was laid down by the Privy Council in *Beni Ram* v. *Kundan Lal* (1), the findings of the lower Appellate Court are final upon "the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found," and from the facts found the only possible inference is that the plaintiff never stood quietly by and allowed the defendants to build their walls where they did. On the contrary, he protested vigorously and constantly, as both the lower Courts have found, that the land was his and they had no right to build there. How little either of the learned Judges understood the case is clear from the references in both judgments to the alleged damage done to the latrine *pha* by the back flow of the water from the defendants' roof, after it had reached the ground, which was caused by the stoppage at *da* and to that in the judgment of the learned Munsif to the narrow open

(1) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

lane *da* on which the defendants have stacked fuel, as a place on which the plaintiff has acquiesced in the erection of a costly structure by them.

2 The reliefs which the plaintiff now claims have been reduced to the following four:—

(*i*) Possession of the narrow strip on the West of his latrine *pha* or at least an injunction forbidding the defendants to interfere with his free user of it by stacking their fuel there, similar to the injunction granted to him in respect of the lane *a*.

(*ii*) Possession of the patch *ga* on the South side of the latrine *pha* which appears to be the Eastern end on the lane *a*.

(*iii*) Possession of the eleven inch strip on which the defendants have encroached by building their Southern wall on it.

(*iv*) An injunction restraining the defendants from preventing the plaintiff re-constructing the Western wall of his compound, which would lie against the Eastern wall of their house.

All the considerations which are now admitted to justify the injunction in respect of the lane, apply with exactly equal force to the smaller lane *da*. The plaintiff's latrine *da* is cleaned from the West and *da* is merely a continuation of the passage through *ga* by which it is approached. As to the patch *ga* what little evidence is there on the record is much too vague, to form a basis for any decision at all. It is not included in any of the title-deeds of either party and, though the plaintiff's witnesses say something about a cattle-shed having once existed on the South of the latrine *pha*, it is impossible to say that they are referring to the patch *ga*.

3. The evidence on which we have to decide whether the defendant's Southern wall has or has not been built eleven inches too far to the South, so as to encroach on the plaintiff's land, consists of Municipal maps and what are called maps, but are really only statements of boundaries and dimensions, in sale-deeds. The dimensions stated in the latter are notoriously mere approximations, in which, for instance, a third of a cubit, which is about six inches, might be stated as a quarter or as a half, giving itself a range of inaccuracy of more than four inches. It is also well-known that the cubit is anything between seventeen and nineteen inches, and might even occasionally be still less or still more. On the Municipal maps no dimensions are stated, and we are asked to ascertain the precise dimensions of a house about 18 feet from North to South, by measurement from a tracing which is itself liable to differ from the original, made on cloth which is liable to stretch slightly, from a plan in which one inch represents 44 feet. It is obviously impossible to detect a difference of one-forty-fourth of an inch on such a map. An error of the thickness of the line in making the tracing, which is probably a tracing of a tracing, would vitiate the whole result. The plaintiff has filed in this Court a map on which dimensions are stated. This is a copy of the map attached by the defendants to their application to the Municipal Committee for permission to build the house about which the plaintiff is complaining. But that plan shows the width of the house from North to South, including the lane *a* to be 18 feet 6 inches and the plaintiff's own map filed with his plaint shows that the house they have actually built is only 17 feet and 4 inches.

4. As to the plaintiff's wall on the West of his compound, where there is already the Eastern wall of the defendant's new house, though it was not admitted here that his only reason for desiring to build that wall was a desire to annoy the defendants, no other reason could be suggested. Nor was it seriously contended that he had proved that the defendants had ever really interfered with his right to build what he chose on his own land. No Court could possibly grant him such an injunction as that for which he asks in this respect. In the result then the decree of the First Court will be modified by the addition to it of an injunction restraining the defendants from interfering with the plaintiff's right to use the lane *ga* for the purpose of having his latrine cleaned. Each party will pay its own costs in all three Courts.

G. R. D.

Decree modified.

BRIJ RATAN DAS *v.* RAGHUNANDAN GIR.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 94 OF 1920.

January 16, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Babu BRIJ RATAN DAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

RAGHUNANDAN GIR AND OTHERS— DEFENDANTS—RESPONDENTS.

Estoppel—Mortgage suit—Mortgagor, whether can set up jus tertii.

For the purpose of determining the issues in a mortgage suit the Court is not concerned with the question whether some third party has a title adverse to that of the mortgagor. [p. 947, cols. 1 & 2.]

A mortgagor is estopped from denying, in answer to a suit on the mortgage, the interest which he represented in the mortgage-deed as his own proprietary right. [p 947, col. 1.]

Obiter.—Even where a mortgagor is a trustee acting in a public capacity and not for his own benefit he is estopped from denying his title to the mortgaged property and cannot set up as a defence against the mortgagee that the property mortgaged is trust property which he had no right to mortgage. [p. 947, col. 1.]

Doe d. Levy v. *Horne*, (1842) 3 Q. B. 760; 12 L. J. Q. B. 72; 3 G. & D. 230; 7 Jur. 38; 61 R. R. 397; 114 E. R. 698 and *Mahamaya Debi* v. *Haridas Haldar*, 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183, relied upon.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 7th February 1920.

Messrs. *L. N. Singh, N. C. Sinha, Banwari Lal* and *S. S. Bose*, for the Appellants.

Messrs. *S. M. Mullick* and *Kailaspati*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Gaya, dated the 7th February 1920.

The appellant, Brij Ratan Das, and his son, Raj Kumar Lal, who is joint with him in estate, instituted the suit as plaintiffs on the 4th March 1919 to enforce a mortgage-bond executed in favour of Brij Ratan by the first defendant, Goshain Ragunandan Gir, on the 22nd October 1910 to secure payment of a sum of Rs. 4,850-14-6, the amount found due on an adjustment of accounts between the parties, together with interest. The property hypothecated under the bond is described by the mortgagor in the instrument itself as "The entire 16-annas of *brit* and the temple of Sri Pita Maheshwarji with the orchards and houses appertaining to it and all sorts of income and profits accruing therefrom situate in *Mohalla* Utarmanus appertaining to *Mohalla* Ramana, ward No. 5, one of the quarters of Sahebganj, Pargana and District Gaya, constituting my proprietary interest and held by me in occupancy right and which has been acquired by me personally, the boundaries whereof are given below, *minihai-mafi* land appertaining to the temple and the said temple."

The defendants other than the mortgagor are his brother, Wazir Gir and other members of his family, most of whom are minors. Raghunandan Gir, the mortgagor, filed a written statement but took no part in the trial and was not represented in this appeal. His brother, the second defendant, as also the minors, filed written statements and contested the suit. It was pleaded that the plaintiffs had no cause of action, that the Court-fee was insufficient, that the suit was barred by limitation, that it was bad for misjoinder of parties, that the bond was executed by the first defendant under fraud and undue influence of the plaintiffs, that there was no consideration for the bond and that it was not genuine and valid, that the loan covered by the bond was not contracted for legal necessity and that the minors were not benefited thereby and were not liable for the same, that the rate of interest was usurious and unconscionable and by way of penalty, that the properties mortgaged were inalienable and the mortgagor had no right to mortgage them. A plea of payment was also set up by the first and second defendants and the suit was challenged as being invalid on the ground of champerty and as against public policy. Most of those pleas, as to which issues were framed, were abandoned at the trial and the only questions left for determination by the learned Subordinate Judge were those which related to limitation, the genuineness and validity of the bond and the consideration therefor, the question of legal necessity, the question relating to interest and whether the properties were inalienable so as to preclude the mortgagor's right to mortgage them.

All these issues except the last were determined in favour of the plaintiffs. The last mentioned issue, however, was one which, in the opinion of the learned Subordinate

Judge went to the root of the whole claim and was determined in favour of the defendants. The learned Judge found that the properties mortgaged were inalienable, that the defendant Raghunandan Gir had no right to mortgage them and that the mortgage was absolutely void.

From this decision the plaintiffs have appealed and contend in the first place that it was not competent to the mortgagor to dispute the title which he himself had granted or to set up against the mortgagee the paramount title of a third party, even though the latter might eventually prove a right to recover the property. They contend in the second place that the Judge was not justified upon the evidence arriving at the conclusion that the property was inalienable.

A considerable volume of evidence was admitted at the trial to prove that the temple of Pita Meshwarji, the subject of the mortgage, had existed from time immemorial and was a place of public worship for the whole Hindu community who were entitled to worship there without let or hindrance and that the temple and the property appertaining thereto were *debuttar* property dedicated to the idol. Admittedly, the temple is an ancient one which has been in existence from time immemorial and there is no evidence to show its origin. No deed of dedication is in existence and the terms and conditions upon which it was founded are unknown. The oral evidence proved that as long as could be remembered it had been a place of public worship, that many people contributed to its upkeep and adornment both by donations and periodical subscriptions and that it had been repaired and decorated from time to time by members of the public who were in the habit of worshipping therein. The documentary evidence relating to it went back to the year 1852 when *Mussammat* Sita Dayi, the widow of one Bihari Lal, a former Pujari of the temple, executed a deed of gift of her property including her rights in the said temple to one Chaman Lal who appears to have been the adopted son of her husband, and from that date until the year 1896 Chaman Lal appears to have remained in possession providing for the performance of the Puja by appointing Pujaries at a fixed salary and himself collecting the surplus profits arising from the offerings and other sources of income of the property. His right appears to have been disputed on more than one occasion by others who claimed the rights of Pujari of the temple and disputed the validity of the gift made by *Mussammat* Sita Dayi in 1852, but throughout Chaman Lal successfully maintained his title to and possession of the property. By his Will, dated the 30th June 1896, Chaman Lal, after reciting the gift made by *Mussammat* Sita Dayi in 1852, left the whole of his property including all the proceeds arising from *dochhinz brit* and Puja of the temple to his daughter *Mussammat* Aina Dayi for her life and, after her death, to her son Kashi Lal directing that he should be the absolute proprietor of the demised properties and should acquire all the rights and powers which the testator had in respect thereof. The interest of Kashi Lal became vested in him on his mother's death in 1899 when he was still a minor. Ram Lal Pahari was in that year appointed his guardian, and in the application for the appointment of the guardian of the minor a list of his properties included the proprietary interest *sir* of the temple of Pita Maheshwarji. Kashi Lal in September 1905 mortgaged, amongst other property, the 16-annas *brit* of the temple of Pita Maheshwarji to one Sham Lal Mahto to secure a loan of Rs. 800. Again in April 1907, he transferred by usufructuary mortgage-bond to the defendant Raghunandan Gir the entire 16-annas of the temple of ri Pita Maheshwariji, which he describes as belonging to him in his ancestral proprietary interest and recites that in the said temple he has got ancestral *brit* right and has been in possession and occupation thereof without participation and possession by any one else and has been enjoying the proceeds of the same. A few days later he also mortgaged, amongst other property, the 16-annas *brit* attached to the temple of Sri Pita Maheshwarji including the orchards and houses belonging thereto, described as belonging to him in his proprietary interest, to the plaintiff Brij Ratan Das to secure a loan of Rs. 1,500. Finally, in 1909 by a *kobala*

dated the 15th April that year, Kashi Lal having become involved in debt sold to the defendant Raghunandan Gir the entire 16-annas of the *brit* attached to the temple of Sri Pita Maheshwarji and the orchards and houses appertaining thereto, described as belonging to the executant in his proprietary interest, for the sum of Rs. 6,998. This *kobala* stated: "It is desirable that the said vendee should enter upon possession of the property sold as absolute owner thereof and continue to appropriate all profits and income arising from the said temple, orchards and houses. All rights which I have in respect of executing a sale-deed as well as other deeds of any nature whatsoever of making management for the benefit of the said temple and of performing worship either myself or through other persons according to my wish shall pass into the said vendee in their entirety." The property sold is described thus: "Entire 16-annas of *brit* attached to the temple of Sri Mahadevaji, orchards, houses and all sorts of income and proceeds belonging to the said temple being the ancestral property of me, the executant." The defendant Raghunandan Gir having thus acquired his interest executed the mortgage-bond in suit in favour of the plaintiff on the 22nd October 1910.

It is important to consider the terms of the mortgage-bond. It recites at considerable length the history of the said temple already referred to from the year 1852 and refers to each of the transactions as having been a transfer of the proprietary interest. The gift made by Sita Dayi to Chaman Lal in 1852 is recited as a gift of the entire 16-annas of the *brit* attached to the temple, the flower garden and houses appertaining to it with the right to appropriate the income arising from the temple and the right to perform Pujapat in the said temple belonging to *Mussammat* Sita Dayi in her proprietary interest. It further recites that in a suit by Mohan Nath Kanthia claiming to be the proprietor of the temple against Chaman Lal in 1886, it was decided that Chaman Lal Pandi was the absolute proprietor of the temple and entitled to appropriate the income accruing therefrom. It then goes on to refer in great detail to all the other transactions which have been referred to, and which need not be repeated, and states, "As security for payment of the said loan, principal with interest, I have mortgaged and hypothecated the entire 16-annas of *brit* and temple and the right to appropriate the income derived from the temple of Sri Pita Maheshwarji owned and possessed by me and in respect of which I have acquired proprietary interest and occupancy right as well as the flower garden and houses attached to the said temple which I, the executant, have purchased from Kashi Lal Pande, the former proprietor under a registered deed of absolute sale dated the 15th April 1909." The mortgaged property is also described in similar terms at the end of the deed as "my proprietary interest and held by me in occupancy right and which has been acquired by me personally."

Having regard to the documentary evidence in the case from which it appears that since the year 1852 the property in suit has been disposed of or dealt with by those from time to time in possession as if they had a proprietary and transferable interest therein, there is much to be said for the appellants' contention that it is not made out that the property is inalienable or that the mortgagor had no right to mortgage the same. It is not, however, in my opinion, necessary to determine this question, for I consider that the appellants must succeed upon the first point. The respondents by the plea taken are in fact endeavouring to set up the *jus tertii* and to plead as between the mortgagor and his mortgagee the paramount title of another. The Court is not concerned for the purpose of determining the issues in a mortgage suit whether some third party has a title adverse to that of the mortgagor. It was contended on behalf of the respondents that Raghunandan Gir, the first defendant, was really in the position of a trustee in regard to the property in suit and, therefore, had no powers of alienation contrary to the terms of the trust and that no question of estoppel could arise in such a case. Had the mortgagor purported to transfer the property in the capacity of trustee, this question would have arisen for determination. There is authority both in this country and in

England for the proposition that even where the mortgagors are trustees acting in a public capacity and not for their own benefit they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. See *Doe d. Levy* v. *Horne* (1), *Mahamaya Debi* v. *Haridas Haldar* (2) and Fisher's Law of Mortgage, section 872. It is unnecessary, however, in the present instance to decide this wider issue, as the mortgage-deed clearly and unmistakably purports to be executed by the mortgagor as the proprietor of the property in his own interest and he is estopped from denying the interest which he represented as his own proprietary right in the deed. With great respect to the learned Subordinate Judge, I think that he ought not to have embarked upon a consideration of the question of the defendant's interest in the present suit. If it should hereafter turn out either that the Hindu public or anybody else is interested as proprietor of the mortgaged property or has a paramount title adverse to that of the mortgagor the decision in this suit will not be binding upon such a person, and if in fact there is a paramount title in anybody else, it is competent to such person to take proper steps at the proper time to protect his interests. In my opinion, this appeal should be allowed with costs against the respondents who have appeared and contested the appeal. The judgment and decree of the learned Subordinate Judge should be set aside and in lieu thereof there will be the usual mortgage-decree for the amount claimed with interest at the bond rate up to the expiry of the days of grace, which in this case will be three months from the date of the this decree, and costs, and further interest thereafter on the decretal amount so found due and costs at 6 per cent. per annum until realisation.

Foster, J.—I agree. As to the mortgagor's plea that the mortgaged property is held in trust for the Hindu public and the idol, in my opinion, there can be no doubt that it lies outside the scope of the mortgage suit, so far as it asserts a third person's title. A mortgage-decree for sale does not purport to assure a good title to the prospective auction-purchaser.

As to the plea that the property is inalienable on the ground that the sale of a public endowment and its emoluments is against public policy, my opinion is that the mortgagor is in this case estopped by his own deed. A material question of law would, I concede, have arisen, had the defendant expressly mortgaged the emoluments of a public endowment; for there are decisions which declare such properties inalienable. There are English decisions which have removed the bar of estoppel where the mortgagor in his deed has contravened Legislative enactments limiting his authority and where he has in the mortgage suit raised the question of alienability. So a plea of public policy, based on Indian decisions, might possibly be brought into analogy with those English decisions. But, in my opinion, we have no such case before us. A close study of the whole mortgage-deed, the subject-matter of the suit, will, I think, show that the private ownership of the mortgagor was emphasized by frequent eiteration. Much has been made of the me ning of certai terms in the deed implying (in the circumstances of this case) that the income is derived from daily offerings made by devotees to the idol, but, in my opinion, this is not inconsistent with private ownership. So, having regard to the general tenor of the mortgage-deed which indicates a mortgage of private property, I do not think that any question of public policy can be raised in the present suit, and the defendant is estopped by his own act and deed. If in fact it is a public endowment, the Hindu public and the idol have identical interest, and they have numerous remedies, both under special enactments and the general provisions of law.

Z. K.

Decree set aside.

(1) (1842) 3 Q. B. 760; 12 L. J. Q. B. 72; 3 G. & D. 239; 7 Jur. 38; 61 R. R. 397; 114 E. R 698.
(2) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183.

LAL BIHARI SINGH *v.* GUR PRASAD SINGH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 101 1920.

January 31, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Babu LAL BIHARI SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Babu GUR PRASAD SINGH AND OTHERS —DEFENDANTS—RESPONDENTS.

Res judicata—*Mortgage-suit—Prior mortgagee made party—Priority disputed—Civil Procedure Code (Act V of 1908) s. 11, Expl. IV.*

Where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace his prior title and to postpone it to the title of the plaintiff, it is the duty of the prior mortgagee to prove his prior mortgage. If he fails to contest the suit, the decision in the suit will operate as *res judicata* against him. [p. 950, col. 1.]

Lachmi Narayan Marwari v. *Bhagwati Singh*, 58 Ind. Cas. 33; 1 P. L. T. 629, distinguished.

Radha Kishun v. *Khurshed Hossein*, 55 Ind. Cas. 959; 47 C. 662; 18 A. L. J. 401; (1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 28 M. L. T. 415; 25 C. W. N. 417 (P. C), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh*, 14 Ind. Cas. 496, 30 C. 527; 15 C. L. J. 411; 11 M. L. T. 295; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 22 M. L. J. 468; 39 I. A. 68 (P. C.) and *Sri Gopal* v. *Pirthi Singh*, 24 A. 429; 4 Bom. L.R. 827, 6 C. W. N. 889; 29 I. A. 118, 8 Sar. P. C. J. 293 (P. C.), relied upon.

Appeal from a decision of the Subordinate Judge, Second Court, Monghyr, dated the 21st January 1920.

Mr. *S. M.* Mullick for *Rai Guru Saran Prasad*, for the Appellants.

Messrs. *K. P. Jayaswal* and *Bimla Charan Sinha*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the plaintiffs against a decree of the Subordinate Judge of Monghyr dismissing their suit to enforce a mortgage-bond. The bond is dated the 1st November 1903, and it was executed by the defendants Nos. 1 and 2 and one Hargobind Prasad Singh, father of the defendants Nos. 5 and 6, in favour of Amrit Singh and Uzir Singh, whose heirs and representatives the plaintiffs are, for a sum of Rs. 2,000. The property mortgaged therein was a 2 annas 7 *dams* 10 *cowries* 11 *bouris* share of village Asthawan. Defendants Nos. 3 to 6 are the members of the family of defendants Nos. 1 and 2 and defendants Nos. 7 to 15 are alleged to be subsequent purchasers or mortgagees. The suit was contested by the defendant No. 11 and by the guardian *ad litem* of defendant No. 6. The other defendants did not appear. We are in this appeal concerned only with the defendant No. 11, who raised various pleas in bar of the suit, the principal pleas being that the suit was barred by *res judicata* and that the suit was bad for non-joinder of parties. The learned Subordinate Judge has dismissed the suit holding that it was barred by *res judicata* and that it was bad for non-joinder of parties. Three points have been taken by the learned Vakil for the plaintiffs-appellants: first, that the Court below was wrong in holding that the suit was barred by *res judicata*; second, that it was wrong in holding that the suit was bad for non-joinder of parties; and, thirdly, the Court below was wrong in dismissing the whole suit, whereas he ought in any event to have passed a decree for sale of the share of the mortgaged properties not covered by the mortgage of the defendant No. 11.

The first point of *res judicata* arises under the following circumstances: It appears that Babu Bihari Lal, a cousin of defendant No. 11, had a mortage dated the 26th January 1908 over 1 anna 8 *dams* 10 *cowries* of *Mouza* Asthawan executed in his favour by the predecessors of defendants Nos. 1 and 2 for a sum of Rs. 625. After the death of Babu Bihari Lal, the defendant No. 11 brought a suit on the said mortgage. That was Suit No. 78 of 1914 and a certified copy of the plaint of that suit has been produced and marked as Exhibit 5 in this case. In that suit Amrit Singh and Kamta Prasad Singh, who are plaintiffs Nos. 1 and 7 in the present action, were impleaded as defendants and in the plaint it was alleged that they were subsequent mortgagees inasmuch as the plaintiff's (the present defendant No. 11) mortgage was executed to satisfy a prior mortgage of the year 1895 and, therefore, he acquired a priority over mortgage of the present plaintiffs. Kamta Prasad Singh did not appear in that suit, but Amrit Singh filed a written statement, which is marked Exhibit 4 in this case, and in that written statement Amrit Singh alleged that

his mortgage was prior to the mortgage of defendant No. 11 and the latter could claim no priority over him After filing this written statement, Amrit Singh or Kamta Prasad Singh never appeared in this suit and never took any steps to prove their priority over the mortgage of the defendant No. 11. The learned Subordinate Judge who decided the suit in his judgment, dated the 5th May 1916, which is marked Exhibit 7 in this case proceeded on the assumption that Amrit Singh and Kamta Prasad Singh were subsequent mortgagees and the decree in that suit, which is marked Exhibit 6 in this case, directed "that the defendants do pay the decretal amount within four months and that in case of default the same be realized by sale of the mortgaged property." Thereafter, Amrit Singh filed a petition on the 20th July 1916 for a re-hearing of the suit under O. IX, r. 13, Civil Procedure Code but this application was also dismissed. Therefore, the position was that in the Suit No. 78 of 1914 the defendant No. 11 clearly alleged that his mortgage was prior to that of the present plaintiffs and the decree in that suit directed the sale of the property in the event of the defendants in that suit, including the plaintiffs in the present suit, failing to pay up the decretal amount. The decree was executed in due course and the mortgage property 1 anna 8 *dams* 10 *cowries* in Asthawan was sold and purchased by the defendant No. 11. The plaintiffs in the present suit contend that, as their mortgage was in fact prior to that of the defendant No. 11, they were not necessary parties in the suit of the defendant No. 11 and that it was not necessary for them to prove their 'priority in that suit and, therefore, the decree passed in that suit does not operate as *res judicata* in the present suit. This contention cannot be sustained. It may be that, as a matter of fact, the plaintiffs' mortgage was prior in time to that of the defendant No. 11. It is very likely that the allegation of the defendant No. 11 in his plaint of the Suit of 1914 that he was entitled to priority on account of the money advanced under his bond being used in satisfying a prior debt, was false. But it was on the allegation, true or false, that the plaintiffs in the present action had a subsequent mortgage that they were impleaded as parties in that suit. It was their duty in that suit to prove that that allegation was incorrect. The mere filing of the written statement in that suit was not sufficient. It was no proof of priority but a mere allegation of priority, and once their mortgage was attacked as being subsequent to that of the defendant No. 11, it was their bounden duty to prove that it was not so. Having failed to appear and prove their priority in the suit of 1914, the plaintiffs, in my opinion, are now estopped from claiming their priority in the present suit. Reliance has been placed by the learned Vakil for the appellants on the case of *Lachmi Narayan Marwari* v. *Bhagwati Singh* (1), but in that case it does not appear that in the suit of the subsequent mortgagee wherein the prior mortgagee was made a party, there was any allegation disputing his priority, and from the report of the judgment of that case it does not appear what was the form of the decree passed in that case. As a matter of fact, from the extract of the judgment of the Deputy Commissioner Subordinate Judge given in the report of that case it appears that the question of priority was left open. In any event, Mr. Justice Sultan Ahmad in that case clearly says: "At the same time, the puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making the prior mortgagee a party should be clearly stated; but, if no purpose is given in the plaint or provided for in the decree, the prior mortgagee will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor *minus* the interest of the first mortgagee, and in such a suit, in my opinion, no investigation as to the validity or extent of the prior mortgage can possibly be made." In the case now before us the purpose of making the present plaintiffs a party in the suit of defendant No. 11 was clearly stated and the decree clearly directed the present plaintiffs to pay up the decree and, in the event of their failure, a sale of the mortgaged property was ordered. This case, therefore, does

(1) 58 Ind. Cas. 33; 1 P. L. T. 629.

not help the appellants. Mr. Sushil Madhab Mullick, for the appellants, also relies upon the case of *Radha Kishun* v. *Khurshed Hossein* (2). That case far from supporting the plaintiffs is an authority in favour of the proposition that where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace the prior title and to postpone it to the title of the plaintiff it is the duty of the prior mortgagee to prove his prior mortgage. In that case the prior mortgagee was joined as a defendant, but it did not appear whether any and what relief was sought against him. The plaint of the prior suit was not produced and their Lordships held that, in the absence of any proof as to the allegation upon which the prior mortgagee was made a party, it must be assumed that he was made a party as a prior mortgagee and the case came within the terms of section 96 of the Transfer of Property Act. Sir Lawrence Jenkins, in delivering the judgment, observed as follows: "Consequently, to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bukhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bukhtaur Mull's priority." In the present case, the defendant No. 11 in the former suit did allege a distinct case in the plaint in derogation of the present plaintiff's priority. Therefore, this case supports the view taken by me and it does not help the plaintiffs-appellants. In this connection reference may be made to the case of *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3) where their Lordships of the Judicial Committee of the Privy Council in dealing with a case similar to the present case held that it was incumbent on the prior mortgagee to set up his rights under the prior mortgage, and not having done so, section 13, Explanation 2, of the Code of Civil Procedure, 1882, applied and that the claim of the plaintiffs was barred. Reference may also be made in this connection to the the case of *Sri Gopal* v. *Pirthi Singh* (4) where a similar view was taken. I, therefore, agree with the Subordinate Judge in holding that the present suit in so far as it relates to 1 anna 8 *dams* and 10 *cowris* of Asthawa is barred by *res judicata*.

As regards the second point taken by the learned Vakil for the appellant, it appears that Gopal Saran, the defendant No. 3, has a minor son, named Chinta Saran, who has not been made a party in this suit. The learned Subordinate Judge has held that the whole suit is bad inasmuch as Chinta Saran is a necessary party and that on account of this defect the whole suit ought to be dismissed. The learned Counsel for the respondent does not support this part of the judgment and, in my opinion, having regard to the circumstances of the case, it can safely be held that Gopal Saran represents the interests of his son and that the suit ought not to fail on this ground.

As regards the third point, as I have already stated, the property mortgaged in the bond of the plaintiffs was a 2 annas 17 *dams* and 15 *cowris* 11 *bouris* share of the village Asthawan and only 1 anna 8 *dams* 10 *cowris* was mortgaged in the bond of the defendant No. 11 and purchased by him. There is no reason why the plaintiffs should not get a mortgage decree for the sale of the remaining share of 1 anna 9 *dams* 5 *cowris* 11 *bouris* of Asthawan.

The result, therefore, is that the decree of the Court below will be modified and an ordinary mortgage-decree will be passed in favour of the plaintiffs for the sum that may be found due on an account being taken for principal and interest at the bond rate up to the date of decree and for four months thereafter. The defendants, other than the defendant No. 11, must pay up the amount within four months from this date, failing therein 1 anna 9 *dams* 5 *cowris* 11 *bouris* share of *Mouza* Asthawan will be sold for realization thereof. The principal

(2) 55 Ind. Cas. 959; 47 C. 662; 18 A. L. J. 401; (1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 28 M L T 425; 25 C. W. N. 417 (P. C).

(3) 14 Ind. Cas. 496; 39 C. 527; 15 C. L. J. 411; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

(4) 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118; 8 Sar. P. C. J. 293 (P. C.).

amount is to carry interest at the bond rate up to the date of decree and for four months thereafter, and after that the entire amount will carry interest at 6 per cent per annum. The defendant No.11 (respondent) is entitled to the costs of this appeal.

Das, J.—I agree.

Z. K

Decree modified.

LAHORE HIGH COURT.

FIRST CIVIL APPEALS NOS. 1818 AND 1854 OF 1917.

January 4, 1923.

Present:—Mr. Justice Abdur Raoof and Mr. Justice Moti Sagar.

IN NO. 1818 OF 1917.

MOOL CHAND, SON OF RAHDA KISHEN, AND OTHERS—DEFENDANTS NOS. 6 AND 7—APPELLANTS

versus

MOOL CHAND, SON OF SOBHA RAM, AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

IN NO. 1854 OF 1917.

PISSU MAL AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

SOBHA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partnership—Death of partner—Surviving partners, whether can sue for debts—Contract Act (IX of 1872), s. 45, applicability of.

Debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. Section 45 of the Contract Act has no applicability to such cases. [p. 955, col. 1.]

McClean v. *Kennard*, (1874) 9 Ch. 336 at p. 346; 43 L. J. Ch. 323; 30 L.T. 186; 22 W.R. 382, *Gobind Prasad* v. *Chandar Sekhar*, 9 A. 486; A. W. N. (1887) 133; 5 Ind. Dec. (N. S.) 761, *Bal Kissen Das* v. *Kanhya Lal*, 21 Ind. Cas. 509; 17 C. L. J. 648, *Debi Das* v. *Nirpat*, 20 A. 365; A. W. N. (1898) 73; 9 Ind. Dec. (N. S.) 594, *Ugar Sen* v. *Lakhmi Chand*, 6 Ind. Cas. 840; 32 A. 638; 7 A. L. J. 759, *Motilal Iechardas* v. *Ghellabhai Hariram*, 17 B. 6; Chitty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4, *Vaidyanatha Ayyar* v. *Chinansmi Naik*, 17 M. 108; 6 Ind. Dec. (N. S.) 74 and *Mulk Raj* v. *George Knight*, 10 P. R. 1906, 43 P. W. R. 1906, relied upon.

Ram Narain Nursing Doss v. *Ram Chunder Jankee Loll*, 18 C. 86; 9 Ind. Dec. (N. S.) 58, dissented from.

Monmohan Panday v. *Bidhu Bhusan Rav Chowkury*, 48 Ind. Cas. 309; 28 C. L. J. 268, distinguished.

First appeal from a decree of the Subordinate Judge, First Class, Rawalpindi, dated the 26th March 1917.

Messers. *Carden Noad* and *M. Obedulla*, for the Appellants.

Messers. *M. S. Bhagat* and *M. Mohammad Rafi*, for the Respondents.

JUDGMENT.

IN NO. 1818 OF 1917.

This and Civil Appeal No. 1854 of 1917 are by different sets of defendants in the same suit, and may conveniently be disposed of in one judgment. The suit was against three separate sets of defendants, and was brought by one Sobha Ram and his three sons, Mul Chand, Malawa Ram, and Shanker Das, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi. The first set of defendants consisted of Budha Mal, defendant No. 1: Lekh Raj, defendant No. 2, and Chandi Ram, defendant No. 3, proprietors of the firm Budha Mal-Lekh Raj at Gojra, in the District of Lyallpur. The second set consisted of two persons Pissu Mal, and Jetha Mal, who were residents of Kherpur Mir Thati in Hyderabad, defendants Nos. 4 and 5 in the plaint. The third set was composed of three persons, Radha Kishen, defendant No. 6, Parma Nand, defendant No. 7, and Sawan Mal, defendant No.8, proprietors of the firm of Radha Kishen and Parma Nand, carrying on business as commission agents at Karachi. The suit was one for recovery of Rs. 8,000 on the basis of certain dishonoured *hundis*, or, in the alternative, for the price of goods alleged to have been supplied to all the defendants in partnership. The facts as alleged in the plaint were briefly these:—

MOOL CHAND *v.* SOBHA RAM.

In *Sawan Sambat* 1964 Pirsu Mal and Jetha Mal, defendants Nos. 4 and 5, came to the plaintiff's shop and told them that they were partners in the firm of Budha Mal-Lekh Raj who had started business in all kinds of grain in partnership with Messers. Radha Kishen-Parma Nand of Karachi. They asked them to despatch goods to the Karachi firm on the joint responsibility of all the defendants, and to recover the price of the goods so despatched by means of *hundis* drawn on that firm. The plaintiffs alleged that in compliance with this request they despatched goods to the value of Rs. 29,811-13-0 to Messers. Radha Kishen, Parma Nand at Karachi between the 9th August and the 14th September 1907, and received in payment thereof 24 *hundis* drawn in their favour by defendants Nos. 4 and 5 in the name of Budha Mal-Lekh Raj on the Karachi firm. The total value of the *hundis* thus drawn was Rs. 31,200-0-0 out of which the consignees honoured 9 *hundis* to the value of Rs. 13,500 but dishonoured the remaining 15 *hundis*. The plaintiffs, when they came to know that the *hundis* had been dishonoured, wired to the Railway authorities to stop delivery of further goods to defendants Nos. 6, 7, and 8 and also wired to the defendants consignees to refrain from taking any more deliveries and from selling any goods that they may have in their hands belonging to the plaintiffs. It was further alleged that the said defendants in spite of the said receipt of the wire and after refusal to pay the *hundis* on presentation continued taking delivery of and selling the goods sent by the plaintiffs. The goods which had been stopped in transit were eventually sold by the plaintiffs for Rs. 8,500 and the sale proceeds duly credited to the account of the defendants. On these facts the plaintiffs contended that not only the first three defendants, the actual purchasers of the goods, were liable for the payment of Rs. 8,000, the balance due on account of the price of the goods sold, but that the other two sets of defendants were also liable, firstly, because they were partners in the firm of Budha Mal-Lekh Raj, and, secondly, because they had by their conduct led the plaintiffs to believe that they were all purchasing the goods in partnership. It was urged that both sets of defendants were bound in equity to indemnify the plaintiffs for the loss the latter had sustained on account of the false representations of the one and the unfair and dishonest dealings of the other.

Defendants Nos. 1 to 5 failed to put in appearance, and *ex parte* proceedings were taken against them. The third set of defendants, proprietors of the firm of Radha Kishen-Parma Nand, denied all the material allegations in the plaint, repelled the suggestion that they were partners in the firm of Budha Mal-Lekh Raj or with defendants Nos. 4 and 5 and disclaimed all knowledge of the transactions that might have taken place between the plaintiffs and those defendants. They admitted that they were commission agents at Karachi, that the firm of Budha Mal-Lekh Raj used to send goods to thier shop from different stations for sale, and they use to honour their *hundis* to the extent of the goods and the funds at their credit. They also admitted the receipt of the telegram dated the 14th September 1907 but pleaded that after the receipt of that telegram they did not take delivery of any goods, and had in fact closed their accounts with that firm even prior to the receipt of the telegram. They entirely repudiated their liability for payment of anything that may be due to the plaintiffs whether on *hundis* or for the price of goods that the latter may have consigned to their address under instructions from defendants Nos. 1 to 5. It was further contended that the cause of action arose at Karachi, and that the suit was not triable at Rawalpindi.

On the pleadings nine issues were framed by the Court of first instance, and set down for trial. The first issue related to the question of jurisdiction, and was decided by the District Judge on the 18th October 1910. The District Judge held that the breach of contract having taken place at Karachi where the *hundis* had been dishonoured, the Rawalpindi Court had no jurisdiction to hear the suit and returned the plaint for presentation to the proper Court. The Chief Court, on appeal, set aside the order of the learned District Judge on the question of the jurisdiction and remanded the case to the Sub Judge for determination on the merits. After remand defendants Nos. 4 and 5 again

whom *ex parte* proceedings had been ordered appeared in Court and made an application for the setting aside of the *ex parte* proceedings. The *ex parte* proceedings were set aside, and the defendants filed their pleas in which practically the same points were raised as those urged by defendants Nos. 6, 7 and 8. In addition, however, it was urged that they were the servants of defendants Nos. 1 to 3, and had ordered the goods and executed the *hundis* in that capacity on behalf of the firm of Budha Mal-Lekh Raj, and not in the capacity of partners. In fact they entirely repudiated the allegation that they were partners with the firm of Budha Mal Lekh Raj, or that they ever led the plaintiffs to believe that they were partners with either of the two firms at Gojra and Karachi. The Court added two more issues on their pleadings as to their liability under the claim, and proceeded to the hearing of the suit.

After a protracted trial lasting for about two years the Subordinate Judge found that it had not been fully established that defendants Nos. 4 and 5 were actually partners with defendants Nos. 1 to 3 and defendants Nos. 6 to 8, but that there was ample evidence on the record to show that they have led the plaintiffs to believe that they were partners in the said firms.. He further found that it had not been established that defendants Nos. 1 to 3 and defendants Nos. 6 to 8 were not *bona fide* in respect of their refusal to pay the *hundis*, and that they were consequently liable in equity to make good the loss which the plaintiffs had sustained. As a result of these findings the plaintiffs' suit was decreed in its entirety against all the three sets of defendants with costs. Two appeals have been preferred against this decree. One by defendants Nos. 4 and 5 and the other by defendants Nos. 6, 7 and 8, in both of which the findings of the Court below on the question of their respective liabilities under the claim are challenged.

Lengthy arguments have been addressed to us by Mr. M S. Bhagat on the question of abatement which arose under the following circumstances. Sobha Ram and Malawa Ram, plaintiffs Nos. 1 and 4, died during the pendency of the suit in the Court below On the 12th January 1910 the Court passed an order that Mul Chand, and Shanker Das, sons of Sobha Ram, who were already on the record as plaintiffs, should be appointed as representatives of Sobha Ram and that *Musammat* Mal Kaur, widow of Malawa Ram, should be brought on the record as a plaintiff in place of her deceased husband. In the decree-sheet prepared under the orders of the Court below the names of the plaintiffs were shown as Sobha Ram, Mul Chand. Wadhawa Ram and Shanker Das, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi, and *Musammat* Mal Kaur's name was entirely omitted from the decree. In the appeal preferred to this Court by the defendants Nos. 6, 7 and 8 and which was registered as appeal No. 1818 of 1917 *Musammat* Mal Kaur was impleaded as a respondent along with Mul Chand and Shanker Das, all of whom were described as proprietors of the firm of Sobha Ram-Mul Chand. In the other appeal No. 1854 of 1917 preferred by defendants Nos. 4 and 5 the following persons were named as respondents to the appeal :- (1) Sobha Ram (2) Mal Chand (3) Wadhawa Ram (4) Shanker Das, sons of Sobha Ram, proprietors of the firm of Sobha Ram-Mul Chand at Rawalpindi.

Musammat Mal Kaur died during the pendency of the appeal leaving her surviving a daughter, *Musammat* Rani, and no application to implead her legal representatives appears to have ever been made to the Court by the appellants. The contention of Mr. Bhagat in Appeal No. 1818 of 1917 is that the decree being joint in favour of all the plaintiffs and no steps having been taken by the appellants to bring the legal representatives of the deceased respondent on the record, the appeal abates not only against *Musammat* Mal Kaur but in its entirety under O. XXII, r. 4 of the Civil Procedure Code. A large number of authorities have been cited in support of the contention that when on the death of some of the respondents the cause of action did not survive against the remaining respondents alone but against the remaining respondents *plus* the representatives of the deceased respondent, the entire appeal abated. Section 45 of the Indian Contract Act as to the devolution of joint rights is also relied on in this connection and it is conceded that the right to sue

and the right to claim performance of the decree in this case was a joint right devolving on the death of *Musammat* Mal Kaur on the daughter and on the surviving plaintiffs or decree-holders, and that if the defendants wanted to question that right or the correctness of the decree it was incumbent upon them to bring before the Court all the parties on whom the right had devolved, or who were affected by the decree. This contention, in our opinion, though ordinarily correct, has no force when the suit relates to a debt owing to a partnership firm, as it undoubtedly does in the present case. There is ample authority for holding that section 45 of the Contract Act has no application to debts due to trading partnerships, and that such cases must be governed by the rule of the English Law which provides that, although the right of the deceased partner devolves on his executors, the remedy survives to his co-partner who alone must enforce the remedy by action, and who will be liable on recovery to account to the executors or administrators for the share of the deceased. William on Executors, 8th Edition, page 850, referred to in *McClean* v. *Kennard* (1). This rule which is based on sound common sense and expediency has now been adopted by almost all the High Courts in India. The whole subject was elaborately considered by Chief Justice and Mahmood, J., in the case of *Gobind Prasad* v. *Chandar Sekhar* (2), where the learned Chief Justice, while discussing the question of the applicability of section 45 to the case of trading partnerships observed, "It is obvious to my mind that it would lead in many cases to difficulties and confusion in the getting in of the assets of a firm on the death of a partner if it were held that a surviving partner could not sue for such assets unless he joined in the action the representatives of the deceased partner. It might be difficult, if not impossible, for the surviving partner to ascertain who was legal representative of the deceased partner. The period of limitation for the bringing of the action might almost have run, and by the time the surviving partner had ascertained who the representatives were, the action might be barred by limitation. Again, if it were necessary to make the representative a party, the defendant, who might be clearly liable, would be entitled to defend the action, and possibly successfully in that event, on the ground that the person that was added as representative was not the legal representative of the deceased partner." Taking all these difficulties and inconveniences into consideration the learned Judges held that in trading partnerships the principle of English Law should be applied unless there was a statutory provision to the contrary, and were further of opinion that there was nothing in section 45 which made it obligatory upon a surviving partner to implead the representative of a deceased partner in an action for a partnership debt. An opposite view was taken by the Calcutta High Court in the case of *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (3), but this view has not found acceptance by any of the other High Courts in India, and has not been followed even by that High Court itself in a subsequent ruling reported as *Bal Kissen Das* v. *Kanhya Lal* (4). Mr. Bhagat has, however, drawn our attention to another Calcutta case reported as *Monmohan Panday* v. *Bidhu Bhusan Ray Chowdhury* (5), in which also a contrary view appears to have been taken, but the facts of that case were different, and, as appears from the report itself, the decree in that case was in favour of certain individuals and not in the name of a firm. Moreover, none of the previous authorities were brought to the notice of the Court, and we do not think that the learned Judges intended to lay down a rule of universal applicability in that case. In *Debi Das* v. *Nirpat* (6) and *Ugar Sen* v. *Lakhmi Chand* (7), the rule laid down in the earlier ruling was followed and it was held that the representatives of a deceased partner were not necessary parties to a suit for the recovery of a debt which had accrued due during the lifetime of the deceased

(1) (1874) 9 Ch. 336 at p. 346; 43 L. J. Ch. 323; 30 L. T. 186; 22 W. R. 382.
(2) 9 A. 486; A. W. N. (1887) 133; 5 Ind. Dec. (N. S.) 761.
(3) 18 C. 86; 9 Ind. Dec. (N. S.) 58.
(4) 21 Ind. Cas. 509; 17 C. L. J. 648.
(5) 48 Ind. Cas. 309; 28 C. L. J. 268
(6) 20 A. 365; A. W. N. (1898) 73; 9 Ind. Dec. (N. S.) 594.
(7) 6 Ind. Cas. 840; 32 A. 638; 7 A. L. J. 759.

partner and that section 45 of the Indian Contract Act did not apply to such a suit. In the case of *Motilal Bechardas* v. *Ghellabhai Hariram* (8) the same question was considered and the conflicting rulings of the Calcutta and Allahabad High Courts were discussed at considerable length. The learned, Judges, Bayley and Farran, JJ., held that the view of the Allahabad High Court was correct. The same view was upheld in a Madras case reported as *Vaidyanatha Ayyar* v. *Chinnasami Naik* (9), where a Division Bench consisting of Muttasami Ayyar and Best, JJ., laid it down that a surviving partner could sue alone for the recovery of a partnership debt. The Punjab Chief Court in a case reported as *Mulk Raj* v. *George Knight* (10) considered all the various rulings bearing on the subject, and expressly dissented from the view taken by the Calcutta High Court in *Gobind Prasad* v. *Chandar Sekhar* (2) and followed the rulings of the three other High Courts. The same principle was recently reitrated by the Lower Burma Chief Court in *Oodayappa Chetty* v. *Ramasawmy Chetty* (11). The view of the majority of the High Courts has now been adopted in O. XXX, r. 4, Civil Procedure Code, 1908, which declares that the legal representatives of the deceased partner are not necessary parties to suits brought in the name of the firm.

The rule of law now seems to be firmly established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. In this view of the law it is clear that *Musammat* Mal Kaur was not a necessary party and that the non-impleadment of her heirs does not result in the partial, much less in the total, abatement of the appeal.

(8) 17 B. 6; Chitty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4.
(9) 17 M. 108; 6 Ind. Dec. (N. S.) 74.
(10) 10 P. R. 1906; 43 P. W. N. 1 906.
(11) 24 Ind. Cas. 268; 7 Bur. L. T. 261; 8 L. B. R. 130.

In Appeal No. 1854 of 1917 Mr. Jai Gopal Sethi raises four preliminary objections, *viz.*, (1) that Sobha Ram died during the pendency of the suit and that no appeal should have been lodged against a dead person, (2) that *Musammat* Mal Kaur has not been joined as a party in place of her deceased husband who died during the pendency of the suit, (3) that the legal representatives of *Mussammat* Mal Kaur have not been brought on the record after her death and (4) that Wadhawa Ram was no party to the suit and could not, therefore, be joined as a party to the appeal.

The first three objections are disposed of by our decision on the preliminary objection in the connected Appeal No. 1818 of 1917. As to the 4th objection it is clear that the name of Wadhawa Ram is a clerical mistake for Malawa Ram who died during the pendency of the suit in the Court below. If the legal representatives of a deceased partner are not necessary parties to a suit or an appeal, it is obvious that the appeal is a perfectly good and a valid appeal and can proceed, the surviving partners being already on the record as respondents. We do not see any force in these preliminary objections, and we overrule them.

Turning now to the merits, we have no hesitation in holding that none of the two sets of the contesting defendants in this suit can, in any way, be held responsible for the claim of the plaintiffs and that the decree of the Court below, so far as these defendants are concerned, must be set aside. The finding of the learned Sub-Judge is that the plaintiffs have entirely failed to establish that defendants Nos. 6, 7 and 8 were partners with the firm of Budha Mal-Lekh Raj, and having regard to the fact that there is practically no evidence on the record in support of this allegation, the learned Counsel for the respondents has rightly refrained from questioning this finding in the arguments addressed by him to this Court. It is not denied that none of the *hundis* in suit had ever been accepted by the defendants and it is consequently clear that no liability could attach to them on the basis of the *hundis* under sections 32 and 37 of the Negotiable Instruments Act. The only ground on which it is sought to make these defendants liable is that they

by their conduct led the plaintiffs to believe that they had some connection with the firm of Budha Mal-Lekh Raj or that they themselves were the real purchasers of the goods in question. The conduct imputed to these defendants which is relied on in support of the creation of this alleged liability on their part consists (1) in their having accepted deliveries of certain consignments despatched by the plaintiff to their address, (2) in their having honoured certain *hundis* drawn by the firm of Budha Mal-Lekh Raj in favour of the plaintiff and (3) in their having continued to sell goods belonging to the plaintiffs and to make payments to Messrs. Budha Mal-Lekh Raj even when they were prohibited from doing so by a telegram dated the 14th September 1907. In our opinion none of these circumstances is of any material assistance to the plaintiffs That the defendants had some connection with the firm of Budha Mal-Lekh Raj cannot, of course, be denied, but this fact alone is of no consequence unless it is shown that the former had done or omitted to do something by which they had incurred a legal liability to the plaintiffs. No correspondence has been produced nor any other evidence tendered to prove that these defendants were privy to the arrangements that had been entered into between the plaintiffs, and defendants Nos. 1 to 5, or that they had themselves ordered the goods direct from the plaintiffs. On the contrary, it is in evidence that the goods in question were debited to the firm of Budha Mal-Lekh Raj in the books of the plaintiffs and credited to the same firm in the books of the defendants. Further, it is not denied that, even before the transactions in question took place, defendants used to receive goods from the firm of Budha Mal-Lekh Raj for sale on commission, and that they used to honour their *hundis* in the ordinary course of things. In these circumstances, the only reasonable inference that is possible is that the defendants were the agents of Messrs Budha Mal-Lekh Raj and that they had no concern with the plaintiffs whom they did not know and with whom they had no previous dealings. The *hundis* that were honoured by the defendants were also drawn not by the plaintiffs but by the firm of Budha Mal-Lekh Raj to whom as agents they were admittedly accountable. In the present case it so happened that the *hundis* were drawn by their principals in favour of the plaintiffs, but it is clear that so long as the *hundis* remained unaccepted the defendants did not incur any personal liability to the plaintiffs and the latter could not call them to account if payment of the *hundis* was refused.

It is next argued that the defendants should not have sold any goods or made payments to the firm of Budha Mal-Lekh Raj when they had been expressly forbidden to do so by the plaintiff by a telegram admittedly received by the defendants on the 10th September 1907. It should be observed that the evidence on this point is most inconclusive, but even if they did so, we do not think that an adverse inference could be drawn against the defendants from this circumstance alone. The defendants as agents of Budha Mal-Lekh Raj were only accountable to their own principals, and could very well have disregarded the plaintiffs' telegram with whom, as already pointed out, they had no privity of contract. The goods had been sold to the firm of Budha Mal-Lekh Raj; delivery had been given and the property in the goods had already passed. The plaintiffs had no lien upon the goods, and if the price thereof was not paid they could only look to their own vendees for payment. In our opinion there is nothing in the conduct of the defendants which entitled the plaintiffs to hold them responsible for the price of the goods sold, and there is force in the arguments of the learned Counsel for the Appellants that the firm of Budha Mal-Lekh Raj having failed, the plaintiffs are now anxious to fasten the liability on other defendants and to recover their dues from them when they are not liable in law to make the payments. We do not see any force in the points urged by the learned Counsel for the plaintiffs, and hold that defendants Nos. 6, 7, and 8 are not liable.

As to defendants Nos. 4 and 5 it is obvious that they neither purchased the goods nor did they enter into any partnership with the firm of Budha Mal Lekh Raj. There is ample evidence on the record that these defendants were employed as

mere servants on that shop, and that they executed the *hundis* in that capacity and not as partners or proprietors of the firm. It is, however, argued that they are personally liable under section 28 of the Negotiable Instruments Act, because they subscribed their names to the *hundis* and did not indicate therein that they were signing merely as agents or servants on behalf of their principals. A large number of authorities have been cited in support of the contention that mere signing as agent will not be sufficient to indicate that the person signs as agent only and that in order to exclude personal liability an agent should indicate on the negotiable instrument either that he signs as agent or that he does not intend thereby to incur any personal liability. The correctness of the principle as enunciated in these authorities is not disputed, but it is pointed out that the facts of the present case are entirely different and that the rulings cited are not applicable. In our opinion it is unnecessary to refer to these authorities in this judgment, as the present case is clearly distinguishable and does not fall within the purview of the principle enunciated therein. As pointed out by their Lordships of the Privy Council in the case of *Sadasuk Janki Das* v. *Sir Kishan Pershad* (12), "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand." In the present case the preliminary words of the document which, it may be pointed out, has not been correctly translated in the paper book clearly indicate that the drawers of the *hundis* were the firm of Budha Mal-Lekh Raj and that their name was the real name of the persons liable upon the *hundis*. No question of the liability of the defendants Nos. 4 and 5 under section 28 of the Negotiable Instruments Act consequently arises in this case and they cannot be held personally liable. The result is, that we accept the appeal, set aside the decree of the Court below against defendants Nos. 4 to 8 and dismiss the plaintiff's suit against these defendants with costs throughout.

(12) 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 46 I. A. 33 (P. C.).

IN No. 1854 OF 1917.

JUDGMENT.—For reasons recorded in our judgment in Civil Appeal No. 1818 of 1917 we accept this appeal and dismiss the plaintiffs' suit against defendants Nos. 4 and 5 with costs throughout.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 215 OF 1920.

January 9, 1923.

Present:—Mr. Justice Ross.

GOKARAN PRASAD SINGH—DEFENDANT—APPELLANT

versus

Malik WARIS ALI AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Bihar and Orissa Public Demands Recovery Act (III of 1914), ss. 10, 15—Sale to recover arrears of Road-cess—Failure to serve notice—Burden of proof—Construction of Statutes—Enactment reducing period of limitation.

Where a plaintiff claims that a sale of his property held under the Bihar and Orissa Public Demands Recovery Act was null and void owing to the non-service of notice under section 10 of the Act, the *onus* of proving due service of notice is on the defendant. [p. 958, col 1.]

Nemai Charan De v. *Secretary of State*, 46 Ind. Cas. 741; 45 C. 496, followed.

It is an established axiom of the construction of Statutes that, though procedure may be regulated by an enactment for the time being in force, the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it is expressed in unequivocal terms. [p. 958, col. 2.]

Gopeshwar Pal v. *Jiban Chandra*, 24 Ind. Cas, 37; 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 549, relied upon.

Where an enactment reduces the period of limitation provided for a suit by a prior enactment, all suits which would be barred by time under the new enactment at the date when it comes into force would continue to be governed by the old enactment, unless expressly provided for in the new enactment. [p. 958, col. 2.]

GOKARAN PRASAD SINGH *v.* WARIS ALI.

Manjuri Bibi v. *Akel Mahmud*, 19 Ind. Cas. 793; 17 C. W. N. 889; 17 C. L. J. 316, relied upon.

Section 45 of the Bihar and Orissa Public Demands Recovery Act, 1914, has no application to a suit to set aside a sale which took place more than one year before the coming into force of the Act. [p. 959, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Gaya, dated the 20th November 1919, reversing a decision of the Munsif, Third Court, Gaya, dated the 15th April 1919.

Mr. *S. N. Rai*, for the Appellant.

Mr. *S. K. Mitter*, for the Respondents.

JUDGMENT.—This is a suit about the title to a share in Mouza Kendua. The plaintiff's title is derived from a purchase on the 27th August 1913 from the defendant No. 7 who himself had purchased from the defendant No. 8 on the 23rd January 1907. The title of defendants Nos. 1 to 5 is derived from a purchase from defendant No. 6, who, in his turn, was a purchaser of the share in execution of a certificate for arrears of Road-cess held on the 3rd September 1906. The plaintiff claimed that the sale was null and void for non-service of notice under section 10 of the Public Demands Recovery Act. The defence was that the sale was regular. The suit was instituted on the 30th August 1918. The Munsif dismissed the suit but the learned Subordinate Judge gave the plaintiff a decree. In appeal, on behalf of the defendant, three points were taken: the first was, that the Subordinate Judge had wrongly thrown upon him the onus of proving due service of notice under section 10. Apart from the fact that the question of burden of proof is immaterial at this stage, the decision of the learned Subordinate Judge was right, as was held in *Nemai Charan De* v. *Secretary of State* (1). The second contention was that, even if the burden of proof was on the defendant, it has been discharged. This raises a pure question of fact which has been found in favour of the plaintiff by the Subordinate Judge and that finding is binding upon this Court. The third and the principal contention was, that the suit was barred by time by reason of the provisions of section 45 of the Bihar and Orissa Public Demands Recovery Act, 1914. That section provides that a suit to set aside a sale under the Act must be brought within not more than one year from the date on which the possession of the property was delivered to the purchaser. The question is, whether the present suit is governed by that Act or not. The learned Counsel for the respondent contends that, before the passing of the Act, he had 12 years within which to bring the suit and that the suit was brought within 12 years of the date of the sale; and that, by the time the Act was passed, if the period of limitation therein prescribed is the period governing this suit, his vested right of suit was entirely taken away, because the condition under which a suit could be brought was impossible of fulfilment. The Act was passed on the 1st of July 1914 and came into force in November of that year. It is argued that, as the right of suit has not been taken away in express words, the plaintiff is in the same position as regards limitation as if the Act had not been passed. In *Gopeshwar Pal* v. *Jiban Chandra* (2) it was laid down that it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right, without compensation or any saving is not be to imputed to the Legislature unless it be expressed in unequivocal terms. In dealing with the effect of the third Schedule to the Bengal Tenancy Act it was observed that it was not a fair reading of the enactment to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and that their Lordships could only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law, as amended, may regulate the procedure in suits in which the plaintiff could comply with its provisions but cannot govern suits where such compliance was from the first impossible. It was pointed out that there were two positions; where, in accordance with its provisions, a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have

(1) 46 Ind. Cas. 741; 45 C. 496.

(2) 24 Ind. Cas. 371; 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 540.

no application. This second position had previously been laid down in the case of *Manjuri Bibi* v. *Akkel Mahmud* (3). There is no doubt in the present case as to which of these two is the position. The suit could not have been brought after the passing of the Amending Act. Consequently, the amendment would have no application. It was contended by the other side that the effect of the amendment was to give the plaintiffs one year from the date when the Act came into force. But I see no ground for such a contention. That period of limitation is purely fanciful. The limitation must be either that which prevailed before the Amending Act or that prescribed in the Amending Act itself; that is to say, in the latter case, not more than one year from the date on which the possession of the property was delivered to the purchaser, and not one year from the date on which the Act came into force. It must, therefore, follow that this suit is not governed, as regards limitation by the Act of 1914. Consequently, this ground also fails and the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 19 Ind. Cas. 793; 17 C. W. N. 889; 17 C. L. J. 316.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 156 OF 1920.

February 15, 1923.

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

Babu BHAGWAN DAS NAIK AND OTHERS—PLAINTIFFS

versus

Babu MAHADEO PRASAD PAL AND OTHERS—DEFENDANT IST AND 2ND PARTY—RESPONDENTS.

Hindu Law—Joint family property—Alienation—Legal necessity—Benefit to the estate—Litigation for possible benefit, whether constitutes necessity.

The borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is not recognised by Hindu Law as a legal necessity. A distinction should be drawn between litigation undertaken to protect the property and litigation the object of which is to obtain a possible benefit for the estate. The former relates to the security of that which has already been acquired and is in actual possession. the latter relates to that which may possibly be acquired; as a general rule, the former class of litigation would, no doubt, amount to legal necessity and in regard to the latter class of litigation it may be laid down that if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner on the analogy of the maxim 'he who enjoys the benefit ought to bear the burden also' [p. 960, col. 2; p. 961, col 1.]

Indar Kuar v. *Lalta Prasad Singh*, 4 A. 532; A. W N. (1882) 33; 2 Ind. Dec. (N. S.) 1149, relied on.

An act, for which the character of 'benefit to the estate' or 'legal necessity' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property into possession, and which may or may not be successful under the chances attending upon litigation. [p. 961, col. 1.]

Palaniappa Chetty v. *Deivasikamony Pandara Sannadhi*, 39 Ind. Cas. 722; 44 I. A. 147; 21 C. W. N 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom L. R. 567; 22 M. L. T. 1, 6 L. W. 222; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709 (P. C.), referred to.

First appeal from the decree of the Second Additional Subordinate Judge, Basti, dated 2nd of March, 1920.

Messrs. *B. E. O'Conor* and *Harnandan Prasad*, for the Appellants.

Mr. *Mukhtar Ahmad*, for Dr. *S. M. Sulaiman* and Mr. *Haribans, Sahai*, for the Respondents.

JUDGMENT.—The suit, which has given rise to this appeal, was brought to enforce a mortgage, dated the 24th May 1907, executed in favour of the predecessor-in-interest of the plaintiffs by three mortgagors, Mahadeo Prasad Pal, Harihar Prasad Pal and Banke Bahadur Pal.

Of these the only survivor is Mahadeo Prasad, who was impleaded as the first defendant. Banke Bahadur died without issue, while Harihar Prasad, also deceased, is now represented by his two sons and a grandson, defendants Nos. 2, 3 and 4.

The fifth defendant is a grandson of Mahadeo Prasad.

The suit was resisted by the sons and grandson of Harihar Prasad, who pleaded that the property mortgaged was joint family property and that the mortgage-debt had not been incurred for any family

necessity nor for any purpose which would render the family property liable for its discharge.

The lower Court dismissed the suit, finding that there was no legal necessity for the loan.

The learned Subordinate Judge was pressed with the plea that at any rate the joint family had derived a benefit from the taking of the loan. He was, however, of opinion that, although the mortgage might have been binding if the family had got some benefit from the loan, it was not proved that any such benefit had accrued up to the time the suit was brought.

The facts of the case are not now in dispute. They are as follows :—

One Dan Bahadur Pal, a step-brother of the mortgagors, was the owner of a *taluqa* in the Partabgarh District in Oudh. He died in March 1906 and Mahadeo Pal put forward a claim to succeed him. His case was that the estate was held under a primogeniture *sanad*, descending to a single heir and that he was the heir entitled to succeed. His claim was opposed by one Adya Bakhsh Singh, the daughter's son of Dan Bahadur, who claimed under a Will.

The first contest between the parties was in the Revenue Court where each sought to have mutation made in his favour. Mahadeo Prasad lost his case there : the Revenue Court of first instance ordered mutation in favour of Adya Bakhsh on the 8th October 1906 and this order was affirmed by the Board of Revenue on the 6th February 1907. In the year 1912 Mahadeo Prasad with the assistance of a financier, one Seth Kanhya Lal, brought a suit in the Court of the Subordinate Judge of Partabgarh for recovery of the estate. He won his case in the First Court but lost it on appeal in the Court of the Judicial Commissioner of Oudh.

Thereafter Mahadeo Prasad obtained leave to appeal to His Majesty in Council, but before the case could come on for hearing the parties filed a compromise before the Judicial Commissioner and the appeal was withdrawn.

This fact was not within the knowledge of the Court below when it gave judgment, but a certified copy of the compromise has been filed before us which shows that some property out of the estate of Dan Bahadur has been awarded to Mahadeo Pal.

The mortgage now in suit was, as we have said, executed on the 24th May 1907 for a sum of Rs. 4,000.

All this money, except a sum of Rs. 401-2-0, was left with the mortgagee to pay off four usufructuary mortgages executed between the 6th June and the 30th October 1906. The balance, Rs. 401-2-0, was said to have been taken by the mortgagors to defray the stamp and registration charges in connection with the mortgage and to meet unspecified household expenses.

The learned Judge of the Court below finds that the sums borrowed under the four mortgages of 1906 were spent in support of the claim for mutation put forward by Mahadeo Prasad in the Revenue Courts, a claim which, as already stated, failed. He further finds that the mortgagee knew that these sums had been borrowed for the purpose of that litigation.

As regards the balance of Rs. 400 odd, his finding is that no legal necessity for the borrowing of this sum was proved, and that the mortgagee made no inquiry.

It has been argued before us, as it was in the Court below, that on the facts so found it should be held that there was legal necessity for the debt on the ground, apparently, that Mahadeo Prasad has derived some benefit from the litigation which was finally determined by the compromise filed in the Court of the Judicial Commissioner. And it is said that this benefit accrues not only to Mahadeo Prasad but to all the members of the family in virtue of an agreement entered into between them and Mahadeo Prasad.

Admittedly, there is no evidence of this agreement upon the record. It is said that it was registered in Book No. IV of the Registration Department and the plaintiffs were under the rules of the Department, not entitled to ask for a copy of it. We are also told that the plaintiffs tried to get Mahadeo Prasad into the witness-box in the Court below but were unable to secure his attendance.

Coming to the question of legal necessity, we are not aware of any rule of Hindu Law which recognises that the borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is a legal necessity. In the case cited before the lower

Court, *Indar Kuar* v. *Lalta Prasad Singh* (1), it was held that a mortgage executed by a widow to raise funds to enable her to sue for an estate to which her deceased husband had an alleged right of succession which he had never sought to enforce was not a mortgage executed for "legal necessity" within the Hindu Law.

At page 543 of the report the learned Judge, who delivered the judgment says:—

"In my opinion a distinction should be drawn between litigation undertaken to protect the property, and litigation the object of which is to obtain a possible *benefit* for the estate. The former relates to the security of that which has already been acquired and is in actual possession: the latter relates to that which may possibly be acquired; as a general rule, the former class of litigation would, no doubt, amount to legal necessity: and in regard to the latter class of litigation, it may be laid down that if such litigation ends in actual benefit to the estate any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner, on the analogy of the maxim 'he who enjoys the benefit ought to bear the burden also.'"

According to what is stated here, the borrowing of money to pursue litigation the object of which is to obtain a possible benefit for the estate cannot be justified under the doctrine of "legal necessity" as known to the Hindu law, though possibly if the litigation resulted in benefit to the estate the debt would be binding in accordance with the principle of equity embodied in the maxim quoted.

In *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (2) it was laid down that the expression "benefit of the estate," as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir, or by the trustee of a religious endowment, cannot be precisely defined.

At page 155* of the report their Lordships observe:—

"No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit of the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

There is nothing in these remarks to encourage the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate could properly be regarded as a "benefit to the estate" or a "legal necessity". Their Lordships' observations rather import that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession—not an act done with the purpose of bringing fresh property into possession, and which may or may not be successful under the chances attending upon litigation.

We are satisfied, therefore, that the case of legal necessity put forward in the present suit cannot succeed. There remains the question whether the plaintiffs can succeed, either wholly or in part, in accordance with the equitable doctrine mentioned in the judgment in *Indar Kuar* v. *Lalta Prasad Singh* (1), assuming that this doctrine does apply.

It is argued that it is now proved that the estate has benefited, inasmuch as Mahadeo Prasad has secured some portion of the *talqua* under the terms of the compromise.

The first difficulty in the way of the plaintiffs is that the benefit, such as it is, has accrued to Mahadeo Prasad himself and not to the joint family of which he is a member. As has been mentioned already, the plaintiffs have failed to prove any agreement between Mahadeo and the other members of the family to share any benefit which might result from the litigation.

And then there is a second difficulty which

(1) 4 A. 532; A. W. N. (1882) 133; 2 Ind. Dec. (N. S.) 1149.

(2) 39 Ind. Cas. 722 44 I. A 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 4 M. 709; 6 L. W. 222.

* Page of 44 I. A.—[*Ed.*].

the plaintiff cannot possibly surmount. It is clear that whatever benefit has accrued from the compromise has not been derived from the fund secured by the mortgage.

We know that the money advanced by the plaintiffs' predecessor was applied in the re-payment of sums which had been borrowed to finance Mahadeo Prasad in the mutation proceedings. Mahadeo finally lost his case in the Revenue Courts in February 1907 and there can be no question of his having got any benefit there.

It was not till the year 1912 that he began his suit in the Civil Courts and it is proved that the funds which enabled him to maintain this litigation which terminated in the compromise were advanced not by the plaintiffs but by Seth Kanhaya Lal.

In no way, therefore, is it possible for the plaintiffs to trace any connection between the money advanced by them and any benefit which Mahadeo Prasad has succeeded in winning as the result of his claim in the Civil Courts. The plaintiffs cannot succeed and their suit was rightly dismissed by the Court below whose decree we affirm. The appeal fails and is dismissed with costs to the respondents including in this Court fees on the higher scale.

N. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 756 of 1919.
July 19, 1922.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Suhrawardy.

JOGESH CHANDRA GHOSE AND OTHERS —DEFENDANTS—APPELLANTS
versus
PROSANNA KUMAR TALUKDAR AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Decree, setting aside of—False claim—Suppression of service of notice—Pleadings—Appeal, second—Finding of fact.

The mere fact that notice was not served is not necessarily fraud which would justify the setting aside of a decree. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to any scheme of alleged fraud, then such suppression of notice would be clearly fraud. Further, it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. [p. 963, cols. 1 & 2.]

A conclusion of fact arrived at by the lower Court, where it is not established that in coming to that conclusion the learned Judge was under any misapprehension or error of law, cannot be challenged in second appeal. [p. 963, cols. 1 & 2.]

Appeal against the decree of the Additional Subordinate Judge, Backergunj, dated the 27th of January 1919, modifying the decree of the Munsif, Third Court, at Perozpore, dated the 14th of June 1915.

Babus *Jogesh Chandra Ray* and *Asitaranjan Ghose*, for the Appellants.—The facts found by the lower Appellate Court do not constitute fraud and in that view the plaintiffs suit ought to fail. To make an over-claim is not fraud. Also, mere non-service of notice by itself is not fraud. There is no finding that the notices were suppressed in pursuance of a fraudulent purpose. In the absence of such a finding, I submit your Lordships will dismiss the suit on the ground that no fraud has been made out. Further, the fraud which the lower Appellate Court purports to find is different from the fraud alleged in the pleadings. This is not permissible.

Babus *Gunada Charan Sen*, *Bipin Chandra Bose*, *Biraj Mohan Mazumdar* and *Abinash Chandra Ghe*, for the Respondents, submitted that the case was concluded by the findings of fact arrived at by the Court of Appeal below. When that Court says there was fraud, that is a finding of fact which your Lordships cannot go behind in second appeal. But if your Lordships think that that is not enough, then I submit the case ought to go back for a clearer finding on the point.

Babu *Jogesh Chandra Ray* replied briefly.

JUDGMENT.

Woodroffe, J.—In the suit out of which this appeal, arises the plaintiff, who is the respondent in the appeal, prayed for a decree, declaring that the plaintiff and the co-sharer defendants had *nim-howla* right in the disputed lands specified in the Schedule *Kha* and that they had a right to realize rent from tenants under them. The conclusion of

the Court as regards the contention is that he cannot hold that the lands in suit appertain to the *nim-howla* of the plaintiff and defendants Nos. 2 to 7 and the settlement records show that they do not appertain to the *nim-howla*. The Court then says that the presumptive value of these records is considerable, and, therefore, the Court decides this point in favour of the then appellants to this extent that the lands in suit do not appertain to the *nim-howla* of the plaintiff and defendants Nos. 2 to 7. This is the subject-matter of the cross-objection before us. I think the cross-objection fails on the ground that the conclusion is one of fact, and it has not been established before us that in coming to that conclusion the learned Judge was under any misapprehension or error of law. The cross-objection must, therefore, be dismissed.

The second prayer was that the Court should set aside the rent-decree in Suit No. 1473 of 1909 obtained by defendant No. 1 and the auction-sale held on the 4th November 1911 in execution of the decree in Suit No. 567 of 1911 declaring that the same were invalid and inoperative.

A question that has arisen in this appeal is as to whether or not the lower Appellate Court has come to a sufficiently clear finding as regards the alleged fraud so that the proceedings referred to can be set aside on that ground. The contention of the appellants has been that the facts found by the lower Appellate Court do not constitute fraud, and if that point is established then the case of the appellants is that no suit will lie to set aside the decree. It has also been argued that the fraud which has been found by the lower Appellate Court is not that which was made the ground of attack in the plaint, and that there was no fraud or suppression of service of notice.

In my opinion, the appeal must be remanded for a re-hearing upon this particular question, namely, the question of alleged fraud, because the findings of the Court are, in my opinion, insufficient. In the first place it is to be observed that the mere fact that notice was not served is not necessarily fraud. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to any scheme such as that alleged, then such suppression of notice would be clearly fraud. Further, it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. It must be found that there were circumstances which establish that the over-claim, if there be one, was made with knowledge and for a fraudulent purpose. The learned Judge to whom the case is remanded for re-hearing in appeal, must find definitely whether there was or was not fraud committed in respect of the rent-decree as regards non-service of notice, the claim made or otherwise. He should find the facts and state the facts, upon which reliance is placed for the purpose of finding fraud if he so finds, in order that this Court as a Court of Second Appeal whilst accepting his findings of fact can judge whether those facts constitute in law fraud or not. He must further state his reasons for the conclusion at which he arrives.

The judgment and decree upon this point is, therefore, reversed and the case is remitted to the lower Appellate Court for re-hearing upon this issue of fraud.

The costs of the hearing of this appeal before us will abide the result of the decision on remand. The cross-objection is limited to a very small point. It is not necessary to make any order as regards costs of the cross-objection.

Suhrawardy, J.—I agree.

N. K. & B. N. *Decree reversed.*
Case remitted.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 264 OF 1922.

February 5, 1923.

Present:—Mr. Justice Lindsay.

AMJAD ALI KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

Sheikh MOHAMMAD USMAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Execution of decree—Suspension of proceedings

AMJAD ALI KHAN *v.* MOHAMMAD USMAN.

— Application for revival after three years, maintainability of.

Where proceedings in the execution of a decree are suspended by the Execution Court through no act or default of the decree-holder, an application to revive and carry through the pending proceedings will not be time-barred, even if presented more than three years after the order of suspension was passed. Such an application is not one to initiate a new proceeding. [p. 965, col. 1.]

Qamar-ud-din Ahmad v. *Jawahir Lal*, 27 A334; 2 A. L. J 397; 1 C. L. J 381; 9 C. W. N 601; 15 M. L. J 258; 32 I. A 102; 7 Bom L. R. 433; 8 Sar. P. C. J 810 (P. C.), relied upon.

Second appeal against the decree of the Subordinate Judge, Jaunpur, dated the 5th December 1921.

Mr. *Uma Shanker Bajpai*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an execution second appeal. The judgment-debtor is the appellant. The point for decision is, whether or not the lower Appellate Court was right in treating a certain application as being an application for execution which was barred by time.

The facts which it is necessary to set out in order to dispose of this appeal may be summarised as follows :—

The date of the original Court's decree was the 29th of November 1913. This decree was affirmed by the First Appellate Court on the 17th of February 1914 and by the High Court on the 7th of December 1915. The decree was for specific performance, the judgment-debtor being ordered to restore to its original condition a certain water course.

The first application was made on the 19th of July 1916. The present application was made on the 9th of July 1921.

When the first application for execution was made in July 1916 a petition was made in the lower Court asking for the appointment of an *Amin*. An *Amin* was appointed and he submitted certain reports which gave rise to a certain number of objections on the part of the judgment-debtor. The Execution Court made certain orders unfavourable to the judgment-debtor and he appealed. The Appellate Court returned the case to the Execution Court for further proceedings. After this there were further proceedings taken in the Execution Court and eventually the Execution Court directed the judgment-debtor to file his share of fees of the Commissioner. A further order was made thereafter when the judgment-debtor was in default. An order for his arrest was passed and a further order for the attachment of his goods to realise the amount of the Commissioner's fee. Both these orders were appealed to the Appellate Court, but it seems that no order in stay of the original proceedings was passed by the District Judge. Meantime, while these appeals were actually pending in the Court of the District Judge, the Munsif, on the 6th of June 1918, made an order as follows :—

" The application is dismissed for the time being. Costs on the judgment-debtor."

There were other proceedings in this case of a later date after the District Judge had disposed of the appeals which were pending ; in the High Court appeals were brought which were decided on 27th February 1919.

The present application, as I have said, was not made till the 9th of July 1921. It is argued that because more than three years elapsed from the date of the Munsif's order (6th June 1918) the present application could not be entertained. It seems to me, however, that it is impossible to yield to this argument.

The last order passed by the Munsif in the previous execution proceedings was on the 6th of June 1918 and it is a peculiar order. I have never before come across an order couched in similar language. The words ' dismissed for the time being' seem to me to exclude any notion of a final order and it cannot be contended that the earlier execution proceedings were finally brought to a close by the order in question.

For the respondents reliance is placed upon the judgment of their Lordships of the Privy Council in the case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1); and after perusal of that judgment I think the principles which it embodies ought to be applied to the present case. That was a case also in which their Lordships had to consider whether a

(1) 27 A 334; 2 A. L. J 397; 1 C. L. J 381; 9 C. W. N. 601; 15 M. L. J 258; 32 I. A 102; 7 Bom. L. R. 433; 8 Sar P. C. J. 810 (P. C.).

particular application which was made in the Execution Department was barred by reason of the fact that more than three years had elapsed since a previous order purporting to dispose of the execution proceedings had been passed. Their Lordships in dealing with the case remarked that the application was not barred, as the previous proceedings in execution were only suspended through no act or default of the decree-holder. Their Lordships pointed out that the application with which they were dealing was not an application to initiate a new proceeding but to revive and carry through a pending execution suspended as above mentioned. They pointed out in particular that the earlier order which was relied on for the purpose of constituting a bar was in no sense a final order and that I take to be the basis of their Lordships' decision. Applying that reasoning to the present case I am not prepared to hold that where a Court passes an order dismissing an application "for the time being" that that is in any sense a final order. It was argued by the learned Counsel for the appellant that the case before their Lordships was one in which there had been a default on the part of the decree-holder. I do not, however, think that their Lordships' judgment proceeded on this ground. Further, from the order of 6th June 1918 it appears that when the Munsif recorded it he laid costs on the judgment-debtor. That fact would indicate that the decree-holder was not in any way in default otherwise there was no justification for laying costs upon the judgment-debtor. Having considered the question from the point of view of the judgment of their Lordships, I think the lower Court was right in holding that this application was not barred, although perhaps the reasons given by the learned Subordinate Judge in his judgment are not correct. It seems to me that the application was a proper application to entertain and that no bar of limitation could be set up against it. I, therefore, dismiss this appeal with costs.

M. A. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1059 OF 1921.

February 5, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

MUHAMMAD UMAR KHAN—PLAINTIFF—APPELLANT

versus

AMTUL RAHIM BIBI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, application of—Suit by heir to recover property invalidly alienated by deceased—Subsequent suit for possession of other property, maintainability of—Cause of action, meaning of—Test—Appeal, second—New plea.

If a Muhammadan sells some of his property to certain heirs, and after his death another heir sues for a declaration that the sale-deed is fictitious and without consideration and for possession of his legal share in the property covered by the sale-deed, the latter is not thereby precluded from bringing another suit subsequently for possession of his share in other items of property left by the ancestor. The causes of action in both the suits are different. [p. 968, col. 1.]

"Cause of action" means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. [p. 968, col. 1.]

Sonu Khushal Khadake v *Bahinibai Krishna*, 33 Ind. Cas. 950; 40 B. 351; 18 Bom. L. R. 45, *Murti* v. *Bhola Ram*, 16 A. 165; A. W N. (1894) 65; 8 Ind. Dec. (N. S.) 106 (F. B.), referred to.

One valuable test in considering whether causes of action are identical is, whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. [p 968, col. 1.]

A plea not raised in the Trial Court should not be allowed in second appeal. [p. 968 col. 1,]

Second appeal from a decree of the Second Additional Subordinate Judge, Aligarh, dated the 26th May 1921.

FACTS:—One Ahmad Ali Khan died on 3rd January 1917, leaving behind as heirs, Amtul Rahim, sister, Mariam Bibi, consanguine sister, and Muhammad Umar Khan a cousin. The heirs, therefore, inherited ½, ⅙ and ⅓ respectively of the property left by the deceased. A few days before his death, *i.e.*, on the 19th December 1916 Ahmad Ali Khan executed two sale-deeds of two of his properties, one in favour of his sister Amtul Rahim and the other in favour of her daughter Ruqayya Begam.

In 1919 Umar Khan brought a suit No. 3 of 1919 against Amtul Rahim and Ruqayya

Begam for a declaration that the sale-deeds were fictitious and were executed by Ahmad Ali Khan at a time when he could not understand what he was doing, and were fraudulently obtained by the defendents with a view to deprive the plaintiff of his rights to inherit Ahmad Ali Khan's property. He also claimed possession of his legal share. This suit was confined only to the properties covered by the two sale-deeds, and had no reference to the properties now in dispute. In 1920 Umar Khan brought three suits on the same day, *viz.*, Nos. 306, 307, 308 against Amtul Rahim and Mariam Bibi in respect of three properties left by Ahmad Ali Khan in the same town, in the first two of which he claimed possession over his legal share after partition by metes and bounds, and in the third joint possession, besides demanding mense profits of all the three properties. The defence, *inter alia*, in all the three suits was, that the claim was barred by O. II, r. 2. The Munsif overruled this plea and decreed the suits. The lower Appellate Court gave effect to the plea and dismissed the suits. Hence the three second appeals.

Mr. *Iqbal Ahmad*, for the Appellant, submitted that O. II, r. 2 had no application to the case since the cause of action in Suit No. 3 of 1919 was quite different from the causes of action in the three suits out of which the present appeals arise. In the former suit the plaintiff had to allege and prove not only the fact of Ahmad Ali Khan's death and his own right of inheritance but also the further facts that the sale-deeds were fictitious, and unless both facts were proved he could not be entitled to a decree. In the present suits his claim could be decreed merely on proof of Ahmad Ali's death and his own right as an heir. Further in the suit of 1919, the relief was claimed not only against the two defendants in the present suits but also against Ruqayya Begam who is no party to the present suits and who had one of the two sale-deeds then in dispute in her favour. A cause of action, as defined in a number of cases, consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. And clearly the causes of action in the former suit and the present ones are different from each other.

[DANIELS, J., referred to *Sonu Khushal Khadake* v. *Bahinibai Krishna* (1).]

Mr. *M. A. Aziz* for Dr. *S. M. Sulaiman*, for the Respondent, submitted that O. II. r. 2, applied to the present suits in two different ways.

Firstly:—The essential and foremost fact that the plaintiff had to allege and prove in both the cases is the same, *viz.*, the death of Ahmad Ali Khan and the plaintiff's right as an heir. Without the proof of this fact he could not succeed in either case. It is true that in the suit of 1919 the plaintiff had also to allege and prove the additional fact of the fictitious nature of the sale-deeds in dispute. But this does not alter the fact that the main allegation is common to both the cases and the additional allegation is only subsidiary. Nor does the fact of Ruqayya Begam being an additional defendant in the suit of 1919 make any difference, since the allegations against her were identically the same as those against Amtul Rahim.

Secondly:—Even if the Court was against me in this application of O. II, r. 2, there is no doubt that the objection applies at least to Suits No. 307 and 308. For, these two suits and the Suit No. 306 were between exactly the same parties and based on exactly the same cause of action. This point is fully covered by the Full Bench case, *Murti* v. *Bhola Ram* (2) These two cases Nos. 614 and 615 were filed on the same day, and there being nothing to show which case was actually filed first, the first in order *viz.* No. 614 having been taken to have been filed first was held to bar No. 615. Furthermore, in one of the two cases there were some defendants over and above those in other. But this fact was not taken to make any difference in the cause of action.

This case is on all fours with the present case. A still stronger case is *Niaz Ahmad* v. *Abdul Hamid* (3).

In this case the plaintiff brought a suit in Moradabad for possession of a portion of certain partnership property, which he

(1) 33 Ind Cas. 950; 40 B. 351; 18 Bom. L.R. 45.
(2) 6 A. 65 A. W. N. (1894) 65; 8 Ind. Dec. (N. S.) 106 (F. B.)
(3) 30 A. 279; 5 A. L. J. 278; A. W. N. (1908) 131.

subsequently withdrew but without the Court's permission to bring a fresh suit. Thereafter the plaintiff brought a second suit in Nani Tal in respect of another portion of partnership property of which the plaintiff stated he was in possession. It was held that the second suit was barred under provisions of section 43 (corresponding to O. II, r. 2). It will be noticed that in this case the jurisdictions of the two Courts were different, the additional allegation by the plaintiff in the second suit, *viz.* that he was in possession found no place in the first suit. Moreover, the first suit had not been decided on merits, yet O. II, r. 2, was held applicable.

[DANIELS, J., referred to *Ram Harakh* v. *Ram Lal* (4).]

This case is clearly distinguishable.

The plaintiff in this case sued for partition of a house in Allahabad over which he alleged he was in joint possession and for a declaration that a certain deed of gift in respect of it was invalid. He had formerly brought another suit in Sultanpur for partition of property situated there alleging that he had been dispossessed. The judgment of Piggott, J., shows that O. II, r. 2, was held inapplicable because the suit as framed could not be entertained in the Court at Sultanpur. In the Court at Sultanpur dispossession was alleged, whereas in the suit at Allahabad the plaintiff claimed to be in joint possession. Moreover, the question there was essentially one of partition of joint Hindu family property, for which the established law is that suits for partition of different items of joint properties lying in different jurisdictions can be brought separately. In the present case parties are Mohammadans. Moreover, it is to be observed that the Full Bench case *Murti* v. *Bhola Ram* (2), does not appear to have been brought to their Lordships' notice.

Another case which supports my contention is: *Abdul Karim Khan* v. *Muhammad Jan* (5).

As for the 'cause of action', though the term includes every fact which it would be necessary for the plaintiff to prove if traversed, yet, as laid down in the Full Bench case referred to above, it has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action.

Mr. *Iqbal Ahmad* in reply:—The objection that O. II, r. 2, would apply to Suits No. 307 and No. 308 was not taken in the written statement and should not now be entertained. It is at best a dishonest plea. The reason why three separate suits were brought is that in Suit No. 308 relief sought is a prayer for joint possession, whereas in the other two suits the relief claimed is possession after partition by metes and bounds. Moreover, defence pleas are different in the three suits.

JUDGMENT.—These appeals arise out of three connected suits filed by the plaintiff-appellant, Muhammad Umar Khan, for his share as heir to the extent of one-third of Ahmad Ali Khan deceased. In two of the suits he claims partition by metes and bounds of different properties together with certain rents alleged to have been wrongly realised by the defendants. In the third suit he claims joint possession of the fractional share to which he is entitled. The suits were disposed of by the Court below in one judgment and were dismissed on the ground that they were barred by O. II, r. 2, of the Code of Civil Procedure by reason of a suit previously filed by the plaintiff against *Musammat* Amtul Rahim and *Musammat* Mariam Bibi, defendants in these suits, and one *Musammat* Ruqayya Begam who is not a party to this litigation. The learned Munsif held that O. II, r. 2, had no application to the facts of the case. The learned Subordinate Judge in a very brief judgment overruled him and dismissed the suits.

In view of this conflict of opinion it is important to see what precisely the nature of the previous suit was. That suit was concerned with certain property which Ahmad Ali Khan had sold in his lifetime to *Musammat* Ruqaiyya Begam and Amtul Rahim. The plaintiff's cause of action was, first, that according to him the sale-deed was a fictitious transaction and without consideration, and, second, that as heir to Ahmad Ali Khan he was entitled to a one-third share in the property of the latter.

So far as his claim to be heir of Ahmad Ali Khan is concerned, this portion of the cause of action is common to the previous suit and to the present suits. It is clear, however, that this allegation alone would

(4) 33 Ind. Cas. 124; 1 A. L. J. 257; 38 A. 217.
(5) 68 Ind. Cas. 970; 20 A. L. J. 590; (1922) A. I. R. (A.) 379; 44 A. 663.

not entitle the plaintiff to succeed in the previous suit. He was met by the plain fact that at the time of Ahmad Ali Khan's death the property did not stand in Ahmad Ali Khan's name. Ahmad Ali Khan had parted with it in his lifetime by a registered sale-deed. Unless that sale-deed was set aside, it stood in the way of the plaintiff's claim and the plaintiff could claim no relief. It appears to us clear, therefore, that the learned Munsif was right in holding that O. II, r. 2, does not apply. In the Full Bench case of *Murti* v. *Bhola Ram* (2) the plaintiff's cause of action is defined as consisting of every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. The same criterion was adopted in the more recent Bombay case of *Sonu Khushal Khadake* v. *Bahinibai Krishna* (1) in which it was added that one test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. Judged by the criterion laid down in these two cases it is clear that the causes of action in the previous suit and the present suits were not identical.

The learned Counsel for the respondent has sought to support the decree of the Court below as regards two of these suits on another ground, also based on O. II, r. 2. He alleges that the plaintiff has wrongly filed three suits and that there was only one cause of action for all three of the present connected suits. This plea was never raised in the Trial Court where the plaint in the first suit might, if necessary, have been amended, and we do not think that we should allow it to be raised now. For the reasons already given, we allow the appeal, and, as the cases were decided in the Court below on a preliminary point, we remit the appeals to that Court under O. XLI, r. 23, for decision on the merits. The appellants will get their costs of these appeals in this Court including fees on the higher scale. Other costs will abide the result.

Appeal allowed;
Case remanded.

M. A. A.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 53-II OF 1922.
February 6, 1923.
Present.—Mr. Pipon, J. C.

SAYAD SIKANDAR SHAH K. B.—PLAINTIFF—APPELLANT
versus
FIRM BHAI RAM CHAND-SANT RAM, KOHAT—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 4—Negotiable Instruments Act (XXVI of 1881), s. 4—Stamp Act (II of 1899), s. 2 (22)—Promissory-note—Letter requesting loan and promising re-payment—Suit based on promissory-note—Claim, nature of—Double claim—Suit on one claim—Amendment of plaint—Construction of document—Oral agreement to pay—Document referring to agreement, whether promissory-note.

A letter requesting a loan and promising to re-pay the loan with interest by a certain date is not a promissory-note but merely a proposal within the meaning of section 4 of the Contract Act. [p. 969, col. 2.]

Dhondbhat Narharbhat v. *Atmaram*, 13 B. 669; 7 Ind Dec. (N. S.) 442 and *Bharata Pisharodi* v. *Vasudevan Nambudri*, 27 M. 1; 14 M. L. J. 65, relied on.

Every suit based on a promissory-note comprises both a claim on the note itself and also one on the original liability. If a plaintiff sues on one of such causes of action and the right to sue thereon is not free from doubt, it is always open to the Court to direct the plaintiff to amend the plaint, so as to convert it into one based on both causes of action or treat it as so amended. [p. 970, col. 1.]

Duggempudi Nagamma v. *Tirumala Reddi Venkata Reddi*, 59 Ind. Cas. 363; 12 L. W. 147, referred to.

O'Gorman v. *Mahtab Singh*, 92 P R. 1898, dissented from.

The defendant wrote to the plaintiff: "According to our friendly agreement, I would trouble you as a friend to get the execution file consigned to the Record-room at once. As agreed, I will pay up the remaining Rs. 1,400....without hesitation if God wills." In a suit brought on the document, the question was whether the document could be treated as a promissory-note and required to be stamped, and whether the plaintiff could be allowed to change the character of the suit and sue on the transaction referred to in the document:

Held, (1) that the document was not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act and section 2 (22) of the Stamp Act and did not require to be stamped. It merely contained a proposal that the oral agreement be acted on but it was not a document embodying that agreement; [p. 969, col. 2.]

(2) that the fact that the plaintiff sued upon the document as a promissory-note was no bar to his suing upon the transaction referred to in the document and using the document

merely as evidence of the transaction and that the Court was entitled to treat the plaint as amended accordingly. [p. 970, col. 2.]

Further appeal from an order of the Divisional Judge, Derajat Division, dated the 15th January 1922, whereby an order of the District Judge, Kohat, dated the 21st July 1921 was set aside and respondent granted a decree for Rs. 1,347-8-0.

Qazi *Mir Ahmad*, for the Appellant.

Mr. *Mathra Das*, for the Respondent.

JUDGMENT.—The facts of the case are given clearly in the judgment of the two Courts below. The question for decision on this appeal is whether the Divisional Judge is right in holding that the document dated 20th of January 1917 is not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act and section 2 (22) of the Stamp Act, and that it is admissible in evidence though unstamped. The document is in the form of a letter or *ruqa* and runs as follows :—

" According to our freindly agreement, I would trouble you, as a friend, to get the execution file consigned to the Record-room at once. As agreed, I will pay up the remaining Rs. 1,400 by the middle of August without hesitation (*ta amal*) if God wills (*Insha Allah Ta'ala*). You should rest assured. " The contention that the document is a promissory-note may be treated under two aspects : (1) that the document itself is in form and substance a promissory-note, and (2) that the plaintiff himself treated it as a promissory-note, based his suit upon it and described it in the plaint as a promissory-note and that he cannot be permitted to change his suit by denying the character of the document. As regards the first of these two aspects, I must agree with the Divisional Judge that the document is not in itself a promissory-note. It certainly could not be treated as one if the definition of the promissory-note given in section 4 of the Negotiable Instruments Act were the sole test. It contains two conditions, (1) that the execution proceedings be dropped and (2) " If the Almighty wishes " (*Insha Allah Ta'ala*). There are two rulings, *Dhondbhat Narharbhat* v. *Atmaram* (1) and *Bharata Pisharodi* v. *Vasudevan Nambudri* (2), in which letters requesting a loan and promising to re-pay the loan with certain interest by certain date were held not to be promissory-notes, but merely proposals within the meaning of section 4 of the Contract Act. It has been argued, however, by the learned Counsel for the appellant that the definition given in section 2 (22) of the Stamp Act is far wider and includes in any case a promise to pay upon conditions happening. It may further be argued that the second of the two conditions, " If the Almighty wishes," is no condition at all but merely a formality in language which does not alter in any way the character of the terms. It might even be said that among religious people the condition " If the Almighty wishes " qualifies every event which may or may not occur. At the same time it is clear that an expression of this sort is more unusual in documents which have the character of a promissory-note. The fact of the matter is that the letter or *ruqa* now in question is not " an instrument between the parties " at all. It is nothing more or less than a letter which refers to a private agreement and calls upon the addressee to act in a freindly manner, and carry out his part of the bargain, drop the execution proceedings, and trust the writer to carry out his part, *i. e.*, to pay the sum admitted due by the middle of August. It appears to me that it is no more covered by the extended definition of a promissory-note given in section 2 (22) of the Stamp Act than it is by that given in section 4 of the Negotiable Instruments Act. It did not require to be stamped any more than any correspondence between parties requires to be stamped when such correspondence is not the basis of a claim but collateral evidence of a transaction on which the claim is based. Indeed it may be said that it contains a proposal that the oral agreement be acted upon. It is not a final document embodying that agreement, for it calls upon the other side to perform a condition : and it is noticeable that this point is emphasised rather as a " friendly act " than as one arising out of a completed contract. If the plaintiff had not complied by dropping the execution proceedings, it would have been impossible to prove his acceptance of the proposal. I agree with the learned Divi-

(1) 13 B. 669 ; 7 Ind. Dec. (N. S) 442.
(2) 27 M. 1; 14 M.L.J. 65.

sional Judge that the document is not, so far as its internal character is concerned, a promissory-note.

The second aspect of the case is that the plaintiff having sued upon this document as a promissory-note cannot now change the character of his suit. In support of his contention the learned Counsel for the appellant has quoted *O'Gorman* v. *Mahtab Singh* (3) which is distinct authority for such view. There is not the least doubt, however, that the tendency of more recent rulings has been in the opposite direction. *Duggempudi Nagamma* v. *Tiruma'a Reddi Venkata Reddi* (4), is a very definite authority on this point. The learned Judges pointed out that every plaint on a promissory-note comprises both a claim on the note itself and also one on the original liability. They remarked: "If a plaintiff sued on one of such causes of action and the right to sue thereon is not free from doubt, it is always open to the Court (and in my opinion, it is desirable to do so to put an end to the litigation as far as possible) to direct the plaintiff to amend the plaint, so as to convert it into a suit based on both causes of action or treat it as so amended, and then to decide the suit once for all." The same view has been taken by the High Court of Lahore in the case, *Sundar Das* v. *Puran Singh* (5). In that case there was a *hundi* insufficiently stamped and the plaintiff asked to be allowed to sue on the original consideration. It was held that the amendment should have been allowed. There is not the least doubt that the view taken in both these rulings is a sound one. There can be no possible object in forcing the parties into fresh litigation merely by reason of a technical error in the plaint which can be corrected and the correction of which can allow the real dispute between the parties to be judicially settled. There is no doubt in the present case that the plaintiff was badly advised when he drew up his plaint and that his Counsel in Court took up the correct position in explaining the real character of the document. It is not necessary at this stage for a plaint to be returned for amendment.

(3) 92 P. R. 1898.
(4) 59 Ind. Cas 363; 12 L. W. 147.
(5) 67 Ind. Cas. 856; (1922) A. I. R. (L) 56; 11 P. W. R. 1922.

There is ample authority in the first of the two rulings which I have quoted for the view that a Court is entitled to treat the plaint as amended. I hold, therefore, that the fact that the plaintiff sued upon the document as a promissory note is no bar to his suing upon the transaction referred to in the document as one of his two causes of action and of using the document merely as evidence of the transaction upon which his suit now rests.

There is a one-anna stamp affixed to the document but this stamp has not been defaced. The document must, therefore, be treated as unstamped. The Counsel for the appellant argues that, if it is not a promissory-note, it is at least an acknowledgment of the debt and that it is in this character also inadmissible in evidence. I cannot accept this contention. I have already shown above what I believe to be the true character of the document and I do not consider that it required a stamp.

The learned Counsel for the appellant then contends that if the plaintiff is thrown back upon the original liability, his suit is time-barred. The document was executed on the 29th of January 1917 and the present suit was instituted on the 13th of August 1920. It is argued that the original liability, which was based upon a decree, existed prior to the execution of the document, and that the most that can be said is that the document amounted to an acknowledgment of the liability which would constitute a fresh starting point for limitation under section 19 of the Limitation Act. In that case also the suit would be time-barred Now, the first point for determination is what Article of the Limitation Act covers the present suit. The learned Counsel for the respondent has not been very clear on this point, but it would appear that he holds that Art. 120 is applicable. In my opinion there cannot be the least doubt that this suit is governed either by Art. 113 or 120. I have already said that the document dealt with proves that a proposal was made by the defendant to the plaintiff. The proposal was by way of confirming an oral agreement arrived at between the parties. The defendant was either already bound by a contract which had been made verbally or if it be considered that the contract was not then

complete, it was completed when the plaintiff by dropping the execution proceedings overtly declared his acceptance of the proposal made in the letter. The contract was that the defendant should pay Rs. 1,400 by the middle of August in cosideration of the plaintiff dropping the execution proceedings. There is not the least doubt that Art. 113 applies to suits to enforce the specific performance of contracts to pay money in the same way as it applies to suits for specific performance in respect of other property. It has been held indeed by some High Courts that Art. 113 applies to an award made by arbitration for the payment of money by a certain date. It has been held, on the other hand, in other cases that suits based on an award are governed by Art. 120 . It is in the present case immaterial whether Art. 113 or 120 applies. In either case the suit is within time. Under Art. 113 limitation began to run from the middle of August, the date which was fixed for the defendant's performance of his part of the contract and the period was three years. Under Art. 120 the plaintiff would have six years to sue from the date on which his cause of action accrues, and his cause of action acrued when the defendant made default in paying up the money in the middle of August. I hold, therefore, that the suit is within time.

I cannot regard very seriously the contention that the suit should have been remanded to the Trial Court for enquiry and decision upon the existence of the liability itself. The existence of the liability was never denied. It has never been contended that the defendant did not owe the plaintiff Rs. 1,400 and that he did not promise to pay that sum by the middle of August. The suit has been resisted purely upon the legal question as to whether it is not barred by statutory rules. So far as the merits of the case are concerned, there is really no defence.

On the above findings I consider that the interest allowed was justified and the decree as passed will stand. I, therefore, uphold the decree passed by the Divisional Court and dismiss this appeal with costs.

N. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO. 944 OF 1921.

January 31, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Daniels.

KAMPTA PRASAD—DEFENDANT—APPELLANT

versus

SHEO PRASAD—PLAINTIFF AND RAM CHARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy holding—Fruit trees, enjoyment of

An occupancy tenant has, in the absence of a contract or custom to the contrary, the right to enjoy the fruits of the trees standing on his occupancy holding. [p 972 col. 1.]

Ganga Dei v. *Badam*, 30 A 134; 5 A. L. J. 99; 3 M. L. T. 194; A. W. N. (1908) 51, followed.

Imdad Khatun v. *Bhagirath*, 10 A. 159; A. W N. (1888) 32; 6 Ind. Dec. (N. S.) 107, relied upon.

Second appeal from a decree of the Second Subordinate Judge, Cawnpore, dated the 31st of March 1921.

Mr. *M. L. Sandal*, for the Appellant.

Mr. *B. N. Vyas*, for the Respondents.

JUDGMENT.—The plaintiff in this suit is an occupancy tenant and he brought a claim against his landlord to recover a certain sum of money by way of damages alleging that the landlord had without any right deprived him, the plaintiff, of the fruits of certain trees which stand upon his occupancy holding.

The first Court dismissed the claim, but the lower Appellate Court has decreed it in part. It has given the plaintiff relief with respect to the compensation demanded on account of the taking away of mango fruits but has dismissed the claim as regards the fruits of the two other trees, namely, a *jamun* and a *lasora* tree.

The defendant *zemindar* has appealed and the plaintiff has filed cross-objections. The case came up before a Judge of this Court who has referred it for decision to a Bench, being of opinion that a question of general importance is raised.

It seems to us that the law on the subject presents no difficulty whatever. There can be no doubt that the plaintiff (the tenant) has been in occupation of this land, which is, as we have said, his occupancy holding. Then land is let out to a tenant; the lease confers upon the tenant the right to occupy the land which is let out and also to enjoy the fruits of the trees growing thereon and,

in the absence of any contract or custom to the contrary, it is the right of the tenant to enjoy the occupation of the land and also to enjoy the fruits of the trees.

The lower Appellate Court in dealing with this matter appears to have been under the impression that it was necessary for the plaintiff in this case to make out some title by adverse possession. Be that as it may, it is quite clear on general principles that the tenant in this case had a right to enjoy the land and to enjoy the fruits of the trees which were on the land, unless there was a custom or agreement to the contrary. In the Court of first instance the defendant tried to set up a contract by which he had reserved to himself the right to enjoy the fruits of these trees but that contract was not proved.

As regards the law on the subject we need only refer to two rulings of this Court, one in *Imdad Khatun* v. *Bhagirath* (1) and the other in *Ganga Dei* v. *Badam* (2). In the first mentioned case it was held by the Bench that on a review of all the authorities the trees on an occupancy holding, whether planted by the tenant himself or not, belonged and attached to the occupancy holding. Again, in the latter case it was laid down as follows :—

"The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the *zemindar*, and that the tenant has no right to cut and remove such timber. But it appears to be clear that,in the absence of a custom or of a contract to the contrary, a *zemindar* has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists."

The law, as laid down in these cases, clearly covers the case which is now before us. The defendant's appeal, therefore, fails and is dismissed with costs including fees on the higher scale.

The plaintiff has filed cross-objections urging that the lower Appellate Court was wrong in dismissing the claim regarding the *jamun* and *lasora* trees. It is quite clear that there is no ground for drawing any distinction between the case of the mango trees and the case of these trees and the consequence is that the cross-objections must be allowed. The result of all this is that the decree of the Court below is modified and we direct that the plaintiff's claim be decreed with costs in all Courts including in this Court fees on the higher scale.

M. A. A. *Appeal dismissed; Cross-objections allowed.*

(1) 10 A. 159 ; A. W. N. (1888) 32 ; 6 Ind. Dec. (N. S.) 107.

(2) 30 A. 134 ; 5 A. L. J. 99 ; 3 M. L. T. 194 ; A. W. N. (1908) 51.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 449 OF 1922.

February 5, 1923.

Present:—Mr. Justice C. C. Ghose.

EQUITABLE COAL COMPANY, LIMITED —DEFENDANTS—PETITIONERS

versus

Sm. BAGALA SUNDARI DEBI—PLAINTIFF —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for possession—Subsequent suit for mesne profits, if maintainable.

A suit for possession is no bar to a suit for mesne profits accrued due subsequent to the suit for possession.

Sheo Kumar v. *Narain Das*, 24 A. 501; A. W. N. (1902) 139, referred to.

Rule against the order of the Munsif, Assansole, exercising the powers of a Court of Small Causes, in Small Cause Court Suit No. 1856 of 1921.

Babu *Manmatha Nath Mukherjee*, for the Petitioners.

Babus *Bankim Chunder Mukherjee* and *Sukhamoy Chatterjee*, for the Opposite Party.

JUDGMENT.—The facts which have given rise to the application on which this Rule was issued are, shortly stated, as follows :—

By a decree made on the 14th June 1918 by the Munsif of Asansole, the plaintiff's title to a four-anna share in certain lands was declared and it was ordered that the plaintiff should get possession thereof and that the defendant No. 1 (the Equitable Coal Company, Ltd.) should restore the lands to their original condition and that the plaintiff

should get from the said Company a sum of Rs. 90 on account of mesne profits for the period mentioned in the plaint *i.e.*, up to 1323 B. S An appeal from this decree was dismissed by the Subordinate Judge of Burdwan on the 15th August 1919. Thereafter the plaintiff recovered judgment in the Small Cause Court at Assansole against the said Company for mesne profits for the period from 1324 to 1326 at the rate of Rs. 43-12 per annum. Some time in August 1920 the Company alleged that they had given up possession of the lands in question and restored the same to their original condition. This, however, was denied by the plaintiff and she instituted a suit (No. 1856 of 1921) in the Small Cause Court at Assansole for recovery of mesne profits for the years 1327 and 1328. The last mentioned suit was decreed on the 21st March 1922 and the plaintiff's claim for mesne profits amounting to Rs. 79-12 was allowed. Against this decree the present rule was obtained.

On behalf of the applicant it has been contended that the plaintiff's claim was barred under O. II, r. 2, Civil Procedure Code, and that at any rate it should have been held that the suit was not maintainable having regard to the provisions of section 47, Civil Procedure Code. The learned Vakil for the applicant has invited my attention to various cases, but in the view I take it is unnecessary to deal with the same at length. No doubt there is a conflict of decisions as to whether a suit for possession of land is a bar under O. II, r. 2, Civil Procedure Code, to a subsequent suit for mesne profits of such land accrued due *prior* to the institution of the suit for possession. But in respect of a suit for mesne profits accrued due for a period *subsequent* to the institution of a suit for possession it is to be observed that the cause of action is not the same as that for the suit for possession *i.e.*, the cause of action for such mesne profits is one which has accrued subsequent to the suit for possession. It would, therefore, follow that a suit for possession is no bar to a suit for mesne profits accrued due *subsequent* to the suit for possession. [See in this connection the judgment of Stanley, C. J. in *Sheo Kumar* v. *Narain Das* (1)]

(1) 24 A. 501; A. W. N. (1902) 139.

In this view of the matter, section 47, Civil Procedure Code, would be inapplicable to the facts of this case and would be no bar to the subsequent suit for mesne profits.

Thus far I have dealt with the rule on the merits; but assuming that the argument advanced on behalf of the applicant is sound, it would appear that this Rule must be discharged, apart from the merits, on the ground that it does not come within section 115, Civil Procedure Code, because after all, the error, if any, made by the Small Cause Court Judge was an error of law. The Rule is accordingly discharged with costs which I assess at two gold *mohurs*.

N. K. *Rule discharged.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 82 OF 1921.

February 15, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ABDUL GHAFOOR—PLAINTIFF—APPELLANT

versus

QAMAR-UD-DIN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Prior mortgagee, suit by—Puisne mortgagee not impleaded—Subsequent mortgage, suit on—Prior mortgagee not made party—Auction-purchaser of prior mortgage heir of mortgagor—Integrity of mortgage, whether broken—Redemption—Purchaser of second mortgage, whether entitled to piecemeal redemption.

If a prior mortgagee sues on his mortgage without impleading the subsequent mortgagee, and the property is sold and thereafter the subsequent mortgagee sues on his mortgage without making, prior mortgagee a party to the suit, the auction-purchaser of the second decree can sue for redemption of the first mortgage, and if, meanwhile, the original mortgagor dies leaving the first auction-purchaser as one of his heirs, the integrity of the mortgage is not broken up and the purchaser of the second decree is not entitled to redeem only a portion of the property on payment of proportionate amount. [p. 974 cols. 1 & 2.]

Letters Patent Appeal, from a Judgment of Mr. Justice Stuart, dated the 3rd May 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. S. *Raza Ali*, for the Respondent.

JUDGMENT—This appeal arises out of a suit for redemption of a mortgage made on the 11th of February 1893. The property which was mortgaged under this mortgage was subsequently mortgaged to one Nanku Lal in 1895. The prior mortgagee obtained a decree upon his mortgage in 1911 without impleading the subsequent mortgagee. The subsequent mortgagee obtained a decree upon his mortgage without making the prior mortgagee a party to his suit. The decree under the first mortgage was purchased by one Mazhar Ahmad.. In execution of the decree upon the second mortgage the property was sold and was purchased by the present plaintiff. The original mortgagor is dead and Mazhar Ahmad, the purchaser of the decree under the first mortgage, has inherited a portion of the rights of the original mortgagor Aziz-ud-Din. As the second mortgagee was not made a party to the suit brought upon the prior mortgage, his right to redeem the prior mortgage did not become extinguished, and as the plaintiff is the purchaser under the second mortgage he has the right to redeem the prior mortgage. He sought in this suit to enforce that right but instead of seeking to redeem the whole property on payment of the whole of the mortgage money, he claimed the right to redeem a portion of the mortgaged property upon payment of a proportionate part of the mortgage-money. This claim he advanced on the allegation that the integrity of the prior mortgage had been broken up by reason of Mazhar Ahmad, the purchaser of the decree under the prior mortgage, having inherited a part of the mortgaged property and the rights of the mortgagor and mortgagee having thus become vested in the same person. The Courts below dismissed the claim on the ground that the plaintiff could not redeem piecemeal upon payment of a part of the mortgage-money, and this decision has been affirmed by a learned Judge of this Court. In our judgment the learned Judge of this Court was right in the conclusion at which he arrived. All the rights which the original mortgagor had were mortgaged to the second mortgagee subsequent to the prior mortgage. Upon the sale of all those rights in execution of the decree on the subsequent mortgage the whole of those rights (that is, the whole of the equity of redemption of the prior mortgage) vested in the auction-purchaser, namely, the present plaintiff, and no part of the equity of redemption could become vested in Mazhar Ahmad as successor to Aziz-ud-Din, the original mortgagor. Therefore it cannot be said that the integrity of the prior mortgage was broken up, and that mortgage could be redeemed piecemeal. In this view the p esent plaintiff's suit has been rightly dismissed as being a suit in which he sought to redeem the mortgage piecemeal, and we affirm the decision of Mr. Justice Stuart and dismiss the appeal with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 115 OF 1922.

February 7, 1923.

Present :—Mr. Kanhaiya Lal, J. C.

SHEO NANDAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEO BALAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family estate—Mother succeeding son—Liability to pay husband's debts—Son's successors, liability of—Extent of liability.

There may be no pious obligation on a Hindu mother succeeding to the estate of her son for the payment of the debts due by her husband; but if the son has succeeded to the estate of his father, the person who succeeds such son is as much liable for the payment of the debts due by the father, to the extent of the family property, as a person who would directly succeed to the property on his death.

Sheo Ram v. *Sheo Ratan*, 63 Ind. Cas. 279; 43 A. 604; 19 A. L. J. 613, referred to.

Appeal against a decree of the Subordinate Judge, Unao, dated the 6th January 1922, upholding the decree of the Munsif, South Unao, dated 8th March 1921.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

MOHAN LAL *v.* GANGA PRASAD.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage effected by *Musammat* Janki in favour of Barhmadin for Rs. 400 on the 15th February 1904. The consideration was applied to the payment of certain prior debts due partly by her husband, Anant Ram, and partly by her father-in-law, Har Dayal. The property mortgaged belonged to a joint family, consisting of Har Dayal and his son, Anant Ram, and his grandson, Lala. Anant Ram died, leaving his father, Har Dayal, and his son Lala, surviving him. He also left a widow, *Musammat* Janki. The interest of Anant Ram in the joint family property passed by survivorship to Har Dayal and Lala, and the question for consideration in this appeal is, whether the liability to pay the debts due by Anant Ram to the extent of the family property devolved on Lala, who survived Har Dayal, and passed on from Lala on his death to his mother, *Musammat* Janki.

The Courts below found that *Musammat* Janki was not liable to pay the debts due by her husband, Anant Ram, and relying on the decision in *Sheo Ram* v. *Sheo Ratan* (1) they allowed the plaintiffs, who are the reversionary heirs of Lala and have succeeded to the property on the death of *Musammat* Janki, a decree for redemption subject to the payment of only such debts as were due by Har Dayal and were credited in the mortgage. Lala died soon after Har Dayal while he was still a minor. *Musammat* Janki succeeded to his property and *ipso facto* to the liability enforceable against Lala and the family property held by him, and the mortgage effected by *Musammat* Janki to discharge that liability, whether that liability arose on account of a debt due by Har Dayal or on account of a debt due by Anant Ram, must be treated as enforceable against the reversionary heirs of Lala. The liability could have been enforced against the son during his lifetime to the extent of the family property he received on the death of Anant Ram and it can also be enforced after his death against that property. There may be no pious obligation on a mother succeeding to the estate of her son for the payment of the debts due by her husband, but if the son has succeeded to the estate of his father, the person who succeeds such son is as much liable for the payment of the debt due by his father to the extent of the family property, unless it is tainted with immorality, as a person who would directly succeed to the property on his death. The decision in *Sheo Ram* v. *Sheo Ratan* (1) recognises that a son is under a pious obligation to pay the debts of his father; and if that is so, it does not appear how the liability dies on the death of the son, if he leaves property, which had devolved on him on the death of his father in the hands of those who succeed to his estate even though it may not have amounted to a charge.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for redemption of the disputed property subject to the payment of the entire consideration specified in the deed of mortgage with interest on Rs. 350 at Re. 1 per cent. per mensem, from the date of the mortgage to a date six months hence, which will be fixed for payment of the said money. The defendants-appellants will get their costs here and hitherto from the plaintiffs-respondents who will bear their own costs throughout. The decree will be framed in terms of O. XXXIV, r. 7 of the Code of Civil Procedure. In case of non-payment the mortgagees will be entitled to the sale of the mortgaged property in lieu of the money due on the mortgage.

G. H. *Appeal allowed.*

(1) 63 Ind. Cas. 279; 43 A. 604; 19 A. L. J. 61.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 375 OF 1919.
February 15, 1922.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.
Pandit MOHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
GANGA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.
Civil Procedure Code (Act V of 1908), O. XXXII,

r. 4—Guardian ad litem— Vakil, whether officer of Court.

A Vakil is an officer of the Court for the purposes of O. XXXII, r. 4 of the Civil Procedure Code.

First appeal against the decree of the Subordinate Judge, Agra, dated the 17th of June 1919.

The Hon'ble Mr. *N. P. Asthana*, for the Appellants.

Messrs. *Gulzari Lal* and *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—Prior to the hearing of these connected appeals a question has been raised by a petition presented to this Court from Mr. Sital Prasad, Vakil of Agra. It appears that there are two minors, Bala Prasad and Nanhe, whose interests are concerned in both these appeals. The Court having failed to find any other person fit and willing to act as their guardian for the purposes of these appeals, has appointed Mr. Sital Prasad, Vakil, to be such guardian. That gentleman appeals to us to make a proper order as to the costs to be incurred by him in order that he may obtain the legal assistance necessary to the proper representation of the minors at the hearing of the appeals. We have been asked to consider whether such order can properly be made by us under O. XXXII, r. 4 of the Code of Civil Procedure. We are clearly of opinion that a Vakil of the Court is an officer of that Court for the purposes of this rule, and that, therefore, we have jurisdiction to make the order prayed for.

We direct accordingly that the appellant, Pandit Mohan Lal, do pay a sum of Rs. 75 as a fee for Counsel to appear and represent the interests of the minor respondents at the hearing of the two appeals. Previous payment of the fee must be certified to us before the hearing of the appeals. We allow two weeks' time to the said appellant for the purpose.

N. K.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1432 OF 1920.

July 18, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

JAMINI MOHAN SARKAR AND OTHERS—APPELLANTS

versus

DEBENDRA NARAYAN SINGH—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 111—Lease—Surrender, implied or express—Lease, void, whether can determine prior lease.

Where a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; in the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional, to be void in case the grant should be made void. [p. 978, col. 2.]

Doe d. Egremont v. *Courtenay*, (1848) 11 Q.B. 702 at p. 712; 17 L. J. Q. B. 151; 12 Jur. 454; 116 E. R. 636; 75 R. R. 600, relied on.

Zick v. *London United Tramways*, (1908) 2 K. B. 126; 77 L. J. K. B. 942; 98 L. T. 841; 72 J. P. 257; 24 T. L. R. 577 and *Canterbury Corporation* v. *Cooper*, (1909) 100 L. T. 597; 73 J. P. 225; 7 L. G. R. 908; 53 S. J. 301, referred to.

Where a Hindu widow grants a permanent lease of a plot of land at a fixed rent to a person who is already in possession under a prior lease, at a variable rent granted by the full owner and the grant is not intended to operate as a new lease, the object of the parties being merely to alter one of the most important incidents of the tenancy, that is, to fix the rent in perpetuity, the acceptance of the lease is not equivalent to an implied surrender of the prior lease. [p. 978, col 2]

Upendra Krishna Mandal v. *Ismail Khan Mahomed*, 32 C 41; 31 I. A. 144; 8 C. W. N. 889 (P.C.), *Nilratan Mandal* v. *Ismail Khan Mahomed*, 32 C. 51; 31 I. A. 149; 8 C. W. N. 895 (P. C.), *Naba Kumari Debi* v. *Behari Lal Sen*, 34 C. 902; 34 I.A. 160; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433 (P. C.), referred to.

Appeal against the decree of the District Judge, Bankura, dated the 15th of March 1920, modifying the decree of the Subordinate Judge, Bankura, dated the 31st of March 1919.

Babu *Kalikinkar Chakravarty* (with him Babu (*Panchanan Ghose*), for the Appellants:—The lower Appellate Court has found that

the lease granted by the *Rani* to the predecessor-in-interest of the defendant was in excess of her authority as a Hindu widow in possession of the estate of her husband, and, therefore, it cannot be binding upon the reversionary heir to her husband after the death of the widow. But the learned District Judge has modified the decree passed by the Trial Court in my favour on the ground that a prior lease granted by a previous full owner of the property furnished a complete answer to my claim for ejecting the defendant. The learned District Judge has apparently failed to consider the effect of the grant of a subsequent lease upon a prior lease. Refers to section 111, clause (*f*) of the Transfer of Property Act. The taking of the subsequent lease operated as an implied surrender of the prior lease, so that at the date of the suit the prior lease, not being subsisting, cannot protect the defendant from being ejected. Reads Hadsbury's Laws of England, Volume 18, page 549, section 1061.

Babu *Pyari Mohan Chatterjee*, for the Respondent.—The *potta* granted by the *Rani* is only a confirmatory lease Refers to *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1), *Nilratan Mandal* v. *Ismail Khan Mahomed* (2) and *Naba Kumari Debi* v. *Behari Lal Sen* (3). It did not operate as a new lease having the effect of an implied surrender of the old lease. Refers to Woodfall's Landlord and Tenant, 19th Edition, pages 348, 350. I am relying upon the prior lease upon the assumption that the grant by the widow was made under circumstances which could not make it operative against the reversioners. But my contention, by way of cross-objection, will be that the lower Appellate Court ought to have held that the grant by the widow was not beyond the scope of her authority and protected me from eviction. The lease by the widow was not void, it was at worst only voidable. See *Rangasami Gounden* v. *Nachiappa Gounden* (4).

Babu *Kalikinkar Chakravarty* replied.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on establishment of title. The plaintiffs are the representatives-in-interest of the reversionary heir to the husband of a Hindu widow, Rani Nilkumari Debi, who was at one time in possession of the estate. On the 26th October 1869, she granted a permanent lease at a fixed rent to the predecessor-in-interest of the defendant. The plaintiffs contend that this lease was granted in excess of her authority as a Hindu widow in possession of the estate of her husband, and that they are consequently entitled to recover possession by ejectment of the defendant. The defendant resisted the claim on a two-fold ground, namely, first, that the lease granted on the 26th October 1869 was a fair transaction binding upon the estate in the hands of the reversioners after the death of the lady; and, secondly, that if the lease ceased to be operative upon the death of the lady, he was entitled to fall back upon another lease which was in existence when the grant of the 26th October 1869 was made. The Court of first instance found upon both the points against the defendant. The result was that the suit was decreed. Upon appeal the District Judge has held that the Court of first instance had rightly decided the first question in favour of the plaintiffs; but he has held upon the second question that the prior lease was not surrendered. In this view, the decree of the Court of first instance has been modified, and, although the title of the plaintiffs has been declared, no decree for ejectment has been made in their favour. On the present appeal, the plaintiffs have contended that there was no prior lease in operation which would protect the defendant from ejectment. The defendant, on the other hand, has, by way of cross-objection, argued that the grant of 1869 was not beyond the scope of the authority of a Hindu widow and protected him from eviction.

(1) 32 C. 41; 31 I. A. 144; 8 C. W. N. 889 (P. C.).
(2) 32 C. 51; 31 I. A. 149; 8 C. W. N. 895 (P. C.).
(3) 34 C. 902; 34 I. A. 166; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433 (P. C.).
(4) 50 Ind. Cas. 498; 23 C. W. N. 777; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 610; (1919) M. W. N. 262; 42 M. 523; 6 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

We may state at the outset that the cross-objection cannot possibly succeed. The Courts below have concurrently found that the permanent lease at a fixed rent granted by Rani Nilkumari on the 26th October 1869 was in excess of her authority as a limited owner in possession of the estate of her husband and does not bind the estate in the hands of the reversioners. It has been argued before us that this conclusion may be impeached in second appeal, as the various aspects of the case which arise on the facts found were not considered by the Courts below. We are unable to give effect to this contention, and the only question which requires consideration is as to the effect of the lease of the 26th October 1869 upon the prior lease.

It has been found by the Courts below that at the time when the grant of 1869 was made, the predecessor of the defendant was in possession as a tenure-holder. The tenure was heritable and transferable, though held at a variable rent. The tenure had been created by a predecessor-in-interest of Rani Nilkumari who was full owner and was competent to create such an interest in favour of the defendant. The question, consequently, arises whether the acceptance of the lease of the 26th October 1869 by the predecessor of the defendant must be taken to be equivalent to an implied surrender of the prior lease. The Courts below have, in our opinion, correctly answered this question in the negative. Section 111 of the Transfer of Property Act provides in clause (*f*) that a lease of immoveable property determines by implied surrender. The illustration to the clause is to the following effect: "A lessee accepts from his lessor a new lease..to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon." In the present case the grant of the 26th October 1869 was not intended to be, and did not operate as, a new lease. The object of the parties was to alter one of the most important incidents of the tenancy, namely, to fix the rent in perpetuity. This did not effect a new grant; *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1), *Nilratan Mandal* v. *Ismail Khan Mahomed* (2) and *Naba Kumari Debi* v. *Behari Lal Sen* (3). In the case last mentioned, Sir Arthur Wilson pointed out that the view taken in the two earlier decisions was in accordance with the law as laid down in *Ram Chunder Dutt* v. *Jugesh Chunder Dutt* (5). This grant of the 26th October 1869 has, however, not achieved its purpose. The object of the grantor and the grantee was to effect an alteration in the tenancy which would be operative against the estate in the hands of the reversioners. But the grant was made under circumstances which could not make it operative against the reversioners. What then is the effect in law?

It is well settled that an implied condition of surrender by operation of law is that the new lease should be a valid one. Accordingly, a lease which is void or voidable or which does not pass interest according to the contract of the parties does not operate as a surrender. In this connection reference may be made to the judgment of Farwell, L. J., in *Zick* v. *London United Tramways* (6) where he quotes with approval the following passage from the judgment of Coleridge, J., in *Doe d. Egremont* v. *Courtenay* (7): "Where the new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; in the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void: and in case of an express surrender so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional, to be void in case the grant should be made void." To the same effect is the decision in *Canterbury Corporation* v. *Cooper* (8). We hold accordingly that when it was established that the defendant could not rely upon the grant of the 26th

(5) 12 B. L. R. 229 at p. 238; 19 W. R. 353 (P. C.)
(6) (1908) 2 K. B. 126; 77 L. J. K B. 942; 98 L. T. 841; 72 J. P. 257; 24 T. L. R. 577.
(7) (1848) 11 Q. B. 702 at p. 712; 75 R. R. 600; 17 L. J.Q.B. 151; 12 Jur. 454; 116 E. R. 636.
(8) (1909) 100 L. T. 597; 73 J. P. 225; 7 L. G. R. 908; 53 S. J. 301.

October 1869 as an answer to the claim of the plaintiffs he was competent to fall back upon the prior lease; that lease unquestionably furnishes a complete answer to the claim.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed. But there will be no order for costs, as the appeal and the cross-objection have both failed.

Appeal dismissed.

N. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 135 OF 1923.

February 12, 1923.

Present:—Justice Sir P.C. Banerji, KT.

Musammat BASRA BEGAM—PLAINTIFF—APPELLANT

versus

Babu SHEO NARAIN—DEFENDANT—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 4—Title, question of—Decision by Insolvency Court, finality of.

The decision of an Insolvency Court, on a question of title relating to any property attached by the Receiver as the property of an insolvent, is final, and the matter cannot be re-agitated in the Civil Court even if the Insolvency Court permits the claimant to do so.

Second appeal against a decree of the Subordinate Judge, Moradabad, dated the 26th October 1922.

Mr. *S. A. Haider*, for the Appellant.

JUDGMENT.—The Receiver of the estate of an insolvent having attached certain property as the property of the insolvent, the present appellant, preferred an objection claiming the property. This objection was disallowed by the District Judge who recorded a decision to the effect that the appellant had failed to establish his claim. Thereupon the appellant brought a regular suit in the Civil Court for the establishment of his right to the property. This suit was decreed by the Court of first instance but was dismissed by the lower Appellate Court, that Court being of opinion that the matter was *res judicata* in consequence of the decision of the Insolvency Court to which

I have referred above. The plaintiff has preferred this appeal. I am of opinion that the appeal must fail, inasmuch as the suit instituted by the plaintiff is precluded by the provisions of section 4 of the new Insolvency Act, No. V of 1920. That section makes the decision of the Insolvency Court conclusive in all matters. It is true that in the present instance the learned District Judge, when dismissing the plaintiff's objection, stated that he might establish his title in the Civil Court, but that statement in the judgment cannot give the plaintiff a right which he is precluded from enforcing by reason of the provisions of the Insolvency Act. In this view the suit was rightly dismissed, and I dismiss this appeal.

Appeal dismissed.

M. A. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 32-B OF 1921.

October 12, 1922.

Present:—Mr. Kotwal, A. J. C., and Mr. Prideaux, A. J. C.

AMBADAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KASHIBAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will, oral—Proof of exact words necessary—Probate or Letters of Administration, when can be granted.

When an oral Will is pleaded it is necessary to prove, as far as possible, the exact words used by the testator. [p. 982, col. 2.]

Before a person is entitled to Probate or grant of Letters of Administration, he must show that he is an executor or that under the Will the property has vested in him. [p. 983, col. 1.]

A Will provided that the testator's two widows should adopt a boy named *T*; that if he was not available they should, in consultation with each other, adopt any other boy, and that in case of difference of opinion as to the boy to be adopted, the choice of the younger widow should prevail. The younger wife died during the lifetime of the testator; the elder adopted *T*. after her death:

Held, that the elder widow had the power to adopt *T*. which was not put an end to by the death of her co-wife. [p. 983, col. 1.]

AMBADAS *v.* KASHIBAI.

Appeal from a decree of the First Additional District Judge, West Berar, Akola, dated the 10th October 1921, in Civil Suit No. 4 of 1921.

Messrs. *W. A. Forbes, A. V. Khare* and *M. B. Paranjpe*, for the Appellants.

Sir *S. K. Bose* and Mr. *P. N. Rudra*, for the Respondents.

JUDGMENT.—On the 18th of April 1898 one Bansilal Fakirchand executed a Will whereby he endowed to the newly built temple of Shri Pandurang at Akola certain property. He therein stated that the management of the property should be done by one Ganpatlal Mukandlal and Balchand Bansilal in consultation with the testator's sister, Chunabai. It seems that after Bansilal's death Ganpatlal Mukandlal apparently got possession of the property and he in turn on the 6th April 1910 executed a document appointing, in the event of his death, Jankidas Gangadhar and Abaji Ganesh *alias* Bandu Nana, residents of Akola, to succeed him in his trust. He also on the same date executed a Will by which he disposed of his own moveable and immoveable property. He then died in 1917. The relevant portion of the Will has been translated thus :—

"I have no male issue, *etc bai*, but have two married wives only. They two should adopt a boy for the perpetuity of my name after me. And at present there is one of my kinsmen, Totelal Kanhaylal Agarwal, resident of Burhanpur. My wives should adopt him as son after me. If he is not available my two wives should, with the consultation of each other, adopt any other boy of my own family. If no boy in the family is available, my wives should adopt none. If there is a difference of opinion between the two wives as to the boy to be adopted, that boy should be adopted which my younger wife, Sonu, will choose and perpetuate my name and manage the property.

"If my wives adopt no boy after me as written above in clause 3, all my moveable and immoveable property given above should be in possession of my two wives during their lifetime, and each of them should keep Rs. 250 to 300 every year for her own expense and devote the rest of the income to Shri Sausthan Vithal Rukhmai at Akola under my management. After their death all that property should be dedicated to, and put in possession of, the aforesaid Susthana. No other heir shall have right thereto.

"If my wives adopt a boy after me as stated in clause 3, he will be the owner of all my mentioned moveable and immoveable property and it will remain in his possession. But out of the income of my property he should every year spend Rs. 100 for the Ashadi festival in the Vithal Rukhmai Sausthan. Besides this, if my junior wife, Sonu, who has performed no religious act such as pilgrimage, *et c.tra*, demands Rs. 250 to Rs. 300 for pilgrimage, that amount should be paid to her for the expenditure.

"If my wives cannot pull on well with the boy adopted by them after me, they each should take Rs. 250 to 300 every year for expenses. If after the adoption of a boy by my wives they three cannot live together amicably, my senior wife should live in the same house in which she has been living at present and should occupy that portion only, and my junior wife should live in the portion in which I live at present, and the adopted boy should live in the portion in front thereof, that is in the newly built portion towards the west."

Sonu, one of the wives, died in 1911 before the testator, and the remaining wife, Kashibai, is said to have, in 1920, adopted Totelal referred to in the Will.

These proceedings have been started by Ambadas and Jankidas asking for Probate in respect of the Will; or if that cannot be given, Letters of Administration should be granted them in respect of Ganpatlal's property.

Defendants admit the Will but deny that by that document Ganpatlal bequeathed his property to the Sausthan of Vithal Rukhmai It was the petitioner's case that on 31st July 1917 Ganpatlal added an oral codicil to his former Will giving the entire property to the Sausthan and revoking that portion of the Will in which he directed that a boy should be adopted, and it was on his oral Will that Probate was sought. The defendants denied this oral codicil. It was further pleaded that the Sausthan was a public charitable trust and the suit was not maintainable, the sanction of the Advocate-General having not been obtained to it.

After Totelal had been joined as a party the case went to trial on the following issues;

AMBADAS v. KASHIBAI.

"(1) Whether the temple of Shri Vithal Rukhmai is the private property of Bansilal or is it a public charitable trust ?

"(2) Whether the applicants are the trustees and *wahivatdars* of the estate of Bansilal and, as such they are the tustees of the temple ?

"(3) Can they apply on behalf of the Sausthan for Probate or Letters of Administration ?

"(4) Did Ganpatlal provide in his Will dated 6th April 1910 that in case Totelal was not adopted by him or his wife, his estate should go to the Sausthan immediately on his death?

"(5) Did he appoint the applicants the executors by his Will dated 6th April 1901 or under the oral Will or under both, and were they so appointed expressly or impliedly?

"(6) Did Ganpatlal confirm by his subsequent oral Will dated 31st July 1917 the provision in the written Will giving away the property to the Sausthan, after revoking the provision about the adoption as his son by his wife ?

"(7) If the applicants were not appointed executors, can they maintain the application for Probate on behalf of the Sausthan ?

"(8) Can the application be treated as one for Letters of Administration and can they legally be granted to them in these proceedings ?

"(9) Whether the plaintiffs cannot be allowed to ask for a Probate on the strength of the written Will in view of their statement in paragraph 3 of their Written Statement dated 8th January 1921 ?

"(10) If so, do the words as stated by the applicants constitute a Will ?"

The findings of the Trial Court may be summarised thus. That the Sausthan in question is a public charitable trust, and was not the private property of Bansilal. Plaintiffs are the trustees of Bansilal's property but not of the Sausthan. The third issue was found in the nagative. Under Ganpatlal's written Will the Sausthan was entitled to get the property only on the death of the two wives and in case no son was adopted. The Will appointed Ganpatlal's wives as the executors and not the plaintiffs either expressly or by implication The plaintiffs' evidence regarding the oral Will is disbelieved and it was found that Ganpatlal did not make any oral Will modifying or confirming the directions of the Will dated 6th April 1910. The suit was dismissed, and against that dismissal the present appeal has been filed.

We turn to the question of the oral Will. It is discussed by the lower Court in paragraphs 12 and 13 of its judgment. It was stated for the plaintiffs in the pleadings that :—

"When the deceased made the oral Will he did not expressly utter words that the petitioners were appointed executors. We contend that the petitioners were impliedly appointed executors under the oral Will. The oral Will was made on or about 31st of July 1917. The terms of the oral Will are as stated in the paragraph 3 of the petition and paragraph 3 of the reply filed to-day."

The third paragraph of the petition states, referring to Ganpatlal, as follows :—

"At his death he orally declared and ratified his previous intention of giving away his property to Shri Vithal Sausthan and did will it away to the Sausthan. The petitioners who are the trustees of the Sausthan, are applying for a Probate of this Will duly executed."

The third paragraph of the reply given by the Pleader runs :—

"The deceased, as stated in paragraph 3 of the application, revoked the written Will dated 6th April 1910 so far as to will away all his estate to Shri Vithal Rukhmai Sausthan. The applicants are the *wahivatdars* of the Sausthan and hence they think they are entitled in law to ask for a Probate of this final Will of the deceased."

Further, in the pleadings it is stated that Ganpatlal spoke in Marathi as under:—

"*Mala atan Dattak ghenen nahin. Mi mazi sarva istcta Bansilaljine bandhilelya Shri Viththal Rukhmai Sausthanla arpan keli ahe. Devasthananche je tursti ahet tyani va istetichi Devasthanatarfe vahivat karavi.*"

We thus have not only the actual words said to have been used by Ganpatlal but the language in which those words were spoken.

It is here argued that the oral Will is completely proved by the statements of P. Ws. Nos. 3, 5 and 8. Narain (P. W. No. 3) states that at Akola he occupied one of Ganpatlal's houses as a tenant and visited his landlord one day before his death to pay arrears of rent. He asked Ganpatlal what he had done about

his property and was told that he had given it to the Vithal Rukhmai idol and had nothing to care about and that he had sent for Motilal and others. This witness apparently was not present when the oral Will was made. Rupchand (P. W. No. 5) states that Ganpatlal was married to his real sister, Sonabai. About a day before his death when Motilal and others were present Ganpatlal said that he had already made a Will of his property dedicating it to the idol Shri Vithal Rukhmai, he also said that he would enjoy it if he survived, otherwise on his death Shri Pandharinath would be its owner. Ganpatlal asked Motilal and Venkatrao Desai to act as trustees of the temple in respect of his property but both of them refused to do so. This man is Motilal's Gomasta. He can hardly be said to have proved the Will. Pandurang (P. W. No. 6) is the Doctor who was treating Ganpatlal before his death. He states that he suggested to Ganpatlal that he should make some arrangement concerning his property but was told that he had disposed of his property in favour of Shri Vithal. This was two or three days before his death. P. W. No. 8 is Motilal. He states:—

"I understood that he had made an oral disposition. There was no talk between him and myself about the adoption at that time. Four years before that he had told me that he intended to adopt a certain boy of Burhanpur. But on the day previous to his death when he told me that he had gifted the property to the idol of Pandhari, he said that he would not adopt the boy. He did not say why he had changed his mind."

Witness stated that he asked Ganpatlal as to what arrangement he had made for the temple and upon this Ganpatlal said:—

Mi apali isteta Devala dilimala datlaka ghyavayacha nahin.

Ganpatlal spoke in Hindi and the witness does not remember the exact words but remembers he used the following words:—

"*Pandharinath koo isteta deneki dattak leneka nahin hai.*"

Ambadas (P. W. No. 9) says:—

"One day before his death he told me that he had abandoned his idea of adopting a son and had gifted his moveable and immoveable property to the Dewasthan."

He says that the oral Will of Ganpatlal was in Marathi. He first spoke to witness in Marathi and then he spoke to Motilal in Hindi. His Marathi words were:—

"*Mala ata Dattak ghene nahin. Majhi ji sthavar jangam isteta ahe ti Bansilalni bandhalelya Devasthanala deli ahe.*"

And then his Hindi words were as follows:—

"*Merekoo Dattak leneka nahin hai. Meri jo isteta hai so Viththal Rukhmai Sansthanko di diyi.*"

P. W. No. 10, Sadasheo, states that two or three days before his death Ganpatlal told him that he made over his estate to the idol and had no intention to adopt a son. Ganpatlal spoke in Marathi and his words were as follows:—

"*Mi Dattak ghenyacha vichar rahit kela, va apali isteta Viththal Mandirala sarva dili.*"

Now, when an oral Will is pleaded it is necessary to prove, as far as possible, the exact words used by the testator and we are of opinion that this has not been done in the present case. The witnesses do not agree as regards the exact words said to have been used by Ganpatlal in his oral Will. The witnesses vary as to when the Will was made and, as stated by the lower Court, Ambadas' conduct in dunning defendant No. 1 for money due by Ganpatlal to Bansilal and in paying rent of Ganpatlal's house to defendant No. 1 is consistent with his story that the Will appointing him executor was made in his presence. We confirm the finding of the lower Court that no oral Will has been established. If Ganpatlal had wished to modify his former written Will, there was nothing to have prevented him from doing so by making a new one in writing or by making a codicil in writing.

It is here urged that even if the oral Will is not proved the appellants are entitled by force of Exhibit D-1 to get Probate. Appellants do not deny that the Will was executed by Ganpatlal. It is argued that, as Sonu died in 1911 and the boy is said to have been adopted in 1920, the adoption can in no case be valid, as the remaining widow has not under the Will power to adopt Totelal. The question whether Totelal has or has not been adopted is really immaterial. For, if the remaining widow has the power to adopt Totelal the applicants would not be entitled to either Probate

or Letters of Administration. It is argued for the appellants that the power given by the Will was for both widows to adopt and that one could not adopt the boy. The adoption was to have been a joint act and the Will makes no provision for the death of one wife and then an adoption by the existing widow. *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (1) is quoted in support of this argument.

The question is whether the exercise of the power granted by the Will was in the discretion of the two widows jointly and whether the death of one of them put an end to the joint power. It is argued that the Will must be very strictly construed and can neither be varied from nor extended : (Paragraph 114, Mayne's Hindu Law and Usage). Kashibai, it is argued, had no power to adopt singly and the joint power enforced a prohibition against the adoption by one of the widows alone.

We are not pressed by these arguments. We interpret the written Will liberally looking to the intention of the testator which was that a certain boy was to be adopted. Though both widows are mentioned, the Will does not restrain the authority of either. The main object was that a particular boy was to be adopted ; the mention of both widows was subservient to the adoption itself. The document gave the widows, as far as this boy is concerned, no option. It did not allow them any power of selection. Therefore, the fulfilment of the wish of the testator by the remaining widow, who was the only person who could fulfil it, was not against but in accordance with what the testator contemplated. We, therefore, think that if the adoption took place it is valid. If it has not yet taken place, there is still the possibility of its being made, and as long as this possibility exists the temple can have no right to the property. Before the applicants are entitled to Probate or grant of Letters of Administration, they must show that they are executors or that under the Will the property has vested in them ; see sections 4 and 19 of the Probate and Administration Act.

(1) 23 Ind. Cas. 166; 37 M 199; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L.R. 328; 41 I.A 51 (P. C.)

The argument for the appellants is that, though they may not be executors expressly appointed by the document, they are impliedly appointed; but the Will itself makes the widows, if any body, the executors if no adoption takes place.

The appellants are not the managers of the temple, though possibly they are the trustees of the estate of Bansilal left to the temple. What evidence there is shows that the temple was built by Bansilal from his own money and money subscribed by other people for the building of the temple, the site originally belonging to the Hindu community. It would be, it seems to us, a public institution and not a private one.

For these reasons we think that it has been rightly held that the present appellants are neither entitled to Probate nor to Letters of Administration. We confirm the decision of the Court below and dismiss this appeal with costs. The appellants will pay the respondents' costs.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 726 OF 1922.

February 12, 1923.

Present :—Justice Sir P. C. Banerji, KT.

Babu ABDUL HAQ AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOTI LAL—PLAINTIFF—RESPONDENT.

Partition Act (IV of 1893), ss. 2, 3, applications under—Proper time.

The various provisions of the Partition Act indicate that, if any action can be taken under the Act, it can only be taken in the Court of first instance before a decree for partition has been actually made. After a decree for partition has been confirmed by the lower Appellate Court, a co-sharer cannot avail himself of the provisions of sections 2 and 3 of the Partition Act, and ask the final Court of Appeal to do for him what the Court might have done if he had moved it when the case was under trial. [p. 984, col. 1.]

Second appeal against a decree of the Additional District Judge, Saharanpur, dated the 10th October 1922.

Mr. *Nehal Chand*, for the Appellants.

JUDGMENT.—This was a suit for partition of 5.48 shares in a house which the

plaintiff purchased at auction. The appellant is one of the co-sharers in the house and he owns a larger share than one-half. The Court of first instance made a decree for partition which was confirmed by the lower Appellate Court. In neither of those Courts was any application made on behalf of the appellant under the provisions of the Partition Act, No. IV of 1893. In this appeal for the first time it is contended that, as the appellant owns a larger share than one-half, he is entitled to avail himself of the provisions of the Act, and to ask the Court to sell the property instead of partitioning it and give the appellant the option of buying the plaintiff's share. In my opinion it is too late for the appellant to raise this contention. The provisions of the Partition Act apply, in my opinion, to the stage at which the suit is in the Court of first instance. The various provisions of the Act manifestly indicate that, if any action can be taken under the Act, it can only be taken in the Court of first instance before a decree for partition has been actually made. After a decree for partition has been made, after one of the co-sharers in the property has remained quiescent in both the Courts below, he could not be allowed to ask the final Court of Appeal to do for him what the Court might have done if he had moved the Court when the case was under trial. I think the appeal must fail. There was nothing erroneous in the proceedings of the Courts below, specially as those Courts were not called upon to do what the appellant now seeks to be done. I dismiss the appeal.

N. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July 7, 1922.

Present:—Lord Atkinson, Lord Carson, Sir John Edge, Kt., and Mr. Ameer Ali.

JAGDEO NARAIN SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BALDEO SINGH AND OTHERS— DEFENDANTS—RESPONDENTS.

Landlord and tenant—Malikanadari *rights, how created*—Thakbast *map and* Khasra, *meaning of*—Thakbast khasra, *evidentiary value of*—*Claim to hold land rent-free*—Onus—*Non-collection of rent by* thekadar—*Adverse possession.*

A *malikanadari* right can only come into existence by arrangement with the village proprietor. [p. 990, col. 2.]

A Regular Survey of a District is preceded by a preliminary measurement by an *amin* who lays down on a rough map the locality, without any guarantee of scientific accuracy and enters in a register particulars regarding the plots gathered from the people. The map is called the *thakbast* map, and the register the *thak khasra*. [p. 987, col. 2.]

The *thak khasra* is a rough register and statements entered in it have by themselves no evidentiary value. Where, therefore, a statement is made before an *amin* to the effect that within a *mauza* there are certain persons who hold *malikanadari* rights, an entry made to that effect in the *khasra* cannot be treated as evidence to support the claim, until it is proved that the person adversely affected thereby had notice of the statement and knowingly acquiesced in it. [p. 987, col. 2.]

Once a landlord has proved that the land which is sought to be held rent-free, lies within his regularly assessed estate or *mahal*, the onus is upon the person claiming to hold the land free of the obligation to pay rent to show by satisfactory evidence that he has been relieved of this obligation either by contract or by some old grant recognised by Government. [p. 988, col. 2; p. 989, col. 1.]

Rajah Sahib Perhlad Sein v. *Doorgapersaud Tewaree*, 12 M. I. A. 286 at p. 331; 2 B. L. R. (P. C.) 111; 12 W. R. P. C. 6; 2 Sar. P. C. J. 429; 2 Suth. P. C. J. 225; 1 Ind. Dec. (N. S.) 554; 20 E. R. 147, referred to.

Where a *mahal* has all along been held by a *thekadar*, if the latter who collects the rents and pays a fixed sum to the proprietor, fails to collect the rent from any individual tenant, it would not create adverse possession against the proprietor. [p. 990, col. 2.]

Mere non-payment of rent or discontinuance of payment of rent cannot by itself create adverse possession. [p. 990, col. 2.]

Appeal against a decision of Mr. Justice Mullick and Mr. Justice Jwala Prasad, dated the 16th February 1917,

in Second Appeals Nos. 872, 989, 994 of 1915, reported as 39 Ind. Cas. 107, reversing the decrees, dated the 9th February 1915, passed by the District Judge, Patna, and the First Sub-Judge, Patna, dated the 2nd July 1914.

Messrs. *DeGruyther, K. C.*, and *J. K. Roy*, for the Appellants.

Messrs. *Dunne, K. C.*, and *B. Dube*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali,—These consolidated appeals from seven decrees of the High Court of Patna arise out of the same number of suits brought by the plaintiffs in the Court of the First Subordinate Judge of Patna on the 8th February 1913 under the following circumstances.

The plaintiffs are part proprietors of a *mahal* paying revenue to Government consisting of one *mauza* named Amarpur Jabar, which bears on the Collector's register No. 9-4377, and is assessed with a *jama* of Rs. 225, odd annas. The *pro forma* defendants in the several suits are the co-sharers of the plaintiffs, and own the remaining share of the *mahal*. The contesting defendants in the suits hold separate lands within the *mauza*, which in the aggregate amount to a considerable part of the village. In respect of these lands the defendants claim to have acquired either proprietary right by adverse possession, or the right of rent-free tenure-holders, who are known in Bihar as *malikanadars*. Sometime before these suits were brought, there appears to have been a Cadastral Survey under Chapter X of the Bengal Tenancy Act (VIII of 1885), and, on the contention of the defendants, they were entered in the Survey Register as *malikanadars*. The plaintiffs seek in these suits to have it declared that the entry is erroneous, and that the defendants are not entitled to hold the lands in their possession and occupation free of the obligation of paying rent. The Subordinate Judge, upon a careful view of the evidence, came to the conclusion that the defendants were mere tenants, and were liable to pay rent for the lands they hold and accordingly decreed the suits. His decrees were upheld on appeal by the District Judge, but on second appeal they have been reversed by the High Court of Patna and the suits dismissed. The appeals to this Board are from the decrees of the High Court dismissing the suits. One of the objections to the view taken by the High Court is based on the ground that the learned Judges in entertaining the second appeals had no jurisdiction to set aside the decision of the District Judge on questions of fact in respect of which he concurred with the Court of first instance. This objection is not without force, but, in view of the fact that the learned Judges of the High Court have differed from the lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case, and other circumstances, their Lordships deem it expedient to deal with the appeals on their merits.

It is proved beyond doubt that the village of Amarpur Jabar, together with some other villages which were considered as its *dakhili* (appurtenant hamlets), were granted free of revenue in the early part of the reign of the Emperor Aurangzeb, surnamed Alamgir, to one Asdulla Chishti, whose name indicates that he belonged to a holy family. They were afterwards confirmed in favour of other members of the family. The villages in question came subsequently into the possession by purchase of one Khadim Hussain Khan, and he and his successors held the property without question or assertion of right by anybody else until 1838. In that year the East India Company's Government instituted proceedings under Regulation II of 1819, for its "resumption;" in other words, to assess and impose revenue upon it. The documents in connection with the resumption proceedings show that the investigation conducted at the time was thorough and covered not only the examination of the title of the possessor of the estate to hold the village revenue free, but included an investigation into the titles of all persons occupying lands on the allegation that they were not liable to the payment of rent. One was the natural corollary of the other; as the Government claimed the right to assess revenue upon every *bigha* of land from which the owner derived an income, it was necessary for the purpose of fair assessment to examine the title of

every one who claimed to hold any land within the *mauza* free of rent.

In 1838, when proceedings were taken for the Summary Settlement of this village, the admitted owner of the property was a lady of the name of Umatuz Zohra, and the area of the land was recorded as 765 *bighas*, but this measurement was subsequently amended, and the total area was found to be 463 *bighas*. No person other than Umatuz Zohra had put forward at that time a claim to the Summary Settlement. Later on, the matter came before the Deputy Collector for confirmation of the Temporary Settlement, and on the 18th January 1839 a formal order was recorded to the effect that the person with whom the Permanent Settlement should be made was *Musammat* Umatuz Zohra, who was in possession. The measurement in connection with this Settlement was tested by the officer-in-charge in the presence of two men, who are thus described in the order then made, which runs thus :—" I tested the measurement of the under-mentioned plots in the presence of the measurement staff and many other persons of the village and of its vicinity and Girwar Singh, *Gomashta*, and Sheo Dayal Singh cultivator. "

Girwar Singh and Sheo Dayal Singh are the ancestors of the contesting defendants, through whom they claim to have derived their *malikanadari* right. Before the Settlement Officer, who was engaged in the assessment of the revenue on the village and the enquiry for that purpose into its assets, no person put forward any claim that he held any land within the *mauza* adversely to the owner, or had any right therein which absolved him from the obligation of paying rent for the lands in his occupation. Girwar Singh is stated to have been only a servant and *Gomashta* of the owner, and Sheo Dyal Singh a cultivator. No other right is mentioned.

Subsequent proceedings throw further light on the character of the Settlement. The property is situated in the District of Patna ; the owner lived in the District of Monghyr. It had consequently been let out in farm to one Asmani Singh and another. It also appears that originally it consisted of three *mauzas*, *i. e.*, Amarpur Jabar, Amarpur Roop and Jabarpur *khas*, and that they were amalgamated under the Settlement of 1839, and named Amarpur Jabar. The Settlement with Umatuz Zohra is re-affirmed in accordance with the details given in the *rubkari* of the 12th August 1839. It is stated :—

" In view of the *Aima* being a *Badshahi* grant, this Permanent Settlement is made with the said possessor from 1247 *Fasli* at a *jama* fixed with regard to the fullest crop of the land ".

And regarding the measurement it is again stated :—

" When the possessor arrived, the measurement was made from 22nd to 29th May of the said year in the presence of Tilakdhari Lal, *Patwari*, Asmani Singh, *thekadar*, Girwar Singh and Sheo Dyal Singh, *amlas* of the possessors, Doma and Gur Dyal *Goraits*."

The *Gorait* is the village watchman. Then comes the following statement :—

" In spite of Notification being issued, no one has raised any objection until now (up to this time) with regard to the boundary limits."

In the same proceedings there is a statement to the effect that no body within this *mauza* claimed "*jaith raiyatti*" right. A *jaith raiyat* might be either a head *raiyat* or a tenure-holder. Some lands are stated to be dedicated to pious purposes, but there is nothing to give colour to the suggestion that *malikana* rights were claimed, far less held, by anybody. The conclusion is given thus :—

" Besides that, nobody came forward to claim *minhai* and *milkiyat* rights from that time up to this day, notwithstanding the issue of the Notification, etc., during the pendency of the case, and in the *mufasil* *Musammat* Umatuz Zohra was found to be in possession. For the above reasons the said *Musammat* is entitled to settlement in exclusion of the *malikana* right on the ground that she alone was the possessor of the *milkiyat* and *minhai* land. "

The Settlement was thus made with the owner, Umatuz Zohra, after a thorough enquiry, in the presence of *thekadars*, in respect of the whole *mauza*, including the non-assessable lands, on the basis of the rent that they paid to her.

The owner, as stated already, was a non-resident landlord ; the property was let to *thekadars* upon a fixed rental. The

landlord had no direct communication, with the tenants or *raiyats*; the actual collections being left to the *thekadars*. At the time of the Settlement of 1839, the rent payable by the *thekadars* was Rs. 351. The Deputy Collector, in his anxiety to assess as high a revenue as possible upon the *mauza*, considered that 10 per cent. out of this Rs. 351 being the usual allowance or *malikana* to which the proprietors were entitled, was sufficient remuneration for the Zemindar and he accordingly fixed Rs. 316, which represented Rs. 351 less the 10 per cent. *malikana*, as the revenue payable by Umatuz Zohra.

With regard to the plea of the lady that some allowance should be made to her for what is called *saranjami* expenses, in other words, the expenses incurred by the landlord in the management of the property, the Deputy Collector was of opinion that the *saranjami* expenses were included in the *theka* rent and he accordingly rejected her prayer. This Settlement was confirmed by the Collector. It then went up to the Board of Revenue and was finally confirmed, but the *jama* or revenue payable by the landlord was reduced to a more moderate amount, *viz.*, Rs. 225, the revenue it now bears. On the basis of this reduction, an ingenious argument was put forward on the side of the respondents. It was suggested that the revenue was reduced from Rs. 316 to Rs. 225, because there existed in the village these *malikanadari* rights. It is enough to observe that throughout the proceedings there is not the faintest reference to such a ground. The Government's order confirming the assessment with the reduction appears to have been made a year later. The following entry in the *Mauzawar* Register of Amarpur Jabar explains exactly the final Settlement with Umatuz Zohra :—

"This *mauza* is *aima mash* (grant) with the recorded area of 765 (?) It was resumed and entered in the list of *khas mahal* as bearing No. 1225, and was permanently settled on the 25th May 1839, A. D., with effect from 1247 F. S., at an annual rental of Rs. 316 in the name of *Musammat* Umatuz Zohra. Thereafter, on the 6th October 1840, A. D., it was with the sanction of the Government, entered in the Rent-Roll as paying a revenue of Rs. 225. The land of this *mauza* is joint with land the of Mohiud-din Nagar bearing No. 3082. Accordingly, *thakbast* and Survey measurements were effected and numbered as *halka* No. 17 in Persian, and the area thereof was found to be 189 *bighas* 10 *cottas* according to *khatiawni*."

As already observed, the investigation under Regulation II of 1819 was carried out with extreme thoroughness in respect of details, three registers were prepared, named respectively, *mahalwar*, *mouzahwar* and *assamiwar*. In the last the names of all the persons holding land within the ambit of the village are set out, including dedications to pious purposes, but there is nowhere any trace of lands held under *malikanadari* right.

It appears that in 1840 the Regular Survey of the District in which the *mauza* is situated was taken in hand. As is well known, these Surveys are preceded by a preliminary measurement by an *amin*, who lays down on a rough map the locality, without any guarantee of scientific accuracy, and enters in a register particulars regarding the plots gathered from people who collect to watch the proceedings. The map is called the *thakbast* map, and the register the *thak khasra*. The *amin's* measurements are afterwards tested by expert surveyors.

The *khasra*, as its name implies, is a rough register, and statements entered in it have by themselves no evidentiary value. During the *thak* measurements connected with Amarpur Jabar, a statement appears to have been made before the *amin* to the effect that within the *mauza* in question there were certain persons who held *malikanadari* rights; and this officer is said to have made an entry in his register to that effect. The *Thak* Register was apparently produced in the Courts below. The District Judge refers to it, and the Judges of the High Court say, they have looked into it themselves, but, strangely enough, neither the entry has been printed nor the register produced before their Lordships, and they are, therefore, unable to express any opinion on it, and must accept the statements contained in the judgments of the Courts in India that such an entry exists in the *thak khasra*. But, as already observed, by itself it proves nothing. Assuming that

a claim of *mulikanadari* right was put forward by some person or persons with regard to certain lands, it was one to the detriment of the actual owner of the property, and there is nothing to show that it was brought to her notice, or that she had an opportunity to controvert it. The property as it stood belonged to Umatuz Zohra, with whom the Settlement was made in 1839 as owner and proprietor, and who has always paid the revenue assessed thereon, and until it can be proved that she knowingly acquiesced in the assertion made before the *amin*, it would be absurd to treat it as evidence to support the present claim. The Subordinate Judge was of opinion that the *amin* was fraudulently induced to make the entry; having regard to what took place at the resumption proceedings, their Lordships do not think his surmise was unwarranted. In 1876 the Bengal Land Registration Act (VII of 1876) came into force. The preamble of the Act runs as follows:—

"Whereas it is expedient to make better provision for the preparation and maintenance of registers of revenue paying and revenue-free land, and of the proprietors and managers thereof, and of certain mortgages of revenue-paying lands: it is hereby enacted as follows:—"

Then follows the provision relating to such registration.

For the first time, in 1877, a claim is put forward before the Revenue Authorities, in an application, dated the 31st May 1877, made under Act VII of 1876, for the registration of the names of the defendants' ancestors in respect of a share of *Mauza* Amarpur Roop as part propreitors. The claim is with respect to lands lying in Mauza Amarpur Roop, which, as already stated, had been incorporated with Amarpur Jabar, in 1839, and an area of 226 *bighas* is claimed within that *mauza*, although it is stated distinctly in the application that Umatuz Zohra stands registered as owner in the revenue records. This application was opposed in explicit terms by the proprietors; they denied the existence of Mauza Amarpur Roop as a separate *mauza* or that the applicants had any share in it. They stated, further, that had Mauza Amarpur Roop been a separate *mauza*, or a dependency of any other *mauza*, the applicants would have paid its Government Revenue and Road-Cess. The application for the registration of the names of the defendant's ancestor was dismissed by the Deputy Collector on the 7th December 1878, with the following remarks:—

"On perusal of the report submitted by the record-keeper it appears that Mauza Amarpur Jabar stands recorded on the mutation register, that there is no *mauza* known by the name of Amarpur Roop entered therein, and that the names of the applicants in respect of Amarpur Jabar, save and except the names of the ancestors of Nawab Ali Khan and *Musammat* Umdunnissa, do not stand recorded therein. From the evidence of the *Patwaris* and the *Gomashta* it appears that Mauza Amarpur Jabarpur is in the possession and occupation of Nawab Ali Khan and *Musammat* Umedunnissa, and that Balmukand Singh and others, the applicants, have no connection with the registration of the names in respect of the said *mauza*. Hence the objection of Nawab Ali Khan is allowed, and the application of Balmukand Singh and others, applicants, is rejected."

From 1878, after the dismissal of this application, the defendants have taken no action whatsoever for the assertion of the rights they claimed, until the matter came for the purpose of the Cadastral Survey under Act VIII of 1885. Section 103 (B) declares that:—

"Every entry in a Record of Rights prepared and published under the provisions of Chapter X shall be presumed to be correct until the contrary is proved."

Considerable stress has been laid on this presumption on behalf of the respondents. Once, however, the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or *mahal*, the onus is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belonged to the plaintiffs and the *pro forma* defendants, and for which they paid the revenue assessed on the *mauza*. In these circumstances, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract

or by some old grant recognised by Government. This rule was pronounced as long ago as 1869, in a judgment by Sir James Colvile, in the appeal of *Rajah Sahib Perhlad Sein* v. *Doorgapersaud Tewaree* (1) :—

"The appellant is the Zemindar; as such he has a *prima facie* title to the gross collection from all the *mauzas* within his Zemindari. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure."

The defendants have relied on two distinct facts in the assertion of the right they claim, *viz.*, first, the statement in the *thakbast khasra* and, secondly, the non-payment of rent. It is clear upon the evidence that the property has all along been in the hands of *thekadars*. The *thekadar*, or lessee, pays the proprietor a fixed rental, and he is the person who collects the rents from the individual *raiyats*. The proprietor has no responsibility so far as actual collections are concerned. The collections are thus entirely in the hands of the *thekadar*. There can be little doubt that at the time of the Settlement of 1839 the *theka* was held, if not by members of the family, certainly by members of the clan who held these lands. The evidence of Mukh Lal Singh, who has lands in his cultivation in Amarpur Jabar, and who was a *Gomashta* in that village for many years and whose father was before him *Gomashta*, shows the actual character of this village :—

"The landlords' shares of the produce of these lands were always taken by the *thekadars* and *katkinadars* under the landlords. I was *Gomashta* under the *katkinadars*, and collected their share of the produce for thirteen years. I worked with my father for three years. Collection papers were given by *Gomashtas* and *Patwaris* to Dildar Ali Khan, *malik*. Dildar Ali Khan's share was in *theka* to Mozrul Haq, *katkina* lease to Lalit Singh (*sic*) Mauza Amarpur Jabar was never in *seer* possession of the *maliks*."

The evidence of non-payment of rent rests upon the testimony of one of the defendants, Parsidh Narain Singh. He knows nothing of how they came into the possession of the property. He simply stated that "we were in adverse possession of these lands for the last seventy or eighty years," and can give no material for the conclusion he wishes the Courts to draw regarding his right to the land. His evidence in cross-examination deserves notice :—

"My father died in 1315 F. S. I am looking to our affairs for last thirty or thirty-five years. At present plaintiffs, Dildar Ali Khan and Bakar Ali Khan, are the *maliks* of Mauza Amarpur Jabar. We, defendants, have *milkiyat* in Amarpur Jabar also. I cannot say what are our shares in Amarpur Jabar. I have no papers to show how we acquired *milkiyat* in Amarpur Jabar. The statement made in my written statement that Amarpur Jabar was the *milkiyat* of *Musammat* Umatuz Zohra is correct. She was in exclusive possession of the lands of Amarpur Jabar. The vendors of the plaintiffs and Dildar Ali Khan and Bakar Ali Khan are the heirs and the representatives of *Musammat* Umatuz Zohra. The only evidence which we have of the statement that Mauza Amarpur Roop, *alias* Chehutu, was the *milkiyat* of Girwar Singh and Sheo Dayal Singh, our ancestors, and of Umatuz Zohra consists of the *thakbast* papers and the *dakhil kharij* proceedings."

Upon this evidence the Subordinate Judge came to the conclusion that the claim put forward by the defendants was illusory. He considered the entry in the *thakbast khasra* as having been made in fraud of the owner; and that the withholding of the rent, under circumstances which he detailed, did not create an estoppel or destroy the relationship of landlord and tenant.

The District Judge, as already stated, substantially came to the same conclusion.

The Judges of the High Court seem to have misunderstood the position. One learned Judge considered the defendants' claim to be one of joint proprietorship with Umatuz Zohra. He says as follows :—

"In the present case what is the evidence of fraud? The learned Subordinate Judge, in our opinion, has given no reason whatsoever upon which fraud can be established. He suspects fraud on the ground that there is inconsistency between the papers of 1839

(1) 12 M. I. A. 280 at p. 331; 2 B. L. R. (P. C.) 111; 12 W. R. P. C. 6; 2 Sar. P. C. J. 423; 2 Suth. P. C. J. 225; 1 Ind dec. (N. S.) 554; 20 E. R. 347.

and 1842. As a matter of fact, we do not think there was any inconsistency, because it is quite possible that Girwar and Sheo Dayal were both proprietors or claiming to be proprietors, and that one or the other of them was holding as tenant. The fact that Sheo Dayal was shown in 1839 as tenant of a plot would not in itself prove that the entry of 1842 showing them as proprietors of that land was fraudulent. Again, what is the evidence of fraud by the *patwari* Sheo Dayal, Girwar and the *thekadar*? There is no finding, nor is there any evidence that in 1842 either Sheo Dayal or Girwar were the servants of the *thekadar*. There is no finding that there is any sort of conspiracy between the *thekadar*, the *Patwari*, Girwar and Sheo Dayal. In these circumstances, to record a finding of fraud is, in our opinion, merely to proceed on suspicion, and if that is so, the finding is liable to be challenged in second appeal."

Their Lordships regret to observe that they do not follow the reasoning upon which this conclusion is based. The other learned Judge proceeds upon certain assumptions for which there does not appear to be any warrant on the record. He states :—

"There is nothing to show that prior to 1838 there was any relationship of landlord and tenant between the predecessors of the plaintiffs and those of the defendants and that the lands were rent-paying at all. On the other hand, no revenue was paid for these lands to Government before the resumption of the lands in 1838, as the persons in possession of the lands claimed to hold them as Revenue-free lands. Presumably the defendants' ancestors held the lands in suit without payment of any rent or revenue;"

How he comes to draw the conclusion that, "presumably the defendant's ances tors held the lands without payment of rent or revenue" is difficult to understand.

Mr. Justice Mullick says :—

"From the Glossary, published by the Settlement Authorities, we are satisfied that meaning of the words is that the defendants are rent-free tenure-holders by arrangement with the *maliks*. It denotes that the lands belong to an estate which was resumed under the Regulation, II of 1819, and of which there were persons in possession who, although not taking settlement from the Collector, received by private arrangement with the settlement-holder some lands in recognition of their former proprietary rights either on the footing of a rent-free tenure or on a promise to pay the proportionate Government Revenue."

The Glossary itself shows that *malikanadari* right could only come into existence by arrangement. Their Lordships can find no trace of evidence of any arrangement of the character assumed by the learned Judges.

With regard to the claim by adverse possession, as already observed, the *mahal* had all along been held in *theka*; the lessee collected the rents and paid a fixed sum to the proprietor. If the *thekadar* failed to collect the rent from any individual tenant it would not create adverse possession against the proprietor.

Again, mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession. The identical question came for decision before the Calcutta High Court in the case of *Prosonna Kumar Mukherjee* v. *Srikant Raut* (2) where Mr. Justice Mookerjee affirmed the proposition in clear terms.

On the whole, their Lordships are of opinion that the view taken by the High Court is erroneous, that their decrees in the several appeals should be discharged, and that the decrees of the District Judge should be restored. The appellants will be entitled to their costs of these appeals, and in the High Court, and their Lordships will humbly advise his Majesty accordingly.

N. K. *Appeal allowed.*

Solicitor for the Appellants.—Messrs. *W. W. Box & Co.*

Solicitor for the Respondents.—Messrs. *Watkins & Hunter.*

(2) 16 Ind. Cas. 365; 40 C. 173; 16 C. L. J. 202; 17 C. W. N. 137.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 99 OF 1921.

February 9, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAM KHELAWAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BRIJ LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Fixed rate holding—Simple mortgage by tenant—Dispossession, forcible, by Zemindar—Possession not recovered—Holding, whether extinct—Mortgage, whether enforceable against Zemindar.

If a tenant of a fixed rate holding mortgages his holding, and is thereafter forcibly dispossessed by the *zemindar* the mortgagee does not thereby lose his rights under the mortgage but can enforce the same against the *zemindar*, even if the tenant, intentionally or unintentionally, takes no steps to recover possession of the holding. The inaction of the tenant is equivalent to a surrender of the holding but the surrender will not affect the rights under the mortgage.

Letters Patent Appeal from a judgment of Mr. Justice Walsh, dated the 10th May 1921.

Messrs. *Gulzari Lal* and *P. L. Banerji*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—One Mahesh made a simple mortgage of his fixed rate holding in 1910. Upon his death his nephew, Bhagwati, succeeded to the holding. The *zemindar* took forcible possession of the holding, but Bhagwati took no steps to recover it from the *zemindar*. The present suit was instituted against the *zemindar*, who is now in possession, to recover the amount due upon a mortgage. There is no doubt that a mortgage of a fixed rate holding could be legally made under the law. The question is whether the holding has become extinct, and whether the mortgage is enforceable as against the *zemindar*. In our opinion the inaction as to the recovery of possession of the holding is equivalent to a surrender of the holding. If the holding was surrendered, that surrender would not affect the mortgage in favour of the plaintiffs. The same would be, in our opinion, the result if Bhagwati intentionally abstained from recovering possession of the holding and allowed the *zemindar* to take possession and continue in possession. The right of the mortgagee is not, in our opinion, extinguished, and this appeal must fail. We dismiss it with costs.

M. A. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. (*Sic*) OF 1923.

February 6, 1923.

Present:—Mr. Justice Piggott.

SADAR SINGH KONDARI—APPLICANT

versus

AMAR SINGH KONDARI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction, revisional—High Court of Kumaun, whether subordinate to High Court at Allahabad.

The High Court of Kumaon is not a Court subordinate to the High Court at Allahabad for purposes of revisional jurisdiction.

Civil revision against an order of the Commissioner, Kumaun Division, dated the 16th September 1922.

Mr. *M. P. Bhargova*, for the Applicant.

JUDGMENT.—I hold that the High Court of Kumaun is not a Court subordinate to this High Court for purposes of revisional jurisdiction under the Code of Civil Procedure. There is a special procedure provided by Statute, in accordance with which the Local Government can, upon cause being shown to its satisfaction, refer to this Court for opinion any judgment or order passed by the Kumaun High Court. It cannot have been the intention of the Legislature that it should be left open to any dissatisfied litigant in Kumaun to evade these provisions by coming direct to this Court with a petition invoking its revisional jurisdiction. I reject this application.

M. A. A. *Application rejected.*

TIKA RAM *v.* DUBO SHIB LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 811 OF 1921.

January 8, 1923.

Present:—Mr. Justice Gokul Prasad.

TIKA RAM—PLAINTIFF—APPELLANT

versus

DUBO SHIB LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 201—Record of Rights—Entry opposed to decision of competent authority—Presumption of correctness.

Where notwithstanding an order by a competent authority, the entries in the Record of Rights are not corrected in accordance with that order, the Courts are not bound to presume their correctness for the purposes of section 201 of the Agra Tenancy Act.

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 119; 8 A. L. J. 1025; 33 A. 790, distinguished.

Second appeal against a decree of the District Judge, Pilibhit, dated the 18th February 1921.

Mr. *Durga Prasad*, for the Appellant.

Mr. *N. C. Vaish*, for the Respondent.

JUDGMENT.—The point raised in this appeal is a very short one. This was a suit for profits for 1323 to 1325 *Fasli* and the plaintiff claimed profits on a share of 13⅓ *biswansis* in an eleven *biswa mahal*. The defendant's contention with which I am concerned was, that the recorded share of the plaintiff was only one-fourth of 6 *biswansis* 1-7/33 *kachwansis* out of 20 *biswas* in the years 1323 and 1324 *Fasli*. The First Court, after discussing the whole of the evidence, came to the conclusion that the plaintiff was entitled to the extent of the share claimed by him and decreed the claim for Rs. 227-4-3. The defendant went up in appeal, and in discussing the question of the amount of share on which the plaintiff was entitled to his profits the learned Judge has omitted to consider an order passed by the Magistrate and Collector of Pilibhit, dated the 17th of September 1915, that is to say, in the year 1322 *Fasli*, holding that the plaintiff's separated share was 13⅓ *biswansis* in the eleven *biswa mahal*. I have read this judgment and it does so hold. I cannot understand how the learned Judge has omitted to note this very important document, which was clearly mentioned in the judgment of the First Court, and has come to an opposite conclusion. Under these circumstances, the finding of the learned Judge in appeal cannot be considered final. On behalf of the respondents my attention was directed to section 201 of the Tenancy Act and the Full Bench case of *Durga Parshad* v. *Hajari Singh* (1). That case has no application to the present case. It was upon the interpretation of the words 'shall presume' and has nothing to do with the case like the present one, where notwithstanding an order by a competent authority the entries had not been corrected soon afterwards. In the present case it is admitted that the entries, as they stood in the year 1325 *Fasli*, were according to the order of the Collector referred to above. The mere fact that the official concerned waited for more than two years before correcting the entries in accordance with that order does not make the entries as they stood correct. If the order had been carried out promptly, the entries in the years 1323 and 1324 *Fasli* would have been the same as in the year 1325 *Fasli*. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts. The plaintiff-appellant will make good the deficiency of Rs. 5-4 due from the respondent, and in case he does it, it will be added to his costs recoverable from the respondent. He must make good the deficiency within a month from this date and after he has done so the decree of this Court will be prepared.

N. H. *Appeal allowed.*

(1) 11 Ind. Cas. 119; 8 A. L. J. 1025; 33 A. 790.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 196 OF 1922.
December 16, 1922.
Present:—Mr. Pipon, J. C.
SHARIF—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 300 Excep. 1, 302, 304, 157—Culpable homicide not amounting to murder—Wife discovered in flagrante delicto with another man—Provocation, grave and sudden.

When a husband finds his wife *in flagrante delicto* with another man, he is deprived of the power of self-control by grave and sudden provocation and if he kills the wife in the heat of the moment, his case falls within section 300, Exception (1) of the Penal Code, and he is guilty of the offence under the first part of section 304 and not under section 302 of the Code. Further, there is a very small distinction between the actual sight of an adulterous act and the realization of evidence which completely proves the most recent adultery. For instance, the feelings of a man who has just seen his wife's paramour leave her room and who finds her lying naked on the bed, must be taken to be identical with those of a man who has seen the adultery itself. [p. 993, col. 2; p. 995, cols. 1.]

Criminal appeal from an order of the Additional Sessions Judge, Peshawar, dated the 6th September 1922.

Sardar *Raja Singh*, for the Appellant.

Lala *Diwan Chand*, R. S., for the Crown.

JUDGMENT.—The appellant Sharif, aged about 30, has been convicted of murdering his wife, *Mussammat* Khair Khanam or Khair Nishan, aged about 25, on the night of the 8th May 1922 and has been sentenced to transportation for life.

In this case a large number of facts are common ground both for the prosecution and the defence. It is not denied by the accused that he killed his wife on the night in question with a chopper, locally known as "*Toka.*" The medical evidence shows that the woman had received five injuries from this weapon. Two of these were on the right side of the neck, one was on the upper surface of the right shoulder, and another was on the right collar-bone and the fifth, which was the most serious of all, was on the left side of the neck cutting through the throat and wind-pipe. The latter was alone sufficient to cause death. In other words, the accused hacked his wife to death with a chopper. The accused, after committing the deed, left the corpse in his house and the next morning made his way to his relative Nura who was in a village about three miles distant. Nura is the son-in-law of the accused's brother. He took him into his confidence and discussed with him the question as to whether he should abscond to Independent Territory. Nura advised him not to do so, and they returned together to the village where the accused entered his house and opened the door of the room in which the body of his wife was lying on a *charpoy*. A blood-stained chopper was found lying near the bed. The accused was then taken to the Police Station in custody. It is again common ground to the prosecution and the defence that the deceased was a woman of disreputable character, who had carried on intrigues with more than one person. It is also common ground that she had recently had an intrigue with Ahmad, a retired Military Havildar, who was the son of Malik Fazal, the most influential man in the village. Malik Fazal, Lambardar, accompanied the party to the Police Station.

All the above facts are admitted and established. The point at issue between the prosecution and the defence is simply this. The prosecution alleges that the accused killed his wife with premeditation and while she was asleep because of his knowledge of her intrigue with Ahmad. The defence alleges that the accused found his wife and Ahmad actually *in flagrante delicto* and that the accused, deprived by this sight of the power of self-control by grave and sudden provocation, killed her in the heat of the moment. If this defence is accepted, the offence would be one under the first part of section 304, Indian Penal Code, and not under section 302, Indian Penal Code, for there is a consensus of rulings of all Courts, both in England and in India, that when a husband finds his wife *in flagrante delicto* with another man, he is deprived of the power of self-control by grave and sudden provocation. Ahmad, the man mentioned as the adulterer, was also sent up for trial for

the offence of criminal trespass under section 457 Indian Penal Code, and tried simultaneously in the Sessions Court. He has been acquitted. I need not enter in detail into the question of his acquittal, as it is perfectly clear that, whether or not the accused Sharif's story is to be accepted in Sharif's defence, his bare statement could in no case have been sufficient to convict Ahmad of an offence under section 457, Indian Penal Code.

The assessors found that the accused did find his wife and Ahmad *in flagrante delicto*. The learned Additional Sessions Judge disagreed with this view and has given full reasons for so disagreeing. He has held that the accused killed his wife with premeditation and while she was asleep. Against the accused's theory we have the following facts :-

(1) Discharges from the deceased woman's vagina were taken by the medical officer and sent for chemical examination. The chemical examination showed that there were no traces of semen in them.

(2) According to the accused's own showing, he found the door of his house unbolted. It is unlikely that the guilty couple would not have bolted the door if they had been engaged in adultery.

(3) There was clearly no noise as a result of the tragedy. No one in the village was alarmed. It is almost impossible that if the three persons had been together in that room, as alleged by the accused, the affair could have happened so silently.

(4) The accused's own statement was that he had tried to strike Ahmad, but had struck his wife in mistake. The medical evidence alone is sufficient to defeat this contention. Further, it is inconceivable that if the accused had found Ahmad and his wife *in flagrante delicto*, as alleged, Ahmad could have effected his escape so easily. Even if he had succeeded in doing so, one would have expected to find marks of a struggle upon one or other of the two men, and, as I have said before, the neighbours would have been alarmed by the noise.

(5) This is perhaps the most important point of all against the accused. His relative, Nura, stated in the Sessions Court that when the accused first told him the story, he did not say that he had found his wife and Ahmad in actual adultery. On the other hand, before the Committing Magistrate he corroborated the accused. The learned Additional Sessions Judge has alluded to the fact that before the Police also he did not mention that the accused had told him the story that he had found the pair in adultery. This statement before the Police was inadmissible in evidence, especially as it was not proved by any Police evidence to have been actually made. I must accept the contention of the Counsel for the appellant that it must be excluded under section 162, Criminal Procedure Code. It is further pointed out that Nura in cross-examination in the Sessions Court went back on his statement which he had made in his examination-in-chief and said that the first statement which he had made, *i.e.*, that before the Committing Magistrate, was to be taken as the correct one.

The above points, no doubt, tell very heavily against the accused's theory. His Counsel admits that his story that he tried to strike Ahmad but struck his wife in mistake, cannot possibly be sustained. Nevertheless, the great point in the accused's favour is the nature of the injuries. I cannot accept the view of the learned Additional Sessions Judge that there could have been premeditation. The injuries themselves are clearly those inflicted by a man in a sudden excess of age. If he had, as alleged, killed his wife while she was asleep, after a thought-out plan, one blow would have been quite sufficient. The whole facts of the case seem to me to militate against the view of premeditation. Another point which tells, if slightly, in accused's favour, is that Malik Fazal, the most influential man in the village, had a very strong motive for shielding his son Ahmad. One cannot be quite sure to what extent Nura was acting under his influence. Nevertheless, I consider it impossible, in view of the silence and secrecy of the deed, that it could have occurred, as alleged by the accused, at a moment when he had discovered his wife and Ahmad *in flagrante delicto* within his house. To my mind it is absolutely clear that the accused acted

in a sudden fit of anger, and that this was brought about by his having suddenly received overwhelming evidence that his wife had recently been engaged in adultery. It is perfectly possible, and indeed more than probable, that he saw Ahmad leave his house, or saw him near it under circumstances which confirmed the suspicions which he already entertained. His wife's body, when found, was naked, and he may have found her lying naked on the bed only a moment after he had seen her paramour leave the house. This view explains every circumstance which has been established by the evidence. It explains why the door was not bolted, it explains why there was no noise, and it also explains why the accused made a murderous attack on his wife of a character which showed him to be almost insane with rage. I can only accept this view as representing the true story. It remains to consider whether these facts entitle the accused to the benefit of Exception (1) to section 300, Indian Penal Code. It must be admitted that there is a very small distinction between the actual sight of an adulterous act and the realization of evidence which completely proves the most recent adultery. The feelings of the man who has just seen his wife's paramour leave her room and who finds her lying naked on the bed, must be taken to be identical with those of a man who has seen the adultery itself. There is just this distinction that in the former case there may be said to be a very slight interval for reflection, while the evidence of the adultery is assimilated by the injured husband. I cannot, however, avoid taking the view that in the present case his realization of the adultery may have been so quick that he cannot be said to have had a moment for reflection, and that he was, in actual fact, deprived of the power of self-control by grave and sudden provocation. I consider, therefore, that he must benefit by Exception (1) to section 300, Indian Penal Code, and I reduce the conviction from one of murder to one of culpable homicide under the first part of section 304, Indian Penal Code.

It remains to consider the question of sentence. We have a precedent in this Province in the judgment of this Court published as Judicial Record (Criminal) No. 31. In that case a man was sentenced to three years' rigorous imprisonment who had killed his wife and her paramour when together. It was pointed out in that ruling that the lives of two human beings had been sacrificed, and that in the Bannu District, where violent crime is prevalent, punishment to be awarded for offences of this type ought to be more severe than might be necessary elsewhere. In the present case the parties are not Pathans and are residents of a comparatively peaceful District of Hazara. On the other hand, I have already shown that the accused did not find his wife, as in the case dealt with in Judicial Record No. 31, actually in the arms of her paramour, and I take this circumstance into consideration. I also take into consideration, on the other side, the fact that the life of only one person has been sacrificed. I consider, therefore, that a sentence of three years' rigorous imprisonment is appropriate. I, therefore, reduce the sentence in this case to one of three years' rigorous imprisonment.

N. K. *Sentence reduced.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 159 OF 1921.

December 23, 1921.

Present:—Mr. Lyle, A. J. C.

SAT NARAYAN SINGH—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 435—Revision competent to lower Court—High Court, whether should entertain application.

Where an application can be made in revision to a lower Court, the High Court should not, under ordinary circumstances, entertain an application in revision, unless an application has already been made to the lower Court.

Shajayat Ullah v. *Wali Ahmad Khan*, 30 A. 116; A. W. N (1908) 25; 3 M.L.T. 124; 7 Cr. L. J. 48, *Emperor* v. *Kali Charan*, A. W. N. (1904) 232 1 Cr. L. J. 914 and *Bhuyan Abdus Sobhan Khan, In re*, 2 Ind. Cas. 846; 13 C. W. N 753; 10 Cr. L. J. 190; 36 C. 643, relied on.

PITAM LAL *v.* EMPEROR.

Application for revision of an order of the District Magistrate, Sultanpur, dated the 18th October 1921.

Mr. *N. C. Dutt*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of an order of a District Magistrate passed under section 406 of the Code of Criminal Procedure in appeal from an order requiring security to be of good behavior. The applicant could have applied for revision to the Sessions Judge of Fyzabad but admittedly he has not done so. It is a sound rule that, where an application can be made in revision to a lower Court, this Court should not under ordinary circumstances entertain an application in revision unless an application has already been made to the lower Court. This is the rule followed both in the Allahabad and Calcutta High Courts : *Shafaqat Ullah* v. *Wali Ahmad Khan* (1), *Emperor* v. *Kali Charan* (2), *Bhuvan Abdus Sobhan Khan, In re* (3). There are no extraordinary circumstances in the present case which would justify a departure from this rule, but, as it would appear that such applications have been received in this Court and as this application has already been admitted, I have not thought it proper to reject it on that ground and I have heard the learned Counsel for the applicant. He bases his application on two grounds, first, that lower Courts have not given due weight to the evidence produced on behalf of his client, and, secondly, that the lower Courts were not right in treating as admissible in evidence the fact that the accused had been suspected in certain cases of burglary. The judgments of both the Courts below show that they have carefully considered the evidence before coming to a decision, and in this application for revision I am certainly not prepared to go behind the view which both the lower Courts have taken of that evidence. It is true that both the Courts below have referred to the statement of the Sub-Inspector that the applicant was suspected in certain cases of burglary in 1919, 1920 and 1921. That statement, as it stands, is not admissible in evidence; but even if we reject it there is ample evidence on the record to justify the order demanding security. The application is rejected.

N. K. *Application rejected.*

(1) 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124; 7 Cr. L. J 48.
(2) A. W. N. (1904) 232; 1 Cr. L. J. 914.
(3) 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J. 190.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 113 OF 1923.

February 21, 1923.

Present :—Mr. Justice Rafique.

PITAM LAL AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 352—Assault—Search of house by Police Officer outside his Circle—Assault to prevent search whether offence.

Inasmuch as a Sub-Inspector of Police has no right to enter or attempt to search a house, which is situate outside his Circle, if he does so, no offence is committed if the inmates assault him in order to prevent him from entering the house.

Criminal reference made by the Sessions Judge, Bareilly, dated the 20th January 1923.

JUDGMENT.—This is a reference by the learned Sessions Judge of Bareilly recommending the quashing of the conviction and sentence passed upon Pitam Lal and Chokhe Lal. The latter were convicted under section 352, Indian Penal Code, of an assault on a Sub-Inspector and fined Rs. 50. It appears that the Sub-Inspector wanted to search the house of one Dori where the two persons named above also lived. They objected and raised their *lathis* at the Sub Inspector to prevent him from entering the house. The Sub-Inspector drew out his revolver upon which Pitam Lal and Chokhe Lal stood back and did not oppose the Sub-Inspector.

RAMDHARI AHIR *v.* EMPEROR.

The Sub-Inspector admittedly had no right to enter or attempt to search the house of Dori, as Dori's house was not within his Circle. No offence in law was committed by Pitam Lal and Chokhe Lal, as pointed out by the learned Sessions Judge. I, therefore, accept his recommendation and set aside the conviction and sentence of Pitam Lal and Chokhe Lal. In case the fine has been paid it will be refunded to them or if they are in Jail they will be released at once.

N. K. *Conviction quashed.*

PATNA HIGH COURT.

CIVIL CRIMINAL REVISION NO. 1 OF 1920.

April 12, 1920.

Present:—Mr. Justice Sultan Ahmed.

RAMDHARI AHIR AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Appellate Court, power of, to take additional evidence.

An Appellate Court acting under section 195 (6) of the Criminal Procedure Code has ample power to examine any number of witnesses, or to take any evidence it thinks fit in order to satisfy itself whether it should or should not grant sanction or direct the prosecution of any person. [p. 998, col. 1.]

Budhu Lal v. *Chattu Gope* 39 Ind. Cas. 465; 21 C. W. N 269; 25 C. L. J 193; 18 Cr. L. J. 497; 44 C. 816, relied upon.

Jagdeo Lal v. *Ram Lagan Singh*, 53 Ind. Cas. 826; 20 Cr. L. J. 826, distinguished.

Application against an order of the District and Sessions Judge, Saran, dated the 13th January 1920, reversing that of the Munsif, Second Court, Chapra, dated the 22nd July 1919.

Messrs. *P. K. Sen*, *S. P. Varma* and *H. N. Sahay*, for the Petitioners.

Mr. *Manohar Lal*, Assistant Government Advocate, for the Crown.

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

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

A certain decree was obtained in the Court of the Second Munsif of Chapra against one Umrao Nonia. In execution of that decree notices under O. XXI, r. 22 and O. XXI, r. 66, were issued. The sale-proclamation was issued and the sale was held in execution of that decree.

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

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

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

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

It appears that the only witness to prove Umrao Nonia's death before the Munsif was Ramdhan Nonia who spoke to his father having been dead before the execution proceedings In appeal the learned Judge on having been informed that the death of Umrao Nonia had been reported at the *Thana*

where there was an entry in the death register with respect to his death, called for the *chowkidar* who reported the death of Umrao Nonia to the *Thana*, called for the register in which there was an entry with respect to his death, and also examined the Head Constable who had made that entry.

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

He has then contended that on the facts of the present case the learned Sessions Judge was not justified in taking the fresh evidence; and he relied upon a decision of Mr. Justice Das in the case of *Jagdeo Lal* v. *Ram Lagan Singh* (2). It may be noted that that case was under O. XLI, r. 27, and it was laid down there by Mr. Justice Das that O. XLI, r. 27 of the Code of Civil Procedure does not provide that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. It only provides that where it is impossible to pronounce judgment at all on the evidence, the Court might admit additional evidence. Whatever may be the law under O. XLI, r. 27, the Court exercising its powers as an Appellate Court under section 195 (6), has got ample powers to examine any number of witnesses, or to take any evidence it thinks fit in order to satisfy itself whether it should or should not grant sanction, or direct the prosecution of any person. It would be lamentable if the Court's powers to satisfy itself before granting sanction were in the least curtailed. What as a matter of fact has been done in this case is that the Appellate Court had the evidence of only one witness to prove Umrao's death before it, and he therefore, called further evidence to satisfy itself whether the statement made by the one witness in the case was acceptable or not. Whether that evidence is sufficient for the purpose of conviction of the accused or not is neither here nor there; it will be for the Trial Court now to find out whether it will rely upon this evidence, act upon it, and convict the accused.

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

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

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

Z. K. *Rule discharged.*

(1) 39 Ind. Cas. 465; 21 C.W.N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497; 44 C. 816.
(2) 53 Ind. Cas. 826; 20 Cr. L. J. 826.

LAHORE HIGH COURT.

CRIMINAL, REVISION CASE NO. 351 OF 1922.
May 8, 1922.
Present:—Mr. Justice Harrison.
ABDULLA AND OTHERS—CONVICTS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Punishment—Fine, levy of—Capacity to pay.

However serious may be the offence of which an accused person is convicted, a fine should not be imposed which it is wholly impossible for him to pay without ruining himself and inflicting great hardships upon his family. [p. 999, col. 1.]

The maximum fine to be imposed upon any individual should depend in every case upon his position in life and should be within his capacity to pay, and this more especially because no option is allowed under the Penal Code and the liability to pay the fine is not terminated by the serving of a sentence of imprisonment. [p. 999, col. 1.]

If the offence is of an aggravated type a sentence of imprisonment is more suitable than a fine. [p. 999, col 1.]

PRATAP UDAI NATH SAHI DEO v. SUNDERBANS KOER.

Petition, under section 439 of Act V of 1898, for revision of the order of the Sessions Judge, Gujranwala, dated the 31st October 1921, affirming that of the Magistrate, First Class, Gujranwala, dated the 2nd September 1921.

Mr. *Zafrullah Khan*, for the Petitioners,

Sayad *Mohsin Shah*, for the Respondent.

JUDGMENT.—This revision was admitted on the question of sentence only. Three *mochis*, Imam Din, Ghulam Muhammad and Abdullah, have been convicted under section 323, Indian Penal Code of striking Din Muhammad, Sub-Inspector, who was inquiring into a case in their village against the son of one of the accused, Abdullah. Ghulam Muhammad hit the Sub-Inspector with a stick and the other two struck him with their fists. They have been sentenced to pay fines of Rs. 100 each or in default to undergo rigorous imprisonment for one month. Were it not that the accused are poor menials, the sentence would be by no means excessive, and Counsel for the Crown has contended that the gravity of the offence renders it necessary to inflict heavy fines, however humble may be the circumstances of the accused persons. With this view I cannot agree. In my opinion, however serious may be the offence, a fine should not be imposed which it is wholly impossible for the accused person to pay without ruining himself and inflicting great hardships upon his family, and the maximum fine to be imposed upon any undividual should depend in every case upon his position in life. A *mochi's* income in all probability is not more than Rs. 20 a month and the fines imposed amount to the income of five months of each of the accused. I reduce the sentences to fines of Rs. 20 each and this not because I do not take a serious view of the offence committed but because I consider that the fine should be within the capacity of the accused to pay and this more especially because no option is allowed under the Penal Code and the liability to pay the fine is not terminated by the serving of the sentence of imprisonment. If the offence is of an aggravated type, a sentence of imprisonment is obviously more suitable than a fine.

Z. K. *Fine reduced.*

PATNA HIGH COURT.

CRIMINAL REVISION NOS. 124 AND 132 TO 155 OF 1922.

May 15, 1922.

Present:—Mr. Justice Adami.

Maharaja PRATAP UDAI NATH SAHI DEO AND ANOTHER—PETITIONERS

versus

Bhaiain SUNDERBANS KOER AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Dispute concerning land—Delivery of possession under decree of Civil Court, effect of—Failure to maintain possession under decree—Illegality—Civil Procedure Code (Act V of 1908), O. XXI rr. 35, 36—Case requiring actual possession—Symbolical possession, giving of, effect of—Chota Nagpur Tenancy Act (VI of 1908), s. 14, scope of—Resumption—Annulment of under-tenure.

A recent delivery of possession by a Civil Court binds a Criminal Court in a proceeding under section 145 of the Criminal Procedure Code, and the Criminal Court must uphold that possession. The failure of a Criminal Court to maintain such possession in a proceeding under section 145 of the Criminal Procedure Code amounts to an error of jurisdiction which vitiates the order of the Magistrate. [p. 1001, cols. 1 & 2; p. 1005, col. 2.]

Where symbolical possession is delivered in a case in which actual possession ought to have been delivered, the symbolical possession will operate as actual possession. The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representatives. [p. 1005, col. 1.]

Hari Mohan Shaha v. *Baburali*, 24 C. 715, 12 Ind. Dec. (N. S.) 1240 and *Govind* v. *Venkata Sastrulu*, 17 M. L. J. 598, relied upon.

Section 14 of the Chota Nagpur Tenancy Act provides that any incumbrance created by the grantee of a tenure or by any of his successors, without the consent or permission of the grantor or his successors-in-interest, shall be deemed to be annulled on the resumption of the tenure by the grantor. [p. 1003, col. 1.]

The words "grantee or any of his successors" in section 14 of the Chota Nagpur Tenancy Act include not merely the successors of a grantee but also succeeding grantees. [p. 1003, col. 1.]

Applications against orders passed by the Deputy Magistrate, First Class, Gumla.

Messrs. *P. C. Manuk*, *S. M. Mullick* and *B. C. De*, for the Petitioners.

Messrs. *Imam*, *Sami*, *Rai Guru Saran Prasad*, *Rai T. N. Sahay* and *Anand Prasad*, for the Opposite Party.

JUDGMENT.—The thirty-nine applications covered by this judgment are directed against the orders passed by the Deputy Magistrate, Gumla, in the Ranchi District in 41 cases under section 145 of the Criminal Procedure Code declaring the second party, the present respondents, to be in possession

of the *zerait* and *bakasht* lands in dispute in 39 villages in *Pargana* Barwe, Chota Nagpur. The petitioners, who were the first party to the proceedings, are the Maharaja of Chota Nagpur and his Manager, Mr. Peppe.

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

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

With regard to the lands in the other 15 cases the respondents, 2nd party, based

(1) 70 Ind. Cas 232; (1921) Pat. 369

their claim on confirmatory *pattas* granted to them by Lal Sahi and others.

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

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

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

The learned Deputy Magistrate considered the effect of section 14 of the Chota Nagpur Tenancy Act, 1908, under which the 1st party claimed that the under-tenures in the disputed lands were annulled by the resumption decree; he conceded that, if the under-tenures had been granted by Raghubir Sahi whose *jagir* tenure had been resumed under the decree, section 14 would have operated and the under-tenures would have been annulled, but he pointed out that the under-tenures were confirmed by Lal Sahi in 1860 under the *ahadnama*, and had existed from before his time, having been obtained by inheritance and self-acquisition; he held that section 14 would not permit the resumption of the under-tenure on the resumption of the tenure of Lal Sahi, "who had a life-interest and got the tenure subject to all the encumbrances and under-tenures existing since before his time, much less could the resumption of Raghubir's life-grant affect it."

The learned Deputy Magistrate held that the decree would not bind the under-tenure-holders, because they were not made parties to the suit. He was much impressed by the fact that the Maharaja joined only one under-tenure-holder as a party defendant, namely, Nibaran Chandra Chatterji, who had obtained a forest and mineral lease from Raghubir, and argued that the Maharaja understood that section 14 alone would not help him and that, to get rid of an under-tenure, he must join the under-tenure-holder as defendant in the resumption suit. He held that the Maharaja cannot now go beyond his plaint and claim to dispossess the other under-tenure-holders,

and that the other under-tenure-holders were not affected by the decree. He noticed too that the 2nd party were entered as under-tenure-holders in the Record of Rights finally published in 1909 and that the Maharaja had taken steps to have the entry altered in one case only, arguing that the Maharaja if he had any objection against the other entries, should have pressed it at the same time.

With regard to the delivery of possession he was of opinion that, if the Maharaja was resisted in taking possession, his proper course was to proceed under rr. 97 and 98 of O. XXI, Civil Procedure Code, and to go to the Civil Court for an order. He held that the delivery of possession under the decree was effected under r. 36 of O. XXI and not r. 35, and that, as delivery of possession under r. 36 affects only the parties to the suit and not a third party, there was no delivery of the under-tenures in possession of the respondents, as they were not parties to the decree. He then found that, even if the two ladies of the 2nd party had no right under the *ahadnama*, and their tenure was resumable, the 1st party must establish his claim in the Civil Court. Finally, he came to a finding as to actual possession, namely: "Lastly, Exhibit B, judgment of the High Court, and Exhibit G, judgment of the Deputy Commissioner of Ranchi, show that the Bhaiyans are in possession of the land in dispute."

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

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

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

I have pointed out earlier in this judgment that, having the Civil Court decree and the writ of delivery of possession before him, it was necessary to decide whether the 2nd party were bound by the decree, or possession was actually delivered by the Civil Court according to law to the 1st party so as to dispossess the 2nd party. The point I have to decide is, whether the Deputy Magistrate had jurisdiction, or exceeded or abused jurisdiction, if he had it; in fact, I have to decide whether the under-tenures were annulled under section 14 of the Chota Nagpur Tenancy Act and the 2nd party were bound by the decree, and whether in fact possession of the lands was delivered to the 1st party under the decree.

In the first place, the argument of the Deputy Magistrate that, because the Maharaja included one under-tenure-holder as a party defendant to his suit, it must be held that other under-tenure-holders are not bound, is fallacious. Nibaran Chandra Chatterjee held a mining and forest lease, and "land whereon a mine had been sunk under lawful authority" is expressly excepted from annulment by exception (*a*) to section 14. Hence, it was necessary to make this gentleman a defendant, otherwise on resumption his under-tenure woul continue as an encumbrance. It is admitted that the lease of this land was granted by Raghubir, the tenure-holder for life, whose tenure was being resumed, and the argument used by the Magistrate in the case of the under-tenures of the 2nd party, that they could not be resumed because they were ancient grants, could not apply to the grant to Nibaran Chandra Chatterjee.

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

Mr. Hasan Imam shows that up to 1853 there had been a long line of tenure-holders, and between 1853 and 1855 there was a resumption by the Maharaja and then in 1855 a grant to Lal Sahi. He argues that, when in 1860 Lal Sahi executed the *ahadnama* it was therein stated that Lachman's

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

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

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

The very fact that Lal Sahi and the under-tenure-holders found it necessary that an *ahadnama* or confirmatory *patta* should be executed to continue the sub-tenancy which had been granted by Deo Sahi or one of his successors clearly shows, in my opinion, that the parties to the *ahadnama* and *pattas* recognised that on the resumption in 1853 the under-tenure had been annulled, and that it was in the power of Lal Sahi to refuse to recognise it. As the *ahadnama* shows, Lachman had performed some good service for Lal Sahi and it was for that

(2) 26 I A. 216; 4 C. W. N. 274; 27 C. 156; 7 Sar. P. C. 580; 14 Ind. Dec. (N. S.) 103 (P. C.)

reason that the latter agreed to execute the deed. The *ahadnama* and the *patta* were new grants. Deo Sahi or any of his successors could not create an under-tenure to exceed in duration the subsistence of their own tenure. Even though section 14 of the Chota Nagpur Tenancy Act had not been enacted in 1860, when the tenure held by Deo Sahi's line ended, any sub-tenure created by him or his successors must necessarily come to an end too.

Now, if the grant of the sub-tenure was by Lal Sahi, who had a life-interest, he could not grant the sub-tenure to exceed the period of his life, and when he died the sub-tenure came to an end. Raghubir, his successor, was allowed to continue as tenure-holder by indulgence with a life-interest and, without a fresh grant, he recognised the sub-tenure but had no power to give that recognition effect beyond the period of his life. Furthermore, at the time of his death, section 14 expressly provided that on resumption of the tenures all sub-tenures granted by the grantee of the tenure whom he succeeded should be deemed to be annulled.

However we look at it, whether we treat the under-tenure as first granted by one of the tenure-holders previous to Lal Sahi, or whether it is held that the grantor was Lal Sahi, section 14 will apply.

I must hold that by the decree of this Court in 1920 the under-tenures claimed by the respondents 2nd party were annulled under section 14 of the Act, and that the 2nd party were bound by the decree to that extent. The argument put forward by the Deputy Magistrate that they were not bound because they were not made parties to the resumption suit cannot stand, and I have pointed out that the reasons stated by the Magistrate are fallacious.

The learned Magistrate seemed to think that, because the 2nd party were entered in the Record of Rights finally published in 1909 as under-tenure-holders and the Maharaja did not put in any objection to those entries but only objected to the entry of Raghubir as holding a *putra putradi* interest, and succeeded in having that entry changed to a life-interest, the Maharaja must be held to have acquiesced in the claim of the 2nd party to be under-tenure-holders, and he was precluded from annulling their under-tenures. The Maharaja's conduct would show no such intent. Raghubir was still alive in 1909 and during his life could grant any under-tenures he liked, and the Maharaja knowing that these under-tenures would be annulled on the expiry of Raghubir's life-interest had no good reason to object at that time to the entries in the Record of Rights while to allow the entry of a *putra putradi* Jagir in favour of Raghubir would have the effect of preventing resumption of the tenure.

Having found that the under-tenures of the 2nd party were annulled by the resumption decree, it remains to be decided whether the Maharaja, 1st party, obtained delivery of possession of the disputed lands under the decree. It is argued that the order-sheet in the execution proceedings shows that it was directed that possession should be delivered under r. 36 of O. XXI, that is to say, symbolical possession should be given which would not operate as actual possession against third persons who were not parties to the decree. Under r. 35 actual delivery is given by eviction of the person bound by the decree if he refuses to vacate It is plain that at first the order of the Subordinate Judge was that possession should be delivered under r 35, and in fact the writs were drawn up under r. 35 as shown by their heading, but afterwards the figures in the order-sheet were altered to r. 36 and possession was delivered in the manner prescribed in r. 36.

Now r. 36 refers to "immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree"

It can hardly be said that after the decree for resumption the 2nd party, under-tenure-holders, were entitled to occupy the lands and were not bound by the decree, having in view the provisions of section 14. This was a case in which actual possession should have been delivered, but by reason of the size of the Barwe *Pargana* and the multitude of villages and under-tenures is would have been well nigh impossible to give actual possesion by eviction. The High Courts of Calcutta and Madras, *Hari*

Mohan Shaha v *Baburali* (3) and *Govind* v. *Venkata Sastrulu* (4), in dealing with questions of limitation have held that where symbolical possession is delivered in a case where actual possession ought to have been delivered the symbolical possession will operate as actual possession. The delivery of symbolical possession even erroneously operates as actual possession against the udgment-debtor and his representatives.

The 2nd party were bound by the decree, as they were affected by it under section 14, and as pointed out by Chapman, J., in *Bhikhia Jha* v. *Brij Behari Singh* (5) in regard to O. XXI, rr. 100 and 101, the word "judgment-debtor" will include a representative of the judgment-debtor, the word "representative" being taken to mean all persons who are bound by the decree. I need only refer to the cases of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (6) and *Juggobundhu Mitter* v. *Purnanund Gossami* (7).

I would hold then that at the time delivery of possession was given, the officer of the Court who delivered possession was acting under writs described as being issued under r. 35, though the only possible means of delivery of possession over such a large area as the whole of the *zerait* and *bakasht* lands of the Barwe *Pargana* was by beat of drum and the posting of notices as described in r. 36, and that, as the 2nd party were bound by the decree, the possession so given had the same effect as actual possession. This possession being possession delivered under the decree of the Civil Court, took away the jurisdiction of the Deputy Magistrate to entertain proceedings under section 145 and declare the 2nd party to be in possession.

It has been necessary to deal with the questions raised in this case at great length and to enter into topics which would usually be quite foreign to proceedings under section 145, but it has been essentially necessary to find whether actual possession was given to the 1st party by the Civil Court and for that purpose to decide whether the 2nd party were bound by the decree.

The Deputy Magistrate having found that possession of the disputed lands had not been delivered to the 1st party, examined no witnesses to prove that the 2nd party were in possession, but in each of his judgments mentions certain documents on which he based his finding as to the 2nd party's possession.

So far as I can see, none of these documents proved possession at the time of the order or within two months of it. The Record of Rights was finally published in 1909, when, there is no question, the 2nd party were in possession, and the Maharaja had no reason to question their possession, and I have already pointed out that the two documents, Exhibits B and J, contain no finding or proof of the 2nd party's possession. Rent receipts relied on in some of the cases show possession up to 1915 only. According to the Police reports on which the proceedings started, it appears just before the proceedings started the 1st party were in possession seeking to cultivate the lands. Having no evidence as to possession at the time of the order or within two months, the Magistrate had really no jurisdiction to come to a finding that the 2nd party were in possession.

He relied on the agreement between the parties and the admission that there had been no change of possession since the delivery of possession by the Civil Court. The parties cannot confer on the Court by their agreement jurisdiction which it otherwise does not possess.

The failure to maintain possession delivered by the Civil Court under its decree amounts to an error of jurisdiction which vitiates the order of the Deputy Magistrate. I accordingly set aside the order in all the proceedings covered by this judgment.

(3) 24 C 715; 12 Ind Dec. (N. S.) 1246.
(4) 17 M. L. J. 598.
(5) 42 Ind. Cas. 526; 2 P. L. J. 478; 1 P. L. W. 685.
(6) 5 C. 584; 5 C L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N S) 979.
(7) 16 C. 530; 8 Ind. Dec. (N. S.) 350 (F. B.).

SARDARI LAL *v.* EMPEROR.

The paddy which has been attached by the order of the Court will now be released from attachment.

Rule made absolute.

LAHORE HIGH COURT.

MISCELLANEOUS CRIMINAL APPLICATION NO. 84 OF 1922.

November 3, 1922.

Present:—Mr. Justice Broadway.

SARDARI LAL—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Grounds for transfer.

It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts and if a person has reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias a transfer should be directed. [p. 1007, col. 1.]

Where the Public Prosecutor of a District was virtually the complainant in a case and the proceedings had been instituted under the orders of the Additional District Magistrate, who was himself a witness in the case as was another Magistrate who was subordinate to him, and the Trying Magistrate who was on friendly terms with the Additional District Magistrate had shown an undue desire to expedite the trial and had refused an adjournment when it should have been granted:

Held, that the apprehension of the accused that he would not obtain a complete, fair and impartial trial in the district, could not under the circumstances be called unreasonable and that the case should be transferred to some other District for trial. [p. 1008, cols. 1 & 2.]

Bans Gopal Pande v. *Emperor*, 24 Ind. Cas. 951; 1 O. L. J. 271: 15 Cr. L. J. 543, *Srilal Chamaria* v. *Emperor*, 45 Ind. Cas. 680; 19 Cr. L. J. 632, *Kali Charan Ghose* v. *Emperor*, 33 C. 1183; 3 C. L. J. 637; 10 C. W. N. 793; 3 Cr. L. J. 477, *Rang Bahadur Singh* v. *Karimun*, 67 Ind. Cas. 868; 22 Cr. L. J. 708; 2 P. L. T. 297, *Emperor* v. *Abdul Latif*, 26 A. 530; A. W. N. (1904) 94; 1 Cr. L. J. 338, refered to.

Application, under section 526, Criminal Procedure Code, for transfer of the case, pending in the Court of the Magistrate, 1st Class, Lyallpur, from the Lyallpur District to some other District.

Mr. *C. Bevan Pelman*, for the Petitioner.

Mr. *Des Raj Sawhny*, Public Prosecutor, for the Respondent.

ORDER.—Proceedings were instituted on the 11th July 1922 against Sardari Lal, Vakil, and three others under sections 161-116, Indian Penal Code. These proceedings were commenced under the orders of the Officiating Distict Magistrate of Lyallpur who acted on information given to him by the Public Prosecutor.

The case was taken up by *Malik* Allah Baksh, Magistrate, First Class, and the 19th July 1922 was fixed for hearing. On that date Sardari Lal appeared, but the Police reported that the other three persons complained against had absconded.

As stated above, the complaint had been instituted on the 11th July 1922, so that the Police had not had much time in which to get the other three persons served. Sardari Lal applied to the Magistrate under section 526 (8), Criminal Procedure Code, for an adjournment in order to enable him to move the superior Courts for a transfer. The Magistrate, however, proceeded to record evidence as to the absconding of the other three persons and recorded an order expressing himself as satisfied that the said persons were absconding, and that proceedings against them should be taken under section 512, Criminal Procedure Code. He then examined some of the prosecution witnesses and adjourned the case to the 25th July 1922 for the remaining prosecution evidence.

Sardari Lal then moved this Court under section 526, Criminal Procedure Code, on the 21st July 1922 and the learned Chief Justice issued notice and ordered further proceedings to be stayed.

SARDARI LAL *v.* EMPEROR.

On the 25th July 1922 Sardari Lal filed a copy of the High Court's order and asked for a stay of proceedings in accordance therewith.

In spite of the definite direction that further proceedings were to be stayed the prosecution sought to get the Magistrate to continue the examination of the prosecution witnesses, but this the Magistrate very properly refused to do. In the application for transfer the petitioner has assigned many reasons for apprehending that he would not receive a fair and impartial trial in the Lyallpur District. The Magistrate has traversed these reasons so far as he is personally concerned, but Mr. Petman for the petitioner has contended that the atmosphere in Lyallpur is such as gives his client grave apprehension that he will not receive impartial justice in that District.

Now, it has been repeatedly held by the various High Courts that it is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts, and if a person has reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias a transfer should be directed. It appears that the permanent District Magistrate of Lyallpur has now returned and the petitioner is willing to be tried by that officer. The District Magistrate concerned, however, does not wish to deal with the case on the ground that he is greatly pressed with other important work.

The gentleman who was officiating as District Magistrate in July 1922 and who directed the institution of these proceedings, is still attached to the Lyallpur District as Additional District Magistrate. He is on friendly terms with the Trying Magistrate and the other Magistrates of the District—a very excellent state of affairs—and the petitioner is convinced that this case has formed the subject of discussion at various social gatherings and functions.

The question is, whether the apprehensions held by the petitioner are reasonable. As to this the first point for consideration is the procedure adopted by the Magistrate on the 19th July 1922 when the case first came up for hearing.

Out of four persons complained of the petitioner alone appeared. The Police had had only eight days in which to search for the other three, and yet it was considered necessary to proceed with the case. Now the witnesses for the prosecution, I am told by the Public Prosecutor, were members of the Bar and Magistrates. It is obvious that they are not of the stamp of persons who could be "got at" by the defence. It was extremely improbable that the three other persons had really absconded so as to render their apprehension within a reasonable time unlikely. The record shows that one of them put in an appearance on the 25th July 1922. In these circumstances, I consider the Magistrate acted ill-advisedly in not adjourning the case when requested to do so by the petitioner.

Again, it appears that the petitioner was served with process on the 13th July 1922. Some conversation took place between him and the Magistrate relating to the likelihood of the case being heard on the 19th July. This is apparent from an order of the Magistrate dated 19th July 1922.

The petitioner apparently understood that in the absence of all the persons complained against an adjournment would be granted. The Magistrate records that he made no such promise. I am prepared to accept the Magistrate's view of the conversation, but it cannot be denied that the petitioner may have, in good faith, understood differently.

That the late officiating District Magistrate has taken a keen interest in the case seems also to be indisputable. He is also a witness in the case.

In *Banu Gopal Pande* v. *Emperor* (1) a transfer to another district was considered necessary when the proceedings against an accused were initiated under the orders of a District Magistrate, and one of the important witnesses for the prosecution was a Deputy Magistrate of the same district.

In *Kali Charan Ghose* v. *Emperor* (2) it was held that a transfer was advisable if the actions of a Judicial Officer, though

(1) 24 Ind. Cas. 951 ; 1 O. L. J. 271 ; 15 Cr. L. J. 543.

(2) 33 C. 1183 ; 3 C. L. J. 637 ; 10 C. W. N. 763 ; 3 Cr. L. J. 477.

susceptible of explanation and traceable to a superior sense of duty, are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial. In *Machal* v. *Mairu* (3) it was pointed out that in matters of this kind the law has regard not so much to the motives which might be said to bias the Judge as to the susceptibilities of the litigant parties, and that where there is anything in the case likely to create in the mind of the accused a reasonable apprehension that he may not have an impartial trial, the case should be transferred. What is "reasonable" must, of course, depend on the degree of intelligence of the accused. Again, in the present case it is alleged that the petitioner intends to summon the Trying Magistrate as a witness in connection with certain conversations between him and other Magistrates relating to the case, and in *Emperor* v. *Abdul Latif* (4) this was considered a good ground for transfer. In *Srilal Chamaria* v. *Emperor* (5) and *Rang Bahadur Singh* v. *Kariman* (6), however, it was pointed out that before a transfer could be made on this ground it must first be ascertained that the Magistrate was in a position to give some evidence directly bearing on the case, and I am, therefore, not pressed with this point, as it has not been made clear that the Magistrate in question can give any evidence that has any bearing on the guilt or innocence of the petitioner. There can be no doubt that this case has created somewhat of a stir in Lyallpur. The Public Prosecutor of the District is virtually the complainant; the present Additional District Magistrate ordered the institution of the proceeding, he is himself a witness as also is another Magistrate who acts under his orders. The Trying Magistrate's action in proceeding with the case on the 19th July 1922 was ill-advised and indicated a desire to expedite proceedings, which, though highly commendable in most cases, might well have created a suspicion in the mind of the petitioner that he was influenced by the fact that the then District Magistrate was taking an interest in the case. I am unable to hold that there was any real justification for taking proceedings under section 512, Criminal Procedure Code, as against the other three persons. The time taken by the Police was only eight days and, as has been stated above, one of the other persons appeared in Court on the 25th July 1922. That something of the kind would occur should have been anticipated by the Magistrate, and it was obvious that all the evidence would have to be taken over again.

In all these circumstances, I am of opinion that the petitioner's apprehension that he will not obtain that complete, fair and impartial trial that he is entitled to must be regarded as not unreasonable.

In saying this I must not be taken to be casting any reflections on the integrity and good faith of the Magistrate. I have no doubt that he would hold the scales evenly and come to a decision in the case solely on the evidence that would be lead before him, but regard must be had to the susceptibilities of the accused and his apprehensions must be given due weight to.

He has no objection to being tried by the District Magistrate, but as that officer has not time to take up the case, I transfer this case to the District Magistrate of Sheikhupura who may deal with the case himself, or make it over for trial to one of the Magistrates in his district.

Z. K.

Petition accepted; Case transferred.

(3) 22 Ind. Cas. 980; 10 N. L. R. 15; 15 Cr. L. J. 196.
(4) 26 A. 536; A. W. N. (1904) 94; 1 Cr. L. J. 338.
(5) 45 Ind. Cas. 680; 19 Cr. L. J. 632.
(6) 63 Ind. Cas. 868; 22 Cr. L. J. 708; 2 P. L. T. 297.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 138 OF 1922.

February 16, 1923.

Present:—Mr. Pipon, J. C.

AKHI—PLAINTIFF—PETITIONER

versus

HAZRATGUL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. II, r. 2—"Might and ought to have been made ground of attack or defence," meaning of —Suit for possession as proprietor—Subsequent suit as heir whether barred—Res judicata, *question of—Revision whether competent.*

If a plaintiff has two alternate capacities upon which to rest his claim he must disclose both these capacities, provided that they "might and ought" to be made grounds of attack within the meaning of section 11, Explanation IV of the Civil Procedure Code. [p. 1011, col. 2]

Umraobi v. *Hummalbi*, 54 Ind Cas. 200, *Guddappa* v. *Tirkappa*, 25 B. 189, 2 Bom. L. R. 872, *Kameswar Pershad* v. *Rajkumari Ruttan Koer*, 20 C. 79, 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind Dec. (N. S) 53 (P. C.) and *Kamachi Ammal* v. *Agilandammal*, 6 M. 334, 2 Ind. Dec. (N. S.) 513, relied on.

Where a person first sues for possession as a proprietor and after the suit is dismissed sues again as an heir to the original owner, the question whether he can or cannot bring the second suit, depends upon (1) whether he could have based his former suit on the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of section 11 and O. II, r. 2, of the Civil Procedure Code, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape, if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. [p. 1011, col. 2.]

An application for revision should not be entertained upon the question of *res judicata*, unless the decision is so manifestly illegal and inequitable as to amount to a miscarriage of justice. [p. 1011, col. 1.]

Petition for revision of an order of the Divisional Judge, Peshawar, dated the 23rd February 1922, by which the defendents-respondents' appeal was accepted and the plaintiff-petitioner's suit dismissed with costs.

Lala *Gokal Chand Dhawan*, for the Petitioner.

Mehta *Mangal Sain*, for the Respondents.

JUDGMENT.—The material facts are these :—

On the 7th October 1920, plaintiff brought a suit for possession of a house against the persons in occupation, Hazratgul and Faizgul. The suit was brought in the form of one for ejectment of tenants and was valued at Rs. 18 or one year's alleged rent. The defendants resisted the suit on the ground that they were themselves landlords and that the plaintiff had no interest. The plaintiff based his own claim to be landlord on an unregistered deed of sale covering both the site and the materials of the house, executed in his favour on the 9th of January 1920 for Rs. 120 by one Imam Sadin. This person's name is variously given in the record as Imam Sadin, Mohammad Sadin and Imamdin. His correct name appears to be Imam Sadin. This man is the son of Gul Sadin. Gul Sadin had married the daughter of Mehram. Mehram was the uncle of the plaintiff. An issue was framed as to whether the site and the materials of the house were the property of the plaintiff. The first witness produced by the plaintiff was Imam Sadin, the alleged vendor of the house. Imam Sadin supported the sale and also remarked that the plaintiff was the nephew and heir of the original owner Mehram. After the oral evidence had been concluded the plaintiff filed a copy of the House Enumeration Register of the village showing the house as owned by his uncle Mehram. He appears in so doing to have alleged that he was in any case entitled to succeed to the house as the heir of Mehram. The Munsif held that the sale-deed was inadmissible in evidence as unregistered and that the plaintiff could not prove his alleged purchase. As regards the copy of the House Enumeration Register filed by the plaintiff the Munsif remarked that "the mere filing of a copy of *khanashumari* does not show anything unless plaintiff proves that he is the descendant or inheritor of the person whose name is given in the *khana milkiyat* of the *khanashumari*. Accordingly, this *khanashumari*, even if it be admitted in evidence; does not help the plaintiff." On this finding the suit was dismissed on the 20th of December 1920. The plaintiff lodged no appeal against the dismissal of the suit; but on the 24th of January 1921 he instituted a second suit for possession of the same house against four persons Imam Sadin, the alleged vendor, Khaistaghul, from whom he alleged he had purchase

the mortgagee rights in the house and the two previous defendants, Hazratgul and Faizgul, who were in occupation and who set up a rival title as landlords. The plaintiff in this case based his title to be landlord on the ground of inheritance from Mehram, the alleged original owner. He also referred to his purchase from Imam Sadin and added that he had purchased the mortgagee rights from Khaistagul. The suit in this case was valued for purposes of Court-fee and jurisdiction at Rs. 100 which purported to be the market-value.

The claim was admitted by Imam Sadin and Khaistagul but contested by Hazratgul and Faizgul. They alleged that the suit had been under-valued for purposes of jurisdiction and Court-fee and that the plaintiff's title as against them had already been judicially decided and was a *res judicata* by the first suit. The same Munsif, who had decided the first suit, heard the second suit and held (1) that the suit was *res judicata* of the former suit and (2) that the suit had not been under-valued for purposes of jurisdiction and Court-fee. The finding on this point recites: "As to Issue No. 2 the defendants have proved nothing. It is decided against the defendants Nos. 3 and 4." The suit was dismissed accordingly on the 14th of February 1921. The plaintiff appealed to the District Judge to whose Court an appeal lay, as the value of the suit for purposes of jurisdiction was Rs. 100 only. On the 27th of May 1921 the District Judge overruled the finding that the claim of the plaintiff was *res judicata* for the former suit and remanded the case for re-trial on its merits under O. XLI, r. 23. The presiding Officer of the First Court had meanwhile been changed and the suit came up for hearing before a different Munsif. This Munsif framed an issue on the question of the valuation of the property for the purposes of Court-fee and had a local enquiry made under section 9 of the Court-Fees Act. As a result of this inquiry, the suit was re-valued at Rs. 162 and Court-fee was paid accordingly. On the 14th of November 1921 the Munsif decreed the claim of the plaintiff for possession, holding that Mehram was the original owner of the house, that plaintiff was his heir, and that Hazratgul and Faizgul could not show adverse proprietary possession. Against this decree Khaistagul and Faizgul appealed. As the suit had been re-valued at Rs. 162 the appeal now lay to the Court of the Divisional Judge. The learned Divisional Judge held that he was not bound by the finding of the District Judge in the former appeal on the question of *res judicata*, inasmuch as the value of the suit being Rs. 100, the decision of the appeal by the Distict Judge was *ultra vires*. He, therefore, re-considered the question of *res judicata* and held that the claim of the plaintiff was barred as *res judicata* as held by the Munsif on the 14th of February 1921. He accordingly accepted the appeal and dismissed the suit. Against this order a petition for revision has been lodged in this Court by the plaintiff.

The first contention set up by the petitioner is, that the Divisional Judge had no jurisdiction to entertain the appeal. It is argued that the Munsif who tried the second suit had come to a definite finding on the question of valuation and that that finding was not overruled by the District Judge on the first appeal. It is argued that the second Munsif had no authority to re-open the question of valuation and that, therefore, the enhancement of the value from Rs. 100 to 162 was illegal and could confer no jurisdiction upon the Divisional Judge. It is certainly not clear why the second Munsif should have re-valued the suit. He did so obviously on the question of Court-fee and not upon that of jurisdiction. The jurisdiction of that Court extended up to Rs. 500 and it is tolerably clear that the Munsif had no idea at the time that, by enhancing the valuation, he would thereby modify the course of appeal. I think, however, for a number of reasons that it is not necessary for me in these revisional proceedings to deal further with the question. The jurisdiction of the Divisional Judge to entertain the appeal was not challenged at the time by the plaintiffs and under section 11 of the Suits Valuation Act, I am not obliged to consider the question of jurisdiction of the Divisional Judge. It is clear again that the suit had been under-valued, for the consideration for the sale-deed produced

by plaintiff himself was Rs. 120. The finding of the first Munsif in this respect seems to have been based upon a misconception of the duty of the Court in respect of Court-fee. Again, it may be argued that the only point decided by the District Judge on appeal was that of *res judicata*, and that in remanding the case for re-decision upon its merits he left it open to the Trial Court to decide all other issues except that which the Appellate Court had specifically decided. I do not propose to enter further into this question, as interference on revision is discretional and I see no reason to regard the appeal as having been decided by the Divisional Court without jurisdiction.

The contention set up is that the Divisional Court has wrongly decided that the second suit was *res judicata*. There are authorities for the view that a wrong decision upon the question of *res judicata* is a material irregularity sufficient to open the door for revision. There are also rulings to the effect that such a decision, even if wrong, is not material irregularity within the meaning of section 84 (1) (*a*) of the North-Western Frontier Province Law and Justice Regulation. It is to be noted that sub-clause (*b*) of the same section which allows a revision upon an important question of law or custom does not apply to the present case which is an unclassed suit of less than Rs. 200 in value. My own view upon this question is, that an application for revision should not be entertained upon the question of *res judicata* unless that decision is so manifestly illegal and inequitable as to amount to a miscarriage of justice. It will be necessary, therefore, for me to consider to a certain extent the justice of the finding of the Divisional Court in this respect. I find myself in entire agreement with the view taken by the learned Divisional Judge. Great stress has been laid by the learned Counsel for the petitioner upon the ruling published as *Chiragh Din* v. *Nizam Din* (1), which is quoted as being exactly parallel to the present case. There is certainly a parallel. In that case it was held that a person who had set up a title as a vendee might subsequently sue in the capacity of an heir. It is, however, extremely doubtful if the whole course of reasoning adopted by the learned Judges in that case is sound in law. It was argued that Explanation 2 of section 13, Civil Procedure Code, did not override the main provisions of the section which refer to a plaintiff litigating under the same title. I hardly think, however, that it can be seriously denied that if a plaintiff sets up a title as a proprietor and if he has two alternate capacities upon which to rest such a title, he must disclose both those two capacities, provided that "they might and ought to have been made grounds of attack." The following rulings appear to me to support this view:—

Umraobi v. *Himmatbi* (2), *Guddappa* v. *Tirkappa* (3), *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (4), *Kamatchi Ammal* v. *Agilandammal* (5).

From all these rulings it appears to me perfectly clear that the question as to whether a plaintiff can or cannot bring a second suit depends upon whether (1) he could have based his former suit upon the same cause of action and (2) whether he ought to have so based it. In the first case he can escape from the operation of section 11 and from O. II, r. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. We have, therefore, in the present case three points to determine, (*a*) whether the plaintiff in the first suit did actually put forward his alleged claim as an heir as a basis for his suit, (*b*) whether, if he did not, he was unaware at the time that he could also claim as an heir, and (*c*) whether, although he knew of this second cause of action as an heir, he was nevertheless unable to combine it with his cause of action as a vendee without inconsistency and confusion.

(1) 55 P. R. 1907; 65 P. L. R. 1908; 96 P. W. R. 1907.

(2) 54 Ind. Cas. 200.

(3) 25 B. 189; 2 Bom. L. R. 872

(4) 20 C. 79; 19 I. A. 234; 6 Sar P. C. J 241; 10 Ind Dec. (N. S.) 53 (P. C.).

(5) 6 M. 334; 2 Ind. Dec. (N. S.) 513.

To take these points in order:

(*a*) There is certainly something to be said for the view that the plaintiff, although he did not in his plaint sue as an heir of Mehram, nevertheless attempted during the hearing of that suit to base his claim on such a title and that his contention was adjudicated upon and rejected. It would be difficult, however, in my opinion to press this aspect of the case too far, as the Munsif himself regarded the plaintiff's allegation of inheritance as a belated one.

As regards (*b*), it is contended by the learned Counsel for the petitioner that he was utterly unaware when he lodged his first suit that Mehram was the original owner of the house. I cannot accept this contention. To begin with, the plaintiff knew perfectly well that Mehram was his uncle and that he was Mehram's heir. The transaction which he made with Imam Sadin was clearly collusive and speculative. Imam Sadin was out of possession and was a relative of the plaintiff. Their idea clearly was that the plaintiff would have a better title to oust the persons in possession if he could come forward with a title as a vendee. I do not believe for a moment that the plaintiff was in any way unaware of such rights as he afterwards alleged to have held in the house. In fact, Imam Sadin's own title seems to have rested purely on the fact that he was Mehram's son-in-law. So far as one can see, the plaintiff merely concealed his claim to succeed as an heir to Mehram in the first instance, because he had a mistaken idea that a title-deed by sale (though it was an obviously worthless document) would put him in a better position to sue.

As regards (*c*), I am unable to understand the contention that the plaintiff was in any way debarred from uniting his two causes of action as inconsistent or confusing. Even in the second suit he did actually combine the two causes of action. He still alleged that he was a purchaser of Imam Sadin and he let it to be understood that Imam Sadin had somehow obtained possession of the house, because Imam Sadin's father was the son-in-law of Mehram. He also followed this up by the contention that Imam Sadin's father had erected the buildings. Now, he could perfectly well have sued, in the first instance, by alleging (1) that he was the heir of Mehram and that Mehram's estate devolved upon him, (2) that if Imam Sadin contended that he had received the house in gift from Mehram and was owner of the building, he could nevertheless show a title by sale from Imam Sadin. So far as I can see, the second suit was nothing more or less than an attempt to revive the same suit in a different form. The whole question really at issue between the parties was whether the proprietary title to the house vested in plaintiff's family or in that of the occupants, Khaistagul and Faizgul. If it vested in plaintiff's family at all, it could only do so, because Mehram had been the original owner. So far as the defendants were concerned, it was immaterial whether the house came directly to plaintiff from Mehram or whether it had passed through the stage of being gifted to and re-built by Imam Sadin's father and then re-conveyed to the plaintiff. I consider, therefore, that the Divisional Judge was perfectly right in holding that the first suit operated as *res judicata* to bar the second. I have already said that even if the finding was wrong I should not interfere on revision unless it was so manifestly illegal and inequitable as to amount to a miscarriage of justice. In the present case there is, therefore, not the slightest ground for me to interfere upon revision. This application is dismissed with costs.

N. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 125 OF 1923.

February 12, 1923.

Present :—Justice Sir P. C. Banerji, KT.

BANSIDHAR—DEFENDANT—APPELLANT

versus

Lala SHAM LALL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Decree against assets of deceased debtor—Assets, attachment of—Objection by reversioner under O. XXI, r. 58—Reversioner no party to suit or execution proceedings—Objection allowed—Suit by decree-holder to make assets liable in execution, maintainability of.

SHEO NANDAN *v.* MUNNI.

Where a creditor obtains a decree against, and attaches the assets of, a judgment-debtor who has since died, and a reversioner, who was neither a party to the suit nor to the execution proceedings, prefers objections under O. XXI, r. 58 of the Civil Procedure Code, which objections are allowed, the decree-holder is entitled to bring a suit for declaration that the assets of the deceased debtor are liable to attachment and sale in the execution of the decree; such a suit is not barred by section 47 of the Civil Procedure Code.

Second appeal against a decree of the Subordinate Judge, Meerut, dated the 11th of October 1922.

Messrs. *Janki Prasad* and *A. P. Pandya*, for the Appellant.

JUDGMENT.—In my judgment there is no force in this appeal. Sham Lal was the creditor of one Ram Sarup under a bond. After the death of Ram Sarup his assets were taken possession of by one Piarey Lal. Sham Lal brought a suit on the basis of the bond (which was a simple bond) against Piarey Lal, and obtained a decree which directed the amount of it to be realised from the assets of Ram Sarup, in the hands of Piarey Lal. After the passing of the decree the present appellant, Bansidhar, brought a suit against Piarey Lal claiming the property of Ram Sarup on the allegation that he was the reversioner to the estate of Ram Sarup and that Piarey Lal had no right to it. The matter was compromised and a decree was obtained by Bansidhar against Piarey Lal. After obtaining this decree Bansidhar preferred a claim to the Court in which the decree obtained by Sham Lal was in course of execution and by which the property had been attached for the recovery of the amount of the decree. This objection purported to be one under O XXI, r. 58 of the Code of Civil Procedure, so that it was an objection by a third party claiming the property attached by the decree-holder. His objection was allowed and, therefore, the present suit was instituted by Sham Lal, the decree-holder, for a declaration that the property attached by him was liable to attachment and sale as part of the assets of Ram Sarup. The claim has been decreed by both the Courts below, and the property being admittedly the property of Ram Sarup and the debt in respect of which the decree has been obtained by Sham Lal being a debt due by Ram Sarup, the assets were liable. In this appeal it is contended that, after the objection of Bansidhar had been granted by the Execution Court, the only remedy of the decree-holder was to appeal against that order and not to bring a suit to establish his right.

This contention is, in my opinion, without force. The appellant, Bansidhar, was no party to the suit in which the decree in favour of Sham Lal was passed. Execution of that decree had not been taken out against him, and he himself came to the Court opposing attachment of the property as a third party who was interested in the property. As I have said above, he purported to make his application under r. 58 of O. XXI. The proceedings between Sham Lal and Bansidhar were not proceedings under section 47 of the Code of Civil Procedure, because he was neither a party to the decree nor a party to the execution proceedings. Therefore, the only remedy of Sham Lal, the decree-holder, was to bring the present suit for a declaration of his right as against Bansidhar, and this declaration has been granted to him by the Courts below. Those Courts, in my opinion, were right and the present suit is not barred by section 47 of the Code of Civil Procedure. I dismiss the appeal.

M. A. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 700 OF 1921.

February 9, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

SHEO NANDAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUNNI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—*Inheritance—Father's sister's great-grandson.*

A father's sister's great-grandson of the propositus is not a *bhinna gotra sapinda* and cannot inherit his property.

HARIHAR DAS *v.* RAJ KUMAR MUKHERJEE.

Second appeal from a decree of the Additional Subordinate Judge, Banda, dated the 17th February 1921.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *K. N. Laghate*, for the Respondents.

JUDGMENT.—The only question which arises in this appeal is, whether the plaintiff is a heritable *bhinna gotra sapinda* of the deceased Digga. The plaintiff is the great-grandson of *Musammat* Sahaisi, the sister of Digga's father, Khem Raj. The defendants are the mortgagees in possession and the suit is one for redemption of the mortgage. The First Court had held that the plaintiff was a *bhinna gotra sapinda* who could inherit the property of Digga and decreed the claim for redemption. On appeal the lower Appellate Court has held that the plaintiff was not such a *bhinna gotra sapinda* as could inherit the property of Digga and has on this finding dismissed the claim. The plaintiff comes here in second appeal. It is quite clear that his relationship is not such as would entitle him to inherit the estate of Digga, deceased, (*see* Sarvadhikari's Hindu Law of Inheritance, Second Edition, page 592). We have not been referred to any authority to the contrary, and all the authorities which we could lay our hands on are against the plaintiff-appellant. This appeal, therefore, fails and is dismissed with costs.

M. A. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 579 OF 1922.

August 16, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

HARIHAR DAS CHOWDHURY AND DEFENDANTS NOS. 1 TO 5—PETITIONERS

versus

RAJ KUMAR MUKHERJEE AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), s. 12—"Valuation of the original suit," meaning of—Plaintiff's valuation of suit not challenged in Trial Court—Appeal, forum *of.*

"The value of the original suit," in section 21 of the Bengal Civil Courts Act, means the valuation as made by the plaintiff subject to such amendment as may have been made under the orders of the Trial Court. [p. 1016, col. 1.]

Nimony Singh v. *Jagabandhu Roy*, 23 C. 536; 12 Ind. Dec. (N. S.) 357, *Abdur Rashid* v. *Qudratunnissa Bibi* 57 Ind. Cas. 134; 18 A. L. J. 741; 2 U. P. L. R. (A) 316; *Badrunnissa Bibi* v. *Shanker Lal*, 49 Ind. Cas. 687; 17 A. L. J. 266; 41 A. 384, *Bandiram Mookerjee* v. *Purna Chandra Roy*, 43 Ind. Cas. 758; 45 C. 926; 27 C. L. J. 115, referred to.

Although, ordinarily, the valuation of a suit, as made by the plaintiff, is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the *forum*, either of the trial of the suit or the adjudication of the appeal. The valuation as made by the plaintiff may be challenged either by the Court of its own motion or by the defendant In either event, there is a determination of the question of valuation. [p. 1016, col. 1.]

Ijjatulla Bhuyan v. *Chandra Mohan Banerjee*, 6 C. L. J. 255; 34 C. 954; 11 C. W. N. 1183 (F. B.), relied on.

Where the valuation of a suit as stated by the plaintiff in his plaint is not challenged either by the Court of its own motion or by the defendant and the trial proceeds on the assumption that the valuation made by the plaintiff is correct, it is not open to the defendant, after he has been defeated in the Trial Court, to seek to change the *forum* of appeal by the assertion that the suit was under-valued. The *forum* of appeal at this stage must be determined with reference to the valuation as set out in the plaint. [p. 1016, col. 2.]

Rule against the order of the Subordinate Judge, First Court, 24-Parganas.

Babu *Dwarkanath Chakraverty* (with him Babus *Kali Kinkar Chakraverty* and *Romaprasad Mookerjee*), for the Petitioner:—I obtained this Rule on the opposite party to show cause why I should not be allowed to lodge an appeal in the High Court against the decree of the Subordinate Judge in a suit for redemption which was valued by the plaintiffs for purposes of jurisdiction at Rs. 3,600 only. My contention is that, as the real value of the subject-matter of the suit is more than Rs. 5,000, the appeal from the decision in the suit should lie to the High Court and not to the Court of the District Judge. Refers to section 8 of the Suits Valuation Act and section 21 of the Bengal Civil Courts Act.

Babu *Rupendra Kumar Mitter*, for the Opposite Party.—No objection as to valuation was taken in the Trial Court and no

issue was raised on the point. It was open to the defendants in the Trial Court to challenge the plaintiff's valuation of the suit. If on such objection it was found that the suit was really undervalued, the consequences described in O. VII, r. 11 (*b*), of the Code of Civil Procedure would have followed. But, as there was no objection to the plaintiff's valuation of the suit either by the defendant or at the instance of the Court, before the conclusion of the trial of the suit in the Court of first instance, the value of the subject-matter of the litigation must be taken to have been fixed by agreement of the parties. After the conclusion of the trial in the Court of first instance it is too late for the defendant to raise any objection to the valuation of the suit. The *forum* of an appeal cannot be altered in the way in which it is sought to be done in the present case. Section 21, of the Bengal Civil Courts Act, does not warrant any such procedure. The expression "value of the original suit" in that section does not mean the true value of the suit irrespective of what had happened in the Trial Court. When a suit has reached its appellate stage, its value for purposes of jurisdiction must be taken to be fixed. At this stage the valuation cannot be challenged with a view to change the *forum* of the appeal.

The value of a redemption-suit for purposes of jurisdiction is not the value of the whole fee-simple but only of the interest which the mortgagee was claiming. The proper valuation for such a suit is, therefore, the amount of the principal mortgage-money and not the market-value of the property mortgaged. However that might be, unless there is fraudulent under-valuation the value put by the plaintiff in his plaint for purposes of jurisdiction is the value of the suit within the meaning of section 21 of the Bengal Civil Courts Act.

Babu *Kali Kinkar Chakraverty* in reply:—

In suits for redemption of mortgages the valuation for purposes of jurisdiction and Court-fee is not the same. Refers to *Nga Tun Baw* v. *Mi Kye* (1), *Amrita* v. *Shamji* (2). The mere fact that the trial in the original Court proceeded on the assumption that the valuation of the suit as put by the plaintiff in his plaint was correct, cannot for ever preclude me from showing that that valuation was inadequate. If on the face of the record and upon the admission of the parties it is apparent that the value of the subject-matter of the suit is more than Rs. 5,000, the appeal lies to the High Court and not to the Court of the District Judge. Here no further investigation is necessary to arrive at a decision as to the proper valuation of the suit. For the purposes of section 21 of the Bengal Civil Courts Act, "the value of the suit" means the real value of the subject-matter of the litigation.

(1) 8 Ind. Cas. 464; 1 U. B. R. (1910) 10; 4 Bur. L. T. 226.
(2) 13 B. 489; 7 Ind. Dec. (N. S.) 325.

JUDGMENT.—We are invited in this Rule to allow the defendants in the Court below to lodge an appeal in this Court against the decree of the Subordinate Judge in a suit for redemption which was valued at Rs. 3,600 by the plaintiffs for purposes of jurisdiction. The petitioners contend that the real value of the subject-matter of the litigation exceeds Rs. 5,000 and that, consequently, the appeal from the decision of the Subordinate Judge lies to the High Court and not to the Court of the District Judge. We are of opinion that this contention is not well founded.

Section 20 of the Bengal Civil Courts Act, 1887, provides that an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court; section 21 then provides that, save as aforesaid, an appeal from a decree or order of a Subordinate Judge shall lie to the District Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made, did not exceed five thousand rupees, and to the High Court in any other case. The determination of the question raised by the petitioners depends upon the construction of the expression 'the value of the original suit' which finds a place in section 21. For this purpose, a reference to the provisions of the Code of Civil Procedure on the subject of the valuation of suits is necessary.

Order VII, r. 1, Civil Procedure Code, provides that the plaint shall contain among others the following particulars; namely, a statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of Court-fees, so far as the case admits

This implies that the value of the subject-matter of the suit for purposes of jurisdiction may not in every case be identical with the value of the subject-matter of the suit for purposes of Court-fees. This is made clear by section 8 of the Suits Valuation Act, which provides that, except in the cases specified therein, the value as determined for the computation of Court-fees and the value for purposes of jurisdiction shall be the same. Consequently, the duty is cast upon the plaintiffs, in the first instance to value the subject-matter of the suit for the two-fold purpose, of jurisdiction and of Court-fees. His valuation, however, is not final, for, as was ruled by a Full Bench of this Court in *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee* (3), although ordinarily the valuation as made by the plaintiff is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the *forum*, either of the trial of the suit or the adjudication of the appeal. The valuation as made by the plaintiff may be challenged either by the Court of its own motion or by the defendant. In either event, there is a determination of the question of valuation. If, on such investigation, it transpires that the subject-matter of the suit has been under-valued or over-valued, the Court may call upon the plaintiff to amend the valuation of the suit. If the plaintiff does not carry out the order of the Court, the consequence described in O. VII, r. 11, follows. That rule provides that where the relief claimed is under-valued and the plaintiff on being required by the Court to correct the valuation within the time to be fixed by the Court fails to do so, the plaint shall be rejected. This, then, is the penalty for persistence in under-valuation. If the order of the Court is carried out, the statement of valuation for purposes of jurisdiction or Court-fees or both, is amended, and the amended valuation thereupon becomes the valuation of the suit. We are of opinion that, when section 21 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff subject to such amendment as may have been made under the orders of the Trial Court : *Nilmony Sing* v. *Jagabandhu Roy* (4), *Abaur Rashid* v. *Oudratunnissa Bibi* (5), *Badrunnissa Bibi* v. *Shanker Lal* (6), *Bandiram Mookerjee* v. *Purna Chandra Roy* (7). We are unable to hold that the Legislature intended that the expression 'the value of the original suit' in section 21 means the real value of the subject-matter of the original suit, regardless of what may have happened in the Trial Court. Before the appellate stage is reached, the suit must already have been tried and the value of the suit fixed either by agreement of parties or on adjudication by the Court. In the case before us, the plaintiff stated that the value of the subject-matter of the suit for purposes of jurisdiction, as also of Court-fees, was Rs. 3,600. The defendants did not challenge this statement and the trial proceeded on the assumption that the valuation made by the plaintiffs was correct. It is after the defendants have been defeated that they now seek to change the *forum* of appeal by the assertion that the value of the subject-matter of the suit exceeds Rs. 10,000 ; in other words, that if the suit had been properly valued, the appeal would have lain to this Court and not to the Court of the District Judge. We are of opinion that they should not be permitted to take recourse to such a procedure.

In the view we take, it is needless to investigate at this stage how the value of the subject-matter of a suit for redemption should be determined for the purpose of jurisdiction of the Court. There is some divergence of Judicial opinion on the subject, as appears from the decisions in *Mana Vikrama, Zamorin Maharaja Bahadur of Calicut* v. *Surya Narayana Bhatta* (8), *Kubair Singh* v. *Atma Ram* (9), *Rupchand Khemchand* v. *Balvant Narayan* (10), *Amrita* v. *Shamji* (2), *Ramchandra Baba Sathe* v. *Janardan Apaji* (11), *Maung Kyaw Dun* v. *Maung Kyaw* (12), *Nga Tun Baw* v

(3) 6 C. L. J. 255; 34 C. 954; 11 C. W. N. 1183 (F. B.);

(4) 23 C. 536; 12 Ind. Dec. (N. S.) 357.
(5) 57 Ind. Cas. 134; 18 A. L. J. 741; 2 U. P. L. R. (A) 316.
(6) 49 Ind. Cas. 687; 17 A. L. J. 266; 41 A. 384.
(7) 43 Ind. Cas. 758; 45 C. 926; 27 C. L. J. 115.
(8) 5 M. 284; 2 Ind. Dec. (N. S.) 198.
(9) 5 A. 332; A. W. N. (1883) 47; 3 Ind. Dec. (N. S.) 318.
(10) 11 B. 591; 6 Ind. Dec. (N S.) 389.
(11) 14 B. 19; 7 Ind. Dec. (N. S.) 471.
(12) 1 L. B R. 96.

Mi Kyc, (1). The judgment of Mahmood, J., in *Amanat Begam* v. *Bhajan Lal* (13), indicates that in all suits for redemption the value of the subject-matter of the suit for purposes of jurisdiction may not be identical with the value of the subject-matter of the suit for purposes of payment of Court-fees. The later decision of the Allahabad High Court in *Kedar Singh* v. *Matabadal Singh* (14) seems, however, to enunciate the rule in an inelastic form, namely, that in the case of a suit for redemption of a mortgage the value for purposes of jurisdiction is the amount of the principal mortgage-money and not the market-value of the property mortgaged. We are not now called upon to decide this question, for the *forum* of appeal at this stage must be determined by reference to the valuation as set out in the plaint; that *forum* is the Court of the District Judge.

The result is that this Rule is discharged with costs, two gold *mohurs*.

B. N. & N. K. *Rule discharged.*

(13) 8 A. 438; A. W. N. (1896) 146; 5 Ind. Dec. (N. S.) 217.

(14) 1 Ind. Cas. 703; 33 A. 44; 5 A. L. J. 713; A. W. N. (1908) 270.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 455 OF 1921.

February 8, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

HABIB KHAN—DEFENDANT—APPELLANT

versus

FIDA HUSAIN KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 198—Suit by landlord for rent—Payment in good faith to third person pleaded—Third person made party to suit—Decision against third party—Civil suit by third party whether barred—Appeal, second—Finding, based on mistake of fact, whether binding.

If in a suit by the landlord for arrears of rent, the tenant pleads payment in good faith to a third person, and upon that person being made a party to the suit, the suit is decided against him, such a decision does not preclude the latter from establishing his title in a Civil Court. [p. 1017, col. 2.]

A finding by the lower Court which is based on a mistake of fact does not bind the High Court in second appeal. [p. 1018, col. 1.]

Second Appeal from a decree of the Subordinate Judge, Azamgarh, dated the 22nd December 1920.

Mr. *Kumuda Prasad*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows:—Fida Husain Khan, Madar Baksh and Muhammad Ali were co-sharers of the village in suit. Madar Baksh and Muhammad Ali sold their shares to *Musammat* Saidunnissa, who was the predecessor-in-title of Habib Khan, defendant No. 1. They became ex-proprietary tenants of their *sir*. They relinquished their rights, and Bangur, defendant No. 2, became non-occupancy tenant of the plots in suit. In proceedings under section 36 of the Land Revenue Act it was decided that certain plots, including the plots in suit, were in the exclusive possession of *Musammat* Saidunnissa Bibi, under a partition of *sir* land in those proceedings. Subsequently, Habib Khan sued Bangur for the whole of the rent of the two plots in suit. Bangur pleaded that he had paid the rent in good faith to Fida Husain. Fida Husain thereupon was made a party to the suit and the suit was ultimately decreed by the Appellate Court, which decided against Fida Husain. Thereupon Fida Husain brought this suit for a perpetual injunction restraining the defendant No. 1 from realising more than his share of the rent from the defendant No. 2. Both the lower Courts have decreed the claim. The defendant Habib Khan comes here in second appeal and three grounds have been pressed on his behalf: (1) that the suit is barred by the provisions of section 11 of the Code of Civil Procedure: (2) that the suit is not cognisable by the Civil Courts, and (3) that on a true construction of Exhibit A, it is clear that the land in suit is the exclusive property of the defendant-appellant. The first and the second pleas have no force having regard to section 198 (2) of the Tenancy Act. This suit does not come within the purview of those rulings of this Court which have held that a suit will not lie in a Civil Court if its object

to avoid a decision arrived at by a Revenue Court in a matter in which it had exclusive jurisdiction. There remains the third point. It appears that in the proceedings under section 36 of the Land Revenue Act, to which we have referred, a petition was put in by Muhammad Ali Khan and Madar Baksh to the effect that the *sir* land had been partitioned privately between the co-sharers and *Musammat* Saidunnissa and that she had been given exclusive possession of certain plots as appertaining to her share, and details were given of the plots which were said to have been allotted to the exclusive possession of *Musammat* Saidunnissa and also of the plots which had been allotted to the other co-sharers. We find that the two plots in suit were there entered as having been allotted exclusively to *Musammat* Saidunnisa. The learned Subordinate Judge in the Court below dealing with the question of possession has come to what would appear to be a finding of fact, namely, that the appellant, that is to say, Habib Khan, was not in exclusive possession of the plots in suit. We find that this finding is entirely based on a mistake of fact and, therefore, it is not a finding which can bind us in second appeal. There was no oral evidence in the case. The defendant relied on Exhibit A, which was the application already referred to, filed by Madar Baksh and Muhammad Ali in the proceedings under section 36 of the Land Revenue Act. Those proceedings ultimately ended in an order in terms of the application. To those proceedings Fida Husain was a party, and this is the mistake of fact which has vitiated the whole of the finding of the learned Subordinate judge. He says that Exhibit A proves nothing, because the present plaintiff, Fida Husain Khan, was no party to it, and this was the reason which he gives for holding that Habib Khan was not in exclusive possession of the plots in suit. Of course, Fida Husain was no party to the application, but he was a party to the proceedings which ended in an order against him in terms of the application. There being no legal finding on the question of possession under section 103 of the Code of Civil Procedure, we propose to examine the evidence which is entirely documentary to decide the point. We find that the rent suit, to avoid which this suit was brought, was rightly decided on the ground that the *sir* land had been partitioned between the co-sharers, and *Musammat* Saidunnisa was given particular plots of *sir* land for her exclusive possession and enjoyment, and, as Habib Khan represents her now, he must be held to be in possession of those particular plots of *sir* land and entitled to their rent, whether he cultivates them himself or lets them out to tenants is quite immaterial. It is not a fact, as the learned Munsif seemed to think, that the plots could not be in his exclusive enjoyment if they were actually cultivated by a tenant. In this view of the case the decision in *Debi Pershad* v. *Bhagwan Din* (1) has no application, as the facts are different. In our view the decisions of both the Courts below must be reversed and the suit dismissed. We, therefore, allow this appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

M. A. A. *Appeal allowed.*

(1) 16 Ind. Cas. 399; 35 A. 27; 10 A. L. J. 437.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 85 OF 1922

January 9, 1923.

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

ABUL NASAR RASHIDUDDIN AHMAD KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

LALTA PRASAD AND ANOTHER—AUCTION-PURCHASERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Sale proclamation—Amount undeclared—Deposit of amount mentioned, whether compliance with rule—Execution sale, stay of, by Appellate Court—Sale held notwithstanding stay, effect of—Revision—Court failing to apply its mind to real question—High Court, jurisdiction of.

To entitle a person to the benefit of r. 89 of O. XXI of the Civil Procedure Code, it is sufficient if he deposits in Court, besides the 5 per cent. commission for the auction-purchaser and the necessary costs, the amount specified in the proclamation

of sale as that for the recovery of which the sale was ordered. If the proclamation of sale is incorrectly drawn up and fails to specify the full amount for the recovery of which the sale was ordered, that is not a circumstance which can be invoked in derogation of the terms of the rule. [p. 1021, col. 1.]

Where a competent Court of appellate jurisdiction directs an Executing Court not to proceed with a sale, a sale held in contravention of such order is a nullity having been made without jurisdiction, and it is competent to the High Court to interfere in revision. [p. 1022, col. 1.]

Where a Court fails to apply its mind to the real question requiring adjudication, the High Court has jurisdiction to interfere in revision. [p. 1022, col. 1.]

Fazal Rab v. *Manzur Ahmad*, 45 Ind. Cas. 773, 16 A. L. J. 433; 40 A. 425, distinguished.

Civil revision against a decree of the Subordinate Judge, Moradabad, dated 6th March 1922.

Mr. *Sankar Saran*, for the Applicant.

Mr. *Uma Shankar Bajpai*, for the Opposite Party.

JUDGMENT.—This is an application in revision which arises out of a somewhat complicated state of facts. If our order is not to be misinterpreted and misapplied hereafter as deciding something which we have no intention of deciding, it seems advisable that we should state the essential facts in some detail. In the year 1920 two decrees were obtained in two different suits in the Court of the Munsif of Moradabad. One decree, passed on the 15th of April 1920, was in Suit No. 175 of 1920, and was in favour of Ram Prakash against Rashiduddin. The other decree passed on the 4th of August 1920 was in Suit No. 298 of 1920, in favour of Babu Ram against Muhammad Shafi and Rashiduddin. Execution was first taken out in the latter of these two decrees, but apparently the attempts of Babu Ram as decree-holder were directed in the first instance against the property of Muhammad Shafi and were unsuccessful. At any rate, on the 26th of October 1920, Ram Prakash, having taken out execution of his decree in Suit No. 175 of 1920, succeeded in attaching immoveable property belonging to his judgment-debtor Rashiduddin. Thereupon on the 18th December 1920 Babu Ram applied for rateable distribution as against the assets of Rashiduddin of any money which might be realised upon the application of Ram Prakash. The property of Rashiduddin thus attached was put up for sale more than once, but no sale actually took place on the first two or three occasions, because the Court in charge of the execution proceedings refused to accept any of the bids offered. After several of these ineffectual attempts the property under attachment was ordered to be sold on the 20th of June 1921, and a sale proclamation was issued for that date.

In the meantime several things had happened. First of all, Rashiduddin paid off in full the decree of Ram Prakash, and satisfaction of that decree was entered on the 15th of February 1921 under the orders of the Court. The Execution Court nevertheless ordered that the sale of the attached property should proceed in consequence of Babu Ram's application for a rateable distribution, until Babu Ram's decree was also satisfied. We are not concerned to consider whether this was a strictly regular method of procedure, or whether, in his own interests, it would not have been better for Babu Ram, as soon as the decree of Ram Prakash was satisfied, to have asked the Court formally to re-attach the property in execution of his own decree. The practical result, however, was that in the sale proclamation by which the property was advertised for sale on the 20th of June 1921 the amount for the recovery of which the sale was ordered was wrongly stated. Obviously, the sale was being ordered for the satisfaction of Babu Ram's decree for which by that time a sum of Rs. 567-6-6 was required. In the sale proclamation, however, the amount entered was only Rs. 300-9-6, being the amount of the decree originally passed in favour of Ram Prakash.

Another important event which had occurred before the 20th of June 1921 was that Rashiduddin, having in the meantime appealed against Babu Ram's decree in Suit No. 298 of 1920, presented an application to the Appellate Court for stay of execution. That Court, whether rightly or wrongly, granted this application for stay. It did not merely pass an order in general terms directing execution proceedings in respect of the decree obtained by Babu Ram in Suit No. 298 of 1920 to be stayed, but it sent down to the Execution Court a specific order directing the auction-

sale to be postponed. That order could only refer to the sale which was about to be held under the orders of the Execution Court for the satisfaction of Babu Ram's decree. Nevertheless, the learned Munsif, with this order before him flatly refused to issue orders for the postponement of the sale. He gave certain reasons for doing so. He seemed to think that the judgment-debtor was in some way to blame for the fact that the execution of Babu Ram's decree obtained in Suit No. 298 of 1920 was still proceeding upon an attachment which had been effected in the course of the execution of Ram Prakash's decree in Suit No. 175 of 1920. Throwing the blame of this fact upon the judgment-debtor, the learned Munsif held that the stay order which he had received was not an order directing him to do what he perfectly well knew that it did direct him to do, namely, to stay the sale of Rashiduddin's property which was about to be held on the 20th of June 1921 for the satisfaction of Babu Ram's decree. Accordingly, the sale actually took place on that date and the property was finally knocked down to an auction-purchaser who bid a sum of Rs. 1,000.

We have no doubt that Rashiduddin, if he had been properly advised, could have obtained from the Appellate Court, if not from the learned Munsif himself, upon mature consideration, an order to the effect that this sale was an absolute nullity, having been held without jurisdiction at a time when the Execution Court had in front of it an order by a competent Court of appellate jurisdiction directing it not to proceed with the sale. However, Rashiduddin seems to have determined that the best thing for him to do, under all the circumstances, was to pay up his debts in the quickest and easiest manner possible. He thought that, even though the method which he proceeded to adopt might throw upon him the burden of an additional payment of Rs. 50 for the benefit of the auction-purchaser, it might nevertheless prove to be the simplest and easiest way out of his difficulties to invoke the provisions of rule 89 of Order XXI, Civil Procedure Code, to pay up all demands and to get the sale conclusively set aside. Presumably with this object in view, Rashiduddin applied to the Court, on the 18th of July 1921, that is to say, within the period of 30 days required by the rule in question, to receive from him what he obviously believed in good faith to be the full amount necessary to pay off Babu Ram, to satisfy the auction-purchaser and to get back his property which had been sold at auction. In his application he stated the amount due to Babu Ram as decree-holder to be Rs. 558-14. He tendered that amount *plus* Rs. 50 for the benefit of the auction-purchaser and Rs. 6 on account of the costs of the sale, making a total of Rs. 614-14 in all. It so happened that the records of the case were at that time before the Appellate Court in the appeal which had been lodged against the decree in Babu Ram's favour in Suit No. 298 of 1920. There was, consequently, some little delay in preparing the office report. We have before us an office report of the 18th of July 1921 which purports to specify the amount due under the decree at Rs. 567-6-6; but the very same clerk who prepared that report expressly states that, not having the necessary papers before him, he cannot prepare a final report regarding the sufficiency of the amount tendered. The money thus tendered by Rashiduddin was taken in deposit subject to further orders, and eventually it was ascertained that the deposit was short by the difference between Rs. 567-6-6 and Rs. 558-14 and possibly by some further amount on account of accumulated costs of execution. Rashiduddin made one further attempt to obtain from the Execution Court the restoration of his property on payment of all liabilities, and, on the 2nd of August 1921 he tendered a further sum of Rs. 21-6-6. It has never been contested that the total of the two amounts tendered by Rashiduddin on the 18th of July 1921 and on the 2nd of August 1921 was sufficient to pay off Babu Ram, as well as to compensate the auction-purchaser by payment to him of the 5 per cent. as purchase-money required under rule 89, Order XXI. When, however, the question of the confirmation of the sale came up before the Execution Court, that Court held that it could take no account of the deposit made on the 2nd of August 1921. It did not apply itself to the terms of Order XXI, rule 89, or pause to consider whethe

Rashiduddin had not, after all, effectually complied with these terms. It simply took note of the fact that the deposit made on the 18th of July 1921 was insufficient, regard being had to the office memorandum which had been forwarded by the Execution Court to the Collector, specifying the amount necessary to satisfy Babu Ram's decree as Rs. 567-6-6. On the strength of this finding the learned Munsif held that he had no option but to reject Rashiduddin's application under Order XXI, rule 89 and to confirm the sale, which he accordingly did. There was an appeal against this order as permitted by the terms of Order XLIII, rule 1 (*j*), but in the Court of Appeal the real point in favour of Rashiduddin was once more overlooked. The learned Subordinate Judge, in disposing of the appeal, expressly took it upon himself to consider only whether the sum deposited on the 18th of July 1921 was or was not sufficient to pay off the decretal amount. Finding that it was not so, he dismissed the appeal of Rashiduddin.

Now, that both the Courts below were at least technically wrong is beyond all question. Order XXI, rule 89, requires a person entitled to the benefit of that rule to deposit in Court, besides the 5 per cent. compensation for the auction-purchaser and necessary costs, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The person making the deposit and the Court receiving the deposit are only concerned with what was notified in the proclamation of sale. If the proclamation of sale was incorrectly drawn up and failed to specify, as it should have done, the full amount for the recovery of which the sale was ordered, that is not a circumstance which can be invoked in derogation of the plain terms of rule 89. It is for a decree-holder to see to it that the sale proclamation, whatever other errors may creep into it, does at least correctly state the amount for the recovery of which the sale is ordered. The whole trouble in the present case arose out of Babu Ram's decree applying for rateable distribution in the execution proceedings taken by Ram Prakash and then not troubling himself to keep an effective watch over those proceedings, more especially when the conditions had been modified by the decree of Ram Prakash being satisfied in full. If he had done so, he might have found himself technically in the right over the matter of the deposit made by Rashiduddin on the 18th of July 1921 just as certainly as he is now technically in the wrong. We are bound to hold that Rashiduddin did on the 18th of July 1921 deposit the full amount which he was required to deposit in order to entitle him to the benefit of that rule. His deposit ought to have been accepted.

The question, however, remains, and it has been strongly pressed upon us in argument on behalf of the decree-holder and auction-purchaser, that whether the Courts below were right or wrong, they have after all decided a question within their jurisdiction. It is put to us in argument that the question raised in both the Courts below was whether Rashiduddin's deposit of the 18th of July 1921 was or was not sufficient to entitle him to the benefit of the provisions of Order XXI, rule 89, and that both the Courts below, in the exercise of their jurisdiction, have decided this point against the judgment-debtor. In this connection our attention has been drawn to the principles laid down by a Bench of this Court in the case of *Fazal Rab* v. *Manzur Ahmad* (1). The difficulty we feel about applying the principles laid down in that rule to the facts of the present case is twofold. In the first place, neither of the Courts below, in the case now before us, applied its mind at all to the real question requiring adjudication, namely, whether the deposit made on the 18th of July 1921 was or was not sufficient to fulfill the requirements of Order XXI, rule 89. Neither Court consulted the proclamation of sale at all, or made any reference to the amount therein specified as that for the recovery of which the sale was ordered. If this were the only matter for consideration before us, we might, even while recognising the hardship suffered in the present instance by the applicant in revision, hesitate to lay down a principle which might seem to open a door to the presentation of what are, in substance, second appeals upon qustions of law in cases where the Legislature has not seen fit to allow of such

(1) 45 Ind. Cas. 773; 16 A. L. J. 433; 40 A. 425

appeals. We are, however, much impressed with the fact that the sale itself, as held on the 20th of June 1921, was, in our opinion, a nullity. After all, it has been necessary for us, in order to dispose of this application in revision, to go into the facts and to examine the whole of the proceedings taken in the Execution Court. We are clearly of opinion that on the 18th of June 1921 the Execution Court had before it a clear order from an Appellate Court of competent jurisdiction directing it to postpone this particular sale which it had fixed for the 20th of June, 1921. It was the duty of the Execution Court to comply with that order. In our opinion it had no jurisdiction to do otherwise.

Taking this fact into consideration, along with all the other points which we have set forth and discussed, we feel satisfied that this is a case in which this Court has jurisdiction to interfere in revision, and in which the revisional jurisdiction of this Court might properly be exercised in the interests of justice. We have no doubt that Rashiduddin was acting in good faith on the 18th of June 1921 and was simply anxious to rid himself of further trouble and litigation by satisfying Babu Ram's decree and getting his property back. It was for this reason, undoubtedly, that he preferred to accept the auction-sale as provisionally valid and to endeavour to get it set aside under Order XXI, rule 89. He could, in our opinion, have brought forward an unanswerable case for challenging its validity. It was his misfortune that he failed to tender the full amount necessary to pay off Babu Ram's decree. On the other hand, he was fortunate enough, without knowing it, to comply fully with the provisions of Order XXI, rule 89, because, as a matter of fact, the amount for the recovery of which the sale to be held on the 20th of June 1921 had been ordered, was under-stated in the sale proclamation and his deposit was more than sufficient to cover that amount.

Our order, therefore, is that we set aside both the order of the learned Munsif confirming the sale and the order of the lower Appellate Court refusing to interfere with that order. In lieu thereof we pass an order under Order XXI, rule 89, setting aside the auction-sale in question. We see no reason why advantage should not be taken of the full amount deposited in Court by Rashiduddin to meet the claims for the satisfaction of which that money was in fact tendered. We direct accordingly that out of the total amount deposited by Rashiduddin on both the dates, namely, the 18th of July 1921, and the 2nd of August 1921, Rs. 50 be paid to the auction-purchaser, Lalta Prasad, and the balance after payment of lawful costs to the decree-holder, Babu Ram. Under all the circumstances, we leave the parties to this application to bear their own costs throughout.

Application allowed.

W. C. A.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 53, 61 OF 1922.

January 10, 1923.

Present :—Mr. Justice Das and Mr. Justice Kulwant Sahay.

J. A. STONEWIGG AND ANOTHER—APPELLANTS IN NO. 53 OF 1920 AND RESPONDENTS IN NO. 61 OF 1920

versus

KAMESHWAR NARAYAN SINGH AND ANOTHER—RESPONDENTS IN NO. 53 OF 1920 AND APPELLANTS IN NO. 61 OF 1920.

Transfer of Property Act (IV of 1882), s. 106—Tenant holding over—Tenancy from year to year—Notice—Bengal Tenancy Act (VIII of 1885), s. 103 B—Occupancy rights—Entry in Record of Rights—Presumption—Burden of proof.

Where a tenant on the expiry of his lease continues in possession of the property with the assent and sanction of the proprietor, there is created, by the operation of law, a tenancy from year to year in favour of the tenant, and such tenancy can be put an end to only by a notice under section 106 of the Transfer of Property Act. [p. 1023, col. 2.]

Under the general law a landlord is entitled to claim rent from every one shown to hold land within the ambit of his *Zemindari*, and if any of such persons relies upon any exception to the general rule it is for him to prove that he comes within the exception. [p. 1024, col. 2.]

Where, however, a tenant is entered as an occupancy tenant in the Record of Rights, it is for the landlord to rebut the presumption arising under section 103-B of the Bengal Tenancy Act and not for the tenant to establish that the entry in the Record of Rights is correct. [p. 1024, col. 1.]

STONEWIGG *v.* KEMESHWAR NARAYAN SINGH.

Stonewigg v. *Dwarka Singh*, 45 Ind. Cas. 706; 4 P. L. W. 428, *Jagdeo Narain Singh* v. *Baldeo Singh*. 71 Ind. Cas. 984; 49 I. A. 399; 3 P. L. T. 605; (1922) A.I. R. (P. C.) 272; 36 C. L. J. 499, distinguished.

Appeals from a decision of the Additional Subordinate Judge, Darbhanga, dated the 12th November, 1919.

Messrs. *S. M. Mullick* and *Sambhu Saran*, for the Appellants in No. 53 of 1920.

Messrs. *Jayaswal, S. K. Mitra* and *Janak Kishore*, for the Respondents in No. 53 of 1920.

Messrs. *Jayaswal, S. K. Mitra* and *Janak Kishore*, for the Appellant in No. 61 of 1920.

Messrs. *S. M. Mullick, Sambhu Saran* and *D. N. Sircar*, for the Respondents in No. 61 of 1920.

JUDGMENT.

Das, J.—These analogous appeals arise out of a suit instituted by Kameshwar Narayan Singh, the respondent in First Appeal No. 53 of 1920, against the appellant in that appeal. The suit was for recovery of certain lands specified in the plaint. Prem Narain, Nem Narain and Bindeshwari were three brothers who had certain shares in *Mouzah* Siroli. The plaintiff is the son of Nem Narain. It appears that sometime in 1885 Prem Narain, Nem Narain and Bindeshwari gave a *thicca* lease to the proprietors of Dowlatpore Concern for seven years from 1292 to 1298.

The plaintiff's case is that after the expiry of the lease the defendants first party who represented the interest of the factory held over on paying rent to the proprietors. The plaintiff asserts that he asked the defendants to make over possession of the disputed lands to him, and, as the defendants refused to make over possession of the lands to the plaintiff, he instituted the suit out of which this appeal arises on the 16th March 1918 claiming possession of the properties which are specified in two schedules. Schedule I comprising the *milkiat* property, and schedule II comprising the *zerait* lands within the *milkiat*.

The defendants first party resisted the suit on various grounds. It is unnecessary to enter into the defence of the defendants, because before us the only point that has been argued by Mr. Sushil Madhab Mullick on their behalf is, that the plaint filed on behalf of the plaintiff discloses no cause of action. Mr. Mullick argues that, if the defendants first party held over on paying rent to the proprietors, the effect in law was to create in their favour a tenancy from year to year, and if the factory were tenants from year to year that tenancy could only be terminated by a notice under section 106 of the Transfer of Property Act.

Now, Mr. Mullick points out that there is no suggestion at all in the plaint that any notice under section 106 was served on the defendants first party. There is, in my opinion, considerable force in the arguments which have been advanced before us. It is undoubted law that, if a tenant on the expiry of the lease continues in possession of the property with the assent and sanction of the proprietor, then there is, by the operation of law, a tenancy from year to year in favour of the tenant; and if there is a tenancy from year to year, that tenancy can be put an end to only by a notice under section 106 of the Transfer of Property Act. But the difficulty is that this point was not taken in the written statement and the learned Subordinate Judge has not gone into the question at all, nor has the point been taken in the grounds of appeal in this Court; and after all it will still be open to the plaintiff to serve a notice upon the defendants first party at once and determine the lease. Having regard to this difficulty, the defendants first party have agreed to surrender possession of schedule I properties to the plaintiff and pay to the plaintiff the *thicca* rents for three years prior to the institution of the suit and also all rent up to the time they do surrender possession of the properties to the plaintiff. The defendants first party undertake to surrender these lands forthwith to the plaintiff. So far as the schedule I properties are concerned, there will, therefore, be a decree by consent of the parties, that the defendants first party will forthwith surrender the properties enumerated in schedule I to the plaintiff and also pay the plaintiff his share of the *thicca* rent from the 16th March 1915 up to the date they make over possession of the properties to the plaintiff. It is also agreed that the defendants first party will be entitled to recover rent from the tenants for this period.

I now come to the other appeal, namely, Appeal No. 61 of 1920. We are concerned

in this appeal with certain *raiyati* lands specified in schedule II of the plaint. The learned Subordinate Judge has come to the conclusion that the factory has established its right to hold the lands which are the subject-matter of this appeal as occupancy tenants.

Now, the Record of Rights is undoubtedly in favour of the factory and there is no evidence worth the name on either side. In my opinion the plaintiff has not rebutted the presumption of the correctness of the Record of Rights.

Mr. Jayaswal, arguing on behalf of the plaintiff-appellant, contends before us that it is still necessary for the defendants first party to prove that he holds the lands as occupancy tenants and he relied upon a decision in the case of *Stonewigg* v. *Dwarka Singh* (1). But that was a different case altogether. The learned Judges found on the facts that the evidence on behalf of the plaintiff was reliable and showed clearly that the defendant No. 1 who claimed occupancy rights was not in possession of the lands previous to the lease in question, and the learned Judges had no difficulty in showing that, so far as the Record of Rights itself was concerned in that case, it completely demolished the case of defendant No. 1. In other words, the Record of Rights in the case cited, far from supporting the case of the defendants, who claimed to be the occupancy tenants, completely demolished it. The other case upon which Mr. Jayaswal relied is the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (2). The Judicial Committee in deciding that case did indeed say as follows:—

"Section 103-B declares that 'every entry in a Record of Rights so published shall be presumed to be correct until the contrary is proved.' Considerable stress has been laid on this presumption on behalf of the respondents. Once, however, the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or *mahal*, the *onus* is shifted. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the plaintiffs and the *pro forma* defendants, and for which they pay the revenue assessed on the *mouza*. In these circumstances, it lies upon those who claimed to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government."

But it will appear that the Judicial Committee did rely upon some evidence which showed clearly that there was a very careful enquiry made by the Government in the course of certain resumption proceedings which established that there was no one upon the lands with a rent-free title; and apart from any other consideration it does seem to me that there is a distinction between a case where a person claims a rent-free title and a case where a person claims a title as an occupancy tenant. Under the general law the landlord is entitled to claim rent from every one shown to hold land within the ambit of his *zemindari*. That is the general law, and if any one relies upon any exception to the general law it is for him to prove that he comes within the exception. To that extent there is a conflict between the Record of Rights and the general law which allows a landlord to recover rent from every one shown to occupy land within the ambit of his *zemindari*. But the case of an occupancy tenant is entirely different. There is no denial of the right of the landlord to recover rent from the tenant and there is no conflict whatever between the Record of Rights and the case as put forward on behalf of the tenant that he has an occupancy holding within the ambit of his *zemindari*. In my opinion the decision of the Judicial Committee in the case to which we were referred by Mr. Jayaswal does not support the extreme proposition which was argued by him before us, namely, that, although the Record of Rights is in favour of the tenant, it is still necessary for the tenant to establish by clear evidence that the entry in the Record of Rights is correct

I must dismiss Appeal No. 61 of 1920 with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal No.* 53 *decreed.*
Appeal No. 61 *dismissed.*

(1) 45 Ind. Cas. 706; 4 P. L. W. 428.
(2) 71 Ind. Cas. 984; 49 I. A. 399; 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 36 C. L. J. 499.

SHYAM LAL *v.* PADAM SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1237 OF 1921.

February 9, 1923.

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

SHYAM LAL—VENDEE—APPELLANT

versus

PADAM SINGH—PRE-EMPTOR—RESPONDENT.

Pre-emption—Custom—Wajib-ul-arz, *interpretation of*—"Haq-i shufa jaiz hai," *meaning of.*

A recital in a *wajib-ul-arz* that "*haq-i-shufa jaiz hai*" only means that the right of pre-emption can be asserted according to Muhammadan Law but it does not show that the custom of pre-emption obtains in the village.

Jagdam Sahai v. *Mahabir Prasad*, 28 A. 60; 2 A. L. J. 482; A. W. N. (1905) 190, referred to.

Second appeal against a decree of the First Additional District Judge, Aligarh, dated the 27th April 1921.

Mr. *S. N. Mukerji*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—It appears that one Asa Ram executed a deed of sale in respect of some of his landed property in favour of Shyam Lal on the 26th October 1919, and the sale-deed was registered on the 11th November 1919. On the 27th October 1920 the suit, out of which this appeal has arisen, was brought by Padam Singh, the plaintiff-respondent, for the recovery of the property conveyed by the deed of the 27th October 1919 on the ground of pre-emption. It was stated in the plaint that the custom of pre-emption prevailed in the village in which the property in suit was situate and under that custom a co-sharer had a preferential right of purchase to a stranger. The plaintiff was a co-sharer in the village with the vendor and the vendee was an absolute stranger.

The claim was resisted by the denial of the custom of pre-emption set out in the plaint. The Court of first instance decreed the claim and its decree was upheld in appeal.

The vendee has come up in second appeal to this Court and contends that the evidence on the record is insufficient to prove the custom alleged in the plaint. We find that there are three documents on the record which are relied upon by the plaintiff pre-emptor in support of his claim, namely, (1) the *wajib-ul-arz* of 1872, (2) a decree of 1859, and (3) a decree of 1920. A copy of the *wajib-ul-arz* is on the record but two of its paragraphs only are referred to in argument, namely, the 5th and the 14th. The 5th paragraph recites that in case of a transfer a co-sharer has a preferential right to a stranger. It further recites the rights of the widows *inter se* and the children by different wives and many other matters which cannot possibly be construed to refer to custom. The principal paragraph which mentions pre-emption is paragraph 14. All that it recites is that "*Haq-i-shufa jaiz hai*," in other words, "the right of pre-emption is lawful." None of the two paragraphs of the *wajib-ul-arz* bears out the case of the plaintiff pre-emptor. The recital of the right of a co-sharer over a stranger in paragraph 5 is not in any way connected with a custom of pre-emption. On the other hand, the words in paragraph 14 which mention the right of pre-emption simply mean that the co-sharers recognise that the right of pre-emption among themselves was lawful, *i.e.*, that it could be enforced according to law. It has been held in this Court in two cases that, where the words in a *wajib-ul-arz* are "that the right of pre-emption prevails" that means that the right of pre-emption can be asserted according to Muhammadan Law, *Jagdam Sahai* v. *Mahabir Prasad* (1). The decree of 1869 does not help the plaintiff pre-emptor for the simple reason that the question whether a custom of pre-emption obtained in the village was not in issue in that case. In the litigation of 1920, it appears from the decree filed on the record that some of the defendants compromised the case and a decree was passed against the rest with regard to half the property in suit on the finding that the custom of pre-emption obtained in the village. The finding presumably was based upon the entries of the *wajib-ul-arz* mentioned above. The decree was made by the Munsif of Bulandshahr. No appeal was preferred from it. At the most, the decree of 1920 is an instance where the right of pre-emption was allowed. It cannot by itself be said to be sufficient evidence to establish the allegation of the plaintiff pre-emptor that the custom obtains in the village. In our opinion this appeal ought to prevail. We,

(1) 28 A. 60; 2 A. L. J. 482; A. W. N. (1905) 190.

therefore, allow it and set aside the decree of the lower Court with costs to the vendee throughout.

N. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 8 OF 1922.
February 23, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji.

KUNJ BEHARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat NARAINI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 9—Temple offerings—Suit for partition—Civil Courts, jurisdiction of.

A suit for a share by partition in the offerings at a temple is cognizable by a Civil Court, though incidentally it may involve a prayer for the assistance of the Court to have the time fixed for the claimant to officiate at the worship for the better security of obtaining his share in the said offerings.

Puran Mal v. *Brij Lal*, 41 Ind. Cas 835; 15 A. L. J. 666; 39 A. 651 and *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*, 19 A 420; A W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276, distinguished.

Appeal under section 10 of the Letters Patent from the judgment of Mr. Justice Rafique, dated the 7th November 1921.

Mr. *S. P. Sinha*, for Dr. *S. M. Sulaiman*, for the Appellants.

Messrs. *D. C. Banerji* and *N. P. Asthana*, for the Respondents.

JUDGMENT.

Rafique, J.—This appeal arises out of a suit brought by the plaintiff-respondent, *Musammat* Naraini, for the partition of property mentioned in the plaint. The property claimed consisted of house property and of a share in the offerings at a certain temple. The plaintiff prayed, with regard to her share in the offerings of the temple, that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her without any future trouble and litigation.

The claim of *Musammat* Naraini was resisted on several grounds, the principal of which were two only, namely, adverse possession and the non-maintainability of the suit in a Civil Court. The learned Munsif, in whose Court the suit was filed, held in favour of the plaintiff on all points except that of adverse possession with regard to the offerings at the temple. The claim of *Musammat* Naraini was decreed with regard to the house property and dismissed in respect of the offerings at the temple. She went up in appeal and the decree of the learned Munsif was reversed with regard to the offerings at the temple; in other words, the claim of *Musammat* Naraini was decreed in its entirety by the lower Appellate Court.

The defendants have come up in second appeal to this Court and have urged two points, namely, that the suit of *Musammat* Naraini with regard to the offerings at the temple is barred by limitation, and that her suit in its present form is not maintainable. The objection of limitation has no force, inasmuch as *Musammat* Chanda, the widow, died in 1917 and the cause of action to *Musammat* Naraini accrued on the death of *Musammat* Chanda.

As to the second objection the learned Counsel for the appellants relies on the following cases:—

Puran Mal v. *Brij Lal* (1), *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (2).

It appears to me that the cases relied upon on behalf of the defence are distinguishable from the facts of the present case. *Musammat* Naraini does not claim a partition in the management of the temple. She claims her share in the offerings made at the worship in the temple. It is true that she seeks the assistance of the Court in having the time fixed for her to officiate at the worship in the temple, or, to be more accurate, as she being a woman cannot officiate at a worship, to have authority for her agent to officiate for her, but that is only a means suggested for the better security of obtaining her share in the offerings. In the two cases referred to above the plaintiffs sought division of the management and

(1) 41 Ind Cas 835; 15 A. L. J. 666; 39 A. 651
(2) 19 A. 420; A. W. N. (1897) 103; 9 Ind. Dec. (N. S.) 276.

superintendence of the temple as trustees. The learned Munsif took the view that I have taken of this case, and gave his decision against the contention of the defendants. It seems that the latter did not object to the finding of the learned Munsif on this point in the lower Appellate Court, for I find no mention of it made in the judgment under appeal. I think that the objection in question has no force. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

JUDGMENT.

Mears, C. J., and Banerji, J.—We agree with the view of the learned Judge of this Court and dismiss the appeal with costs including fees on the higher scale.

N. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1644 OF 1921.

February 5, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Lala RAM DASS—PLAINTIFF—APPELLANT

versus

INAYAT ULLAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 189), s. 35, Sch. I, Art. 1—Memorandum of account signed by debtor—Acknowledgment—Evidence of debt

A document in the form of a letter on a printed form in a book kept by the plaintiff, addressed to and signed by the defendant, which, after mentioning certain debits and credits, concludes with the statement that a certain sum of money is due from the defendant to the plaintiff, is an acknowledgment made in order to supply evidence of the debt within the meaning of Art. 1 of the First Schedule to the Stamp Act and, if unstamped, cannot be received in evidence under section 5 of that Act.

Galstaun v. *Hutchison*, 15 Ind. Cas. 279, 39 C. 789; 16 C. W. N. 95, referred to.

Second appeal from a decree of the District Judge, Meerut, dated the 23rd July 1921.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Mukhtar Ahmad*, for Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff who sought to recover a sum of money from the defendants, one item of which was Rs. 660. This was claimed on a memorandum of account signed by one of the defendants on the 27th November 1917 admitting that a sum of Rs. 660 was due by him to the plaintiff. This account, it appears, started in 1915. The suit was brought on the 14th April 1920, so that unless the memorandum of the 27th November 1917 was legally admissible as an acknowledgment within section 19 of the Indian Limitation Act, so much of the claim as referred to this account would be time-barred. Both the lower Courts have held that this document came within the definition of an acknowledgment of a debt in Art. 1 of the First Schedule to the Indian Stamp Act and held that, inasmuch as it did not bear a one-anna stamp, under section 35 of that Act it was inadmissible. Both Courts, therefore, dismissed the suit, so far as this claim was concerned. On appeal before us it has been urged,—

(1) that the document did not require a stamp;

(2) that the suit was not based on this acknowledgment, and

(3) that, properly considered, this really was a suit for an account stated within the meaning of Art. 64 of the First Schedule of the Indian Limitation Act.

The document in question is in the form of a letter on a printed form in a book kept by the plaintiff. A carbon copy is taken from it and presumably was given to the defendants. It is addressed to the defendants, and, after mentioning certain credits and debits, concludes with the statement that a sum of Rs. 660 is due to the plaintiff from the defendant, errors and omissions excepted, or rather the Hindi equivalent for this. This is signed by one of the defendants. It seems to us impossible to hold that this is not precisely within the meaning of Art. 1 of the First Schedule to the Stamp Act. The way in which the book is kept and signed seems to us to prove that the acknowledgment was made in order to supply evidence of the debt. Various rulings have been quoted by the learned Advocate for the appellant and, among

others, *Galstaun* v. *Hutchison* (1). That case after all merely lays down that each document has to be looked at by itself and it is for the Court in each case to decide whether or not it falls within the definition of Art. I of the Schedule to the Stamp Act. Accepting that criterion, we have no hesitation in saying that in this case, in our opinion, the document required a one-anna stamp. That being so, it seems to us that, under section 35, it cannot be used for any purpose at all. This really does away with both the other contentions raised by the appellant. In our opinion, the appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1337, 1356 & 1357 OF 1920.

January 30, 1923.

Present :—Mr. Justice Daniels and Mr. Justice Lindsay.

HANSRAJ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BALDEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (XIX of 1873), ss. 50, 53—Malikana rights—Sir lands—Zemindars, transfers by validity of.

In villages where the proprietary interest consists of two bodies, the Zemindars, who are entitled to receive a certain percentage on the rental as *malikana* rights and enjoy their *sir* at fixed concession rates, and the *muafidars* with whom the settlement is made and who collect rent, let out the land, pay Government revenue, and are in fact in full properietary management in all other respects, the *malikana* rights, and the *sir* of the Zemindars are not non-transferable. Section 53 and not section 50 of the Land Revenue Act applies to the case of such Zemindars. [p. 1029, col. 2; p. 1030, col. 1.]

Second appeal from a decree of the District Judge, Agra, dated the 17th August 1920.

Mr. *M. L. Sandal*, for the Appellants.

The Hon'ble Mr. *N. P. Ashthana*, for the Respondents.

JUDGMENT.—Second Appeals Nos. 1337, 1356 and 1357 are connected and have been argued together. They arise out of two suits brought, respectively, by *Musammat* Sunder Kunwar and one Hansraj for a declaration that a certain sale did not pass the right to receive a 10 per cent. *malikana* allowance in respect of a Zemindari share and did not convey any interest in certain *sir* land. The state of the proprietary interest in this village is peculiar and is set out in the judgment of the learned District Judge. There are two bodies interested in it who are known as the *muafidars* and the Zemindars. In the case of this village the persons who correspond to the proprietors in the ordinary sense, who collect the rents from the tenants, let out the land and pay the Government revenue, are the *muafidars*. The settlement also has been made with them. The only rights which the so-called Zemindars have, is a right to receive from the *muafidars* a cash payment of 10 per cent. of the total rental and to hold *sir* land at a favourable rent which has been fixed by the Settlement Officer. So long as they pay this rent they are not liable to ejectment.

The appellants in Appeals Nos. 1356 and 1357 are auction-purchasers at a sale held in execution of a decree on a mortgage of the interests of two of the Zemindars, Mula and Kulua. The property sold consisted both of a fractional share in the Zemindari, that is, in the right to receive *malikana* allowance and of certain *sir* plots. *Musammat* Sundar Kunwar, the plaintiff in one of the two suits, is a *muafidar*. Hansraj and Sri Chand, the plaintiffs in the second suit, are the sons of one of the Zemindars whose interest was sold. The plaintiffs in both suits asked for a perpetual injunction restraining the appellants from realising the *malikana* amount payable on the shares which they had purchased; and Hansraj and Sri Chand also asked for a declaration that the plots which had been sold as *sir* were merely ex-proprietary tenant holdings and that the plaintiffs might be awarded possession of them. *Musammat* Sundar Kunwar asked in addition for a declaration that no *zemindari* right passed by the sale.

Both Sundar Kunwar and the father and predecessor-in-interest of the plaintiffs in the other suit, were parties to the suit on the mortgage in connection with which the sale was held. The learned Munsif dismissed both suits. The learned District Judge upheld the Munsif's decision with regard to the *sir* right but gave the plaintiffs a decree in respect of the *malikana*. *Musammat* Sundar Kunwar accepted the decision so far as it was against her. Hansraj and his brother filed Appeal No. 1337 of 1920 against the decision as regards the *sir* plots, and the defendants-purchasers, Baldeo Singh and others, filed the remaining two appeals in respect of the *malikana* right.

We take first the appeals of Baldeo Singh and others. The ground on which the learned District Judge appears to have allowed the appeal was that, in the absence of any clear specification of the nature of the right sold, he must hold that it was a *muafidari* and not a Zemindari right. We are entirely unable to follow this reasoning and the respondents' learned Pleader is not able to support it. The interest which was sold could only be the interest which the judgment-debtors had, and that interest was admittedly the Zemindari interest entitling them to the 10 per cent. *malikana* allowance. The respondents have, however, attempted to support the decision on another ground, namely, that this allowance was a personal right which was not transferable. We are unable to find any reason for holding that this is a non-transferable right. It is a right of a proprietary nature and the decisions which are on the record make it clear that from 1875 onwards these rights have been transferred and the purchasers have realised the *malikana* dues in place of their vendors. Indeed, as we have already noted, both sets of plaintiffs were actually parties to the proceedings in which the rights had been sold up in this very case. No reason has been shown us on which the judgment of the lower Appellate Court can be supported and we allow appeals Nos. 1356 and 1357 and, setting aside the decrees of the Court below, restore the decree of the Munsif with costs in all Courts.

In Appeal No. 1337 of 1920 the appellants' contention is, that the *sir*, though described as *sir*, was really an ex-proprietary right which is non-transferable. The most important decision laying down the status of the parties in respect of these plots was a decision of the Settlement Officer of the year 1875. That decision is not on the record but it has been referred to and quoted in several of the subsequent decisions dealing with disputes regarding the *sir* land in this village. What the Settlement Officer appears to have held in that case was, that there was an arrangement existing in the village whereby the Zemindars received a *malikana* of 10 per cent. on the rental and enjoyed their *sir* at a certain fixed rental, while the *muafidars* were in full proprietary management in all other respects, "and this arrangement," he said, "appears to have been in existence ever since the *muafidars* received the *muafi* grant." It is clear from other documentary evidence on the record that this *muafi* was prior to the British occupation. It is stated to have been granted originally by the Maharaja Scindia in the year 1793 when this village of Barehru belonged to the Gwalior Raj. The statement by the Settlement Officer that the *muafidars* were in full proprietary management in *all other respects* indicates that the right of the Zemindars was also to some extent a right of proprietary nature. It is further apparent from the various judgments on the record that the Revenue Authorities have consistently taken the view that the rights of these *sir* holders were of a proprietary nature. There is a decision of the Commissioner of the year 1892 in which he says that this land has undoubtedly been *sir* for many years and that it is more consistent with the intention of the Act to recognise it as connoting proprietary title rather than to treat it as not having emanated from any proprietary title whatever. Similarly, there is a decision of the Board of Revenue of the year 1916 in which the learned Junior Member held that the status of these *sir* holders was decided long ago in 1875 and held that they held transferable *sir* bearing a privileged rent. Concurring with the Court below, he refused to allow them to be treated as occupancy tenants. The same view was taken by Mr. Evans as Settlement Officer as far back as 1879 in a decision which is upon the record. On the other side three judgments of single Judges of this Court have been referred to. These judgments are not *inter parties* but

are relied on as showing that these *sir* holders have been treated as mere tenants. One of these judgments is clearly irrelevant, as it deals with a case in which one of the *sir* holders had taken possession of certain land previously vacated by a non-occupancy tenant. The other two judgments proceeded on the assumption that the *sir* holders were excluded proprietors under section 50 of Act XIX of 1873. Section 50 applies to co-sharers who were offered a settlement but refused it and had been granted a *malikana* allowance in consequence. These Zemindars clearly did not come within that provision. The settlement was never offered to them. It was made with the *muafidars* in preference and their case came under section 53 and not under section 50 of the old Revenue Act. We are satisfied on the evidence on the record that the Court below was right in holding that these *sir* holders have a transferable interest. We accordingly dismiss appeal No. 1337 with costs including in this Court fees on the higher scale.

M. A. A.

Appeals Nos. 1356 & 1357 *allowed*; *Appeal No.* 1337 *dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1540 OF 1920.

July 25, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

KAMALA KANTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANNANDA CHANDRA CHAKRABURTTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Mortgage by conditional sale—Mortgage in possession—Dispossession by landlord, if can operate as adverse possession against mortgagor—Evidence Act (I of 1872), s. 92—Evidence of acts and conduct, admissibility of.

Where a mortgagee is in possession, his dispossession by the landlord cannot, by itself, operate as adverse possession as against the mortgagor during the continuance of the mortgage. Besides, the mortgagee cannot by suffering dispossession and having taken a new title from the landlord affect the right of the mortgagor in the property of which the mortgagee was put into possession under the mortgage.

Evidence of the acts and conduct of parties to a document is not admissible between them to show that the document is really not what it purports to be.

Maung Kyin v. *Ma Shwe Lu*, 42 Ind. Cas. 642; 22 C. W. N. 257; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 2 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 30; 45 C. 20; 9 L. B. R. 114; 11 Bur. L. T. 21, 44 I. A. 236 (P. C.), relied on

Balkishen Das v. *W. F. Legge*, 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.), referred to

Appeal against a decree of the Officiating Subordinate Judge, Mymensingh, dated the 3rd March 1920, affirming the decree of the Munsif, First Court, Kishoregunj, dated the 17th June 1919.

Babu *Gopal Chandra Das*, for the Appellants:—The plaintiff is the appellant. The appeal arises out of a suit for redemption of a mortgage by conditional sale. Defence was that the mortgage was of a non-transferable occupancy holding. The First Court dismissed the suit which was affirmed on appeal. The money advanced was Rs. 200. I submit oral evidence cannot be given to prove the terms of the mortgage-deed. See Ghosh on Mortgage, Volume I, 206 (T. L. L.) 1922 Edition.

Babu *Hemendra Kumar Das*, for the Respondents:—The findings are that there is a stipulation that if money is paid up then it will operate as an out-and-out sale. I am on the land making fresh settlement with the landlord. As to the admissibility of oral evidence of the conduct of the parties, I submit section 92 of the Evidence Act only applies to the parties to a document. Therefore, evidence would be admissible in case of third parties. I am a third party in this sense that I claim by virtue of settlement from landlord. I submit the deed being to defeat the rights of landlord is really one of sale in the garb of a mortgage.

Babu *Gopal Chandra Das*, replied in brief.

JUDGMENT.—This appeal is by the plaintiffs and it arises out of a suit for redemption of a mortgage by conditional sale dated the 4th *Jaistha* 1304 B. S. Both the Courts below have dismissed the suit on the ground that the document which purported to be

a deed of mortgage was really a deed of sale and upon that it was held that the plaintiffs had no right to redeem the mortgage. The Subordinate Judge on appeal, although he held that oral evidence was not admissible for the purpose of showing that the deed was really a deed of sale, though in the form of a mortgage, was of opinion that evidence of the acts and conduct of parties was admissible to show that the document was really not what it purported to be, that is, that it was not a mortgage but really a sale. That such evidence is not admissible between parties to the document has been definitely laid down by the Judicial Committee in the case of *Maung Kyin* v. *Ma Shwe La* (1). The learned Subordinate Judge refers to this case in his judgment as reported in 22 Calcutta Weekly Notes 257 [*Maung Kyin* v. *Ma Shwe La* (1)], but he has overlooked the fact that their Lordships of the Privy Council observed in that case that the cases which rejected evidence of acts and conduct rightly followed the decision of the Privy Council in *Balkishen Das* v. *W. F. Legge* (2). There is no doubt, therefore, that that evidence is not admissible under the law. So, the deed must be taken as a mortgage and the rights of the parties should be regulated upon that basis. The learned Vakil for the respondents, however, seeks to support the judgment of the Subordinate Judge mainly upon the ground that the landlord had taken possession of the holding and remained in possession for two years and the mortgagees took a fresh settlement from the landlord, the result being that the right of the mortgagors has been extinguished and the mortgagees have acquired a new title which the plaintiffs are not entitled to redeem. The short answer to their contention seems to be that the mortgagees were in possession, and the dispossession of the mortgagees by the landlord, even assuming that it was done against their will, cannot by itself operate as adverse possession as against the mortgagors during the continuance of the mortgage. Besides, the mortgagees cannot by suffering dispossession and having taken a new title from the landlord affect the right of the mortgagors in the property of which they were put into possession under the mortgage. The plaintiffs, therefore, have a subsisting right to the property which they are entitled to redeem under the mortgage-deed.

It is, however, urged by the mortgagees-respondents that, under the terms of the deed, the mortgagors were bound to pay rent to the landlord but they had omitted to make the payment and that they, the mortgagees, had paid the rent, although they were not bound to do so under the terms of the contract contained in the mortgage-bond. If that be so, the mortgagees are entitled to add such amount to the mortgage-money and also to interest under the terms of section 72 of the Transfer of Property Act.

The appeal, therefore, must be allowed, the judgment and the decree of the Court of Appeal below set aside and the case sent back to the Trial Court for making a redemption decree under the law after finding out the sum or sums which the mortgagees are entitled to recover from the mortgagors in addition to the amount payable under the mortgage deed, which the mortgagees had to pay for the purpose of preservation or management of the property in excess of what they were bound to pay under the terms of the deed. The plaintiffs-appellants are entitled to their costs in this Court and in the lower Appellate Court. The costs of the Trial Court will depend upon the sum which is found to be payable by the mortgagors for the purpose of redeeming the property, and the mortgagees will be entitled to such costs which will depend upon the sum so found.

August 10, 1922.—The learned Vakils on both sides pray that our order as regards the costs of the Court of first instance may be varied by directing that each party do bear its own costs in that Court. As both sides agree to this, we modify our order accordingly and direct that the parties do bear their own costs in the Trial Court.

Appeal allowed.

B. N. *Order as to costs modified.*

(1) 42 Ind. Cas. 642; 44 I. A. 236; 22 C. W. N. 257; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L.W. 777; 23 M. L. T. 30; 27 C.L.J. 175; 20 Bom L. R. 278; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21 (P. C.).

(2) 22 A. 149; 4 C. W. N. 1; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 36 OF 1922.

January 10, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ABDUL WAHID—APPLICANT

versus

THE MUNICIPAL BOARD, ALLAHABAD —OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 326 —Act done in official capacity—Refusal to pay amount of bill—Suit to recover amount—Limitation terminus a quo.

Where some members of a Municipal Board, sitting in a matter concerning its finances, disallow an item from a bill, such refusal is a matter which concerns the carrying out of the duties of the Board and amounts to an "official act," within the meaning of section 326 of the U. P. Municipalities Act, and an action for the recovery of the sum so deducted must, under section 326, in order to succeed, be brought within six months from the date of the refusal.

Civil revision from an order of the Judge of the Court of Small Causes, Allahabad, dated the 4th February 1922.

Mr. *P. L. Banerji*, for the Applicant.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—In the early part of the year 1918 the Municipal Board of Allahabad wanted certain huts of a temporary nature built in order to afford temporary accommodation for the persons who would, in the ordinary course of events, attend the *Magh mela* of that year. The Board entered into contracts with one Abdul Wahid and he carried out certain work. When the time came to examine his bills, the Engineer to the Municipal Board was of opinion that Abdul Wahid was claiming for work which in fact had never been ordered, and that, on other grounds as well, there were certain items open to objection, and that the claim of Abdul Wahid, which was for some Rs. 827, should be reduced by Rs. 350. A notification to that effect was sent to Abdul Wahid on the 14th of August 1918, the Board supporting the Engineer with regard to the striking out of the Rs. 350. In 1920 Abdul Wahid having commenced no action went away on military service. On the 12th of January 1922 he commenced an action in the Small Cause Court for a sum of Rs. 390, Rs. 40 of this amount was for return of deposit, a matter with which we are not concerned. In the ordinary course, having regard to the fact that Abdul Wahid was on military service, the action, if it was governed by ordinary rules of limitation, would be within time. The Municipal Board, however, took the point that, under section 326 of the United Provinces Municipalities Act, the suit brought by Abdul Wahid ought to have been commenced within six months from the date of their refusal to pay. The Judge of the Small Cause Court came to the conclusion that that was a fatal objection to the claim of Abdul Wahid and dismissed it. The matter has come up before us in revision and we have been referred to the exact words of the section. The relevant words are: "No suit shall be instituted against a Board in respect of an act done in its official capacity, unless such action be commenced within six months next after the accrual of the cause of action." Now, the cause of action was the refusal by the Board to pay Rs. 350. The refusal by the Board was determination by certain gentlemen sitting as a Board in a matter which concerned the finances of the Board, which concerned the proper carrying out of the duties of the Board, and cannot be otherwise described than as an "official act." The Engineer officially reported to the Board his opinion that Rs. 350 ought to be struck off the bill; certain gentlemen duly elected to the Municipal Board approved that recommendation of the Engineer and decided it should be carried into effect and Rs. 350 withheld. That refusal was clearly, in our opinion, an act done by the Board in its official capacity; and, therefore, for the refusal to pay the sum of Rs. 350 Abdul Wahid ought to have commenced his action within six months from the date of the refusal. We are, therefore, of opinion that the decision of the learned Judge of the Small Cause Court is right and that this application for revision must be rejected with costs and fees on the higher scale.

W. C. A.

Application rejected.

JHARAP RAI *v.* JAINT RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1380 OF 1921.

February 19, 1923.

Present :—Mr. Justice Daniels.

JHARAP RAI—PLAINTIFF—APPELLANT

versus

JAINT RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts 142, 144—Adverse possession—Burden of proof.

In a suit for recovery of immoveable property where the plaintiff alleges dispossession by the defendant it is Art. 142 of Schedule I to the Limitation Act that applies and not Art. 144 [p. 1033, col. 2.]

Mohima Chunder Mazoomdar v. *Mohesh Chunder Neoghi*, 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.), followed.

Secretary of State v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.) and *Jai Chand* v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814, distinguished.

Possession which can be referred to lawful title should be so referred. Therefore, where there is nothing to show the unlawful ouster of the plaintiff from the land, his suit for possession must fail. [p. 1034, col. 1.]

Second appeal against a decree of the District Judge, Ghazipur, dated the 10th August 1921.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *N. Upadhiya*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit originally brought for possession of 1 *bigha* and 2 *biswas* of *sir* land. The First Court decreed it to the extent of 11 *biswas* 17 *dhurs*. The lower Appellate Court has dismissed it. The findings of the Court below are these:—The parties are joint owners of an unpartitioned village. They are in separate possession of *sir* plots. They cultivated two adjoining plots, Nos 1209 and 1210, the latter being in the possession of the plaintiff. This was in 1901 (*Fasli* 1308). At the time of the suit the defendant was in possession of 10 *biswas* in No. 1210 which has been formed into a separate sub-plot. There is no proof whatever as to when this change took place, the allegation in the plaint being that the plaintiff was originally in proprietary possession of this area, and that the defendant had dispossessed him by encroaching on the plaintiff's land to the extent of the area claimed. The learned District Judge held that the case was governed by Art. 142 of the Limitation Act and that, as there was nothing to show that the plaintiff has been in possession within 12 years, his suit must fail.

In appeal it is contended that the case was governed by Art. 144 and the ruling of their Lordships of the Privy Council in *Secretary of State* v. *Chelikani Rama Rao* (1), and of this Court in *Jai Chand* v. *Girwar Singh* (2) have been referred to. It appears to me that there is a tendency on the part of some Courts to give too wide an extension to these decisions. Both were cases falling definitely under Art. 144. In the Privy Council case the area in dispute had arisen in the bed of the sea near the mouth of a river, and in the case in this Court the plaintiff's case was that the defendant was a mere licensee on behalf of the plaintiff. In cases to which Art. 142 applies, that is to say, cases in which there has been a dispossession of the plaintiff, the ruling of the Privy Council in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (3) still holds good. In this case there certainly was an allegation on the plaintiff's part that he was originally in possession and had been dispossessed.

There is, however, another ground on which the decree of the Court below can be supported and it has been supported by the respondents' learned Counsel. On the findings of the Court below this is not a case of adverse proprietary possession at all. The village is undivided and the ownership of other co-sharers is not affected by the fact that one co-sharer cultivates certain land as *sir* or *khudkasht*. He is liable to account to the other proprietors for such land at the distribution of profits. In this case it is the finding of the Court below that the ownership of the village is joint, though the parties are in separate possession of their *sir*. All that has happened in this case, so far as the record shows, is that at some time after 1901 the plaintiff has ceased to cultivate this particular portion of plot No. 1210 as his *sir* and the defendant has

(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; 1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 B m. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(2) 52 Ind. Cas 366; 41 A. 669; 17 A. L. J. 814.

(3) 16 C. 473; 16 I. A. 23; 5 Sar P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

begun to cultivate it. Possession which can be referred to lawful title should be so referred, and according to the finding of the Court below there is nothing to show that there has been any unlawful ouster of the plaintiff from this land. It appears to me, therefore, that the decree of the Court below is correct and I dismiss the appeal with costs.

M. A. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 331 OF 1922.

December 15, 1922.

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

AJUDHIA PRASAD—DECREE-HOLDER—APPELLANT

versus

GOBIND PRASAD—JUDGMENT DEBTOR—RESPONDENT.

Pre-emption—Decree ordering payment out of Court—Payment in Treasury without informing Court—Decree whether complied with.

In a pre-emption suit a decree was obtained and the plaintiff was to pay to the defendant within thirty days a specified sum; in the event of the latter refusing to accept the money when tendered, the plaintiff was given the option of depositing it in Court. The plaintiff did not tender the money out of Court. The defendant, well within the period limited by the decree, applied to the Court that the plaintiff was present with the money and that he might be asked to make the payment. The plaintiff, however, was not to be found when called but he deposited the money, which he had been ordered to pay out of Court, in the Treasury on the same day, without informing the Court of the deposit or asking it to issue notice to the defendant that the money was lying to his credit in the Treasury:

Held, that there had not been any effective compliance with the provisions of the decree. [p. 1035, col. 1.]

Execution second appeal against a decree of the Subordinate Judge, Basti, dated the 28th January 1922.

Dr. *S. N. Sen*, for the Appellant.

Dr. *S. M. Sulaiman* and Messrs *Jang Bahadur Lal* and *S. P. Sinha*, for the Respondent.

JUDGMENT.—This is a second appeal by the plaintiff decree-holder in a pre-emption suit. The decree was on a compromise. The plaintiff was to pay to the decree-holder within thirty days a specified sum. In the event of the defendant-vendee refusing to accept the money when tendered, the plaintiff was given the option of depositing the sum in Court. Failing such payment or deposit within the period limited, the suit was to stand dismissed. The decree was passed on the 22nd December 1920. On the 2nd February 1921, the plaintiff asked the Court to execute the decree by putting him in possession of the property. On the 9th February 1921 the opposite party, Gobind Prasad, objected that the money had neither been paid nor tendered within the period fixed. The Courts below, after taking some evidence, have held that the plaintiff, Ajudhia Prasad, never tendered the money to Gobind Prasad out of Court, but that he did deposit it in Court within the period of 30 days limited by the decree. Both Courts have held, as a question of interpretation, that this deposit was not a sufficient compliance with the terms of the decree. The appeal before us is by the plaintiff Ajudhia Prasad. If we had merely to decide the point as it has been put in the judgment of the lower Appellate Court, we might have felt some little difficulty, but, on an examination of the record, we are satisfied that the appeal must fail. The question as to what actually happened in the interval between the passing of the decree and the application of the 2nd February 1921 is a little complicated by the fact that the Courts below have disbelieved Ajudhia Prasad's oral evidence as to a tender made out of Court. The record does, however, establish certain facts. On the 12th January 1921, well within the period limited by the decree, Gobind Prasad presented to the Court an application to the effect that the plaintiff, Ajudhia Prasad, was present with the money which he had been required to pay, and he asked that payment might be made and a receipt handed over in the presence of the Court. Upon this the Court Officer called for Ajudhia

Prasad, but he was not to be found. The Court then ordered Gobind Prasad's petition to be filed. We know also that, on that very same day, namely, the 12th January 1921, Ajudhia Prasad went to the Treasury and there deposited, to the credit of Govind Prasad, the money which he had been directed to pay out of Court. He never informed the Court that this money had been so deposited, or asked the Court to issue notice to Gobind Prasad of the fact that the money was lying to his credit in the Treasury. On this state of facts it seems sufficient to say that there had not in our opinion, been any effective compliance with the provisions of the decree. This appeal, therefore, fails and we dismiss it with costs, including fees in this Court on the higher scale.

N. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 30, 1922.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge, Sir Lawrence Jenkins, KT., and Lord Salvesen.

CHALIKANI VENKATARAYANIM GARU AND OTHERS—APPELLANTS

versus

SREE RAJAH VATSAVAYA VENKATA SUBADRAYAMMA JAGAPATI BAHADUR GARU AND OTHERS—RESPONDENTS.

Mortgage with possession—Agreement by mortgagor to pay fixed sum for expenses to be incurred by mortgagee, validity of—Fixed payment in respect of variable charge—Tender—Formal tender, when unnecessary.

There is nothing to prevent a mortgagor from entering into an agreement to pay the mortgagee a fixed sum for certain expenses to be incurred by the latter when in possession of the property mortgaged to him. Such an agreement merely provides for a fixed payment in respect of a variable charge and is valid even though the amount is not fixed so as to prejudice the mortgagee. [p. 1036, col. 2.]

The practice of the Courts is not to require a party to make a formal tender where from the facts it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. [p. 1037, col. 2.]

Hunter v. *Daniel*, (1845) 4 Hare 420; 14 L. J. Ch. 194; 9 Jur. 520; 67 E. R. 712; 67 R.R.114, referred to.

Appeal against the judgment and decree of the High Court of Madras (Abdur Rahim and Oldfied, JJ.), dated the 9th and 21st November 1913, in Appeal Suit No. 209 of 1916, printed as 45 Ind. Cas. 437, modifying a decree of the Court of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 30 of 1910, dated the 25th December 1915.

Messrs *Upjohn, K. C., Narasimham* and *Rao*, for the Appellants.

Messrs. *De Gruyther, K. C.*, and *K. Brown*, for the Respondents.

JUDGMENT.

Lord Buckmaster.—Three questions are raised upon this appeal. They all arise out of the rights created under a mortgage-deed which was executed on the 2nd March 1891, in favour of the first plaintiff in the suit by the first defendant. The appellants are assignees of the equity of redemption of that mortgage, and claim that in the accounts taken to determine the true amount due under the deed three mistakes have been made adverse to their interests. The mortgage-deed itself is in a peculiar form. It is a mortgage with possession to secure the re-payment of Rs. 1,80,000 with interest at the rate of Re. 1 per cent. per month; the prinicipal of the debt is to be re-paid by sums of Rs. 10,000 payable year after year, beginning on the first February 1892 down to the first February 1898, and on the 1st February 1899 the entire balance of the debt and the interest is to be paid. These instalments are protected not merely by the security of the mortgaged property but also by an express agreement in these terms: "We shall pay to you at Tuni the principal according to the aforesaid instalments and the whole of the interest upon the entire debt calculated with refereuce to the instalments, along with the last instalment." There was a further agreement in the deed by which certain charges which would be incurred by the mortgagee, when in possession, were fixed at the sum of Rs 4,000 per annum. They are specified as being the usual earthwork repairs annually done to canals, etc., expenses on account of the village headmen, service Inams of

village headmen, village deities, contingent charges, and other business expenses. The deed also contained two further material provisions. The first, that notwithstanding the arrangement by which the mortgagee was to be put into possession, a lease was to be granted by him to the mortgagor for a period of two years, and the second, that if the provisions of the mortgage-deed as to re-delivery of the estate to the mortgagee by the mortgagor at the expiration of the lease for two years were not carried out, the mortgaged estate should at the end of the time stand sold to the mortgagee for the entire amount due inclusive of the balance of principal and interest, and further, that the mortgagor should not sell any portion of the estate to anybody except the mortgagee. Arrangements were also made by which the mortgagee was to pay all the necessary *peishcush* or quit-rent or land-cess, and a provision that if that should be raised there should be a further right on his part to recover the money from the mortgagor with interest as therein mentioned. What happened consequent upon the execution of the deed was this: The lease for two years was duly granted to the mortgagor, but at the expiration of the term he did not pay the second instalment due on February 1st, 1893, nor did he re-deliver possession to the mortgagee. The mortgagee accordingly instituted a suit for recovery and possession and for the amount of the second instalment. To meet this a sum of Rs. 15,000 was paid into Court by the appellants on behalf of the mortgagor, but possession was not delivered up by him, and he was in fact in possession at the time when the third instalment became due.

Shortly before this date, namely, on the 16th January 1894, the mortgagor executed a sale-deed for Rs. 1,60,000 for some of the mortgaged properties, and a mortgage for Rs. 60,000 for the others in favour of the appellants, and requested them to pay to the mortgagee Rs. 2,05,000, being the total Rs. 2,20,000 after deducting the Rs. 15,000 already paid into Court. The appellants accordingly, on the 10th February 1894, tendered the Rs. 10,000, due on the 1st February to the mortgagee, who refused to accept the money upon the ground that there existed at that date a breach of the bargain made by the mortgagor as to re-delivery of possession, and that consequently his acceptance might prejudice his rights. Their Lordships think that this is a mistaken view of the rights which the mortgagee possessed. The agreement for the payment of the instalments of the mortgage-money is in fact the main obligation of the mortgage-deed, and the whole of the other provisions, however extensive and far-reaching they may be, are really nothing but the security to enforce this obligation. The acceptance of Rs. 10,000 due on the 1st February 1894 would not have prejudiced the mortgagee in any way in the claim he had then pending against the mortgagor for possession, and their Lordships think there was consequently no justification for his refusal of the tender. The fact that the tender was nine days after the due date is, of course, immaterial; accordingly, in taking the accounts, interest on the sum of Rs. 10,000 according to the terms of the deeds must cease to be charged against the mortgagor from the 10th Februay 1894.

On the 13th July 1894 the mortgagee obtained a decree for possession, and entered in pursuance of its terms, so that the agreement for the annual allowance of Rs. 4,000 for the particular payments to which reference has been made became operative, and the next question is as to the validity of that agreement. It is urged on behalf of the appellant that it gives the mortgagee a collateral advantage under the deed which he is not entitled to exact, but their Lordships think that that contention cannot be supported. The truth is that it is a fixed payment to be made in respect of a variable charge, and though it may be assumed that the amount was not fixed so as to prejudice the mortgagee, there is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure. They, therefore, think the objection to the Rs. 4,000 cannot be maintained.

There remains what is after all the most serious part of this appeal, and it is the claim that, in February 1899, the appellants were willing and offered to make a tender of the whole of the outstanding principal

and interest, but that the mortgagee so acted as to excuse the actual tender being made, and that in consequence there is no longer any right on the part of the mortgagee to debit interest in the mortgage accounts from that date. This controversy depends upon the true meaning to be placed on two important letters. The first is written on the 17th January 1899, by the appellants to the mortgagee. It refers to the mortgage and the assignments, and points out that the balance of the monies payable by them to the mortgagor in respect of such transaction—which appear to be stated erroneously at Rs. 2,25,000 instead of Rs. 2,05,000—had not been paid over but left with them for satisfaction of the mortgage-debt, and concludes in this way. "It is requested that, on receipt of this letter, the amount becoming due to you by that date from the estate may be made known at once. Soon after receipt of your letter, we are ready to send respectable men with money and get the re-payment of the amount of your debt made in full in the forenoon on the due date. Your reply is requested." Both the Subordinate Judge and the High Court Judges, before whom this case has been heard, have come to the conclusion that that was not a *bona fide* offer on the part of the appellants. They say that they had not at that time either the money or the control of the money that would have enabled them to meet the tender of the large amount that was due upon the mortgage-deed. Their Lordships think, for reasons that will presently appear, that it is not necessary to consider that question. It is very difficult indeed to say whether or no a man will be able to have control of money at a future date, and the real question to be determined here is not whether that money was within the power of the appellants, but whether the mortgagee in the letter he sent in answer to the offer definitely and unequivocally refused to accept the money. were it tendered. Before reading this reply it is well to bear in mind what has been stated by Vice-Chancellor Wigram in the case of *Hunter* v. *Daniel* (1) as to the true position in such a case. He there says: "The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money." Their Lordships think that that is a true and accurate expression of the law, and the question, therefore, is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money. The letter is dated the 28th of February 1899, and is in part in the from of an argument, and the substantial part is as set out in the record in these words:—"As in the face of the suit instituted by us of late in the District Court of Vizagapatam against the proprietor for possession of the entire proprietary estate of Uratla held by us under the terms of our possessory mortgage-deed, you have purchased from the proprietor, as you have stated, during the pendency of that suit and subsequent thereto, with full knowledge of the conditions, etc., of our possessory mortgage-deed, and yet in contravention of the same and without necessity, a considerable portion of the estate at different times for Rs. 2,40,000 in favour of yourself and others, there is no need for us to pay any of those amounts you state under that head, inasmuch as the right to purchase that estate for that sale price has vested in us."

The explanation of the earlier part of that paragraph is due to the provisions contained in the deed which prohibit, so far as they had the power, just such a transaction as that which had taken place. The latter part of the letter is unfortunately an obvious mistake or misprint. Either it should run, "there is no need for us to receive," or "there is no need for you to pay us any of those amounts you state under that head." The better reading in favour of the appellants is the latter, "there is no need for you to pay any of those amonnts you state under that head, inasmuch as the right to purchase that estate for the sale price is vested in us." Accepting this as the true reading, the meaning of the letter in their Lordships' mind is this, that the rights which the mortgagee had conferred upon him have vested in him the

(1) (1845) 4 Hare 420; 14 L. J. Ch. 194; 9 Jur. 520; 67 E. R. 712; 67 R. R. 114.

whole of the estate, and that consequently the mortgage is at an end. It was an erroneous view based upon invalid provisions in the deed, but it by no means followed from that that if, in fact, the tender had been made of the whole of the principal money and interest which was due up to that date, the mortgagee would not have accepted it, and it is remarkable that in the latter part of the letter he continues in these words: "In reply to the letter, dated 14th ultimo, from the proprietor about the balance of demand after payments made, on the proprietary estate of Kota Uratla, we informed him on the 27th instant, that the amount of debt due under our said deed was Rs. 3,19,940-2-2." Now, upon the view that this letter was intended to excuse the mortgagor from making any tender at all under the deed, there could have been no possible reason for stating what the amount was that was to be paid. The fact is that this letter contains a reason why the tender is unnecessary, but the reason was wrong, because the right to buy according to the terms which the mortgage-deed contained was a right which was not enforceable in law. But it is on that hypothesis that they say there is no need for payment to be made. If this were not accepted as correct, there is nothing to relieve the appellants from making the tender. Their Lordships are unable to construe the letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From that time to this nothing has in fact been tendered. No money has been paid into Court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think that the appellants must fail upon that part of his appeal. It follows, therefore, that the appeal succeeds, but succeeds only to a very limited extent; but though it is small in relation to the part in respect of which he fails, he does obtain some substantial relief which could not have been obtained, without coming before this Board, and their Lordships, therefore, think, having considered all the circumstances, that he ought to have one-half of the taxed costs of the appeal, and they will humbly advise His Majesty accordingly.

N. H. *Appeal allowed.*

Solicitor for the Appellants:—Mr *E. Dalgado.*

Solicitor for the Respondent:—Mr. *Douglas Grant.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 117 OF 1921

February 9, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

HAZARI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NIMAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grove-holder allowing land to remain waste for 12 years—Abandonment.

If a grove-holder cuts down the grove trees and allows the land to remain waste without trees or cultivation thereon for upward of 12 years, it amounts to abandonment and his descendants are not entitled to take possession of the land and re-plant a new grove thereon without the permission of the *zemindar.*

Letters Patent Appeal from a judgment of Mr. Justice Gokul Prasad, dated the 2nd July 1921.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This appeal must succeed. The fact is that there was a grove, some 18 years ago, on land properly in the possession of the ancestors of the defendants as grove-holders. Those trees were cut down and the grove-holders abandoned the land which thereupon reverted to the *zemindars.* For upwards of 12 years the land remained as waste—there were neither trees nor cultivation upon it. At a period which is certainly from three to six years prior to the commencement of the suit, the defendants planted certain trees on the groves. They are the descendants of the original grove-holders. We are of opinion that that fact

gives them no preferential right or differentiates them in any way from any other person who might have come in and planted trees without the permission of the *zemindar*. They had no right to come upon the land after its abandonment by their predecessors-in-title. The learned Judge in this Court says that, "as the matter stands, the plot in question is now covered with trees," (as to that there is no doubt; they were, however, found to be of quite recent planting) "and cannot be said to have quite lost the character of a grove." We are obliged to differ from him, because we believe the history of the land for the past 20 years to have been—and as found by the lower Appellate Court—first a grove, then land abandoned for upwards of 12 years and lying waste, then re-occupied by the descendants of the original grove-holders and transferred into a newly planted grove. In these circumstances, the *zemindars* who have brought the action are entitled to the relief originally claimed by them, and we allow the appeal, set aside the decree of this Court and restore that of the lower Appellate Court. The appellants will have their costs of both hearings in this Court.

M. A. A. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 341 AND 342 OF 1922
AND
CIVIL MISCELLANEOUS PETITIONS NOS. 1869 AND 1870 OF 1922.
September 18, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Venkata Subba Rao.

C. K. RAMASWAMI GOUNDER—RESPONDENT NO. 1—PETITIONER
versus
MUTHU VELAPPA GOUNDER AND OTHERS—PETITIONERS NOS. 1 AND 2—RESPONDENT NO. 2—RESPONDENTS.

Madras Local Boards Act (XIV of 1920), ss. 57, 199 Sch. X, r. 10—Taluk Board—Election of President—Outgoing President, term of, extension of—District Judge conducting election inquiry, whether persona designata or Court—Finality of orders deciding election disputes—Revision—Question of law affecting jurisdiction—Material irregularity—Civil Procedure Code (Act V of 1908), s. 115.

Section 57 of the Madras Local Boards Act and the Rules for deciding election disputes which provide that the decisions of the District Judge are "final," prohibit only a right of appeal to the High Court and do not bar a right of revision, when revisional powers are intended to be taken away it must be done by express words to that effect. [p. 1045, col. 1.]

A District Judge acting under the Rules framed under section 199 of the Madras Local Boards Act for decision of election disputes is not a "*persona designata*" but a Civil Court exercising judicial functions and is subject to the superintendence of the High Court in its revisional jurisdiction.

When jurisdiction is given to a Court, without defining the procedure to be followed it will attract the ordinary procedure of that Tribunal When any existing Tribunal is given a right to determine certain matters, the presumption is that that Tribunal is to determine such matters as a Court. The party who contends that the matters referred to the Tribunal were not referred to it as a Court of Law must make good that position. In such cases the jurisdiction of the Tribunal is enlarged but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same. [p. 1045, col. 2; p. 1052, col. 2; p. 1053, col. 1.]

National Telephone Co. v. *Postmaster-General*, (1913) A. C 546 at pp. 560, 562; 82 L. J. K. B. 1197, 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637, *Balakrishna Udyar* v. *Vasudeva Aiyar*, 40 Ind. Cas. 650, 40 M 793; 15 A. L. J. 645 2 P. L. W. 101; 33 M L. J. 69; 26 C. L. J. 143, 19 Bom. L. R 715: (1917) M. W. N 628; 6 L. W. 50; 22 C. W. N 50; 11 Bur. L. T. 48; 44 I A. 261 (P. C.), *Vasudeva Aiyar* v *Devasthanam Committee of Negapatam*, 2 Ind. Cas. 451; 38 M. 594; 14 M. L. T. 354; (1913) M W N. 842; 25 M.L. J. 536, *Minakshi Naidu* v. *Subramanya Sastri*, 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 and *Municipality of Belgaum* v. *Rudrappa*, 34 Ind. Cas. 21; 40 B. 509 at p. 512; 18 Bom. L. R. 340, considered.

Balaji Sabharam Gurav v. *Mervanji Nowroji*, 21 B. 279; 11 Ind. Dec (N. S) 189 and *Vijiaraghavalu Pillai* v. *Emperor*, 25 Ind. Cas. 345; 38 M. 581; 16 M. L. T. 128; 27 M. L. J. 227; 15 Cr. L. J. 593, distinguished.

When a section says that a certain order shall be final it only means and intends that it shall not be open to appeal, and the intention is not to take away the revisional powers. Finality can be attached only to orders passed with jurisdiction as those passed without jurisdiction are in reality nullities. [p. 1045, col 1.]

Matangini Debi v. *Girish Chunder Chongdar*, 30 C 619; 7 C. W. N. 433 and *Valli Ammal* v. *Corporation of Madras*, 16 Ind. Cas 971; 38 M. 41; 12 M. L. T. 459; 23 M. L. J. 531; (1912) M. W. N. 1162, relied on.

An error of law which affects the

jurisdiction of a Court is a ground for interference in revision under section 115 of the Civil Procedure Code. To assume jurisdiction to do a certain act by taking an erroneous view of the law, when there is really no jurisdiction, raises a case for interference under section 115 of the Civil Procedure Code. [p. 1046, col. 2.]

Vuppuluri Atchayya v. *Sri Konchumarti Venkata Seetarama Chandra Rao*, 18 Ind. Cas. 555; 39 M. 195; 13 M. L. T. 60; 24 M. L. J. 112, *Reg.* v. *Manchester Justices*; (1899) 1 Q. B. 571 at p. 574; 68 L. J. Q. B. 358; 63 J. P. 360; 47 W. R. 410; 80 L. T. 531, *Hindley* v. *Joynarain Marwari*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288, *Balakrishna Udayar* v. *Vasudeva Iyer*, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.) and *Sundaram* v. *Mamsa Mavuthar*, 63 Ind. Cas. 937; 44 M. 554 40 M. L. J. 407; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272 (F. B.), relied on.

Sheoraj Nandan Singh, In the matter of, 18 C. 290; 9 Ind. Dec. (N. S.) 193, *Shew Prosad* v. *Rama Chunder*, 23 Ind. Cas. 977; 41 C. 323, *Amir Hassan Khan* v. *Sheo Baksh Singh*, 11 C. 6, 11 I. A. 237, 4 Sar P. C. J. 559; Rafique and Jackson's P. C. N. 83; 5 Ind. Dec. (N. S.) 760 (P. C.) and *Manisha Eradi* v. *Siyali Koya*, 11 M. 220 at p. 228; 12 Ind. Jur. 49; 4 Ind. Dec. N. S. 153, explained and distinguished.

The legal effect of rule 10 of the Rules in Schedule X of the Madras Local Boards Act of 1920 is to extend the term of office of the outgoing President of a Taluk Board as such till the election or appointment of a new President under the new Act, and not to extend the President's term of office as a member of the Board.

Where, on a petition by a defeated candidate at an election for Presidentship of a Taluk Board, the District Judge set aside the election on an erroneous view of the law as to the eligibility of the successful candidate to stand for election and declared the defeated candidate as the duly elected President in contravention of the Election Rules, without giving the other candidate an opportunity to prove allegations of corruption, etc., under the rules;

Held, the Judge acted with material irregularity in the exercise of his jurisdiction and the order was liable to be set aside in revision.

IN C. R. P. Nos. 341 AND 342 OF 1922.

Petitions under section 115 of Act V of 1908 and sections 106 and 107 of the Government of India Act, praying the High Court to revise the orders of the District Court, Coimbatore, in O. P. Nos. 47 and 51 of 1922 respectively dated 10th April 1922.

IN C. M. P. Nos. 1869 AND 1870 OF 1922.

Petitions praying that, in the circumstances stated in the affidavit filed with Civil Miscellaneous Petition No. 1869 of 1922, the High Court will be pleased to issue writs of *certiorari* to the District Court, Coimbatore, for the production of the records in O. P. Nos. 47 and 51 of 1922, on the file of the said Court and to quash the proceedings and order in the said O. P. Nos. 47 and 51 of 1922.

Mr. *A. Krishnaswami Aiyar*, for the Respondent, took the preliminary objection that no revision lay. "District Judge" in the rules is only *persona designata*. The order is also final under the rules.

Messrs. *S. Srinivasa Aiyangar*, *S. Muthiah Mudaliar*, *K. Krishna Bharati* and *K. Ramaswami Gonder*, for the Petitioner.—The rules for decision of election disputes do speak of the District and Subordinate Judge, but that does not render him a "*persona designata*." The words "Court" and "Judge" are used loosely throughout the Act. Section 3 of the Indian Evidence Act defines "a Court" as including all Judges and Magistrates authorised to take evidence. The District Judge was a Court. Where additional powers are intended to be conferred on an existing Tribunal, it is a case of supplemental jurisdiction and not *persona designata*. See *National Telephone* v. *Postmaster-General* (1), IX Halsbury's Laws of England 9.

When a question is referred to an established Tribunal without more, it imports the ordinary incidents of the procedure of that Court, *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (2) on appeal *Balakrishna Udayar* v. *Vasudeva Aiyar* (3), *Queen-Empress* v. *Munda Shetti* (4), *Nataraja Iyer, In re* (5), *Atchayya* v. *Gangayya* (6),

(1) (1913) A. C. 546 at pp. 560, 562; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637.

(2) 21 Ind. Cas. 451; 38 M. 594; 14 M. L. T. 354; (1913) M. W. N. 842; 25 M. L. J. 536.

(3) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(4) 24 M. 121; 2 Weir 170.

(5) 16 Ind. Cas. 755; 36 M. 72, 23 M. L. J. 393; (1912) M. W. N. 1012; 13 M. L. T. 367; 13 Cr. L. J. 723.

(6) 25 M. 138 at p. 140; 2 M. L. J. 64; 5 Ind. Dec. (N. S.) 445. (F. B.)

Secretary of State for India v. *Chelikani Rama Rao* (7) were then referred to and relied on.

In *Vijaraghavalu Pillai* v. *Emperor* (8) the Magistrate was held to be merely a referee between the President and the candidate. *Palanikumara Chinnayya Gounder, In re* (9) was a case of a Revenue Officer exercising jurisdiction as an executive officer on the administrative side. The decision in *Balaji Sakharam Gurav* v. *Merwanji Nowroji* (10) was also distinguished.

Secondly, neither is the petition barred by the provisions of section 57 and r. 12 (3) of the Election Decision Rules. The finality prevents only a right of appeal. No Court can clutch at jurisdiction by deciding erroneously: *Reg.* v. *Manchester Justices* (11). There is no bar to the exercise of revisional jurisdiction. See *Valli Ammal* v. *Corporation of Madras* (12) and *Matangini Devi* v. *Girish Chunder Chongdar* (13).

Thirdly, in any case whether or not there is revision, and whether or not the District Judge is a *persona designata*, I have applied for a writ of *certiorari*.

The power to issue the writs is inherent in the High Court and cannot be taken away ordinarily except by express and clear words: 10 Halsbury's Laws of England 175, *Vuppalari Atchayya* v. *Sri Kanchumarti Venkata Seetarama Chandra Rao* (14). The extraordinary prerogative writ of *certiorari* is not excluded by the use of the word final. See *Annie Besant* v. *Advocate-General of Madras* (15), *Rex* v. *Jukes* (16); see also *Nataraja Iyer, In re* (5), *Nundo Lal Bose* v. *Corporation of Calcutta* (17), *Justices of Bombay, In re* (18), *Ameer Khan, In the matter of* (19), *Jamuna Bhai Ammal* v. *Srimati Sadagopa* (20), *Rajah of Ramnad* v. *Seetharam Chetty* (21), *Kochunni Elaya Nair, In re* (22).

On the merits, the rules are perfectly clear. A special provision had to be made for an interregnum between the expiry of the old Taluk Board and the election of the President under the new Board for the discharge of executive functions. Hence, the old President continues till the new one is elected: but that does not make him a member of the new Taluk Board. Continuance of President is not his continuance as member. Else it will lead to an absurd anomaly, that of imposing a disability on all retiring members, not (see section 55) likely to have been contemplated by the Legislature. The learned Judge's construction is clearly wrong.

This is the only ground of the decision. Further, the Judge was clearly wrong in declaring the defeated candidate as President without giving an opportunity to prove circumstances in r. 9. I am entitled to have the order set aside in revision. The Court has no jurisdiction to decide a point wrongly and assume jurisdiction. The error of law affects jurisdiction; where this is so, it is settled it is a ground of interference; see *Balakrishna Udayar* v. *Vasudeva Aiyar* (3), *Sitharam Chetty* v. *Subramania Aiyar* (23), *Sundaram* v. *Mamsa Mahanair* (24), *Hindley* v. *Joynarain*

(7) 35 Ind Cas. 932; 39 M. 617; 31 M. L. J. 324, 21 C. W. N. 1311 (1916), M. W. N. 224, 14 A. L. J. 1114; 29 M. L. T. 435; 4 L. W. 400; 18 Bom. L. R. 1007; 25 C. L. J. 65, 43 I. A. 192 (P. C.)

(8) 25 Ind Cas. 315; 38 M. 581; 15 M. L. T. 128, 27 M. L. J. 227; 15 Cr. L. J. 503.

(9) 60 Ind Cas. 500; 41 M. L. J. 577; 14 L. W. 548, (1921) M. W. N. 757; (1922) A. I. R. (M.) 337.

(10) 21 B. 279; 11 Ind. Dec. (N. S.) 189.

(11) (1899) 1 Q. B. 571 at p. 574; 68 L. J. Q. B. 338; 63 J. P. 390; 47 W. R. 410, 80 L. T. 931.

(12) 10 Ind. Cas. 971; 36 M. 41; 12 M. L. T. 409, 23 M. L. J. 531; (1912) M. W. N. 1162.

(13) 30 C. 619; 7 C. W. N. 433.

(14) 18 Ind Cas. 555; 39 M. 195; 13 M. L. T. 60, 24 M. L. J. 112.

(15) 52 Ind Cas. 209; 43 M. 146 at pp. 159, 160; 37 M. L. J. 139, 17 A. L. J. 925, 25 C. W. N. 905, 21 Bom. L. R. 897; (1919) M. W. N. 555, 10 L. W. 451; 20 Cr. L. J. 593; 29 M. L. T. 400; 1 U. P. L. R. (P. C.) 74; (1919) 35 T. L. R. 500; 46 I. A. 176 (P. C.).

(16) (1800) 101 E. R. 1335; 8 T. R. 542; 5 R. R. 485.

(17) 11 C. 275 at p. 278; 5 Ind. Dec. (N. S.) 943.

(18) (1823), 1 Knapp 1 at pp. 31, 32; 12 E. R. 222.

(19) 6 B. L. R. 392 at pp. 452, 453.

(20) 7 M. 50; 1 Ind. Jur. 527; 2 Ind. Dec. (N. S.) 624.

(21) 26 M. 120.

(22) 66 Ind. Cas. 270; 45 M. 14; 41 M. L. J. 441; 1 L. W. 403; (1921) M. W. N. 708, 23 Cr. L. J. 410 (1922) A. I. R. (M.) 215.

(23) 32 Ind. Cas. 211; 39 M. 700 at p. 715; 30 M. L. J. 23, 17 M. L. T. 25; 3 L. W. 43 (F. B.).

(24) 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 417; 13 L. W. 498; 29 M. L. T. 209; (1921) M. W. N. 272 (F. B.).

Marwari (25). All decisions, both of the Privy Council and of the High Courts, recognise this. The order of the lower Court is without jurisdiction and must be vacated.

Messrs *A. Krishnaswami Iyer, T.R. Ramachandra Aiyar, K. Pereasami Gounder* and *T. M. Krishnaswami Iyer*, for the Respondents. —On the merits, the lower Court has correctly construed the rules. A President of a Board without being a member is an anomaly and the rules should not be construed so as to lead to one. The disqualification is absolute. The inconvenience cannot affect a proper construction of the rules. It was also within the jurisdiction of the Court to declare the unsuccessful candidate as President. No rule has been infringed and the other side could have let in evidence.

On the question of jurisdiction, this is not a case of want of jurisdiction. A misconstruction of rules is at best an error of law. The Court has acted within its jurisdiction. See *Manisha Eradi* v. *Siyali Koya* (26), *Amir Hassan Khan* v. *Sheo Baksh Singh* (27), *Balakrishna Udayar* v. *Vasudeva Aiyar* (3), *Sheoraj Nandan Singh, In the matter of* (28), *Shew Prosad* v. *Rama Chunder* (29).

There is no material irregularity amounting to interference.

There is no power of revision both because of finality provided by the rules and because the Judge was only a *persona designata*.

On the question of finality the language is quite express. The decision in *Matangini Debi* v. *Girish Chunder Chongdar* (13) and *Valli Ammal* v *Corporation of Madras* (12) are easily distinguishable.

The District Judge was only a *persona designata* and not a Court. See *Lalaji Sukharam Gurav* v *Mervanji Nowroji* (10), *Municipality of Belgaum* v. *Rudrappa* (30), *Cooper, In re* (31), *Corporation of Calcutta* v. *Bhupati Roy* (32), *Vijiaraghavalu Pillai* v. *Theagaroya Chetti* (8) and *Minakshi Naidu* v. *Subramania Sastri* (33). Every Tribunal exercising judicial functions is not a Court, *Boulter* v. *Kent* (34), *Annie Besant* v. *Advocate-General of Madras* (15), *Tower Justices* v. *Chambers* (35). *Huish* v. *Liverpool Justices* (36), 9 Halsbury's Laws of England 19. Where *quasi*-judicial functions are delegated to an officer subject to the jurisdiction of the High Court, he is not subject to the revisional authority in reference to that delegated power.

On the question of *certiorari* such a writ can lie only in regard to a judicial act; 10 Halsbury's Laws of England 320, 338, 345, 348, 374, 375.

There is no "judicial decision." The decision here is a decision on an administrative matter with summary jurisdiction. There is no *lis*. As to what is a judicial act reference was made to *Sharp* v *Wakefield* (37), *Boulter* v. *Kent* (34), *Reg.* v. *Sharman* (38), *Reg.* v. *Manchester Justices* (11), *Reg.* v. *Nicholson* (39), *Hagmeier* v. *Willesden Overseers* (40), *Macbeth* v. *Ashley* (41).

Colonial Bank of Australasia v. *Willan* (42) and *Reg.* v. *Bolton* (43) show that a superior

(25) 54 Ind Cas. 439, 40 C. 962; 24 C. W. N. 288

(26) 11 M. 220 at p. 228; 12 Ind Jur. 4; 4 Ind Dec. (N. S.) 153

(27) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Ratique and Jackson's P. C. No 83 5 Ind. Dec. (N S) 750 (P. C.).

(28) 18 C 290; 9 Ind. Dec (N. S) 193.

(29) 23 Ind. Cas. 977; 41 C. 343

(30) 34 Ind. Cas. 211; 40 B. 509, at p. 512; 18 Bom. L. R. 340.

(31) 43 Ind Cas. 465; 42 B. 119; 19 Bom. L. R 926.

(32) 26 C 74; 3 C. W. N. 70; 13 Ind. Dec. (N S.) 651

(33) 11 M 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur 393; 4 Ind. Dec. (N. S.) 18.

(34) (1897) A. C. 556; 66 L. J. Q. B. 787; 77 L. T. 288, 46 W. R. 114; 61 J. P. 532.

(35) (1904) 2 K. B. 903 at p. 906; 73 L. J. K. B. 951, 20 T. L. R. 784; 68 J P 581; 91 L T 643.

(36) (1914) 1 K. B. 109; 83 L. J. K. B. 133; 110 L. T. 38; 78 J. P. 45; 12 L. G. R. 15; 58 S. J. 83; 30 T L. R. 25.

(37) (1891) A. C. 173 at p. 179; 60 L. J. M. C. 73; 64 L T. 180; 39 W. R. 551; 55 J. P. 197.

(38) (1898) 1 Q. B. 578; 67 L. J. Q. B. 460; 78 L. T. 320; 46 W. R. 367; 62 J. P. 296.

(39) (1899) 2 Q B. 455; 68 L.J. Q. B. 1034; 81 L T. 257; 48 W. R. 52; 64 J P. 388, 15 T. L. R.509.

(40) (1904) 2 K. B. 316; 73 L. J. K. B 638; 90 L. T. 683; 52 W. R. 654, 68 J. P. 343; 2 L. G. R. 965; 20 T. L. R. 494.

(41) (1875) 2 H. L. Sc. 351 at p. 371; 30 L. T. 310.

(42) (1874) 5 P. C. 417; 43 L. J. P. C. 39; 30 L. T. 257; 22 W. R. 516.

(43) (1841) 1 Q. B. 66; 4 P & D. 679; 5 Jur. 1154; 10 L. J. M. C. 49; 55 R. R. 209; 113 E. R. 1045.

Court cannot quash an order though erroneous and essential to its validity. There is no ground to interfere with the order of the lower Court.

Mr. *S. Muthiah Mudaliar* in reply distinguished the cases cited by the respondent.

These Civil Revision Petitions coming on for hearing on the 1st August 1922, and these Civil Revision Petitions and the Civil Miscellaneous Petitions coming on for hearing on the 18th August 1922, and the 21st August 1922, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Krishnan, J.—These petitions arise in connection with the election of the President of the Taluk Board of Gopi Chetty Palayam under the new Madras Local Boards Act, XIV of 1920. Petitioner before us, Mr. Ramaswami Gounder, and one of the respondents, Mr. Venkatesa Iyer, were the rival candidates for the place. In the election on the 15th of March last, the date fixed for it, Mr. Gounder was declared duly elected. Thereupon an application, Original Petition No. 51 of 1922, was made to the District Judge of Coimbatore under section 57 of the Act to have it declared that Mr. Gounder was disqualified as a member under section 55 clause (2) (*v*) and, therefore, unfit to be a President under section 15 clause (1). On this petition the District Judge gave a declaration that Mr. Gounder was disqualified for appointment as a member. It may be mentioned that the date fixed for the new Taluk Board to come into existence in the notification under r. 9 of the Transitory Rules was the 1st of March; the elections and nominations were over by the 21st of February on which date the President of the District Board, Coimbatore, had nominated Mr. Gounder as a member of the new Board to take effect from the 1st of March. It is this nomination that the District Judge has held to be bad. Civil Revision Petition No. 342 of 1922 and Civil Miscellaneous Petition No. 1870 of 1922 are against the order in O. P. No. 51.

About the same time, two other members of the new Board filed O. P. No. 47 of 1922 making a number of allegations of corruption, fraud and other election offences against Mr. Gounder and prayed for an enquiry and asked that his election as President might be declared void and a re-election ordered. This petition was filed under the rules framed by the Government of Madras under section 199 of the Act for the trial of election petitions and published in the *Fort St. George Gazette*, No. 650, dated 14th June 1921. The District Judge heard this petition and Original Petition No. 51 together and without holding an enquiry on evidence held that on his finding in Original Petition No. 51 that Mr. Gounder was "ineligible to be a member of the re-constituted Taluk Board, his election to the Presidentship of that body became illegal" and made a declaration to that effect purporting to act under r. 11 (*c*) of the rules. He then proceeded to declare Mr. Iyer to have been duly elected as President without any opportunity being given to Mr. Gounder or to any other to attack his election on grounds of corruption, etc., which had been alleged by Mr. Gounder in his written statement. Civil Revision Petition No. 341 of 1922 and Civil Miscellaneous Petition No. 1869 of 1922 are filed against these orders.

There can be no doubt that the orders of the District Judge are wrong. The argument is put thus by him. Under r. 10 of the Transitory Rules, Mr. Gounder continued as President till the new President was elected and took charge; that must be after the 15th of March, the date of the election. Mr. Gounder must, therefore, be taken to have continued as a member of the Board, as no one can be a President without being a member and that as section 55, clause 25, says, "a person, who is already a member of the Local Board whose term of office will not expire before his fresh election or appointment, can take effect, is disqualified for election or appointment." Mr. Gounder's nomination or appointment as member to take effect on the 1st of March was, therefore, illegal. The District Judge says, he ceased to be a member and his election as President was bad. Under

what rule and when he ceased to be a member the Judge does not say If the nomination is bad because Mr. Gounder was already a member he must be taken to have continued as a member under his original right unless under some rule or other his membership ceased. Loss of Presidentship does not carry with it loss of membership. No rule has been pointed out to us as having that effect, unless rule 10, clause (2) of the Transitory Rules is applied, in which case his membership ceased on the 1st of March and his nomination was not obnoxious to section 55, clause (2) (*a*).

The fact is the District Judge has misconstrued rule 10 altogether. Clause (1) of it merely continues the Presidentship of the old President and not his membership. Clause (2) deals with the office of the member and makes it expire with the date fixed in the notification under rule 9. That clause applied, in my opinion, to the membership of all members including that of the President. No doubt the words 'office of other members' are used in clause (2), but that, I think, is to distinguish the office of the President from the office of the members.

It is said that this view contravenes the rule that the President should be a member of the Board. As a matter of fact, in this case Mr Gounder was nominated a member as soon as his old membership ceased and there was no gap But even if rule 10 contravenes the rule stated above, rule 10 must prevail under section 238 of the Act.

The District Judge's view leads to the extraordinary result that no one who was a President of the old Board at the time of its re-constitution could stand as a candidate for the First Presidentship of the new Board—a result which I cannot accept that the Legislature intended without very clear language showing it.

If, as I hold, the District Judge was wrong in thinking that Mr. Gounder's nomination was bad, the whole basis of his judgment fails and his orders are all wrong. But it is argued for the respondents that we have no power to interfere with them in revision or by way of writ of *certiorari*, because it is said that the District Judge in disposing of these petitions was acting as a *persona designata* and not as a Court and was not subordinate to the High Court nor subject to its appellate jurisdiction as required by section 115, Civil Procedure Code, and section 107 of the Government of India Act, to enable us to interfere. It was further contended that, as orders under section 57 and under r. 12 of the Election Rules are both declared to be final we cannot interfere, and also that, even if section 115 or section 107 applied to such proceedings as these, we should not interfere in the present case, because there is no question of jurisdiction or material irregularity of procedure to justify our interference. It is also argued that a writ of *certiorari* will not lie, both because the inquiry is not a judicial one and because there is no question of want of jurisdiction arising here. The petitioner argues to the contrary.

I shall consider these arguments first with reference to Original Petition No. 47 of 1922 which was filed under the Election Rules. It seems clear from the rules that the District Judge and the Subordinate Judge are given jurisdiction under them not as mere *persona designata* but as the presiding officers of their respective Courts and they act as Courts in their enquiry into such petitions. Rule (4), clause (3) expressly says that in certain cases the Judge may direct any Court subordinate to him to hold the enquiry. A District Judge or Subordinate Judge has no Court subordinate to him when acting as a *persona designata* but only when acting as the District Court or the Subordinate Court This point seems to be strongly in favour of petitioner's contention. But this is not the only indication to show that the Judge acts as a Court in disposing of election petitions, for rule 6 makes the procedure for trial of suits under the Civil Procedure Code applicable to enquiries under election petitions as nearly as may be. Evidence is taken on oath and provision is made for hearing Counsel. The Judge has finally to come to his decision between the parties judicially and not arbitrarily. All these to my mind support the view that the Judge acts as a Court.

The use of term "Judge" instead of the term "Court" in the rules is, I think, not sufficient to imply that he acts as *persona designata* any more than the use of the word

"Court" would necessarily imply the contrary; See the observations in *Minakshi Nail* v. *Subramania Sastri* (33) and *Municipality of Belgaum* v. *Rudrappa* (30). The words "enquiring authority" used in the rules to which also our attention was drawn by the respondents' Vakil, are only used as a compendious way of referring to the District Judge or the Subordinate Judge who conducts the enquiry and no inference can be drawn from their use. I think the objection to our interference against the orders in Original Petition No 47 of 1922 on the ground of the Judge not acting as a Court fails.

The next question is, whether the provisions in rule 12, clause (3), that orders under sub-rules 1 and 2 shall be final is a bar to the exercise of our revisional powers. Full effect can be given to the provision by holding that it prevents interference with the order by way of appeal or by suit. When revisional powers are intended to be taken away, it has always been held that it must be done by express words to that effect. Finality can be attached only to orders passed with jurisdiction, as those without jurisdiction are really nullities. The meaning of the word "final" has been considered in *Matangini Debi* v. *Girish Chundar Chongdar* (13) and the cases therein cited, and also in *Valli Ammal* v *Corporation of Madras* (12) held not to exclude the High Court's powers of revision Following these cases, I hold that rule 12 (3) is not "bar" to the exercise of our revisional powers

The next question is, whether we should decline to interfere on the ground that no question of jurisdiction arises. Before dealing with this point I shall consider the arguments with reference to Original Petition No. 51 of 1922, as the order in it is made the basis of the orders in Original Petition No. 47 by the District Judge.

The first contention in Original Petition No. 51 also is that the District Judge acted only as a *persona designata* and not as a Court under section 57 of the Act. The question is more difficult to decide under the section than under the rules as the indications are not so clear. But, on the whole, I have come to the conclusion that there is no certain indication that the District Judge is to be treated merely as a *persona designata* under the section He is the presiding officer of an existing Tribunal and jurisdiction is given to him in words which refer to the territorial jurisdiction conferred upon his Court. I have already held that the use of the word "Judge" instead of the word 'Court' is inconclusive. Clause (2) gives him the right to make such enquiries as he thinks fit but says nothing of the procedure to be adopted for them. I take it that when he does make an enquiry he will adopt the same procedure as for any other judicial enquiry in his Court, for otherwise he could not merely as a *persona designata* examine witnesses on oath. The principle stated in *National Telephone Company, Limited* v. *Postmaster-General* (1), that when jurisdiction is given to a Court without defining the procedure to be followed, it will attract the ordinary procedure of that Tribunal, will have to be applied. The enquiry may often be of a complicated kind, as he has to determine, under sections 55 and 56, questions such as whether a person is insane or interested in a contract with the Local Board, or has ceased to reside within jurisdiction and so forth. Such an enquiry cannot be held satisfactorily without taking evidence on oath. But to do so the Judge must be acting as a Court and not as a mere nominated individual. It is true he can dispense with any enquiry if he deems fit, but that is inconclusive in deciding whether he acts as a Court or as a *persona designata*, for in either case he may be given that power as no enquiry may be necessary in some instances. He has further to give a decision between the parties as to whether the person concerned is disqualified from being a member under sections 55 or 56 of the Act or not. I take it he has to give his decision not arbitrarily but judicially, particularly as it is declared to be final in the section. These circumstances show, to my mind, that the District Judge is acting as a Court and not as a mere *persona designata* under section 57 of the Act as well.

I shall now consider the authorities cited by the learned Vakil for the respondent in support of his contention. The first case he quoted is *Balaji Sakharam Garad* v. *Meherji Norowji* (10) That was a case under the Bombay District

Municipalities Act, II of 1884. No doubt, the learned Judges held that the District Judge in acting under section 23 of the Act was not a Court and no revision lay against his order. There is, however, no discussion in the judgment, the learned Judges following a previous judgment of the same Court, reported as *Jagannath Ponapa* v. *De Souza* (44). Turning to that case we find no discussion there either, the learned Judges again following two of their previous unreported decisions in Applications Nos. 127 of 1892 and 236 of 1889 which are not available for reference. The reasoning of the learned Judges for their conclusion is thus not known. But accepting their decision, it is clearly distinguishable from the present case, for there is a clear distinction between the language of section 23 of the Act they were dealing with and that of section 57 of the Local Boards Act, though there is undoubtedly some similarity as well. The Bombay Act provides that, for purposes of the enquiry, the District Judge may exercise any of the powers of a Civil Court. This may well have been held to indicate that the District Judge when making the enquiry was not a Civil Court himself. Each case has to be judged on its own language, and I am unable to treat the Bombay case which deals with a different Act as an authority for the present case.

The next case referred to is *Vijiaraghavalu Pillai* v. *Emperor* (8). This case arose under the rules framed by the Government under the City Municipal Act, Madras Act III of 1904, whereby a Presidency Magistrate was to decide as to the competency of the candidate for a Municipal election. It was held that the Magistrate's order was passed by him as a " reference " between the President of the Corporation and the candidate and not as a Court. This case is again no authority in the present case, as the language to be construed was not the same and the considerations that prevailed there do not arise here. On the other hand, it was held in *Vasudeva Aiyar* v. *Devasthnam Committee of Negapatam* (2) that an order of the District Court under section 10 of the Religious Endowments Act was revisable by the High Court and this view was confirmed by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (3). The authorities, therefore, do not conclude the case before us.

The answer to the argument based on the use of the word " final " in section 57 is the same as in the case of Election Rules and need not be repeated. As I am holding that both in the case of section 57 and in that of the Election Rules jurisdiction is given to the District Judge as the District Court and is really a supplemental jurisdiction conferred on an existing Tribunal and as the District Court is subordinate to the High Court and subject to its appellate jurisdiction, it is open to us to revise its orders both under section 115, Civil Procedure Code, and under section 107 of the Government of India Act. It is not, therefore, necessary to consider the applications for the issue of writs of *certiorari*.

The last argument of respondent is that there is no question of jurisdiction or irregular exercise of it in the present case to justify our interference. What happened in this case is that by an erroneous construction of rule 10 of the Transitory Rules taken with section 55, clause (2) (*a*) the District Judge assumed jurisdiction to declare the membership of Mr G under as void and as a necessary consequence his Presidentship also and he then went on to declare that Mr. Iyer was duly elected without giving any one an opportunity to show that his election was vitiated by the commission of election offences as alleged in the written statement of Mr. Gounder. That, I am inclined to think, amounts to acting with material irregularity or illegality in the exercise of his jurisdiction. To assume jurisdiction to do a certain act by taking an erroneous view of law, when there is really no jurisdiction, raises a case for interference under section 115 of the Civil Procedure Code. See the observations in *Vuppuluri Atchayya* v. *Sri Kunchumarti Venkata Seetarama Chandra Rao* (14). Mr. Justice Channel observes in *Reg.* v. *Manchester Justices* (11): " It seems to me to be clear that a Tribunal cannot give itself jurisdiction which it has not got by taking an erroneous view of the law." I think the order on O. P. No. 51 falls within the rule and we must set it aside and Civil

(44) (1894) P. J. 87.

Revision Petition No. 342 of 1922 is, therefore, allowed with costs here and in the Court below and Original Petition No. 51 of 1922 is dismissed. As regards Original Petition No. 47 of 1922 it fails with Original Petition No. 51, as the order in it is based on the order in the latter. There is further the material irregularity pointed out above. Civil Revision Petition No. 341 must be allowed and the order on Original Petition No. 47 of 1922 must be reversed and the petition remanded to the District Judge to be disposed of according to law on the merits. The costs of the petitioner in the High Court in that petition will be paid by respondents Nos. 1 and 2. The costs in it in the lower Court will abide and follow the result.

Civil Miscellaneous Petitions Nos. 1869 and 1870 of 1922 are dismissed but without costs.

Venkatasubba Rao, J.—The District Judge of Coimbatore set aside the appointment of Mr. Ramaswami Gounder as a member of the Taluk Board of Gopi Chetty Palayam and has further declared his election as the President of the Taluk Board illegal and the District Judge has made a further order declaring Mr. Venkatesa Aiyer to have been duly elected President of the Taluk Board The propriety of these orders is questioned by Mr. Ramaswami Gounder before us.

Before entering on a discussion of the question of law raised, I may briefly state the facts that led to the passing of the above orders.

Under the Madras Local Boards Act, 1920, the Local Government is required to fix by the Notification the date on which the first re-constituted Taluk Board in any Taluk shall come into existence. Accordingly, by a Notification, dated 3rd January 1922, the re-constituted Taluk Board of Gopi Chetty Palayam was brought into existence with effect from the 1st March 1922. Under rule 10 of Schedule X to the Act the term of office of the members of the Taluk Board holding office at the commencement of the Act would, subject to an exception presently to be noticed, expire on the date fixed in the Notification, *viz.*, 1st March 1922. Contemporaneously with the expiration of the terms of office of the old members, the members elected or appointed under the Act for the first time were to assume office as the members of the re-constituted Taluk Board (See rule 9 of Schedule X). The result is, that there is no interval of time between the going out of the old members and the coming in of the new members. To achieve this object it is further provided that the President of the District Board shall, in respect of the Taluk Board in his jurisdiction, make appointments and cause arrangements to be made for election of members, so that the newly appointed or elected members may come into office on the date specified in the notification [See rule 12 (2) Schedule X]. The elections and appointments were accordingly completed by the 21st February 1922 and Mr. Ramaswami Gounder was, under section 9 (*b*) of the Act, appointed member of the Taluk Board by the President of the District Board. Under rule 12 (3) of Schedule X, on the first re constitution of the Taluk Board or as soon as may be after such re-constitution, a meeting should be held at a time to be fixed by the President of the District Board for the election of the President of the re-constituted Taluk Board. In pursuance of this provision the 15th March 1922 was fixed for the election of the President, Mr. Ramaswami Gounder and Mr. Venkatesa Aiyer being the candidates that stood for election. The election was held and Mr. Ramaswami Gounder was elected President.

Two petitions were filed before the District Judge of Coimbatore, Original Petition No. 47 of 1922 and Original Petition No. 51 of 1922. In Original Petition No. 47 of 1922 two of the elected members of the Taluk Board, Muthu Vellappa Gounder and Kaliana Gounder, called into question the election of Mr. Ramaswami Gounder as President and joined as respondents to that petition Mr. Ramaswami Gounder and Mr. Venkatesa Aiyer. This petition was filed under section 199 (*c*) of the Act and under the rules made under that section in respect of the conduct of the enquiries, etc., relating to elections.

Original Petition No. 51 was filed by Srinivasan Chettiar questioning the appointment of Mr. Ramaswami Gounder as a member of the Taluk Board and to that

petition the latter alone was made a respondent. This petition was filed under section 57 of the Act.

The District Judge dealt with Original Petition No. 51 and came to the conclusion that Mr. Ramaswami Gounder's appointmen as a member was invalid and set aside the said appointment.

Before dealing with the grounds of the District Judge's decisions it must be noted that Mr. Ramaswami Gounder had been a member and the President of the Taluk Board constituted under the old Act. I shall first refer to the provisions of the Act, on a construction of which the District Judge has come to this conclusion.

Section 55, so far as it is relevan to the present purpose, is in the following terms: "A person shall be disqualified for appointment as a member of the Local Board if such person is at the date of appointment already a member of the Local Board whose term of office will not expire before his appointment can take effect."

Rule 10 (1), (2), (3) of Schedule X (Transitory Provisions) runs thus:—

"(1) The term of office of the President of a Taluk Board holding office at the commencement of this Act shall extend until a new President elected or appointed under rule 12 (3) assumes office.

"(2) The term of office of the other members of a Taluk Board holding office at the commencement of this Act shall expire on the date fixed in the Notification under rule 9.

"(3) Such President and members shall during the period specified in sub-rules 1 and 2 have all the powers and be subject to all the duties of the President and members respectively of a Taluk Board under this Act."

The District Judge has held that under rule 10 (1) the term of office as member of M. Ramaswami Gounder became extended and that, as on the date his appointment could take effect he was already a member of the Local Board, he was disqualified to be appointed a member of the new Board under section 55 (5).

It seems to me that this decision is clearly wrong. On a reading of rule 10 (1) and rule 10 (2) together, the intention of the Legislature appears to be that the term of office of all the members as members should expire but the term of office of the President as President should extend for a further period. The object of this exception in favour of the President is obvious. On the date fixed in the Notification the new Taluk Board comes into existence, the old members go out and new members assume office, but there is bound to be an interval of time between the coming into existence of the re-constituted Board and the election of the President. The interval in this case happened to be a fortnight.

It is necessary that the executive work of the Taluk Board should be carried on without a break and for this continuity a provision was inserted that the President of the old Taluk Board should continue to be the President until the new President elected or appointed should assume office. The rules in Schedule X are termed "Transitory Provisions" and are made under section 238 of the Act which occurs in the Chapter headed "Transitional and Transitory Provisions." These provisions and rules were enacted to meet difficulties that may arise in connection with the first constitution of the Boards. As it was felt that the continuance of the President was essential, a special rule was made extending his term of office. It does not follow because his terms of office as President was extended, his term of office as a member was also necessarily extended. As a matter of fact there is no need to do so, and it would be contrary to the intention of the Legislature that the President whose term of office was extended necessarily also continued to be a member. It is true that rule 10 (1) and (2) could have been more skilfully drafted, but I think on a reasonable construction of the terms of these provisions, no other conclusion than what I have stated above is possible. The District Judge's reason for rejecting this construction is that both under the old and the new Act only a member can be appointed or elected as a President and no person can be a President unless he is also a member, and the District Judge refers to sections 15 and 22 (2) of the old Acts and sections 12 (2) and 15 of the new Act. In adopting this line of argument the District Judge seems to have ignored section 238 of the Act which is as follows: "In their application to the members and Presidents of the Local

Boards in office on the date of commencement of this Act and the first re constitution of such Boards in accordance with this Act, the provisions of this Act shall be read subject to the rules contained in Schedule X." From this section it is clear that in the transitional stage there may be a President of the Taluk Board who is not a member thereof. It, therefore, seems to me, both on a consideration of the principles underlying the Transitory Provisions and of the constructions of the various sections and rules referred to above, that the office of Mr. Gounder as member of the Taluk Board did expire on the 1st March 1922 and that only his term of office as President was extended for a further period.

If the view of the District Judge were correct it would follow that the President of the old Taluk Board would be disqualified to be a member of the re-constituted Board ; that is to say, the person who occupied the most important position in regard to the Taluk Board which became dissolved would by reason of the very fact that he occupied that important position, be placed under a disability and would be prevented from being even a member of the Taluk Board. This result would be preposterous, and the Courts would not adopt a construction which would lead to such a result unless driven to do so by the plain language of the provisions of the Act.

I am, therefore clearly of opinion that the appointment of Ramaswami Gounder as a member was valid and the order passed in Original Petition No. 51 of 1922 by the District Judge declaring the appointment invalid is wrong.

As I observed, the District Judge had before him two petitions, 51 of 1922 challenging Mr. Gounder's appointment as a member and 47 of 1922 disputing his election as President. Original Petition No. 51 of 1922 was filed under section 57 which deals with the disqualifications specified in sections 55 and 56. But section 57 is confined in terms to objections to election or appointment as member and, therefore, although the petition contained a prayer for setting aside the election of Mr. Gounder as President on the ground that the validity of his election as President was dependent on the validity of his appointment as a member, the District Judge rightly decided that he could not in that petition adjudicate on the validity of Mr. Gounder's election as President. Original Petition No. 47 of 1922 was an Election Petition presented under the rules made under section 199 for the decision of election disputes challenging the election of Mr. Gounder as President and it contained various charges of corruption, etc., of which he was alleged to be guilty but did not allege that his election as President was invalid because he was not validly appointed a member. The District Judge having decided in Original Petition No 51 of 1922 that Mr. Gounder's appointment as member was invalid, recorded a decision in Original Petition No. 47 of 1922 that his election as President was invalid because he was not a validly appointed member. In other words, the District Judge considered it unnecessary to enquire into any of the allegations made in Original Petition No. 47 of 1922 and decided against the validity of the election of Mr. Gounder as President solely on a ground not taken in the said petition but taken only in Original Petition No. 51 of 1922

It has been argued before us that the District Judge was in error in having, in these circumstances, set aside the election of Mr. Gounder as President and I am of opinion that this argument is sound.

Exception is taken to the order of the Judge on another ground which seems to me to be a very substantial ground. As I have already pointed out, in Original Petition No. 47 of 1922 both Mr. Ramaswami Gounder and Mr. Venkatesa Aiyer were respondents, but relief that was asked was merely that the election of Mr. Gounder as President of the Taluk Board should be declared void and a re-election ordered. In the written statement of Mr. Gounder it was alleged : " the 2nd respondent and his supporters have committed various corrupt and illegal acts in connection with this election and are guilty of such acts, but it is not necessary to detail them here as the petition is not for declaring the 2nd respondent as duly elected." The District Judge however declares by his order that the second respondent Mr Venkatesa Aiyer, had been duly elected President of the Taluk Board. In so doing the District Judge has

contravened the very clear provisions of the rules made under section 199 (2) (*c*) referred to above. Rule 9 says: "Where at any enquiry into an election petition any candidate other than the returned candidate claims the seat for himself the returned candidate or any other candidate to the proceeding may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented complaining of his election."

Rule 3 is in these terms: "The petitioner may, if he so desires in addition to calling in question the election of the returned candidate, claim a declaration that he himself or any other candidate has been duly elected."

It is clear that no such declaration was asked for in the petition, and from the papers before us it does not appear that Mr. Venkatesa Aiyer claimed the seat for himself. In any event Mr. Gounder had a right to adduce evidence in support of the allegations of corruption, etc., made by him against Mr. Venkatesa Aiyar; and without giving the former an opportunity to adduce such evidence, the District Judge has made a declaration that the latter was duly elected.

The District Judge disposes of the matter in these words: "There will be some justification for ordering a fresh election if the 2nd respondent has been able to get only a few votes as against the 1st respondent. A fresh election means a delay and I should think that the 2nd respondent should have the benefit of his fairly large number of votes at the election of the 15th March" This ground is utterly untenable and the order of the District Judge on this point is wrong.

To sum up I hold:

(1) That the District Judge's view of the law is wrong and that by taking a wrong view he declared Mr. Gounder's appointment as member and the election as the President invalid and gave a further declaration that Mr. Venkatesa Aiyar was the only elected President. His decision is tantamount to removing Mr. Gounder from membership and from his office as President, and restraining him from acting as member or President and in addition directing the Taluk Board to accept Mr. Venkatesa Aiyer as the President

(2) That the District Judge acted with material irregularity, if not illegally, in adjudicating in Original Petition No. 47 of 1922 that Mr. Gounder's election as President was invalid on a ground not taken in that petition.

(3) That the District Judge acted in contravention of the plain provisions of the rules relating to trial of Election Petitions by declaring, without enquiry into the allegation of corruption, etc., urged against Mr. Venkatesa Aiyer that the latter was validly elected as the President.

With these observations I shall proceed to consider the next question that has been argued before us, namely, are we justified in interfering with the orders of the District Judge in the exercise of our revisional powers?

Section 115, Civil Procedure Code, is in the following terms:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears

"(*a*) to have exercised a jurisdiction not vested in it by law, or

"(*b*) to have failed to exercise a jurisdiction so vested, or

"(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

"the High Court may make such order in the case as it thinks fit."

There can be no doubt that the District Judge acted with material irregularity under clause (*c*) above in setting aside the election of Mr. Ramaswami Gounder in Original Petition No 51 of 1922 on a ground not taken in the petition and in declaring Mr. Venkatesa Aiyer to have been duly elected in contravention of the rules pertaining to the conduct of Election Petitions. Even if the words "with material irregularity should be held to refer to" faults of procedure, as held by Jenkins, C. J., in *Shew Prosad* v. *Rama Chunder* (29). and the word "procedure" should be understood in the language of Rankin, J., in *Hindley* v. *Joynarain Marwari* (25) in the restricted sense of method of conducting a case" still, the irregularity committed by the District Judge

would amount to "material irregularity" within section 115, clause (c).

As regards the portion of the order of the District Judge which proceeds upon a misconstruction of the provisions of the Local Boards Act including the Transitory Provisions, I am also of the opinion that we have power to deal with it under either clause (a) or clause (c) of section 115. In regard to the scope of these clauses there has been an almost irreconcilable divergence of judicial opinion. I may instance the cases of *Sheoraj Nandan Singh, In the matter of* (28) and *Shew Prosad* v. *Rama Chunder* (29). In the former a certain property was attached in the hands of the petitioner before the High Court on the ground that he had become a trustee for the judgment-debtor by virtue of a certain alleged agreement. The petitioner preferred a claim and the Subordinate Judge rejected it and he thereupon applied to the High Court to set aside the order of the Subordinate Judge. It was contended on behalf of the decree-holder that the order of the Subordinate Judge was not made without jurisdiction. The ground of the decision of the Subordinate Judge was that the petitioner had agreed to pay the decree-debt by the document which transferred the property to him and in consequence thereof he became a trustee of the property for the judgment-debtor and, therefore, the property was liable to attachment in the petitioner's hands. It will thus be seen that the Subordinate Judge in disallowing the claim proceeded upon a wrong view of the law. The High Court (Sir Comer Petheram, C. J., and Amir Ali, J.), however, held that they had power to interfere with this order in revision. In the latter, that is, in *Shew Prosad* v. *Rama Chunder* (29), an application under section 41 of the Presidency Small Cause Courts Act for the recovery of the possession of certain immoveable property was refused by the Presidency Small Cause Court on the ground that the relationship of landlord and tenant had not been established. Fletcher, J., to whom an application was made by the landlord under section 115 of the Civil Procedure Code, to set aside the judgment of the Small Cause Court, holding that "it is quite impossible to understand what the learned Judge (of the Small Cause Court) means when he says that the plaintiff is not entitled to evict the defendant, because the lease to the plaintiff does contain a covenant authorising him to do so," interfered with the judgment in question and directed that it should be set aside. On appeal from the judgment of Fletcher, J., Jenkins C. J., and Woodroffe, J., came to the conclusion that the exercise of the revisional powers on the part of the High Court was not justified, as the Small Cause Court was entitled to come to the conclusion to which it did, even though the conclusion was erroneous and if it did come to that conclusion it could not be said that the Court had failed to exercise the jurisdiction vested in it by law.

It may be interesting to note that in the former of the two cases referred to above, that is, *Sheoraj Nandan Singh, In the matter of* (28), Petheram, C. J., and Ameer Ali, J., while being in agreement, as regards the decision to be given in the case, differ in respect of the grounds upon which their respective decisions were based. Petheram, C. J., says: "It seems to us that the Subordinate Judge was acting beyond his jurisdiction in directing that this property which belongs to a person other than the judgment-debtor should be attached and sold," thus acting under clause (a) of section 115, whereas Ameer Ali, J., acts under clause (c), for he observes, "I am clearly of opinion that the lower Court has acted illegally and with material irregularity in the exercise of its jurisdiction in directing execution to issue against the properties held by the petitioner."

A mere error of law does not justify interference in revision, for, as observed in *Amir Hassan Khan* v. *Sheo Baksh Singh* (27) a Court may have jurisdiction to make an order which in fact or in law is wrong. But no Court can act illegally, although it is very difficult to say when merely an error of law has been committed or when the Court has acted illegally. There being, as I observed, a conflict of opinion in the statement of the principles on this subject it seems to me that I may usefully examine the facts of some of the cases binding upon us with reference to the decisions given in those cases. In *Manisha Eradi* v. *Siyali Koya* (26) the Court

consisting of five Judges, unanimously came to the conclusion that the High Court had power in revision to set aside the decree of a Small Cause Court which had jurisdiction to entertain suits for rent only where the claim is founded on a contract when it erroneously assumed that a sub-tenant by entering on lease became liable by an implied contract to pay the rent and passed on that footing a decree against the sub-tenant. In *Balakrishna Ulayar* v. *Vasudeva Aiyar* (3) this question had to be considered. The facts were as follows: Under section 10 of the Religious Endowments Act if a vacancy occurring among the members of the Committee is not filled up by election within three months after it has occurred, the Civil Court may appoint a person to fill up the vacancy or may order that the vacancy be filled up by the remaining members of the Committee. After the period of three months mentioned in the section was over, in pursuance of an order made by the District Court an election was held by the remaining members of the Committee, a certain person was declared duly elected and the District Judge accepted him as a member of the Committee on the ground that upon the true construction of section 10 the remaining members of the Committee should hold an election and the vacancy should be filled up in that way. The Privy Council agreeing with the High Court held that this construction of the section was wrong, that it was not competent to the remaining members to fill up the vacancy by means of an election and that the terms of the section did not warrant the course adopted by the District Judge. It will be noticed that the District Judge had jurisdiction in the ordinary sense, that is, a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit [See judgment of Woodroffe, J., in *Shew Prosad* v. *Rama Chunder* (29)]. If the jurisdiction, therefore, means merely propriety of forum, the District Judge had certainly jurisdiction to deal with the matter that arose before him under the Religious Endowments Act. But, as their Lordships of the Privy Council set aside the order of the District Judge as made without jurisdiction, it cannot be said that they were using the word "jurisdiction" in the narrower sense referred to above. The same question again arose for decision in *Sundaram* v. *Mamsa Mayuthar* (24). The lower Courts held that the judgment-debtor who, after the Court sale, has transferred his interest in the property sold in execution of a decree, had no *locus standi* to apply under O. XXI, r. 89 and rejected his application. Against this decision the judgment-debtor filed a revision petition to the High Court. The Full Bench held that the judgment-debtor retained sufficient interest to entitle him to apply under the rule. In regard to the point whether any question of jurisdiction was involved, they answered the reference in the affirmative, following *Balakrishna Ulayar* v. *Vasudeva Aiyar* (3).

In the above cases referred to by me the error of law committed by the lower Courts was held to have affected their jurisdiction. On the authority of these decisions the proper conclusion, in my opinion, seems to be that the order of the District Judge made in Original Petition No. 51 of 1922 also comes within the scope of section 115 of the Civil Procedure Code.

It has next been argued before us on behalf of Mr. Venkatesa Aiyer that the District Judge exercised his powers under the Act not as a Court of law but merely as a *persona designata* whose decisions are not to be treated as the judgment of the legal Tribunal and the High Court cannot therefore, interfere with the orders of the District Judge in revision. Whether the District Judge is a Court or not must be determined on a consideration of the language of the various provisions which defines his powers his duties and the procedure to be followed by him. The presumption is, when any existing Tribunal is given a right to determine certain matters, that Tribunal is to determine such matters as a Court. The party who contends that the matters referred to the Tribunal were not referred to it as a Court of law must make good that position by referring to the various sections which establish that his contention is correct. This point was expressly decided by the House of Lords in *National Telephone Company Limited* v. *Postmaster-General* (1); Lord Parker of Waddington observed that where by a

Statute matters are referred to the determination of a Court with no further provision the necessary implication is that the Court will determine the matters as a Court. It is pointed out in the judgment that the jurisdiction of such a Tribunal is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.

Balakrishna Udayar v. *Vasudeva Aiyar* (3), to which I referred above in another connection, is also an authority upon this point. It was contended in that case that the order of the District Judge which was under consideration was not a judicial but merely an administrative or ministerial Act. That contention was based upon an argument that the Civil Court exercised its powers not as a Court of law but merely as a *persona designata*. Their Lordships of the Privy Council after examining the language of the various sections of the Religious Endowments Act overruled that contention. The decison of the Privy Council affirmed the judgment of the High Court in the same case reported as *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (2). Sir Arnold White, C. J., in dealing with this question refers to certain sections of the Religious Endowments Act and arrives at the conclusion that in regard to those sections the District Judge undoubtedly exercises judicial functions as a Civil Court and not as a *persona designata* and he then observes: "It seems to me it would be inconvenient if for certain purposes the District Judge is a Civil Court exercising judicial functions under the Act, and for other purposes under the Act he is a *persona designata* not exercising judicial functions." These observations apply with great force to the present case. No doubt an application may be made to the District Judge under section 57 for an enquiry in respect of the allegations of disqualification arising under sections 55 and 56. But this is merely an enabling provision, because the right of the applicant to call in question an election on any of the grounds specified in sections 55 and 56 by an election petition under the rules remained unaffected. The first rule runs as follows: "Save as provided in section 57 of the Madras Local Boards Act, 1920, no election held * * * * shall be called in question except by an election petition presented in accordance with these rules." The result is, that the party considering himself aggrieved may, at his option, apply under section 57 or present an Election Petition. If in dealing with an election petition the District Judge acts as a Court and not as a *persona designata* it would be indeed very inconvenient in the words of Sir Arnold White, C. J., if for certain purposes the District Judge is a Court and for certain other purposes he is a *persona designata*. The indications are perfectly clear that when dealing with Election Petitions he acts as a Court and if this position is correct, in my opinion, it follows that he acts as a Court even when he deals with applications under section 58. The rules provide that the petition, if presented to the District or Subordinate Judge having jurisdiction, shall be signed and verified in the manner prescribed in the Code of Civil Procedure. If the provisions are not complied with, it is the District or the Subordinate Judge that is to dismiss the petition. It is further provided that the District or Subordinate Judge may direct any Court subordinate to him to hold an enquiry. Rule 6 provides that every Election Petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. It is also provided that at an enquiry the Local Board concerned may appoint a legal practitioner to attend the enquiry and take such part therein as the enquiring authority may allow. I think what I have stated is sufficient to show that the Legislature intended that the District Judge should determine questions referred to him in his capacity as a Court.

The cases cited for the respondent do not have much bearing on the matter, as they turn upon the language of other Acts. but I may observe in regard to *Vijiaraghavalu Pillai* v. *Emperor* (8), on which reliance was placed, that it was decided before the decision by the Privy Council reported in *Balakrishna Udayar* v. *Vasudeva Aiyar* (3). The decision of the High Court, which was then under appeal to the Privy Council, was cited to the learned Judges and in their judgment they state that they were informed that that decision

was under appeal to His Majesty in Council. I, therefore, hold that the District Judge was acting as a Court and not as a *persona designata* and that his decisions can be revised by the High Court in the exercise of its powers of revision.

There remains one more argument to be dealt with. On behalf of the respondent, it was argued that under rule 12 (3) of the rules made for the conduct of election enquiries, as well as under section 57 (3) of the Act, the decision of the District Judge or other enquiring authority is said to be final, and that, therefore, the decisions in question are not open to revision. In *Matangini Debi* v. *Girish Chunder Chowdar* (13) it was pointed out that when a section says that a certain order shall be final it only means and intends that it shall not be open to appeal and that the intention is not to make the order absolutely final so as to make it not open to revision. Observations to a similar effect occur also in the judgment in *Valli Ammal* v. *Corporation of Madras* (12). I reject the contention and hold that the orders of the District Judge are liable to be revised by the High Court.

For these reasons I agree in the conclusions arrived at and in the orders proposed by my learned brother.

V. N. V.

C. R. P. Nos. 341 *and* 342 *allowed.*
C. M. P. Nos. 1859 *and* 1870 *dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 373 OF 1920.

June 26, 1922.

Present.—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

PROSANNA KUMAR CHAKERBUTTY AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

JOTINDRA NATH BOSE—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Execution application—Previous application, date of, not mentioned—Defect whether material—Cross-decree, object of mentioning—Omission, whether material.

Where there have been two previous applications for the execution of a decree and in the third application, the date of the disposal of the first application is stated but not that of the second, though the numbers of execution cases with regard to both the previous applications are stated, the defect is not material so as to vitiate the application for execution. [p. 1055, col. 1.]

The object of mentioning a cross-decree in an application for execution seems to be that the Court may be in a position to see that the decree-holder in the one case does not take out execution without the cross-decree being set off. But the principle can have no application where the decree obtained by the decree-holder is in his personal capacity, and the decree obtained by the judgment-debtor is in his capacity as an executor. Consequently, omission to mention such a cross-decree in an application for execution, is not a material defect. [p. 1055 col. 2.]

Appeal against an order of the Subordinate Judge, First Court, Zillah 24-Parganas, dated the 17th of July and 4th of August 1920.

Babu *Rajendra Chandra Guha*, for the Appellants.—The decree-holder is the appellant. The appeal arises out of an application for execution of the decree passed by the High Court affirming that of the District Judge, Chittagong, granting the Probate of a Will with costs. It amounted to Rs. 700. The decree was in 1915. On two previous occasions I applied for execution. I applied for transfer of the decree to District 24-Parganas. The District Judge transferred the application to Subordinate Judge. Execution was taken out, sale proclamation was issued, but on a subsequent date it was dismissed on the grounds of non-mention of two cross-decrees and of dates of two previous execution cases. Hence, under O. XXI, r. 11, my application was dismissed with costs. The learned District Judge having received and registered my application under O. XXI, r. 17, Civil Procedure Code, the Court should have asked me to remedy the formal defects instead of dismissing my application. Refers to O. XXI, r. 18, Civil Procedure Code, O. XXI, r. 17 (4); Civil Procedure Code; *Asgar Ali* v. *Trailokya Nath Ghose* (1). The defect is merely formal. The application could be amended even after registration. *Gopal Chunder Manna* v. *Gosain Das Kalay* (2).

(1) 17 C. 631; 8 Ind. Dec. (N. S.) 960 (F. B.).
(2) 25 C. 594; 2 C. W. N. 559; 13 Ind. Dec. (N. S.) 392 (F. B.).

Babu *Jogesh Chandra Roy* (with him Babu *Asitranjan Ghosh*), for the Respondents. —The defects are certainly not formal. The dates are very material to decide limitation. See *Gopal Sah* v. *Janki Koer* (3), and *Gopal Chunder Manna* v. *Gosain Das Kalay* (2) does not apply. We put in objections pointing out the defects. They never cared to rectify the mistake.

Babu *Rajendra Chandra Guha*, replied in brief.

JUDGMENT.—This appeal is against an order dismissing an application for execution of a decree on the ground that the date of disposal of two previous applications for execution as also certain cross-decrees obtained by the judgment-debtor against the decree-holder were not mentioned in the application.

It appears that the present application for execution was made on the 12th January 1920 No defect in the application was noticed at the time and the Court directed it to be registered. Subsequently, on the 17th July 1920, the Court held upon the objection raised by the judgment-debtor that the application for execution did not comply with the requirements of O. XXI, r. 11, as stated above.

There is no doubt that material defects would vitiate an application for execution and the question, therefore, is whether there were material defects in the application.

Now, so far as the dates of disposal of the two previous applications are concerned, it appears that the date of disposal of the first application for execution was stated but not that of the second, though the numbers of execution cases were stated with regard to both the previous applications. The omission of the date of disposal of the second previous application for execution we think, is not a material defect.

The omission to mention the existence of cross decrees however, may be material defect. O. XXI, r. 11 (2) (*g*) provides that the application shall contain, among other matters, particulars of any cross-decree passed before or after the date of the decree sought to be executed. It is stated that one of these cross decrees in favour of the judgment-debtor has subsequently been set aside by the High Court on appeal; but at the time of the application for execution it had not been set aside.

However that may be, it is contended that the cross-decrees obtained by the judgment-debtor could not be executed for two reasons, first, that the decree in favour of the judgment-debtor was in his capacity as executor, whereas the decree in favour of the appellant was in his personal capacity; and, secondly, that the decree in favour of the judgment-debtor was passed by the Court at Chittagong and it could not be set off against the appellant's decree until the former decree was transferred to the Alipore Court.

We think that the first contention should prevail.

The rule as to satisfaction of cross-decrees is laid down in O. XXI, r. 18, sub-section (3) (*a*), and it provides that the rule shall not be deemed to apply unless the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits. As stated above, the decree obtained by the appellant was in his personal capacity, whereas the decree obtained by the judgment-debtor was in his capacity as executor. Satisfaction could not, therefore, be entered upon the decrees. The object of mentioning cross decrees in an application for execution seems to be that the Court may be in a position to see that the decree-holder in the one case does not take out execution without the cross-decree being set off. The principle can have no application to a case like this where the decrees could not possibly have been set off against each other. That being so, we think that in the present case the omission to mention the cross-decrees obtained by the judgment-debtor was not a material defect for which the application for execution should have been dismissed.

The order appealed against must, therefore, be set aside and the case sent back to the lower Court for the decision of other objections raised by the judgment-debtor.

The appellant is entitled to costs of this Court We assess the hearing fee at one gold *mohur*.

Future costs to abide the result.

N. K. *Order set aside.*

(3) 23 C. 217; 12 Ind. Dec. (N. S.) 145.

OFFICIAL ASSIGNEE OF MADRAS *v.* DORAIAPPA AIYAR.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3507 OF 1922

January 22, 1923.

Present :—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

THE OFFICIAL ASSIGNEE OF MADRAS —RESPONDENT—PETITIONER

versus

DORAIAPPA AIYAR *alias* KRISHNASWAMY AIYAR AND OTHERS—APPELLANTS—RESPONDENTS.

Madras High Court Insolvency Rules, rr. 133, 136—*Costs in insolvency proceedings—English Law.*

Under rr. 133 and 136 of the Madras High Court Insolvency Rules, in all insolvency proceedings, unless an order is made to the contrary, the successful party is entitled only to half the ordinary fees allowed on the Original Side whether the costs are directed to be paid out of the insolvent's estate or by a third party.

The rule under the English Bankruptcy Law which allows full costs in cases in which proceedings are between the Official Assignee and third parties cannot be imported into cases governed by the Madras Insolvency Rules.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the Taxing Officer of this Court to tax the costs of the petitioner herein, and first respondent in Original Side Appeal No. 61 of 1921 on the file of the High Court, Appellate Jurisdiction, on the Original Side Scale to award costs of this application.

Mr. *H. D. Cornish*, instructed by Mr. *S. G. Sadagopa Mudaliar*, for the Petitioner

Messrs. *K. G. Srinivasa Aiyar* and *N. Swamina ha Aiyar*, for the Respondents.

ORDER.

Schwabe, C. J.—This is an application by the Official Assignee of Madras. What he asks for is an interpretation of an order of this Court under which an appeal was dismissed 'with costs and the order drawn up is 'costs of the respondent'. It is clear from what took place and from the wording of the order that that order was intended to apply to the Official Assignee only. He gets his costs and the other respondents get none.

The second point raised in the case is that one half of the ordinary fees on the Original Side have been allowed under r 136 of the Insolvency Rules. It is contended that that rule applies only to cases in which fees are payable out of the estate, and we are referred to the analogous rule in Bankruptcy in England and to authorities decided thereunder. The English rule in small insolvencies gives three-fifths of the charges ordinarily allowed in all proceedings under the Act and the rules, and it has been held that that applies directly to proceedings under the Act and does not apply to cases in which the proceedings are between the Official Receiver and third parties. But we have to interpret the Madras Rules, and r. 133 gives the Court, which is the Court which heard this case, power to direct the costs of any petition, application or matter to be paid by any party to the proceedings or to be paid out of any fund in or under the control of the Court or in the hands of the Official Assignee, and generally to deal with the costs of all proceedings in the Court as to it may seem just. That rule seems to me to cover all proceedings under the Act and it gives the Court power to deal with proper discretion with the costs of any such proceedings; and the succeeding r. 136, which states the scale of costs, in my judgment, applies: and the Legislature has thought fit to make the costs in an insolvency only half the ordinary costs. There again, the whole position is safeguarded by sub-clause (3) of r. 136, which gives the Court power, under r. 40 of Appendix IV to the High Court Fee Rules, to allow in proper cases the full fees instead of half. So that, the result is that in insolvency proceedings, unless an order is made to the contrary, the rule is half the Attorney's fees. Whether this would have been a proper case to allow the full fees is a matter which is not open to discussion now. Such application should have been made at the hearing of the appeal.

The costs of the Official Assignee and of the appellant in this application shall be paid out of the estate.

Wallace, J.—I agree.

V. N. V. *Petition allowed.*

END OF VOLUME 71.

GENERAL INDEX.

VOLUME 71—1923.

—— :-o:-O-:o-: ——

Abandonment—*Question of fact—Bengal Tenancy Act (VIII of 1885), s. 87.*

The question whether there has been an abandonment or not is in each case a question of fact. **C** SARAT CHANDRA MAJUMDAR *v.* PRASANNO KUMAR GOPE **304**

Abatement. *See* PROBATE AND ADMINISTRATION ACT, 1881, S. 89 **77**

Abatement of appeal—*Death of joint plaintiff before hearing of appeal, effect of—Decree passed in ignorance of fact of death, validity of*

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. **A** AMBIKA PRASAD *v.* JHINAK SINGH, 21 A. L. J. 91; (1923) A. I. R. (A.) 211 **321**

Account—*Mistake, right of party to prove—C. P. General Clauses Act (I of 1914)—Interest, calculation of—Gregorian calendar.*

A person is always entitled to prove that there was a mistake in the accounts and that he signed them as correct by mistake.

Interest on an account need not be calculated according to the Gregorian calendar, as the General Clauses Act does not apply to cases of this kind. **N** BHOJRAJ *v.* SHANKERNATH, (1922) A. I. R. (N.) 265 **45**

———, *suit for—Duty of Court—Direction as to manner of accounting.*

In all cases in which accounts are directed to be taken it is desirable that before ordering an account to be taken the question of principle involving the measure of liability of the defendant should be decided by the Court.

It is always permissible to a Court which has directed the taking of an account to vary or modify the directions already issued by it, if it is satisfied that some mistake has been made. **Pat.** HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH **911**

Acquittal, *order of, when justified—Revision.*

An order of acquittal, without a charge having been framed against the accused, is justified only (1) in summons-cases by the operation of section 248, Criminal Procedure Code; (2) under section 345, when there has been a composition, and (3) under section 333, when the Advocate-General withdraws from the case, and where the Court considers it proper, even though a charge has not been framed, to acquit the accused. The last is a rare contingency.

Acquittal—*concld.*

The High Court will, in revision, interfere to set aside an order of acquittal which is illegal, having been passed on a composition which was invalid. **Pesh.** HARNAM SINGH *v.* SAIN DASS, 24 Cr. L. J. 120 **248**

———— *Revision—Private complainant—Locus standi to be heard by High Court.*

A private complainant, in a proper case, may well be heard by the High Court when it is called upon to exercise its powers of revision against an order of acquittal. **C** ASUTOSH DAS GUPTA *v.* PURNA CHANDRA GHOSE, 36 C. L. J. 287; (1923) A. I. R. (C.) 11, 24 CR. L. J. 200; 50 C. 159 **670**

Acts—General.

Act 1839—XXXII. *See* INTEREST ACT.
—— 1841—XIX. *See* SUCCESSION (PROPERTY PROTECTION) ACT.
—— 1855—XIII. *See* FATAL ACCIDENTS ACT.
—— 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT.
—— 1860—XLV. *See* PENAL CODE.
—— 1865—X *See* SUCCESSION ACT.
—— 1867—III. *See* PUBLIC GAMBLING ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1873—X. *See* OATHS ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1893—IV. *See* PARTITION ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT.
—— 1899—IX. *See* ARBITRATION ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.

Acts—General—concld.

Act 1908—XIV. *See* CRIMINAL LAW (AMENDMENT) ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1910—I. *See* PRESS ACT.
—— 1912—II. *See* CO-OPERATIVE SOCIETIES ACT.
—— 1913—VII. *See* COMPANIES ACT
—— 1918—VII. *See* INCOME TAX ACT
—— 1918—IX. *See* INDIAN SOLDIERS (LITIGATION) ACT.
—— 1920—V *See* PROVINCIAL INSOLVENCY ACT.
—— 1920—XXVI. *See* LIMITATION AND CODE OF CIVIL PROCEDURE (AMENDMENT) ACT.

Acts—Bengal.

—— 1847—IX. *See* BENGAL ALLUVION AND DILUVION ACT.
—— 1866—IV. *See* CALCUTTA POLICE ACT
—— 1884—III. *See* BENGAL MUNICIPAL ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT
—— 1887—XII *See* BENGAL, N.-W. P. AND ASSAM CIVIL COURTS ACT.
—— 1897—V *See* BENGAL ESTATES PARTITION ACT
—— 1920—III. *See* CALCUTTA RENT ACT

Acts—Bihar and Orissa.

—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT
—— 1914—III *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT.
—— 1922—II. *See* BIHAR AND ORISSA COURT-FEES (AMENDMENT) ACT.

Acts—C. P.

—— 1898—XI. *See* C. P. TENANCY ACT.
—— 1914—I. *See* C. P. GENERAL CLAUSES ACT.
—— 1917—II. *See* C. P. LAND REVENUE ACT.
—— 1920—I. *See* C. P. TENANCY ACT.

Acts—Madras.

—— 1870—I. *See* MADRAS SUB DIVISION OF ZEMINDARI ACT.
—— 1886—I. *See* MADRAS ABKARI ACT
—— 1889—III. *See* MADRAS TOWN NUISANCES ACT.
—— 1920—XIV. *See* MADRAS LOCAL BOARDS ACT.

Acts—Punjab.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1914—I. *See* PUNJAB EXCISE ACT.

Acts—U. P.

—— 1869—I. *See* OUDH ESTATES ACT.
—— 1873—XIX. *See* U. P. LAND REVENUE ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
—— 1916—II. *See* U. P. MUNICIPALITIES ACT.
—— 1919—VIII. *See* U. P. TOWN IMPROVEMENT ACT.

Regulations.

Reg. 1819—VIII. *See* PUTNI TALUKS REGULATION.
—— 1901—III *See* FRONTIER CRIMES REGULATION.

Statute.

1915 (5 & 6 GEO. V, c. 61). *See* GOVERNMENT OF INDIA ACT.

Admissions, *receiving of, in evidence.*

Per *Napier, J.* Admissions must be taken either altogether or not at all; that is to say, although a party cannot by an admission make evidence for himself, still, if it is sought to be used against him, all the words of the admission must be taken and even if they operate in favour of the defendant they must be taken with the words which the person seeking to rely on admission calls to his aid **M** THIRUMALASSERI KOTTAYIL SREEDHARAM VALIA RAJAH *v.* PARAKKAT, (1921) M. W. N. 630; 41 M. L. J. 525 **270**

Adverse possession – *Brother in possession on behalf of himself and sister- Gift by brother without knowledge of sister, effect of—Registration—Notice.*

The sole possession by one of two or more joint owners is not adverse to the others until the owner in possession has done some act to the knowledge of the others which amounts to a denial of the latter's right.

Registration is not notice.

If a brother in possession on behalf of himself and his sisters executes a deed of gift in favour of his sons without the knowledge of his sisters and there is nothing to put the sisters on enquiry, the possession of the brother does not become adverse to the sisters. **A** SHAKUR *v.* HUSAINI BIBI **653**

—— *Co-sharers—Alience from co-sharer.*

Where a co-sharer sells a specific portion of a joint holding, which portion is in his possession and possession of which is immediately delivered to the purchaser, the possession of such purchaser is adverse to the other co-sharers from the moment of his entry. **L** ANWAR *v.* KISHEN SINGH, (1922) A. I. R. (L.) 205 **171**

—— —— *Execution of decree—Formal possession delivered—Judgment-debtor in actual possession—Limitation, operation of.*

The mere delivery of formal possession of immoveable property to a decree-holder in execution of a decree cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupation of a tenant or other person entitled to occupy the same. **L** SARDAR KHAN *v.* ABDULLA KHAN **885**

—— *Joint owners—Proof—Ouster actual or by conduct—Denial or repudiation of title—Mixed question of law and fact.*

To constitute adverse possession against a joint owner his ouster may be actual or there might be conduct which would amount to his ouster.

The mere possession of a house by some of its joint owners or by a mortgagee from them, if the mortgage was effected without the knowledge of

Adverse possession—concld.

the joint owner not in actual possession, cannot amount to adverse possession against him unless there was what may be deemed to be his ouster, that is, actual ouster or some act to his knowledge by which his title was denied or repudiated.

The question of adverse possession is a mixed question of law and fact. **A** HAFIZ ABDULLAH *v.* ALLI, 21 A. L. J. 204; (1923) A. I. R. (A.) 291 **640**

——— *Proof- Enclosing land for keeping cattle during day time- Possession, nature of.*

It is no defence to a suit for possession of land that the land has been in possession of the defendant for more than 12 years. If plaintiff's title is to be denied, adverse possession for more than 12 years must be set up and proved.

To enclose a plot of land, which is of no immediate use to its owner, and to use it for the temporary purpose of keeping cattle there in the day time, does not amount to adverse possession. **A** LAKHU *v.* LAL SINGH **265**

Agra Tenancy Act (II of 1901), s. 56—*Sub tenant, status of—Ejectment—Jurisdiction of Civil and Revenue Courts—Pleadings.*

The person to whom for his lifetime an occupancy tenant sub-lets a portion of his holding for a fixed rent is a tenant within the meaning of section 56 of the Agra Tenancy Act, and can only be ejected in accordance with the provisions of that Act and not by a Civil Court. **A** RAM GAJADHAR *v.* SURTANI, (1923) A. I. R. (A.) 343 **381**

——— **s. 57 (d)**—*Tenant grove-holder — Ejectment.*

A tenant grove-holder is very different from a tenant of a grove. His rights in the plot of the grove are not those of a tenant but of a grove-holder and as such he cannot be ejected from it under section 57 (*d*) or any other provision of the Agra Tenancy Act. **A** SHEO PRASAD *v.* BABU RAM, (1923) A. I. R. (A.) 108 **350**

——— **ss. 79, 167**—*Declaratory suit between rival tenants—Forcible dispossession of person recorded as tenant in* khewat *—Claim for possession as occupancy tenant and damages for crops cut—Jurisdiction of Civil and Revenue Courts—Claim for damages, whether must fail if claim for possession fails for want of jurisdiction—Possession, suit for—Plaintiff must prove better title than defendant's.*

A suit for a declaration between two rival tenants may be brought in a Civil Court. But where on the death of an occupancy tenant, a person, not an heir, takes possession of the holding and gets himself recorded in the *khewat* as an occupancy tenant in succession to the deceased, and on being forcibly dispossessed by a person who takes a registered lease from the Zemindar, brings a suit for possession of the holding "*together with occupancy rights*" that is, brings a suit not merely for possession of the holding, but also wants to get back possession "*as the occupancy tenant in succession to the deceased*", the suit is not cognizable by a Civil Court and must be brought in a Revenue Court, under section 79 of the Tenancy Act with the Zemindar as a defendant.

Agra Tenancy Act—contd.

Where a suit for possession and damages for crops forcibly cut and appropriated is brought in a Civil Court, and the claim as to possession fails on the ground that it is cognizable, only by a Revenue Court, the claim for damages must also fail.

A suit for possession must fail where the plaintiff fails to prove a better title than that of the defendant. **A** SITA RAM *v.* CHAIT RAM, (1923) A. I. R. (A.) 257 **447**

——— **ss. 177 (e), 158**—Muafi, *suit for resumption of—Proprietary title set up in defence—Jurisdiction—Appeal.*

If in a suit for the resumption of a *muafi*, under section 130, read with section 154, of the Tenancy Act, the defendant sets up a plea based on section 158 of the Tenancy Act, a question of proprietary title is raised, for, if the plea is determined in his favour, he is entitled to have a declaration of his proprietary title, and the case falls within the purview of section 77 (*e*) of the Tenancy Act.

The words "in all suits" in section 177 of the Tenancy Act comprise suits of any description in whatever group they may be. Therefore, in a suit falling in group C an appeal lies to the District Judge. **A** LALTA PRASAD *v.* KHARGA, 21 A. L. J. 189; (1923) A. I. R. (A.) 313 **773.**

——— **ss. 177 (e), 198**—*Title of landlord repudiated—Third person's title pleaded—Third person not made party to suit—Question of title raised and decided—Appeal.*

If in an ejectment suit, under section 58 of the Agra Tenancy Act, the defendant repudiates the title of the landlord and pleads the title of a third person, a question of proprietary title is raised and the fact that the person whose title is pleaded as *jus tertii* is not impleaded in the suit, makes no difference. When in such a case the question of proprietary title is not only raised but decided by a Revenue Court, an appeal lies to the District Judge. The remedy under section 198 of the Tenancy Act is an additional remedy and it does not prevent an appeal lying to the District Judge under section 177, clause (*e*) of the Act. **A** TULSI PRASAD SAHAI *v.* RAMRAJ AHIR **308**

——— **s. 198**—*Suit by landlord for rent—Payment in good faith to third person pleaded—Third person made party to suit—Decision against third party—Civil suit by third party whether barred—Appeal, second—Finding, based on mistake of fact, whether binding.*

If in a suit by the landlord for arrears of rent, the tenant pleads payment in good faith to a third person, and upon that person being made a party to the suit the suit is decided against him, such a decision does not preclude the latter from establishing his title in a Civil Court.

A finding by the lower Court which is based on a mistake of fact does not bind the High Court in second appeal. **A** HABIB KHAN *v.* FIDA HUSAIN KHAN **1017**

——— **s. 201**—*Record of Rights—Entry opposed to decision of competent authority—Presumption of correctness.*

Where notwithstanding an order by a competent authority, the entries in the Record of Rights are

Agra Tenancy Act—concld.

not corrected in accordance with that order, the Courts are not bound to presume their correctness for the purposes of section 201 of the Agra Tenancy Act. **A** TIKA RAM *v.* DUBO SHIB LAL, **992**

— — — **s. 202**—*Ejectment suit—Plea of tenancy —Bona fides, question of—Duty of Civil Court.*

If in a suit relating to an agricultural holding the defendant pleads a tenancy, the Civil Court has no option but to refer him to a Revenue Court under section 202 of the Agra Tenancy Act, as there is nothing in the section which requires the Court before applying it, to decide that the claim to tenancy is *bona fide*. **A** JASRAM *v.* AMAR NATH **475**

Agreement to sell—*Consideration paid—Vendee in possession—Registered deed not passed—Vendee, whether can resist vendor's suit for possession*

Where a person agrees to sell his property to another who is already in possession and who has paid the purchase-money but there is no registered deed of sale, the vendee can successfully resist a suit for possession by pleading that there has been in his favour an agreement to sell the property whether the time for filing a suit for specific performance has expired or not. **N** SAMPAT *v.* MOTILAL, (1923) A. I. R. (N.) 177 **808**

— — — —*Possession, transfer of—Promisee already in possession as mortgagee—Transferee, subsequent, rights of—Equity.*

A purchaser, who has actually taken possession under an agreement to sell, can retain such possession as against the seller even though the agreement to sell has not been converted into an actual sale. But this principle is one of equity only. It does not amount to the conversion of an agreement of sale into an actual sale, and the enforcement of this equity depends entirely upon the fact of the purchaser having taken actual possession.

Where a person who is already in possession of a property as mortgagee, enters into an agreement to purchase the same and there is nothing to show that his possession is definitely altered from that of a mortgagee to that of a vendee, he cannot be protected against a subsequent transferee without notice. **Pesh.** SAID KHAN *v.* ZARIF KHAN **781**

Appeal, (Civil)—*Additional evidence, when to be admitted.*

There is no jurisdiction in an Appellate Court to admit additional evidence unless upon examining the evidence as it stands some inherent *lacuna* or defect becomes apparent. **Pat.** JAI KRISHNA *v.* BIBI SOGHRA, 4 P. L. T. 418 **881**

— — — —*Technical plea.*

A technical plea should not be allowed to be taken for the first time in appeal. **L** BUDHA MAL *v.* SHIB DAYAL, **826**

— — — — *Wrong order.*

If a Court purports to act under a power it possesses but makes a wrong order in the exercise of that power, an appeal will lie. **M** MALAYANDI COUNDAN *v.* BOMAN POOSARI, 17 L. W. 159; (1923) A. I. R. (M) 331 **204**

— — — —, **(Criminal)**, *forum of—Different sentences passed on several accused.*

Appeal—concld.

Where different sentences are passed on different accused, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence and not on the extent of the sentences of the other accused. **M** MITTOR MOIDEEN HAJEE, *In re*, 43 M. L. J. 561, 1 O. L. W. 704; (1923) A. I. R. M.) 05; 24 CR. L. J. 80 **217**

— — — —, **second** *Arbitrary finding of fact, whether binding.*

An arbitrary finding of fact by the lower Courts is not binding on a Court of second appeal. **N** RAMBHABAI *v.* TOTARAM, (1923) A. I. R. (N) 188 **727**

— — — — — — *Concurrent finding of fact.*

A concurrent finding of fact should not be upset in second appeal without good reason. **Pesh.** RAHIMUDDIN *v.* SHAHBAZ KHAN **812**

— — — — *Finding of fact.*

A conclusion of fact arrived at by the lower Court, where it is not established that in coming to that conclusion the learned Judge was under any misapprehension or error of law, cannot be challenged in second appeal **C** JOGESH CHANDRA GHOSE *v.* PROSANNA KUMAR TALUKDAR **962**

— — — — — *Finding of facts, whether can be attacked where reasoning is weak*

A finding of fact, where there is sufficient evidence to support it, cannot be attacked in second appeal on the ground that the reasoning for it is weak or inconclusive. **A** MUHAMMAD SHAKUR *v.* ABDUL GHANI, (1923) A. I. R. (A). 362 **369**

— — — — Inference of law. *See* BENGAL TENANCY ACT, 1885, s. 50 (2) **15**

— — — — *New plea.*

A plea not raised in the Trial Court should not be allowed in second appeal **A** MUHAMMAD UMAR KHAN *v.* AMTUL RAHIM BIBI, 21 A. L. J. 267, (1923) A. I. R. (A) 311 **965**

— — — — — — *Plaintiff, if can ask for remand for producing new evidence.*

A plaintiff ought to come to Court with a definite statement of facts necessary for him to succeed in his case and with all his evidence, and is not entitled in second appeal to ask for a remand to enable him to prove a fact by new evidence. **C** JATINDRA MOHAN CHAKRAVARTI *v.* BIJOY CHAND MAHATAB **284**

— — — — — *Remand.*

Unless it is shown that material circumstances were brought to the notice of an Appellate Court which it has omitted to consider, a Court of second appeal will not impute any negligence, and remand the case for re-consideration. **N** ANAND RAO *v.* DADA **43**

Arbitration—*All interested persons not joining in application for reference—Court, jurisdiction of, to make reference.*

Where all the persons interested do not join in an application for reference to arbitration, the Court has no jurisdiction to make the reference. **C** HARA PRASANNA BANDOPADHYA *v.* ARAB ALI **32**

——— *Award—Decree in terms of award before expiry of ten days, validity of—Agreement not to object to award, effect of—Fraud—Material irregularity.*

Where a Court passes a decree in terms of an award prior to the expiry of the ten days allowed for the filing of objections to the award, it acts without jurisdiction, or with material irregularity, notwithstanding the fact that the defendant had agreed not to raise objections to the award.

An agreement whereby the parties contract not to raise objections to an award is of no effect, where the award travels into various extraneous matters not connected with the suit and not forming the subject-matter of the reference to arbitration, nor does such an agreement cover fraud unless it is expressly excepted. **M** RANGIAH CHETTY *v.* GOVINDASAMI CHETTY, (1921) M. W. N. 793; 15 L. W. 100; (1922) A. I. R. (M) 179 **266**

——— *Hindu family—Separation—Reference to arbitration—Imposition of conditions affecting tenure or devolution of shares allotted, legality of.*

In the case of a reference to arbitration for division of property, it is not only open to the arbitrators to allot a definite share of the estate to each of the referring parties but it is also open to them to make the allotment subject to conditions which affect its tenure or devolution.

A dispute between three brothers was referred by their common consent to arbitration, the reference containing the following passage, "you will make a division of the moveable and immoveable property having considered what is proper and having made a just settlement. That division we accept in every respect" The arbitrators gave each brother one-third of the property but declared that an issueless brother would have only a life-interest in the share allotted to him, that a male issue subsequently born would have the right to succeed to his father's share but not so a female issue, and that after death of the brother his widow would have a right of maintenance only and would not be entitled to succeed; the brothers or nephews becoming the heirs:

Held, (1) that the arbitrators were authorized under the reference to annex the condition in dispute to the division made by them;

(2) that as under the Hindu Law the brothers could have validly come to such an agreement as the above, there was nothing to prevent them from doing the same thing through arbitrators. **N** PHULA *v.* KUSAMSINGH, (1923) A. I. R. (N.) 70 **413**

——— *Matter not referred determined—Award, validity of—Consent of parties—Reference by some only of parties concerned—Award binding on referring persons—Arbitration without intervention of Court.*

Where, in the case of an arbitration, the arbitrators proceed to decide as well a matter that is not included in the reference, and the parties concerned take part in the proceeding and accept the award when it is made and act upon it, they must be deemed to have made a second submission in respect of that matter and cannot subsequently be allowed to repudiate the award.

Though some persons do not join in submitting a dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. It is binding on them especially when it has been acted upon. **N** DHARNIDHAR *v.* SAKHARAM **860**

———, *reference to—Jurisdiction of Court.*

Once a reference to arbitration is made, the jurisdiction of the Court is ousted and any order passed after such reference, except under the provisions of the law relating to arbitration, is *ipso facto* an illegal order made without jurisdiction. **Pesh.** CHET RAM *v.* KANSHI RAM **7**

Arbitration Act (IX of 1899), ss. 4, 8 (2)—*Civil Procedure Code (Act V of 1908), s. 47—Compromise not embodied in decree—Arbitration—Reference—Order under s. 8 (2) of Act—Appeal.*

Parties to a suit for accounts entered into a compromise, whereby they agreed to a preliminary decree being passed in accordance with the compromise. The petition of compromise also provided that one of the parties would have a certain share in the profits of a particular contract and that the profits would be determined by the certificate of a firm of Chartered Accountants. It was further provided that any dispute relating to this share of the profits would be referred to arbitration under the provisions of the Arbitration Act. A preliminary decree was passed as to past accounts and the petition of compromise was attached to it, but no mention whatsoever was made of the clause relating to the sharing of the profits of the contract, as the compromise expressly provided that this matter would be entirely distinct and separate from the rest of the compromise. When the accounts of this contract were about to be audited the party entitled to a share in its profits insisted that it had a right to be represented at the audit. The other party denied this right; whereupon the former claimed to refer the matter to arbitration, nominated its arbitrator, called upon the other party to nominate its arbitrator and on its failure to do so made an application to the District Judge under section 8 (2) of the Arbitration Act. The District Judge held that there was a valid submission to arbitration and made an order under the section:

Held, (1) that it could not be said that the proceedings related to the execution of a decree, within the meaning of section 47 of the Civil Procedure Code, inasmuch as the decree passed in the suit for accounts did not relate to the matter now in dispute;

(2) that, therefore, no appeal lay from the order of the District Judge;

(3) that the petition of compromise being signed by both parties amounted to a valid submission to arbitration within the meaning of section 4 of the Arbitration Act;

(4) that the clause relating to the matter in dispute not having been embodied in the decree

Arbitration Act– concld.

in the previous suit, advantage could still be taken of it;

(5) that a dispute had arisen relating to the matters dealt with by this clause of the compromise and the order of the District Judge was not, therefore, *ultra vires*.

The definition of submission in section 4 of the Arbitration Act covers an agreement to refer future disputes as well as the reference, the reference amounting to delegation of authority to the arbitrator. **L** BAKHSH ILAHI *v.* ABDUL RAHMAN **817**

——— **s. 19**—*Arbitration—Agreement to refer—Defendant submitting to jurisdiction of Court—Estoppel.*

A defendant who submits to the jurisdiction of the Court and does not at the earliest possible moment plead a subsisting agreement between himself and the plaintiff to refer the dispute to arbitration, is precluded from relying upon the agreement at subsequent stages of the suit **A** KHARIDAR KAPRA COMPANY *v.* RUKMANAND RAMDEO, 20 A. L. J. 975; (1923) A. I. R. (A) 139 **144**

Attestation—*Knowledge of contents of deed.*

Mere attestation of a deed does not lead to the inference that the person attesting the deed knows its contents. **N** ANANDRAO *v.* DADA **43**

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—*Resumption and assessment of "added" lands.*

Jurisdiction may be assumed on behalf of the Crown under the Bengal Alluvion and Diluvion Act, only if the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of the Statute; when that jurisdiction is challenged it is incumbent upon the Crown to establish that the disputed lands are "added" lands, that is, lands not included in the original assessment. If, in such circumstances, the relevant papers are withheld by the Crown, the Court cannot but draw an inference adverse to the case set up by the Crown. **C** SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY, 30 C. L. J. 330, (1923) A. I. R. (C) 217 **849**

Bengal Estates Partition Act (V of 1897)—*Holders of plots of* zerait *land paying neither revenue nor rent—Partition—Rent determined and embodied in Record of Rights—Liability of holders of plots to pay rent—Presumption.*

The purchasers of separate plots of certain *zarait* land neither paid any revenue to Government nor any rent to the proprietor within the ambit of whose Zemindari the plots fall. On proprietor's application under the Estates Partition Act, it was determined that the holders of the plots were liable to pay the same rent as was payable for the lands of similar nature in the vicinity; and as the result of this determination their status was shown in the *batwara* Record of Rights as that of tenure-holders:

Held, that unless the presumption raised by the Record of Rights in favour of the proprietor was rebutted the holders of plots were liable to pay a fair and equitable rent as embodied in the Record of Rights. **Pat.** BHOLA PANDEY *v.* RAM BILAS PANDEY **395**

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 12—*"Valuation of the original suit," meaning of—Plaintiff's valuation of suit not challenged in Trial Court—Appeal,* forum *of.*

"The value of the original suit" in section 21 of the Bengal Civil Courts Act, means the valuation as made by the plaintiff subject to such amendment as may have been made under the orders of the Trial Court.

Although, ordinarily, the valuation of a suit, as made by the plaintiff, is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the *forum*, either of the trial of the suit or the adjudication of the appeal. The valuation as made by the plaintiff may be challenged either by the Court of its own motion or by the defendant. In either event, there is a determination of the question of valuation.

Where the valuation of a suit as stated by the plaintiff in his plaint is not challenged either by the Court of its own motion or by the defendant and the trial proceeds on the assumption that the valuation made by the plaintiff is correct, it is not open to the defendant, after he has been defeated in the Trial Court, to seek to change the *forum* of appeal by the assertion that the suit was under-valued. The *forum* of appeal at this stage must be determined with reference to the valuation as set out in the plaint. **C** HARIHAR DAS *v.* RAJ KUMAR MUKERJEE, (1923) A. I. R. (C) 405 **1014**

Bengal Tenancy Act (VIII of 1885), ss. 19, 20, 21, 22, 120—*Evidence Act (I of 1872), s. 8—Zerait land, proof of—Relevant evidence—Occupancy rights, whether can be created by grant—Land purchased by landlord from tenant, character of.*

In order to establish that certain land is his *zerait* land within the meaning of section 120 of the Bengal Tenancy Act a landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March 1883 or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such though it may be that such evidence standing by itself will be of small value and will not induce the Court to hold that the land claimed as proprietor's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March 1883, the matter is conclusive under section 120 of the Bengal Tenancy Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd of March 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land, although it is open to the Court to take that evidence into consideration in coming to the conclusion whether the land claimed as *zerait* is in fact *zerait* land.

Section 19 of the Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired.

An occupancy right is inherent in the status of the *raiyat* and is not the landlord's to grant. There is nothing in either section 20 or section 21 or in any other section of the Bengal Tenancy Act which provides that a right of occupancy can be acquired either by grant or by contract.

Obiter.—There is no indication in the Bengal Tenancy Act that if, as a result of the bounty of the landlord, a person acquires a right of occupancy in the *zerait* land, there is, as a consequence of such bounty, the conversion of the *zerait* land into *raiyati* land.

Whenever a question is raised as to the character of any land purchased by a landlord from a tenant, the enquiry must be directed to ascertain the original character of the land. If it was initially *raiyati* land, the landlord in getting *khas* possession cannot treat it as his *zerait*, for to permit him to do so would be to allow him to increase his stock of *zerait* land, which it was the object of the Bengal Tenancy Act to prevent. But where it is proved that the land was *zerait* land within the meaning of section 120 of the Bengal Tenancy Act, the land, on coming into the *khas* possession of the landlord, regains the character which it once possessed. **Pat.** KESHO PRASAD SINGH *v.* PARMESHRI PRASAD SINGH, 4 P. L. T. 135; (1923) PAT. 65; 1 P. L. R. 111; (1923) A. I. R. (PAT.) 270 **902**

——— **s 29**, *applicability of—Absence of proof of original* jama.

Where there is no evidence to prove the original *jama*, section 29 of the Bengal Tenancy Act does not apply. **C** FAIJADDIN *v.* AGNI KUMAR SARMA, **300**

——— **ss. 29, 147A**—*Ejectment suit between landlord and tenant holding over—Compromise—Tenant recognised as occupancy tenant—Enhancement of rent, legality of.*

If a tenant, who holds over after the expiration of the term of his tenancy, is sued *bona fide* in ejectment as a trespasser and the suit is compromised by recognition of the tenant as occupancy tenant from the date of the compromise, the enhancement of rent is not illegal under sections 29 and 147 of the Bengal Tenancy Act, inasmuch as the suit was between a landlord and a trespasser and not between a landlord and a tenant as such. **Pat.** SHEOGOBIND SINGH *v.* MAHABIR MISSER, (1922) PAT. 319; (1922) A. I. R. (PAT.) 654; 4 P. L. T. 301 **143**

——— **s. 48**, application of. *See* CONSTRUCTION OF DOCUMENT **470**

——— **s. 50 (2)**—*Record of Rights against tenant—Benefit of presumption afforded by s. 50 (2)—Same rent paid for large number of years—Presumption—Second appeal—Inference of law.*

When the Record of Rights is against tenants, they are not entitled to the benefit of the presumption afforded by section 50 (2) of the Bengal Tenancy Act.

Once the Record of Rights shows that a tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has been unchanged from the time of Permanent Settlement; and the proof of the fact that he has been paying the same rent for 48 years would not entitle him to the presumption that he has been paying at fixed rate from the time of the Permanent Settlement.

The inference that fixity of rent could be presumed from the fact that there has been no change of rent for 48 years is an inference of law and can be set aside in second appeal. **Pat.** KESHO PRASAD SINGH *v.* ISSER DUBEY, 1 P. L. R. 32 **15**

——— **s. 85**—Fixed-rate tenant—Permanent under-tenure, creation of. *See* EJECTMENT, SUIT FOR **319**

——— **s. 103 B**—Occupancy rights—Entry in Record of Rights—Presumption—Burden of proof. *See* TRANSFER OF PROPERTY ACT, 1882, S. 100 **1022**

——— **s. 106.** *See* CIVIL PROCEDURE CODE, 1908, S. 11 **307**

——— **s. 167**—*Annulment of incumbrance—Notice, if essential.*

The Bengal Tenancy Act makes it imperative that notice as provided by s 167 should be served for the purpose of annulment of an incumbrance. **C** JATINDRA MOHAN CHAKRAVARTI *v.* BIJOY CHAND MAHATAB **284**

——— **s. 171**—*Payment into Court—Payment to decree-holder, under Court's direction, whether payment into Court.*

Where the mortgagee of an occupancy holding applies to the Court for permission to deposit in Court the amount of a decree for rent, and under the direction of the Court pays the money to the landlord direct, such payment is tantamount to payment into Court, within the meaning of section 171 of the Bengal Tenancy Act. **Pat.** MOSAFIR LAL DAS *v.* GANESH JHA, (1922) PAT. 347; (1922) A. I. R. (PAT.) 656; 4 P. L. T. 137 **473**

——— **s. 174**—*Application to set aside sale—Cost of copy of decree obtained by decree-holder and stamp on* vakalatnama, *whether to be deposited—Shortage in amount to be deposited—Judgment-debtor misled by mistake of clerk and order of Court—Admission of shortage after expiry of time.*

It is not incumbent on a judgment-debtor who applies to set aside a sale under section 174 of the Bengal Tenancy Act to include within the costs to be deposited by him the amount spent by the decree-holder in obtaining a copy of the decree or the value of the stamp on a *vakalatnama* filed by the decree-holder, inasmuch as a separate *vakalatnama* is not necessary in execution proceedings.

An Executing Court is lacking in the due discharge of its duty in entertaining an application to set aside a sale under section 174 of the Bengal Tenancy Act until it has satisfied itself that the statutory conditions laid down in the section have been fulfilled.

It is the duty of the Executing Court, in such a case, before entering in the order-sheet that the full decretal amount with costs and compensation has been deposited, to satisfy itself as to the correct amount which it was necessary for the judgment-debtor to deposit.

Bengal Tenancy Act—concld.

A judgment-debtor who fails to deposit the full amount required to be deposited under section 174 of the Bengal Tenancy Act cannot claim relief on the ground that he has been misled by information given by a clerk of the Court, it is only when the information is given by the Court itself that the judgment-debtor is entitled to rely on that intimation as correct.

A judgment-debtor made an application to set aside a sale under section 174 of the Bengal Tenancy Act and deposited a certain sum, which, according to information supplied to him by a clerk of the Court, was sufficient to cover the decretal amount, costs and compensation. Thereupon the Court made an order that he had deposited the full amount required under the section. On the date on which this order was made the time for making the deposit had not expired. It was subsequently discovered that the costs had been wrongly calculated by the clerk and consequently the amount deposited by the judgment-debtor was short by a small sum. It was found that the Court had not calculated the amount of the costs which the judgment-debtor was required to deposit:

Held, that the judgment-debtor having been misled not merely by the mistake of the clerk but also by the failure of the Court to calculate the costs and the order of the Court recording that the full amount had been paid, this was a fit case in which the judgment-debtor should be allowed to deposit the deficiency and that the sale should be set aside on such deposit. **Pat.** DIDAR ALI *v.* KUSUM KUKARI **925**

Berar Alienated Villages Tenancy Law, s. 40—*Ante-izara tenant, rights of, whether transferable—Ante-alienation tenant, whether liable to be ejected.*

A person who has been in possession for a large number of years as a tenant of land which was under cultivation before the grant of an *izara* is an ante-*izara* tenant under section 40 of the Berar Alienated Villages Tenancy Law and the rights of such a tenant are transferable.

Notwithstanding any contract to the contrary, an ante-alienation tenant cannot be ejected from his holding by his landlord as such for any cause. **N** SHAIKH IMAM *v.* RAMCHANDRA, (1923) A. I. R. (N.) 69 **25**

Berar Inam Rules, Class V, r. VII—*Grant for maintenance and service—Service by any member of grantee's family sufficient—Resumption.*

Where a grant is made for the purpose of service and maintenance and the tenure is stated to be in perpetuity conditional on service the grant falls under Class V and is governed by r. VII and is both a maintenance and service grant. Such a grant is not liable to be resumed so long as any member of the family of the first grantee renders the stipulated service. **N** WAZIRUDDIN *v.* SHAHABUDDIN, (1922) A. I. R. (N.) 254 **150**

Berar Land Revenue Code, 1896, ss. 205, 201—*Presumption—"Co-occupant," whether includes juridical person.*

A co-occupant who is entitled to pre-empt under the Berar Land Revenue Code may be a juridical person as well as a living person. **N** BAKARAM *v.* RAM CHANDRA, (1923) A. I. R. (N.) 96 **89**

Bihar and Orissa Court-Fees (Amendment) Act (II of 1922)—*Restrospective effect.*

The Bihar and Orissa Court-Fees (Amendment) Act (II of 1922) does not have retrospective effect so as to impose a liability upon an appellant to pay Court-fee, on copies of judgment and decree filed with a memorandum of appeal which he was not liable to pay on the date such copies were obtained. **Pat.** ANAND RAM BRAHMAN *v.* RAMGULAM SAHU, 3 P. L. T. 820; (1922) PAT. 305; 1 P. L. R 12; (1923) A. I. R. (PAT) 150; 2 PAT. 264 **426**

Bihar and Orissa Public Demands Recovery Act (III of 1914), ss. 10, 45—*Sale to recover arrears of Road-cess—Failure to serve notice—Burden of proof.*

Where a plaintiff claims that a sale of his property held under the Bihar and Orissa Public Demands Recovery Act was null and void owing to the non-service of notice under section 10 of the Act, the *onus* of proving due service of notice is on the defendant.

Section 45 of the Bihar and Orissa Public Demands Recovery Act, 1914, has no application to a suit to set aside a sale which took place more than one year before the coming into force of the Act. **Pat.** GOKARAN PRASAD SINGH *v.* WARIS ALI, 1 P. L. R. 285 **957**

Burden of proof—*Suit for declaration of title—Decision of Criminal Court under s. 145, Criminal Procedure Code, as to possession—Presumption.*

The mere fact that a Criminal Court has, in a proceeding under section 145 of the Criminal Procedure Code, decided that a particular party is in possession of the property in dispute, is not sufficient to give rise to a presumption in a Civil Court in favour of that party in a suit brought against him for declaration of title to the property. **Pat.** JANTRA KOER *v.* ALI JAN DARJI **478**

——— *Withholding of relavant papers—Presumption*—Presumitur retro, *doctrine of.*

Proof of the existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption, within logical limits, that it exists at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant, must vary with each case—always strongest in the beginning, the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference. Briefly, a given fact or set of facts, whose existence at a particular time is once established in evidence, continue to exist as long as such facts usually exist. This inference of continuance, whether backwards or forwards, whether upward or downwards, is an inference of fact and may, therefore, be rebutted. **C** SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY, 36 C. L. J. 336; (1923) A. I. R. (C) 247 **849**

Calcutta Police Act (IV of 1866), s. 54-A—*Prosecution for possession of stolen goods—Condition for conviction.*

The first condition necessary for a conviction under section 54-A of the Calcutta Police Act is

Calcutta Police Act—concld.

for the prosecution to show that the goods had been stolen or fraudulently obtained. The mere evidence of a Sub-Inspector of Police that the goods were recovered from the house of the accused, would not warrant the conclusion that they had been stolen or fraudulently obtained. **C** RASIK LAL DAS *v.* EMPEROR, 26 C. W. N. 712; (1922) A. I. R. (C.) 492; 24 CR. L. J. 151 **503**

Calcutta Rent Act (III of 1920), s. 20—*Calcutta Improvement Tribunal—Summary enquiry—Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 5 (2), 29 Chap. XXII.*

The President of the Calcutta Improvement Tribunal is competent to hold the summary enquiry referred to in section 20 of the Calcutta Rent Act under the provisions of Chapter XXII of the Code of Criminal Procedure.

Having regard to the provisions of section 29, read with section 5 (2), Criminal Procedure Code, the possibility of the application of the provisions of the Code of Criminal Procedure to Courts which are not mentioned specifically therein is not excluded. **C** ISHAN CHANDRA SARKAR *v.* MONMOTHA NATH DUTTA, 37 C. L. J. 298; (1923) A. I. R. (C.) 330 **611**

C. P. General Clauses Act (I of 1914). *See* ACCOUNT **45**

C. P. Land Revenue Act (II of 1917), s. 2 (17), proviso - *Sir* right, analysis of. *See* C. P. TENANCY ACT, 1898, SS. 45, 46, 49 **129**

——— **s. 169 (1) (a) (n)**—*Application for partition—Revenue Officer referring parties to Civil Court—Cause of action for suit—Limitation, operation of—Jurisdiction of Civil Courts.*

A suit for ascertaining the titles of parties to the lands in a *mahal* in a village is not time-barred under Art. 120 of the Limitation Act merely because a Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court.

The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of title has been decided does not amount to an order to any parties to file a civil suit and does not confer on a Civil Court jurisdiction which did not previously reside in it. A Civil Court can enquire into the question as to whether the *khudkasht* or *sir* lands are or are not the sole property of a person or whether they are joint property, though it cannot decide whether there should be a partition or not. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though they can give no direction whatever as to whether there should be a partition or how a partition should proceed. **N** DONGAR SINGH *v.* VISHWANATH SINGH, 19 N. L. R. 11; (1923) A. I. R. (N.) 86 **205**

——— **s. 188 (2) (a)** — *Partition of* mahal—Lambardar, *powers of, over separated* patti.

The *lambardar* of a *mahal* cannot, after the *mahal* is partitioned, exercise his powers under section 188 (2) *(a)* of the Land Revenue Act over a *patti* in which he may cease to have proprietary rights. **N** RAMAKRISHNA PURI *v.* TANBA, 19 N. L. R. 59; (1923) A. I. R. (N) 153 **777**

C. P. Tenancy Act (XI of 1898)—*Prior mortgage of tenancy lands*—Malguzar *not consenting—Validity as against mortgagor—Priority over subsequent mortgage.*

As between the mortgagor and mortgagee a mortgage of a tenancy holding is valid unless and until it is avoided by the *malguzar*. A mortgage which has not been consented to by the *malguzar* will not fail to have priority over a subsequent mortgage simply because it had not been consented to by the *malguzar*. **N** KUNJILAL *v.* PANNALAL, 19 N. L. R. 10; (1923) A. I. R. (N.) 91 **325**

——— **ss. 45, 46, 49**—*Tenant right*—Sir *land—Alienation of ownership—C. P. Land Revenue Act (II of 1917), s. 2 (17), proviso*—Sir *right, analysis of.*

The tenant right in his *sir* land left in a proprietor after alienation of his ownership is a constituent part of the right he held in the *sir* land and is not something new which is created by the law.

The *sir* right is made up of two parts, one the proprietary and the other occupancy, and it can accrue synthetically by the union of these two parts in the same person and not in different persons. **N** SHEORAM *v.* TIKARAM, 19 N. L. R. 26; (1923) A. I. R. (N.) 93 **129**

——— **s. 48,** *applicability of—Transfer to remote heirs*

Section 46 of the C. P. Tenancy Act, 1898, does not contemplate a transfer only to the nearest existing heir at the time it is made. **N** KRISHNA BAI *v.* DEBISINGH, (1923) A. I. R. (N.) 195 **409**

C. P. Tenancy Act (I of 1920)—*Will devising* malguzari *share in village—Occupancy rights in* sir *land, whether can be devised with such share—Sanction of Revenue Authorities, whether necessary.*

Occupancy rights in *sir* land can be devised by Will along with the *malguzari* share to which they appertain without the sanction of the Revenue Authorities. **N** GADI *v.* GOVINDA, (1923) A. I. R. (N.) 141 **207**

——— **ss. 100, 105**—*Suit by village service tenant for possession — Ejectment by landlord—Jurisdiction of Civil Court, whether barred.*

A civil suit for possession of his holding by a village service tenant asserting that he has been ejected by the landlord is barred by sections 100 and 105 of the C. P. Tenancy Act of 1920. **N** BALARAM *v.* ATMARAM, (1923) A. I. R. (N.) 51 **48**

Charges, *misjoinder of*——*Penal Code (Act XLV of 1860), ss. 411, 414, joinder of charges under, legality of—Defective charge, if can be remedied at, conclusion of trial — Procedure—Alternative charges—Criminal Procedure Code (Act V of 1898), s. 236.*

Joinder of charges of offences under section 411, Indian Penal Code, with charges of offences under section 414, Indian Penal Code, is bad. If, however, the charges are framed in the alternative under section 236 of the Code of Criminal Procedure there would be no defect in the trial. But having framed defective charges, the Magistrate cannot remedy the error at the conclusion

Charges—concld.

of the trial, by saying in his judgment that he would only proceed on the charges that had been legally joined. If he wishes to strike out any of the charges he should do so before concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit on the charges as amended. Where this is not done the error vitiates the trial and makes the conviction illegal. **C** CHETTO KALWAR *v.* EMPEROR, 49 C. 555; (1922) A. I. R. (C.) 401; 24 CR. L. J. 80 **214**

Charitable endowments –Muth, *hereditary—Succession.*

In the absence of proof of a special custom, on the death of the presiding *Mahant* of a *mourosi* or hereditary *muth*, his principal *chela* is entitled to succeed to him. **Pat.** JAGERNATH DAS *v.* JANG BAHADUR RAI, (923) Pat. 33; 4 P. L. T. 285 (1923) A. I. R. (PAT.) 218 **887**

———— *—Temple property—No regular trustees—Right to sue for possession—General body of worshippers—Civil Procedure Code (Act V of 1908), O. 1, r. 8.*

Property bequeathed to an idol or temple although notionally held by the deity, must be in some human being or beings. If there is a trustee or manager, he can sue for its possession; where there is no trustee or manager the right to sue for possession on behalf of the trust may vest in the regular body of worshippers of the temple. In such a case, worshippers who obtain permission under O. 1, r. 8 of the Civil Procedure Code to sue on behalf of the general body are entitled to maintain the suit and obtain a decree for possession. **M** RANGASWAMI NAYUDU *v.* KRISHNASWAMI AIYAR, 17 L. W. 147; 44 M. L. J. 116; (1923) M. W. N. 84; 32 M. L. T. 133; (1923) A. I. R. (M.) 270 **463**

Chota Nagpur Tenancy Act (VI of 1908), s. 14, *scope of—Resumption—Annulment of unaccertenure.*

Section 14 of the Chota Nagpur Tenancy Act provides that any incumbrance created by the grantee of a tenure or by any of his successors, without the consent or permission of the grantor or his successors-in-interest, shall be deemed to be annulled on the resumption of the tenure by the grantor.

The words "grantee or any of his successors" in section 14 of the Chota Nagpur Tenancy Act include not merely the successors of a grantee but also succeeding grantees. **Pat.** PRATAP UDAI NATA SAHI DEO *v.* SUNDERBANS KOER, 3 P. L. T 628; (1923) A. I. R. (PAT.) 76 **999**

Civil Procedure Code (Act V of 1908), s. 9— *Temple offerings — Suit for partition — Civil Courts, jurisdiction of.*

A suit for a share by partition in the offerings at a temple is cognizable by a Civil Court, though incidentally it may involve a prayer for the assistance of the Court to have the time fixed for the claimant to officiate at the worship for the better security of obtaining his share in the said offerings. **A** KUNJ BEHARI LAL *v.* NARAINI **1026**

———— **s. 11**—Res judicata — *Bengal Tenancy Act (VIII of 1885), s. 106—Relation of landlord and tenant — Decision of Revenue Officer, if operates as* res judicata.

The decision of a Revenue Officer under section 106 of the Bengal Tenancy Act on the question whether the relation of landlord and tenant existed between the parties, operates as *res judicata* under section 11 of the Code of Civil Procedure. **C** ROY JATINDRA NATH CHOWDHURY *v.* AZIZAR-RAHAMAN SHAHA, (1923) A. I. R. (C.) 433; 50 C. 79 **307**

———— **s. 11** –Resjudicata *between co-defendants.*

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants, but for this result to follow there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se.*

Per *Moti Sagar, J.*—Courts are generally reluctant to extend the doctrine of *res judicata* to co-defendants, and if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.

The widow of a deceased Hindu mortgaged a portion of the estate left by her husband. After her death her husband's nephews took possession of the mortgaged property. The mortgagee brought a suit for possession of the property and impleaded the nephews of the deceased and his two daughters as defendants to the suit. The nephews pleaded that the deceased was joint with their father before his death and that on his death his property went to their father by survivorship and the mortgage by the widow was, therefore, invalid. The daughters of the deceased pleaded that their father was separate from his brother and admitted the plaintiff's claim. It was decided that the deceased was separate from his brother. Subsequently, the nephews of the deceased sued his daughters for a declaration that the latter were not entitled to succeed to his property, inasmuch as he was joint with the former's father at the time of his death and his property went by survivorship to the plaintiffs' father:

Held, that the suit was barred by *res judicata* by virtue of the decision in the previous suit in which the parties were co-defendants. **L** SUKH DIAL *v.* BHOPI, (1923) A. I. R. (L.) 186 **481**

———— **s. 11, Expl. IV, O. II, r. 2**—*"Might and ought to have been made ground of attack or defence," meaning of — Suit for possession as proprietor—Subsequent suit as heir whether barred.*

If a plaintiff has two alternate capacities upon which to rest his claim he must disclose both these capacities, provided that they "might and ought" to be made grounds of attack within the meaning of section 11, Explanation IV of the Civil Procedure Code.

Where a person first sues for possession as a proprietor and after the suit is dismissed sues

again as an heir to the original owner, the question whether he can or cannot bring the second suit, depends upon (1) whether he could have based his former suit on the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of section 11 and O. II, r. 2, of the Civil Procedure Code, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape, if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. **Pesh.** AKHI *v.* HAZRATGUL **1009**

——— **s. 20**—*Sale of goods—Loan of money—Presumption as to place of payment—Cause of action—Jurisdiction.*

Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or re-payment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender as the case may be. **A** BANGALI MAL *v.* FIRM GANGA RAM-ASHARFI LAL **431**

——— **ss. 20, 115**—*Jurisdiction, decision as to—Revision.*

Where, on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides that it has jurisdiction the order of the Court does not amount to a decision of a case within the meaning of section 115 of the Civil Procedure Code and no revision lies against it. **L** COLONY FLOUR MILLS CO., LTD., LYALLPUR *v.* FIRM BHAI SANT SINGH-BHAGWAN SINGH, 5 L. L. J. 140; (1923) A. I. R. (L.) 414 **487**

——— **ss. 20 (c), 115, O. VII, r. 10, O. XLIV, r. 1 (a)**—*Failure to deliver goods—Cause of action—Place of suing.*

Plaintiff, residing at Gujranwala, ordered goods from defendant, residing at Calcutta. Defendant sent the goods by Railway but consigned them to himself and sent the Railway Receipt to plaintiff per V.-P. P. for the balance of the price. The latter refused to pay for the V.-P.P. but sent the amount of the balance to the defendant and demanded delivery of the goods. The goods were, in the meantime, lost by the Railway. Plaintiff, thereupon, sued the defendant at Gujranwala for return of the price paid by him:

Held, (1) that the goods had throughout continued under the control of the defendant;

(2) that the goods had to be delivered at Gujranwala;

(3) that the failure to deliver the goods was a part of the cause of action;

(4) that, therefore, the Gujranwala Courts had jurisdiction to entertain the suit. **L** JAGAN NATH DIWAN CHAND *v.* JAGAN NATH-MOTI LAL, **38**

——— **s. 22**, *applicability of.*

Section 92 of the Civil Procedure Code has no application to suits by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income. **A** DARSHAN LAL *v.* SHIBJI MAHARAJ BIRAJMAN, 20 A. L. J. 977; (1923) A. I. R. (A) 120 **420**

——— **ss. 22, 23**—*Jurisdiction — Transfer of suit.*

It is only when a suit may be brought in one or other of two Courts, both of which have jurisdiction, that an application may be made under sections 22 and 23 of the Civil Procedure Code. Where the jurisdiction of one of the Courts is denied an application for transfer under these sections cannot lie. **L** NATIONAL ENGINEERING COY., KARACHI *v.* RATTAN ENGINEERING COY., LAHORE, (1923) A. I. R. (L.) 288 **268**

——— **s. 42, O. XXI, r. 16**—*Decree-holder, death of—Right of heirs to apply for execution—Decree for ejectment—Revenue Officer, whether can execute it in favour of heirs of deceased decree-holder.*

Under r. 16 of O. XXI, of the Civil Procedure Code the heirs of a deceased decree-holder may apply for execution to the Court that passed the decree and under section 42 of the Code to the Court to which it may have been transferred for execution and the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can only be done in a Civil Court. A Revenue Officer to whom a decree for ejectment is transferred for execution cannot execute it in favour of any one but the person named in it. If he executes it in favour of the heir of the deceased decree-holder the ejectment is entirely illegal and invalid. **N** KRISHNA BAI *v.* DEBISINGH, (1923) A. I. R. (N.) 195 **409**

——— **s. 47**—*Decree against assets of deceased debtor—Assets, attachment of—Objection by reversioner under O. XXI, r. 58—Reversioner no party to suit or execution proceedings—Objection allowed—Suit by decree holder to make assets liable in execution, maintainability of.*

Where a creditor obtains a decree against, and attaches the assets of, a judgment-debtor who has since died, and a reversioner, who was neither a party to the suit nor to the execution proceedings, prefers objections under O. XXI, r. 58 of the Civil Procedure Code, which objections are allowed, the decree-holder is entitled to bring a suit for declaration that the assets of the deceased debtor are liable to attachment and sale in the execution of the decree; such a suit is not barred by section 47 of the Civil Procedure Code. **A** BANSIDHAR *v.* SHAM LALL, (1923) A. I. R. (A.) 292 **1012**

——— **s. 47, O. XXI, r. 2, O. XXIII**—*Objection not raised in previous suit, if can be set up as defence in subsequent suit—Execution Court—Decree, modification of.*

An objection which could have been raised in a suit by the plaintiff under section 47 of the Code of Civil Procedure, can be made the ground of defence in a subsequent suit.

An Executing Court is not competent to enlarge, extend or modify a decree even by consent of parties subsequent to the decree unless it is in adjustment of the decree.

The only adjustment of a decree of which an Execution Court can take cognizance is the adjustment contemplated by O. XXI, r. 2 of the Civil Procedure Code.

Civil Procedure Code—1908—contd.

O. XXIII of the Civil Procedure Code, which deals with adjustment of suits, is not applicable to execution proceedings. **C** SURADHANI DUTTA *v.* SITOO SHEIKH, (1922) A. I. R. (C.) 311; 27 C. W. N. 280 **378**

——— **s. 92**, *application of.*

Section 92, Civil Procedure Code, does not apply to a suit in which the plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees, have been properly dismissed, and they seek possession on the ground that the defendants are mere trespassers. **A** INAYAT HUSAIN *v.* FAIZ MUHAMMAD, 21 A. L. J. 191; (1923) A. I. R. (A.) 319 **767**

——— **s. 92**, *suit under—Departure from arrangement of author of trust—Jurisdiction of Court—Scheme, framing of Court, duty of—Decree, form of.*

The institution of a suit under the provisions of section 92 of the Civil Procedure Code attracts the jurisdiction of the Court, and the Court has complete power to make such appointment of a trustee as it considers proper in the circumstances, though the appointment may involve a derparture from the arrangement contemplated in the constitution of the trust, but, except for a very strong reason, the Court ought not to depart from the arrangement contemplated by the settlor.

Where in a suit under section 92 of the Civil Procedure Code the Court refuses to frame a scheme to safeguard the interest of the trust it declines a jurisdiction which clearly it is its duty to assert. The fact that the trust deed does not contemplate a scheme in no reason why a scheme should not be framed by the Court.

In a suit for the administration of a public trust it is necessary, that in the decree liberty should be reserved to the parties to apply from time to time and so often as may be necessary, for the direction of the Court for administering the trust **Pat.** MUHAMMAD WAHEB HUSSAIN *v.* ABBAS HUSSAIN, 4 P. L. T. 326 **280**

——— **s. 95, O. XXXIX, r. 1** - *Injunction pending suit granted after hearing both parties—Petition for compensation, maintainability of.*

Where an order for injunction pending the disposal of a suit is passed after hearing both parties, a petition under section 95 of the Code of Civil Procedure for compensation for obtaining an injunction on insufficient grounds can, if at all, be maintained only when the suit is heard. Till then such an application does not lie. **M** CHINTAMANENI VENKATAPPAYYA *v.* CHINTAMANENI VENKATAPPAYYA, 17 L. W. 150; (1923) A. I. R. (M.) 352 **450**

——— **ss. 96, 100, 151, O. XLI, rr. 23, 27, O. XLIII, r. 1** - *Suit, dismissal of—Fresh evidence—Order for re-trial by Appellate Court—Inherent power—Order, if appealable.*

Where a suit is dismissed and upon appeal the plaintiff asks for permission to adduce fresh evidence which has become available long after the dismissal of the suit, an order made by the Appellate Court, setting aside the decree of the first Court and directing a re-trial of the suit with reference to that evidence is made in exercise of the inherent power of the Court and amounts to a decree as it reverses the decree of the Court of first instance and deprives the defendant of the valuable rights he had acquired thereunder. Consequently, the appeal is competent, not as an appeal from an order under O. XLIII, r. 1 (*u*) of the Code of Civil Procedure, but as an appeal from a decree under section 96 read with section 100 of the Code.

An order of the Settlement Authorities, pronounced in proceedings which are *inter partes*, is admissible in evidence in a civil suit. It is, no doubt, not conclusive but a presumption attaches to orders finally published under the Bengal Tenancy Act.

Where after a suit for partition of land is dismissed, the plaintiff asks the permission of the Appellate Court to adduce in evidence an entry in the Record of Rights published during the pendency of the appeal, there is sufficient cause within the meaning of O. XLI, r. 27 for allowing him to do so. **C** BHAIRAB CHANDRA DUTTA *v.* KALI KUMAR DUTTA **453**

——— **s. 105 (1), O. XXII, r. 9**— *Order setting aside abatement—Appeal.*

An order under O. XXII, r. 9 of the Civil Procedure Code setting aside an abatement is an order affecting the decision of the case on the merits within the meaning of section 105 of the Civil Procedure Code and can be objected to in appeal from the final decree which may be passed in the case. **L** AJUDHIA PARSHAD *v.* IMAM UD-DIN, (1923) A. I. R. (L.) 230 **587**

——— **s. 109** *Appeal to His Majesty in Council—Suit for dissolution of partnership and taking of accounts Suit dismissed as time-barred—Dismissal set aside by High Court on appeal and case remanded - Order of High Court, whether final—Final order, what is.*

A suit for dissolution of partnership and taking of accounts was dismissed as being barred by limitation: on appeal the High Court reversed this finding, and remanded the case to the lower Court with a direction to frame a preliminary decree and take further proceedings according to law: against this order application was made for leave to appeal to His Majesty in Council, and the question was whether the order was a "final order" within the meaning of section 100 of the Civil Procedure Code :

Held, that inasmuch as the finding on the question of limitation and its reversal on appeal respectively negatived and declared the plaintiff's right to relief the order sought to be impeached was a final order, and its character was not affected by the direction to frame a preliminary decree and take further proceedings, such direction being merely consequential on the decision

An order is final, within the meaning of section 109 of the Civil Procedure Code, if it finally disposes of the right of the parties on the matters in controversy between them in the suit. **M** SATHAPPA CHETTY *v.* SUBRAMANIAM CHETTY, 16 L. W. 718; 43 M. L. J. 758; 31 M. L. T. 385; (1922) A. I. R. (M.) 510 **334**

——— **ss. 109, cls. (a) and (c), 105, 97**— *Order of remand, when final—Pre-emption suit—Decree*

from pre-emptor pending suit, allowed or disallowed to continue suit - Appeal to His Majesty in Council --Fit case for appeal.

An order of remand to be a final order, within the meaning of section 109, clause (*a*) of the Civil Procedure Code, must be such as finally disposes of the rights of the parties in regard to the subject-matter of the litigation.

The determination of the right of a donee *pendente lite* to continue a suit for pre-emption brought by the donor, though involving an important subsidiary issue, cannot be said to finally determine the rights of the parties so as to bring the case within the purview of section 109, clause (*a*), Civil Procedure Code. Nor does it raise any question of public importance or general interest so as to fall under clause (*c*) of the section.

Obiter. - Sections 97 and 105 of the Code of Civil Procedure do not regulate the right of appeal to His Majesty in Council; for, an order, which the Court declares to be final, may yet be open to an appeal to His Majesty in Council, *e. g.*, where the order negatives the right of a donee *pendente lite* to continue a suit for pre-emption brought by the donor. **O** MOHAMMAD KARIM KHAN *v* SADIQ HUSAIN **339**

——— **s. 110**—*Privy Council appeal—Application for leave—Value of subject-matter on appeal—Suit for rectification of mortgage-decree—Substantial question of law.*

The plaintiff who had obtained a mortgage-decree in respect of a property instituted a suit for rectification of the decree on the allegation that there had been a mistake in the description of the property in the mortgage-deed and the decree, which should have included a 2-annas 4-*gandas* share of the mortgagor in a certain land which had been purchased by defendant No. 8 after the date of the mortgage with full knowledge of the mortgage and of the mistake which had occurred. The Trial Court decreed the suit and the High Court on appeal by defendant No. 8 confirmed that decree. In an application by defendant No. 8 for leave to appeal to the Judicial Committee of the Privy Council it was contended that though the value of the subject-matter of the suit was more than Rs. 10,000, the value of the subject-matter in dispute on appeal to His Majesty in Council was the market-value of the 2-annas and 4-*gandas* share claimed by the applicant, which, being less than Rs. 10,000, no leave could be granted under the provisions of section 110 of the Code of Civil Prodedure;

Held, (1) that as the plaintiff's claim against defendant No. 8 was not distinct from the mortgage transaction and as there was no claim by title paramount set up by the applicant, the value of the subject-matter in dispute on appeal to His Majesty in Council was not the value of the applicant's share of 2-annas 4-*gandas* but the value of the suit which was more than Rs. 10,000;

(2) that the question whether the plaintiff was entitled, as against defendant No. 8, to have the mortgage-deed and the decree rectified by the subsequent suit was a substantial question of law. **C** BEPIN KRISHNA ROY *v.* PRIYABRATA BOSE, (1923) A. I. R. (C.) 387 **371**

——— **ss. 114, 115**—*Review, order rejecting—Revision.*

An order rejecting an application for review is not open to revision except in the case of an obvious injustice. **L** TOLA RAM *v.* CHANDU MALTOTA RAM **160**

——— **s. 115**—*Appellate Court deciding Trial Court had jurisdiction—Revision.*

An appellate judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court, the lower Court having had jurisdiction to entertain and decide the appeal. **L** AYUB *v* KIRPAL SINGH **827**

——— **s. 115**—*Conditional order—"Case," decision of—Refusal to exercise jurisdiction.*

A conditional order in appeal declaring that the appeal will be dismissed if a certain amount of Court-fee is not paid within a fixed time;

(*i*) decides a 'case' within the meaning of section 115, Civil Procedure Code,

(*ii*) amounts to a refusal to exercise jurisdiction. **M** SUDALI MUTHU PILLAI *v.* SUDALI MUTHU PILLAI, (1922) M. W. N. 831; 17 L. W. 623; 623; (1923) A. I. R. (M) 270 **178**

——— **s. 115**—*Government of India Act* (5 & 6 *Geo. V, c.* 61) *s.* 107—*Interlocutory order—Revision—Superintendence, power of, when to be exercised.*

Where there is a right of appeal from the final order or decree which may be passed in a proceeding the High Court will not interfere with an interlocutory order passed in the proceeding in the exercise of its powers of revision or superintendence unless its interference is necessary on the ground of avoiding irreparable loss. **Pat.** HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH **911**

——— **s. 115**—*Jurisdiction, revisional—High Court of Kumaun, whether subordinate to High Court at Allahabad.*

The High Court of Kumaon is not a Court subordinate to the High Court at Allahabad for purposes of revisional jurisdiction. **A** SADAR SINGH *v.* AMAR SINGH, (1923) A. I. R. (A.) 291 **991**

——— **s. 115**—Revision. *See* SUCCESSION (PROPERTY PROTECTION) ACT, 1841, action under **32**

——— **s. 115**—*Revision—Question of law affecting jurisdiction—Material irregularity.*

An error of law which affects the jurisdiction of a Court is a ground for interference in revision under section 115 of the Civil Procedure Code. To assume jurisdiction to do a certain act by taking an erroneous view of the law, when there is really no jurisdiction, raises a case for interference under section 115 of the Civil Procedure Code.

Where, on a petition by a defeated candidate at an election for Presidentship of a Taluk Board, the District Judge set aside the election on an erroneous view of the law as to the eligibility of the successful candidate to stand for election and declared the defeated candidate as the duly elected President in contravention of the Election Rules, without giving the other candidate an opportunity

Civil Procedure Code—1908—contd.

to prove allegations of corruption, etc., under the rules;

Held, the Judge acted with material irregularity in the exercise of his jurisdiction and the order was liable to be set aside in revision. **M** RAMASWAMI GOUNDER *v.* MUTHU VELAPPA GOUNDER, 16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 133; (1923) A. I. R. (M.) 192 **1039**

——— **s. 115**—*Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute refused by Munsif but given by District Judge—Revision.*

Where sanction to prosecute has been refused by a Munsif and given by a District Judge under section 195 (6) of the Criminal Procedure Code, an application for revision of the District Judge's order is governed by the provisions of section 115, Civil Procedure Code, and not by the provisions of section 195 (6), Criminal Pocedure Code. **A** RAM NARAIN *v.* HARBANS SINGH **617**

——— **s. 115**—*Wrong decision on question of law—Revision.*

A wrong decision on a pure question of law, when the Judge has applied his mind to the question and has decided it to the best of his ability, is insufficient to bring a case within the provisions of section 115, Civil Procedure Code. **A** BHOLA NATH *v.* RAM SAHAI **472**

——— **s. 115, O. IX, r. 13**—*Guardian ad litem unfit to represent minor defendant*—Ex parte *decree—Restoration—Revision.*

The only point which a Court has to consider in an application for setting aside an *ex parte* decree, under O. IX, rule 13, Civil Procedure Code, is whether the defendant was prevented by any sufficient cause from appearing. Therefore, where a Judge holds that there was no guardian *ad litem* appointed for a minor defendant because the guardian appointed, though not actually insane, was of a childish and emotional temperament, and, therefore, not a fit person to represent the minor, he cannot refuse to set aside the *ex parte* decree against the minor on the ground that the minor was not prejudiced by the fact of his not being represented by his guardian, as the case was fully contested by his adult co-defendant brother.

If an *ex parte* decree is passed against a non-represented minor, there is sufficient cause for his non-appearance and restoration of the suit; and if the Judge refuses to restore it he fails to exercise a jurisdiction vested in him by law which he was bound to exercise. **A** PEARE LAL *v.* ASHRAF KHAN, 21 A. L. J. 185; (1923) A. I. R. (A.) 213 **456**

——— **s. 115, O. XVI, r. 19 (b), O. XXVI, rr. 1, 4**—*Revision — Interlocutory orders—Witnesses living more than 200 miles from Court-house—Commission for examination—Discretion of Court—'May issue commission,' meaning of.*

In a case where the lower Court has not obeyed the law, it is the duty of the High Court to interfere in revision even in interlocutory proceedings rather than permit a trial to go on, on an illegal course which must entail unnecessary expenses to the parties and useless waste of time.

Ordinarily, where a party asks for a commission for the examination of a witness who is not under the control of the party and who resides beyond the limits fixed under O. XVI, r. 19 (*b*) of the Civil Procedure Code, a commission should issue as a matter of right unless the Court is satisfied that the party is merely abusing its authority to issue a process, but it is not for the Court to decide whether he will be benefited thereby or not. That is a matter entirely for the party.

The words "may issue a commission" are used in O. XXVI, r. 4, Civil Procedure Code, in the same sense in which they are used in r. 1 of that Order mean 'is given authority to issue a commission.' **M** JAGANNATHA SASTRY *v.* SARATHAMBAL SASTRY, 44 M. L. J. 202; 17 L. W. 251; (1923) M. W. N. 157; (1923) A. I. R. (M.) 321 **530**

——— **s. 115, O. XXI, r. 89**—*Sale proclamation—Amount understated—Deposit of amount mentioned, whether compliance with rule—Execution sale, stay of, by Appellate Court—Sale held notwithstanding stay, effect of.*

To entitle a person to the benefit of r. 89 of O. XXI of the Civil Procedure Code, it is sufficient if he deposits in Court, besides the 5 per cent. commission for the auction-purchaser and the necessary costs, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. If the proclamation of sale is incorrectly drawn up and fails to specify the full amount for the recovery of which the sale was ordered, that is not a circumstance which can be invoked in derogation of the terms of the rule.

Where a competent Court of appellate jurisdiction directs an Executing Court not to proceed with a sale, a sale held in contravention of such order is a nullity having been made without jurisdiction, and it is competent to the High Court to interfere in revision. **A** ABDUL NASAR RASHIDUDDIN AHMAD *v.* LALTA PRASAD, 21 A. L. J. 162; (1923) A. I. R. (A.) 315 **1018**

——— **s. 141, O. IX, r. 4, O. XXI, r. 100**—*Application under O. XXI, r. 100, nature of.*

An application under O. XXI, r. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and O. IX, r. 4 would apply to such an application by force of section 141 of the Code. **Pat.** SHRONANDAN CHOWDHURY *v.* BIBI LAL CHOWDHURY, 4 P. L. T. 93; (1923) PAT. 78; 1 P. L. R. 134; (1923) A. I. R. (PAT.) 239; 2 PAT. 372 **484**

——— **s. 144**—*Court Fees Act (VII of 1870), Sch. II, Art 11—Restitution application—Appeal—Court-fee.*

Applications in restitution under section 144, Civil Procedure Code, are applications in execution;

and the Court-fee on appeals from orders disposing of such applications is leviable under Schedule II, Art. 11 of the Court Fees Act. **M** SUDALI MUTHU PILLAI *v.* SUDALI MUTHU PILLAI, (1922) M. W. N. 831; 17 L. W. 623; (1923) A. I. R. (M.) 270 **178**

——— **s. 148**, *applicability of—Time fixed by decree—Extension.*

Section 148 of the Civil Procedure Code does not apply to a case where time is fixed by a decree

Civil Procedure Code—1908—contd.

where, therefore, a decree in a pre-emption suit fixes the time for payment of the pre-emption money a Court has no power to extend that time. **N** AMBADAS *v.* LAXMAN, 19 N. L. R. 8 **401**

——— **ss. 148, 104**—*Pre-emption decree—Time for payment, whether can be extended — Appeal —Revision.*

Section 148 of the Civil Procedure Code does not entitle a Court to extend the time fixed by the decree for payment of the purchase-money in pre-emption cases.

An order made under section 148 of the Civil Procedure Code is not a decree and is not appealable as an order under section 104 of the Code.

The only way in which such an order can be set aside is by an application to the High Court in revision. **L** LABH SINGH *v.* GANPAT, (1923) A. I. R. (L.) 162 **35**

——— **s. 151** — *Inherent power to disregard —Limitation, whether exists.*

Where the Code expressly limits the powers of a Court, there cannot co-exist an inherent power in that Court to disregard that limitation. **M** MALAYANDI GOUNDAN *v.* BOMMAN POOSARI, 17 L. W. 159; (1923) A. I. R. (M.) 331 **204**

——— **ss. 151, 152** — *Appeal, decision of — Words "fails and is dismissed" used by mistake—Real intention to accept appeal—Clerical error—Duty of Court to correct.*

Where the context of a judgment shows that the intention of the Judge was to decree an appeal but that by a mistake he used the words "fails and is dismissed," the Court is bound to correct such clerical error at any time it is asked to do so. **O** MAHESA *v.* RAMESHAR **563**

——— **O. I, r. 3, O. II, r. 3**—*Suit for accounts against cashier and for negligence against supervisor—Misjoinder.*

A suit for accounts against the plaintiff's cashier and for negligence against his *Sadar Naib* making the latter liable to re-pay to the plaintiffs such sum of money as may have been lost by his failure in his duty to supervise the work of the cashier, is bad for misjoinder of causes of action and parties. **C** CHANDRA KUMAR BASU *v.* SASHIMUKHI DEBI **324**

——— **O. I, r. 10, O. VI, r. 17**—*Addition of co-plaintiff—Amendment—Duty of Court.*

An application, made at a very late stage, to join a person as a co-plaintiff, should be granted if it does not operate in any way to the prejudice of the defendant. It is the duty of a Judge to try to put an end, once for all, to all the questions that can arise in relation to a particular transaction.

Where an amendment is necessary for the purpose of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, Judges should make such amendments. **A** NOOR MAHOMED VEERJIBHAI VEELMAHOMED *v.* NATWAR LAL, (1923) A. I. R. (A) 112 **452**

——— **O. II, r. 2,** *application of—Suit by heir to recover property invalidly alienated by deceased—Subsequent suit for possession of other property, maintainability of — Cause of action, meaning of—Test.*

Civil Procedure Code—1908—contd.

If a Muhammadan sells some of his property to certain heirs, and after his death another heir sues for a declaration that the sale-deed is fictitious and without consideration and for possession of his legal share in the property covered by the sale-deed, the latter is not thereby precluded from bringing another suit subsequently for possession of his share in other items of property left by the ancestor. The causes of action in both the suits are different.

"Cause of action" means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.

One valuable test in considering whether causes of action are identical is, whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. **A** MUHAMMAD UMAR KHAN v. AMTUL RAHIM BIBI, 21 A. L. J. 267; (1923) A. I. R. (A) 311 **965**

——— **O. II, r. 2**—*Suit for possession—Subsequent suit for mesne profits, if maintainable.*

A suit for possession is no bar to a suit for mesne profits accrued due subsequent to the suit for possession. **C** EQUITABLE COAL COMPANY, LIMITED *v.* BAGALA SUNDARI DEBI **972**

——— **O. III, r. 4.** *See* LEGAL PRACTITIONERS ACT, ss. 13, 14 **81**

——— **O. III, r. 4**—Vakalatnama— *Omission of Pleader's name—Acceptance—Presentation—Requirements of valid* vakalatnama—*Plaint returned for presentation to proper Court*—Vakalatnama, *whether to be returned—Duty of Court—Prevention of injustice.*

The presentation of a plaint is not bad in law owing to the omission of the Pleader's name in the *vakalatnama* when it is otherwise clear that the *vakalatnama* was offered to and accepted by the Pleader making the presentation. Where a party delivers a duly accepted *vakalatnama* to a Pleader without putting his name in the body thereof he impliedly authorises the Pleader to fill in the detail and if the Pleader simultaneously accepts the *vakalatnama* and signs his name in token of acceptance the provisions of O. III, r. 4, of the Civil Procedure Code are sufficiently complied with.

If a plaint is returned for presentation to the proper Court the original *vakalatnama* enures for the purpose of the suit in the Court in which the plaint is subsequently filed under r. 4 (2) of O. III, of the Civil Procedure Code even if it contains no express provision to that effect.

Although O. III, r. 4 of the Civil Procedure Code, provides that the authorization of a Pleader must be in writing, this does not mean that such authorization must be in a particular form, or that it must show the Pleader's name in the main body of the document. So long as the authority is in writing and it states that the party authorizes the Pleader to act for him and is signed by the party and the Pleader, there is no relaxation of the provisions of the rule in accepting it. Courts are bound to be astute to prevent the defeat of a just claim, and it is their chief duty to prevent injustice and

Civil Procedure Code—1908—contd.

abuse of their process. **N** MAHARASHTRAYA JNAN KOSH MANDAL, LTD., *v.* EIJJULAL, 19 N. L. R. 36; (1923) A. I. R. (N.) 182 **436**

——— **O. VI, r. 17**—*Amendment—Description of plaintiff corrected—Limitation.*

No question of limitation arises in the case of an amendment of plaint when the description of the plaintiff is corrected and when there is no substitution or addition of a new plaintiff. **N** BAKARAM *v.* RAMCHANDRA, (1923) A. I. R. (N.) 90 **39**

——— **O. VI, r. 17**—*Amendment of plaint—Reviving barred claims, whether allowable.*

Per *Odgers, J.*—A plaintiff ought not to be allowed to amend his plaint by substantially altering his original claim and setting up fresh claims in respect of causes of action which, since the suit, have become barred by Statute of Limitation. **M** THIRUMALASSERI KOTTAYIL SREEDHARAM VALIA RAJAH *v.* PARAKKAT, (1921) M. W. N. 631; 41 M. L. J. 525 **270**

——— **O. IX, r. 4**, *applicability of.*

Section 141 of the Civil Procedure Code does not operate so as to make the provisions of O. IX, r. 4 of the Code and all cognate provisions applicable to execution proceedings. **Pat.** SHEONANDAN CHOWDHURY *v.* DEBI LAL CHOWDHURY, 4 P. L. T. 93; (1923) PAT. 78; 1 P. L. R. 134; (1923) A. I. R. (PAT.) 239; 2 PAT. 372 **484**

——— **O. IX, rr. 8, 9**—*Dismissal for default—Restoration.*

If, when a civil case is called for hearing, the plaintiff, instead of putting in an appearance in Court, goes to fetch his Pleader appearing in another Court, and in his absence the case is dismissed for default, he is not entitled as of right to have it restored, but the High Court may order its restoration, if in its opinion justice will be done by awarding costs to the defendant to indemnify him for any loss he may have been put to owing to the fault of the plaintiff. **A** BEHARI LAL *v.* MAQSOOD ALI, (1923) A. I. R. (A.) 189 **283**

——— **O. XVII, r. 3**—*Adjournment granted owing to non-service of summons on witness—Procedure.*

Where a party to a suit has paid the process-fee for the summoning of witnesses the Court and its officers are responsible for effective service, and the adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of O. XVII, r. 3 of the Civil Procedure Code.

If a Court is at any time of opinion that a party to the suit is obstructive and prevents witnesses from being served with summonses, it should record an order giving its reasons therefor and grant the party one more opportunity of producing its evidence under O. XVII, r. 3 of the Civil Procedure Code, on failure to do which the Court might proceed under that rule.

Order XVII, r. 3 of the Civil Procedure Code merely authorises a Court to proceed to decide the suit forthwith. It does not authorise it to dismiss it summarily. **L** KARAM CHAND *v.* JINDA RAM **862**

Civil Procedure Code—1908—contd.

——— **O. XX, r. 11**—*Instalments—Defendant claiming lenient treatment—Burden of proof—Facts disentitling defendant to lenient treatment.*

Where a defendant claims the assistance of the Court in the matter of fixing instalments for the payment of a decretal debt, the burden of proof lies heavily upon him to show that he is entitled to specially lenient treatment. The fact that the decretal amount represents a debt which has been accumulating for a considerable time, would of itself afford no ground for according lenient treatment, and the fact that the defendant disposed of his property, whether fraudulently or otherwise, immediately he became aware that a suit was about to be instituted, would disentitle him to such treatment. **Pesh.** GELA RAM *v.* JHANGI RAM **303**

——— **O. XXI, r. 2**—*Compromise decree directing payment to third person—Payment made but not certified—Recognition of payment by Court.*

The payment of money contemplated by O. XXI, r. 2, is not necessarily a payment to the decree-holder. If by a compromise decree the payment is directed to be made to a third person, it comes within the scope of the rule and if it is not certified in Court, as required by the rule, it cannot be recognised by the Court, even if its receipt is admitted by such third person. **A** MAHADEO PRASAD *v.* HAMIDAN, 21 A. L. J. 97; (1923) A. I. R. (A.) 271 **457**

——— **O. XXI, r. 11**—*Execution application—Previous application, date of, not mentioned—Defect whether material—Cross-decree, object of mentioning—Omission, whether material.*

Where there have been two previous applications for the execution of a decree and in the third application, the date of the disposal of the first application is stated but not that of the second, though the numbers of execution cases with regard to both the previous applications are stated, the defect is not material so as to vitiate the application for execution.

The object of mentioning a cross-decree in an application for execution seems to be that the Court may be in a position to see that the decree-holder in the one case does not take out execution without the cross-decree being set off. But the principle can have no application where the decree obtained by the decree-holder is in his personal capacity, and the decree obtained by the judgment-debtor is in his capacity as an executor. Consequently, omission to mention such a cross-decree in an application for execution, is not a material defect. **C** PROSANNA KUMAR CHAKERBUTTY *v.* JOTINDRA NATH BOSE **1054**

——— **O. XXI, r. 11**—*Execution of decree—Concurrent applications whether maintainable—Amendment of application—Jurisdiction of Execution Court.*

There is no provision of law which prevents a Court from entertaining concurrent applications for execution of the same decree, and r. 11 of O. XXI of the Civil Procedure Code is no bar to the maintenance of such applications.

A Court of execution has jurisdiction to permit the amendment of an application for execution by the addition of other properties to the list of proper-

ties sought to be attached. **Pat.** RAM SUMRAN PRASAD *v.* RAM BAHADUR, 4 P. L. T. 99; (1923) PAT. 61; (1923) A. I. R. (PAT.) 224; 2 PAT. 328 **741**

——— **O. XXI, rr. 35, 36**—*Case requiring actual possession—Symbolical possession, giving of, effect of.*

Where symbolical possession is delivered in a case in which actual possession ought to have been delivered, the symbolical possession will operate as actual possession. The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representatives. **Pat** PRATAP UDAI NATH SAHI DEO *v.* SUNDERDANS KOER, 3 P. L. T. 628; (1923) A. I. R. (PAT.) 76 **999**

——— **O. XXI, r. 57, O. XLI, r. 27**—*Execution of decree—Time granted for payment by decree-holder—Application dismissed—Attachment, whether ceases.*

Where in execution of a decree the decree-holder accepted a payment made by the judgment-debtor towards the satisfaction of the decree and agreed to grant time to the judgment-debtor for payment of the balance, and the Court thereupon dismissed the execution proceedings on part satisfaction:

Held, that the decree-holder by agreeing to grant time to the judgment-debtor having disabled himself from proceeding with the execution of the decree, the dismissal was due to his default and under O. XXI, r. 57 of the Civil Procedure Code operated to release the property attached under the decree from attachment. **Pat.** JAI KRISHNA *v.* BIBI SOGHRA, 4 P. L. T. 418 **881**

——— **O. XXI, r. 63**—*Attachment of debt—Objection dismissed—Finality of order.*

The procedure laid down in rules 58 to 63 of O. XXI of the Civil Procedure Code applies to a debt attached in execution of a decree, and an order dismissing the objection of the alleged debtor that no debt is due from him is binding upon him, if he does not institute a suit for a declaration within a year from the date of the order passed against him.

Unless such a suit is brought by the alleged debtor he cannot assert, in answer to a suit brought by the auction-purchaser of the debt for the recovery of the debt, that no debt was due from him. **L** PIARA RAM *v.* GANGA RAM **45**

——— **O. XXI, r. 63, O VII, r. 7**—*Nature and form of suit by decree-holder—Relief.*

A decree-holder has a statutory right to sue, under O. XXI, r. 63, Civil Procedure Code, in his personal capacity as a decree-holder, representing merely his own right, to have the property attached under his decree. He is not obliged to take the general ground that as against all other creditors and all other persons a mortgage or a sale is to be void.

After the passing of a money-decree the judgment-debtor mortgaged his property and in execution proceedings the mortgagee's objection to the attachment of the property was allowed and the decree-holder was directed to seek his relief by a civil suit. Before the lodging of the civil suit the property was sold by the judgment-debtor and the mortgage was redeemed by the vendee. The decree-holder attacked the validity of the said sale in his plaint, but prayed only for a declaration that the property was liable to attachment without mortgage incumbrance; and sought no relief regarding the sale, as he denied that the sale had really taken place:

Held, that the decree-holder was not obliged to ask for a separate relief voiding the sale.

A judgment-debtor is under no obligation to maintain his property intact for the decree-holder and even where his intention is clearly proved to be to defeat a decree-holder, he is entitled to do so.

Obiter.—The failure of consideration does not necessarily void a sale. **Pesh** LOK NATH *v.* THAKAR DAS **20**

——— **O. XXI, r. 90**—*Execution of decree—Sale, application to set aside—Irregularity—Substantial injury.*

A material irregularity in the publication or conduct of an auction-sale would not justify the setting aside of the sale in the absence of proof that substantial injury to the applicant had resulted therefrom. **L** NUR MUHAMMAD KHAN *v.* NOOR MUHAMMAD KHAN, 5 L. L. J. 30; (1923) A. I. R. (L.) 213 **730**

——— **O. XXII, r. 3, O. XLI, r. 4**—*Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties.*

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, r. 4 of O. XLI of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. **A** AMBIKA PRASAD *v.* JHINAK SINGH, 21 A. L. J. 91, (1923) A. I. R. (A) 211 **321**

——— **O. XXIII, r. 1 (3)**—*Withdrawal of suit—Application to withdraw whether terminates proceedings—Withdrawal of petition for withdrawal, when permissible.*

The presentation of an application by a plaintiff for the withdrawal of his suit, does not automatically terminate the proceedings in the suit, inasmuch as under rule 1 (3) of O. XXIII of the Civil Procedure Code, the withdrawal is not complete until the Court has made its award of costs. Where, therefore, a plaintiff applies for withdrawal on condition that the suit is dismissed without costs, unless and until the Court signifies its intention to pass such an order, the petition of withdrawal does not operate to terminate the proceedings in the suit, and it is open to the plaintiff, before such an order is made, to withdraw the petition for withdrawal. **M** LAKSHMANA PILLAI *v* APPALWAR ALWAR AIYENGAR, 31 M. L. T. 451; 44 M. L. J. 77; 17 L. W. 632; (1923) A. I. R. (M.) 246 **288**

——— **O. XXX, r. 1, Sch. II, r. 1**—*Arbitration—Suit between firms—Reference—Minor members, whether bound.*

Where a suit is brought by a firm against a firm acting under the provisions of O. XXX, r. 1, of the Civil Procedure Code, and a reference to arbitration is made by the parties as firms and an award is made against one of them as a firm and not against the individual members thereof, the

Civil Procedure Code—1908—contd.

reference or the award cannot be objected to on the ground that they are not binding on the minor members of the firm who did not join in making the reference. **L** FIRM BISHAMBAR MAL-PALA MAL *v.* FIRM GANGA SAHAI-NIHAL CHAND, 5 L. L. J. 5; (1923) A. I. R. (L.) 212 **784**

——— **O. XXXII, r. 3**—*Appeal—Death of joint plaintiff before hearing of appeal, effect of—Decree passed in ignorance of fact of death, validity of.*

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. **A** JHINAK SINGH *v.* AMBIKA PRASAD **424**

——— **O. XXXII, r. 3**—*Minor substantially represented—Assumption.*

Where a minor is substantially represented by a guardian *ad litem*, an appointment by the Court under O. XXXII, r. 3, of the Civil Procedure Code can be assumed from the action of the Court, provided that the guardian really acts in the interest of the minor and the minor is in no way prejudiced.

If the Court accepts the pleas of a major defendant on behalf of a minor defendant, the action of the Court amounts substantially to a recognition of the major defendant as guardian *ad litem* for the minor. **Pesh** CHET RAM *v.* KANSHI RAM **7**

——— **O. XXXII, rr. 3 (4), 4 (3)**—*Failure to serve notice on minor and guardian—Guardian appointed without express consent—Judgment passed against minor, whether null and void.*

The service of summons on a defendant and the service of notice under O. XXXII, r. 3 (4) of the Civil Procedure Code are but modes of exercise of jurisdiction and the mere fact, that summons is not served on the defendant, does not make the judgment null and void.

There is nothing in O. XXXII, r. 4 (3) of the Civil Procedure Code which requires the Court to record the consent of the guardian in the proceedings of the suit. **Pat.** SATDEO NARAIN *v.* RAMAYAN TEWARI, 4 P. L. T. 147; (1923) A. I. R. (PAT.) 242; 2 PAT. 335 **705**

——— **O. XXXII, r. 4**—*Guardian* ad litem—*Vakil, whether officer of Court.*

A Vakil is an officer of the Court for the purposes of O. XXXII, r 4 of the Civil Procedure Code. **A.** MOHAN LAL *v.* GANGA PRASAD, (1923) A. I. R. (A.) 298 **975**

——— **O. XXXII, r. 7**—*Next friend or guardian—Reference to arbitration—Agreement—Leave of Court—Irregularity.*

The next friend or guardian of a minor can make an agreement to refer to arbitration on behalf of the minor, under O. XXXII, r. 7, Civil Procedure Code, without the leave of the Court.

A mere irregularity in procedure in arbitration cases cannot vitiate a reference to arbitration where the interests of the minor have in no way been prejudiced.

Therefore, a reference to arbitration by the guardian of a minor does not fail on the technical ground that the leave of the Court was not expressly recorded. **Pesh.** CHET RAM *v.* KANSHI RAM **7**

Civil Procedure Code—1908—contd.

——— **O. XXXII, r. 11**—*Guardian* ad litem—*Notice to minor, necessity of—Guardian retiring during pendency of suit—Notice to minor of appointment of successor, whether necessary.*

Where a Court appoints a guardian *ad litem* for a minor it is not essential that notice of such appointment should be given to the minor.

Where a guardian *ad litem* retires during the pendency of the suit, the Court is not bound to issue notice to the minor before making an order appointing a successor, as such a course is not contemplated by O. XXXII, r. 11 of the Civil Procedure Code. **Pat.** RADHA KRISHNA GOPAL LALJI *v.* LAKSHMI NARAYAN, 1 P. L. R. 86; 4 P. L. T. 329; (1923) PAT. 159; 2 PAT. 273 **341**

——— **O. XL, r. 1**—*Receiver, appointment of—Notice—Discretion of Court—Instructions to Receiver—Appeal, whether lies.*

Rule 1 of O. XL of the Civil Procedure Code does not lay down that notice should issue before a Receiver is appointed, and in many cases the object of the appointment of a Receiver may well be nullified if notice were issued.

The question which the Courts have to decide in dealing with applications under O. XL, r. 1 of the Civil Procedure Code for the appointment of a Receiver is whether, in the circumstances of the case, the appointment of a Receiver is just and convenient, the main object being to preserve the property. The power is discretionary with the Court, but at the same time this discretion is not to be exercised arbitrarily but in a regulated manner.

No appeal lies against instructions issued by the Court to the Receiver. **L.** ISHRI *v.* SHIB RAM, (1923) A. I. R. (L.) 239 **743**

——— **O. XLI, r. 1**—*Appeal, or plaint, presentation of, during vacation, validity of—Appeal, presentation of, to Assistant Registrar, whether proper.*

There is nothing to prevent the presentation of a plaint or memorendum of appeal during a vacation or even on a Sunday, provided it is presented to a proper officer and that officer receives it.

The Assistant Registrar of the High Court of Judicature at Patna is not the officer expressly appointed by the rules of the Court to receive a memorandum of appeal. Therefore, a memorandum of appeal presented to him during the vacation should be deemed to have been presented on the re-opening of the Court when the Registrar actually receives it and stamped according to the law as to Court-fees in force on the day when the Registrar receives it and not when it was presented. **Pat.** ANAND RAM BRAHMAN *v.* RAMGULAM SAHU, 3 P. L. T. 820; (1922) PAT. 365; 1 P. L. R. 12; (1923) A. I. R. (PAT.) 150; 2 PAT. 264 **426**

——— **O. XLI, r. 19**—*Appeal dismissed for default—Application for restoration—Sufficient cause.*

When a Judge for any reason orders a case which is put down in the day's list for hearing to be put lower in the list he is not bound to give notice to the Counsel engaged in other cases.

Civil Procedure Code—1908—concld.

Counsel are expected to be present within the compound of the Court if they have any case in the day's list.

Where an application for re-admission of an appeal which had been dismissed for default alleged that the petitioner's Counsel had been unable to appear owing to the fact that an earlier case was put lower in the list without notice to him and his case was called much earlier than was expected:

Held, that this was not sufficient cause within the meaning of O. XLI, r. 19 of the Civil Procedure Code for re-admission of the appeal. **L** NANAK CHAND *v.* SAJJAD HUSSAIN **813**

—— —— **O. XLI, rr. 23, 24**—*First Court's finding on all issues—Power of Appellate Court to remand whole suit for re-trial after framing additional issues—Appeal.*

Where the Trial Court has framed and decided issues on all points arising from pleadings, it is not open to the Appellate Court, while framing additional issues, to remand the whole suit for re-trial under O. XLI, r. 23 of the Code of Civil Procedure as though the suit had been decided on a preliminary point.

If an appeal cannot be disposed of under O. XLI, r. 24 owing to some essential point not having been considered by the First Court, the proper course is to frame the essential issues and ask the First Court to return findings on them after giving opportunity to parties to adduce fresh evidence. **M.** MALAYANDI GOUNDAN *v.* BOMAN POOSARI, 17 L. W. 159; (1923) A. I. R. (M.) 331 **204**

—— **O. XLI, r. 25**—*Issue remitted for trial to lower Appellate Court—Remission by latter to Trial Court, legality of.*

Where an issue is remitted by the High Court for trial to the lower Appellate Court under O. XLI, r. 25 of the Civil Procedure Code, the latter has no power in its return to remit it to the Trial Court. The lower Appellate Court must itself comply with the order of the High Court. A delegation of its duty to the Trial Court renders the entire proceedings after the remand *ultra vires*. **L** UTTAM CHAND *v.* MUHAMMAD BAKHSH **896**

—— **O. XLI, rr. 25, 26, 31**—*Issues referred to lower Court—Return received—No objection made within time—Duty of Appellate Court.*

On the receipt of findings on issues referred to a lower Court, under r. 25 of O. XLI, Civil Procedure Code, it is the duty of the Appellate Court, under r. 31 of O. XLI, to consider the findings on the merits even if no objection has been preferred under r. 26 of O. XLI, within the time fixed by the Court **A** MUKHTARA *v.* SARDARA **444**

—— **O. XLI, r. 27**—*Appellate Court—Admission of additional evidence—Reasons not recorded—Findings vitiated.*

The admission of additional evidence by an Appellate Court without recording reasons therefor vitiates the findings of the Court. **A** ALI AHMAD *v.* KISHAN PRASAD **289**

—— **Sch. II, para. 1**, *applicability of.*

Paragraph 1 of the Second Schedule of the Civil Procedure Code does not apply to a case when the reference to arbitration is made without the intervention of a Court. **N** DHARNIDHAR *v.* SAKHARAM **860**

Companies Act (VII of 1913), s. 28—*Transfer of shares—Articles of Association.*

A share-holder in a Company has an absolute right to transfer his shares and the transfer is complete as soon as the parties sign the deed of transfer.

The Articles of Association of a Company provided that the Company could decline to register a transferee of its shares without assigning any reasons and that so long as a transferee's name was not registered the transferor would continue the owner of the shares;

Held, that the Articles of Association of the Company were meant to safeguard the interests of the Company and could not affect the right of a share-holder to transfer his shares or determine the rights and liabilities of a share-holder and his transferee *inter se*. **L** FIRM SAWAN MAL-GOPI CHAND *v.* SHIV CHARAN DAS **814**

—— **s. 186**—*Order directing payment of debts by contributory—Debts due by firm of which contributory is member—Contract Act (IX of 1872), s. 43.*

In order to make a contributory liable under section 186 of the Companies Act for payment of debts other than calls, the debts must be due from the contributory himself. Where debts are due from a firm of which a contributory is a member the payment of those debts cannot be enforced from the contributory under the provisions of section 186. Section 43 of the Contract Act has no applicability to such a case. **L** GOVIND SINGH *v.* OFFICIAL LIQUIDATOR, UNION BANK OF INDIA, LIMITED, DELHI, (1923) A. I. R. (L.) 85 **724**

—— **s. 235**——*Limitation Act (IX of 1908), s. 10, Sch. I, Art. 36—Application by Liquidator to recover compensation from Directors for misfeasance—Limitation.*

Section 10 of the Limitation Act applies to cases of express trust only. It has no application to the cases of Directors of Companies, as they are not persons in whom the property of the Company is vested within the meaning of that section.

Section 235 of the Companies Act of 1913 gives no new rights, but simply provides a summary mode of enforcing rights which must otherwise have been enforced by suit.

An application under section 235 of the Companies Act of 1913 to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance or breach of trust is, by virtue of clause (3) of the section, governed by Art. 36 of Schedule I to the Limitation Act, and is barred unless made within two years of the act complained of. **L** BANK OF MULTAN, LD., *v.* HUKAM CHAND **899**

Construction of document—*Mortgage*—Zarpeshgi *lease*—Raiyati *interest, transfer of*—*Lease, simple: by mortgagee in favour of mortgagor—Default in payment of rent—Suit by mortgagee—Bengal Tenancy Act (VIII of 1885), s. 48, application of.*

One *R*, a *raiyati* tenant, executed a *zarpeshgi* lease of his land in favour of one *T* for nine years in consideration of a specified amount. The document recited that *T* would hold possession of the *zarpeshgi* property and appropriate the produce thereof and pay a certain specified sum of money annually

Construction of document—contd.

to the proprietor of the village on account of the rent of the property, that at the end of the stipulated period the executant would re-enter into possession of the property on payment of the *pesghi* money and that in case of dispossession of *T*, the amount of the *pesghi* money would be realised with interest from the executant. Two days after the execution of the above document, *R* executed a *kabuliyat* in favour of *T*, which recited that he had taken a simple lease for a term of nine years of the property mortgaged by him with *T* two days before, that he would cultivate the land and appropriate the produce thereof from year to year till the expiry of the term of the *kabuliyat* and pay a fixed rent annually to the *malik*, *T*, the *zarpeshgidar*. *R* defaulted in payment of rent, and *T* brought a suit to recover the same. The defence was that *R* was an under-*raiyat* and *T* was not allowed to claim more rent than what he was entitled to under section 48 of the Bengal Tenancy Act:

Held, (1) that the *zarpeshgi* lease in favour of *T* was both a lease and a mortgage, that by it *R* transferred his *raiyati* interest to *T*, who thereby acquired the right to hold the land for the purpose of cultivating it and that, as *T* was to hold directly under the landlord and not under *R*, *R* ceased to be a *raiyat* as long as the lease was outstanding against him;

(2) that the simple lease in favour of *R* was not a lease of the *raiyati* interest of the land to the original *raiyat* as *R* was not to pay rent to the proprietor but to *T*, the *zarpeshgidar*;

(3) that, therefore, the rent recoverable by *T* was to be regulated by section 48 of the Bengal Tenancy Act, and *T* was not entitled to a greater rent than that to which he was entitled under that section;

(4) that the two transactions of the mortgage and the lease were separate and independent of each other and the mere fact that the lease was made in favour of the mortgagor would not alter the relation of landlord and tenant between the parties. **Pat.** CHATURGUN BIND *v.* TILAKDHARI SINGH **470**

——— *Mortgage-deed—Redemption clause—Evidence Act (I of 1872), s. 65—Secondary evidence admitted by Trial Court, Appellate Court, whether can reject.*

A mortgage-deed contained the following clause: "The agreement is that I shall redeem the property on payment of the above mentioned sum (*i.e.*, the principal money) within three years and shall pay interest at the rate of Re. 1-6 per cent. without objection. The mortgaged *haveli* shall remain in possession of the mortgagee who shall be responsible for repairs, etc;"

Held, by the majority (*Martineau, J.*, dissenting), that the conditions as to redemption on payment of the mortgage-money was complete in itself and the mortgagor was not bound to pay interest as a condition precedent to redemption.

Per *Harrison, J.*—Where secondary evidence is produced before the Trial Court and no objection is taken either by the opposite party or by the Presiding Officer, it is not open to the Appellate Court to reject that evidence. **L** JWALA SINGH *v.* TEJA SINGH **801**

Construction of document—concld.

——— *Question of law—Question of fact—Decision as to possession based on revenue entries.*

The term '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, while the effect of the words is a question of law.

If a Court, which reads entries in revenue papers, simply decides to what extent those entries indicate a party's possession of certain plots and does not interpret them to indicate any legal point, its decision interpreting the revenue papers is a decision of fact and not of law. **A** MUHAMMAD SHAKUR *v.* ABDUL GHANI, (1923) A. I. R. (A.) 362 **369**

———Wajib-ul-arz—Zemindar, *arbitrary right of, to turn out inhabitants—Proof required, nature of.*

Where the *wajib-ul-arz* of a village provides that "if the proprietors turn out, put out or eject any of the inhabitants," that does not mean that the *zemindar* can, without assigning some good cause, turn out any body, but it contemplates the turning out or ejectment of a person for good and sufficient cause.

A *zemindar* who claims an arbitrary right to turn persons out, must prove that right with great definiteness. **A** DINA SINGH *v.* DEVI CHAND, (1923) A. I. R. (A.) 203 **529**

Construction of Statutes.

Statutes imposing restrictions on the subject's rights should be strictly construed and such restrictions should not be extended beyond what the words used actually cover. **L** ZAMINDARA BANK, SHERPUR KALAN *v.* SUBA **722**

——— *Enactment reducing period of limitation.*

It is an established axiom of the construction of Statutes that, though procedure may be regulated by an enactment for the time being in force, the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it is expressed in unequivocal terms.

Where an enactment reduces the period of limitation provided for a suit by a prior enactment, all suits which would be barred by time under the new enactment at the date when it comes into force would continue to be governed by the old enactment, unless expressly provided for in the new enactment **Pat** GOKARAN PRASAD SINGH *v.* WARIS ALI, I P. L. R. 285 **957**

Contract Act (IX of 1872), s. 4—*Negotiable Instruments Act (XXVI of 1881), s. 4—Stamp Act (II of 1899), s. 2 (22)—Promissory-note—Letter requesting loan and promising re-payment—Suit based on promissory-note—Claim, nature of—Double claim—Suit on one claim—Amendment of plaint—Construction of document—Oral agreement to pay—Document referring to agreement, whether promissory-note.*

A letter requesting a loan and promising to re-pay the loan with interest by a certain date is not a promissory-note but merely a proposal within the meaning of section 4 of the Contract Act.

Contract Act—concld

Every suit based on a promissory-note comprises both a claim on the note itself and also one on the original liability. If a plaintiff sues on one of such causes of action and the right to sue thereon is not free from doubt, it is always open to the Court to direct the plaintiff to amend the plaint, so as to convert it into one based on both causes of action or treat it as so amended.

The defendant wrote to the plaintiff: "According to our friendly agreement, I would trouble you as a friend to get the execution file consigned to the Record-room at once. As agreed, I will pay up the remaining Rs. 1,400....without hesitation if God wills." In a suit brought on the document, the question was whether the document could be treated as a promissory-note and required to be stamped, and whether the plaintiff could be allowed to change the character of the suit and sue on the transaction referred to in the document:

Held, (1) that the document was not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act and section 2 (22) of the Stamp Act and did not require to be stamped. It merely contained a proposal that the oral agreement be acted on but it was not a document embodying that agreement;

(2) that the fact that the plaintiff sued upon the document as a promissory-note was no bar to his suing upon the transaction referred to in the document and using the document merely as evidence of the transaction and that the Court was entitled to treat the plaint as amended accordingly. **Pesh** SIKANDAR SHAH *v.* BHAI RAM CHAND-SANT RAM **968**

——— **s. 23**—*Agreement postponing registration—Fraudulent intention—Enforceability.*

Where the parties agree that a properly stamped deed of lease should not be executed and registered till after the Settlement, the object being to conceal the actual assets of the village and so to reduce the assessment of Land Revenue, the agreement is void under section 23 of the Contract Act and cannot be specifically enforced. **N** CHAGANLAL *v.* KASHIRAM, (1923) A. I. R. (N.) 76 **33**

——— **s. 65**—*Transfer, void — Transferee, rights of—Compensation.*

An agreement discovered to be void is one discovered to be not enforceable by law, and, on the language of section 65 of the Contract Act, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

Where an instrument of transfer is discovered to be void, because its subject-matter is incapable of being bound in the manner stipulated, the transferee is entitled to recover compensation, which should include the sum advanced by him and also interest at 6 per cent. from the date of the suit. **P. C.** HARNATH KUAR *v.* INDRA BAHADUR SINGH, (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346 **629**

Co-operative Societies Act (II of 1912), s. 43—*Rules framed under s. 43—Dispute between society and member—Jurisdiction of Civil Courts—Remedy.*

Co-operative Societies Act—concld.

The rules framed by the Punjab Government under section 43 of the Co-operative Societies Act lay down the procedure to be adopted in case of a dispute between a society and a member and the remedy provided by the rules in the shape of a reference to the Registrar takes away by necessary implication the common law remedy by way of an action in the Civil Courts.

The object of the Co-operative Societies Act is to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and it will be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive litigation. **L** ZAMINDARA BANK, SHERPUR KALAN *v.* SUBA **722**

Co-owners — *Improvements by one co-owner in possession—Other co-owners compensation by.*

One tenant-in-common, who makes improvements on the property of the co-tenancy without necessity or without the concurrence of the other co-owners, is ordinarily not entitled to compensation for doing so. **M** JANTAPURAM SUBBIAH *v.* GUNDALAPUDI, 17 L. W. 77, 44 M. L. J. 43; (1923) M. W. N. 13, (1923) A.I.R. (M.) 358; 46 M. 104 **374**

Co-sharers—*Common* parti *land—Cultivation by one co-sharer— Other co-sharers, whether entitled to decree for joint possession—Decree, form of.*

If one of the co-sharers brings common *parti* land under cultivation, there is no objection to other co-sharers being granted decree for joint possession with him.

The proper decree in such a case is to declare that the plaintiffs are co-owners of the land in dispute under the cultivation of defendant and to award them joint possession along with the defendant. **A** BADRI UPADHIA *v.* DWARKA UPADHIA **559**

——— *Joint land—One co-sharer in exclusive possession—Ouster by another co-sharer Exclusive possession, whether can be restored—Damages.*

No co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained. If ousted, he is entitled to be restored to the actual possession which he had before and not merely to joint possession with the co-sharer ousting him. He is also entitled to a decree for damages. **A** RAM HARAKH PANDEY *v.* CHUNI SINGH **649**

——— *Joint possession—Decree.*

A decree for joint possession may be given in a suit between co-sharers.

The mere fact that a decree for joint possession might lead to difficulty and trouble by reason of the parties not being on good terms, is not sufficient for refusing a co-sharer a decree for joint possession, though there may be cases in which such a decree ought not to be granted. **A** BHIRGUNATH RAI *v.* APNARAIN RAI **455**

——— Shamilat — *Exclusive possession — Injunction—Suit by one co-sharer.*

Where a co-sharer builds without the permission of the other co-sharers over a portion of the village *shamilat* which is not likely to be partitioned

Co-sharers—concld.

and converts it to his own exclusive use, any other co-sharer may sue to restrain such user, and it is not necessary for him to prove special damage. **L** RUSTAM KHAN *v.* RAHMAN, (1923) A. I. R. (L.) 289 **47**

Court-fees—*Suit against several defendants—Decree against one—Appeal in order to make others liable—Court-fee payable on memo. of appeal.*

Where the Trial Court grants the plaintiff a decree against one of several defendants and the plaintiff appeals with the object of getting the other defendants made jointly liable for the amount decreed, the memorandum of appeal ought to bear an *ad valorem* Court-fee stamp. **L** RAM KISHAN *v.* HIRDE RAM, (1923) A. I. R. (L.) 135 **737**

Court-Fees Act (VII of 1870), s. 7 (iv) (c)—*Suit for declaration that certain sum settled as maintenance and for amendment of document—Nature of suit—Declaration with consequential relief—Court-fee payable—Specific Relief Act (I of 1877), s. 31.*

A suit asking for a declaration that a certain sum of money was settled as the maintenance of the plaintiff, and for the amendment of a document to this effect, is, strictly speaking, a suit for a declaration with consequential relief under section 31 of the Specific Relief Act, and, for purposes of Court-fees and jurisdiction, it is governed by section 7 (*iv*) (*c*) of the Court Fees Act. **N** BARI BAHU *v.* KUNDAN SINGH, (1922) A. I. R. (N.) 64 **31**

Court-sale—*Antecedent claim—Notice—Transfer of Property Act (IV of 1882), s. 40.*

Where a person purchases at a Court-sale, his title cannot be invalidated by vague references to antecedent contracts.

In the case of the Court-sale of certain property belonging to *A* which he had contracted to sell to one *B* a Pleader acting on behalf of the latter arrived at the sale about an hour after it had begun and after reading the agreement between *B* and *A* which was in English, made a general statement in the vernacular that his client would claim the property, saying further, that his client would himself bid at the sale. The question was whether the purchaser had sufficient notice of the contract so that *B* could enforce his claim against him under section 40 of the Transfer of Property Act:

Held, that the statements made by the Pleader fell far short of such unequivocal notice as was required in the case of a Court-sale. **P C** NUR MAHOMED PEERBHOY *v.* DINSHAW HORMASJI MOTIWALLA, (1922) A. I. R. (P. C.) 393 **625**

Criminal Law Amendment Act (XIV of 1908), s. 17 (2), *offence under*—Prima facie *case.*

A Police Report which merely states that action should be taken against a person on the ground that he had been assisting volunteers by giving them shelter in his house, is insufficient upon which to institute proceedings against that person under section 17 (2) of the Criminal Law Amendment Act, as it fails to make out a *prima facie* case in respect of the offence described in that section. **C** PARMANANDA *v.* EMPEROR, 36 C. L. J. 179; (1922) A. I. R. (C.) 538; 24 CR. L. J. 1 **49**

Criminal Procedure Code (Act V of 1898), ss. 10 (2), 197—*Additional District Magistrate, powers of.*

Where, under section 10 (2) of the Criminal Procedure Code, the Local Government appoints an Additional District Magistrate and confers upon him "all the powers of a District Magistrate under the Code," such powers are not confined to those enumerated in Schedule III (*v*) of the Code, but include all powers with which a District Magistrate is invested under the Code, and where one of the powers exercised by a District Magistrate is the power to pass an order of sanction under section 197, it is within the competence of an Additional District Magistrate, empowered under section 10 (2), to exercise this latter power. **M** KAKARLA CHINNA CHENDRAYYA *v.* MADDUKURI SUBBARAYUDU, 17 L. W. 226; (1923) M.W.N. 77; 24 CR. L. J. 116; (1923) A. I. R. (M.) 328 **244**

——— **s. 106**—*Assault—Penal Code (Act XLV of 1860), ss. 325 351, 352—Grievous hurt, voluntarily causing, whether assault—"Breach of the peace," meaning of*

An offence under section 325 of the Penal Code involves the use of criminal force and is; in that sense, an assault, but the word "assault," as used in section 106 of the Criminal Procedure Code, refers to the offence of assault as defined in section 351 of the Penal Code and made punishable by section 352.

The expression "breach of the peace;" used in the accepted meaning which it bears in England; implies some offence against the public. **O** DUBRI *v.* EMPEROR, 8 O. L. J. 318 **691**

——— **s. 106**—*Penal Code (Act XLV of 1860), s. 342—Wrongful confinement, conviction for—Order for security, whether can be made.*

An order under section 106 of the Criminal Procedure Code can only be made where a person is convicted of one of the offences specifically mentioned in the section or an offence of which a breach of the peace is in law a necessary ingredient.

It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement, and, therefore, an order under section 106 of the Criminal Procedure Code cannot be passed where a person is convicted of the offence of wrongful confinement. **L** MUHAMMAD AFZAL *v.* EMPEROR **879**

——— **s. 107**—*Notice of proceedings cancelled owing to complainant's absence—Discharge—Magistrate's authority to re-institute enquiry—Institution of second case after discharge, whether barred.*

An order cancelling a notice of proceedings under section 107, Criminal Procedure Code, owing to the absence of the complainant on the date fixed for the hearing of the case, amounts to an order of discharge and not to an order of acquittal.

A Court which has passed an order of discharge cannot re-open the same case but there is no bar to a second case being instituted.

Therefore, if after the cancellation of notice and the discharge of the accused, owing to complainant's; absence in proceedings under section 107; Criminal Procedure Code, a fresh complaint is

filed there is no bar to the complaint being entertained. **A** JASUA *v.* EMPEROR, 21 A. L. J. 215; (1923) A. I. R. (A) 332 **696**

———**s. 107,** *proceedings under—Mere apprehension of breach of peace sufficient—Information required for starting proceedings, nature of.*

Where a dispute exists between two rival Zemindars, although no riot or unlawful assembly has taken place, an apprehension of a breach of peace is sufficient for drawing up proceedings under section 107 of the Code of Criminal Procedure, but it must also be shown that the particular persons, against whom proceedings are drawn up, were likely to commit a breach of peace. The mere fact that certain persons are interested in a dispute does not by itself afford a ground for taking proceedings against them.

Information of the kind mentioned in section 107 of the Code must be of a clear and definite kind directly affecting the person against whom process is issued and it should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet. Where persons belonging to the same party are acting in concert with a common object in view, it may not be necessary to specify particular acts against them, still it is essential that the information upon which the process is issued, should disclose "tangible facts and details." **C** AINUDDIN *v.* EMPEROR, (1922) A. I. R. (C.) 97 **694**

———**ss. 110, 192** — *Transfer of proceeding under s. 110—Information, receiving of.*

Inasmuch as a proceeding under section 110 of the Criminal Procedure Code is a case, the transfer of such a proceeding from the Court of one Magistrate to that of another is authorised by section 192 of the Code.

The law in no way limits the method in which a Magistrate is to receive information under section 110 of the Criminal Procedure Code. Where information addressed to one Magistrate is sent on by him to another, there is nothing in section 110 of the Criminal Procedure Code to preclude the latter from acting on the information so received. **Pat.** HIRANAND OJHA *v.* EMPEROR, 1 PAT. 621, (1922) A. I. R. (PAT.) 586; 4 P. L. T. 44; 24 CR. L. J. 31 **79**

———**ss. 110, 195**—*Habitual offenders, joint trial of.*

Proceedings against a man for *badmashi* should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable. **A** ANGNOO SINGH *v.* EMPEROR, 20 A. L. J. 881 (1923) A. I. R (A.) 55; 45 A. 109 **865**

———**s. 125** — *Application under section whether appeal—Bond to keep the peace—District Magistrate's power to cancel.*

An application under section 125, Criminal Procedure Code, is not an appeal and does not give power to the District Magistrate to review an order passed by a Deputy Magistrate on the ground that it was improperly passed.

It is open to a District Magistrate to set aside, under section 125, Criminal Procedure Code, a bond to keep the peace if, on such evidence as may be laid before him, he finds that the danger of a breach of the peace no longer exists. **A** RAM DIN SINGH *v.* NAUJADAK SINGH, 24 CR. L. J. 204 **668**

———**s. 144** — *Dispute concerning conduct of prayers in mosque—Breach of peace—Order forbidding reading of prayers, whether proper—Procedure.*

In a dispute concerning the conduct of prayers in a mosque, there being an apprehension of a breach of the peace, the Magistrate drew up a proceeding under section 144 of the Criminal Procedure Code, and eventually recorded an order that "no man of either party will be allowed to read prayers in the mosque:"

Held, that the order was misconceived; that if the effect of the order was that no Muhammadan would be allowed to say his prayers in the mosque, it was not justified under section 144 of the Criminal Procedure Code, and that the proper course was for the Magistrate to ascertain which party was in the wrong and was interfering unnecessarily with the legal exercise of the legal powers of the other party, and to bind down that party restraining them from committing any act which may lead to a breach of the peace. **C** MOHAMMAD ISMAIL *v.* BARKAT ALI, 26 C. W. N. 904; (1922) A. I. R. (C.) 483; 24 CR. L. J. 154 **506**

———**s. 144,** *scope of*—Ex parte *order, legality of—Holding* hat *on one's own property — Breach of peace—Proper procedure.*

Every person is ordinarily entitled to exercise all rights of ownership on his property, and the holding of a *hat* on one's own property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with this lawful exercise of a person's right of ownership, when such exercise, in its ulterior consequences, and being directed primarily against the lawful exercise of another person's right of ownership, is likely to cause a breach of the peace.

An order prohibiting a party from ever holding a *hat* at any place on his own property is not competent under section 144, Criminal Procedure Code.

It is not proper for a Magistrate to pass an *ex parte* order under section 144, Criminal Procedure Code, and, when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters ought to be disposed of quickly in order to avoid unnecessarily encroaching on the civil rights and liberties of the subject. **C** BENOWARI LAL RAM *v.* PRONAB KRISHNA MAJUMDAR, 24 CR. L. J. 164; 35 C. L. J. 397; 26 C. W. N. 663; (1922) A. I. R. (C.) 569 **516**

———**s. 145,** *applicability of — Dispute with regard to sub-soil rights—Possession, meaning of —"Land," whether includes mining rights.*

The provisions of section 145 of the Criminal Procedure Code may be used in disputes with regard to sub-soil rights, and the fact that other proceedings might have served equally well

Criminal Procedure Code—contd.

to preserve tranquillity is no ground for holding that the Magistrate has no jurisdiction to have recourse to that section.

Per *Suhrawardy, J.*—The definition of land, as given in the Criminal Procedure Code, is wide enough to cover mining rights and even prospecting or boring licenses. **C** BIMALA PROSAD MOOKERJEE *v.* TATA IRON AND STEEL CO. LD., 35 C. L. J. 456; (1922) A. I. R. (C.) 83; 24 CR. L. J. 108 **236**

——— **s. 145**—*Costs to successful party—Notice.*

Mere delay in applying for costs in proceedings under section 145 of the Criminal Procedure Code does not affect the jurisdiction of the Magistrate to award costs, but no order as to costs can be made without notice to the party affected. **M** PALANIANDI SERVAI *v.* SAMMANDI AMMAL, 16 L. W. 613; (1923) A. I. R. (M) 87; 24 CR. L. J. 80 **128**

——— **s. 145**—*Different plots of land—Possession with different person—Single proceeding—Jurisdiction.*

One proceeding, taken under section 145, Criminal Procedure Code, in respect of different plots of land in the possession of different persons is not without jurisdiction. **C** SAJANI KANTA ROY *v.* SHAMSHER ALI SHEIKH **699**

——— **s. 145**—*Dispute relating to land—Possession delivered by Civil Court, effect of.*

Though, ordinarily, a dispute relating to land should be enquired into in a proceeding under section 145 of the Criminal Procedure Code, yet when possession in the land is vested in one party as against every person claiming to be in possession of the property by reason of a writ of delivery of possession issued by a Civil Court, for instance, under O. XXI, r. 95 of the Civil Procedure Code, section 145 has no applicability. **Pat.** KAMLA PRASAD SINGH *v.* GOBIND SAHAY; 3 P. L. T. 829; (1922) A. I. R. (PAT.) 13 **785**

——— **s. 145**—*Magistrate, duty of, to complete enquiry.*

After proceedings are started and a preliminary order is passed under section 145 of the Criminal Procedure Code, it is the duty of a Magistrate to complete the inquiry. **M** VIRAPPA CHETTIAR *v.* KATHAYEE AMMAL, 16 L. W. 592; (1923) A. I. R. (M.) 180; 24 CR. L. J. 64 **112**

——— **s. 145**—*Magistrate, whether restricted to property mentioned in Police report—Mines and minerals, proceedings whether applicable to.*

A Magistrate taking action under section 145 of the Criminal Procedure Code is not restricted to the letter of the Police report or information on which he takes action. He should consider as a whole the Police report or information given to him and satisfy himself as to the real subject-matter of the dispute between the parties.

If a party under a mining lease is in actual possession of the mines and minerals it cannot only enforce its possession by a civil suit but can claim to be maintained in its possession by an order under section 145 of the Code of Criminal Procedure.

But the question whether a proceeding under section 145 is appropriate must be determined

Criminal Procedure Code—contd.

with reference to the circumstances of each case. **Pat.** MAHADEO DUTT *v.* J. N. SARKAR, (1922) PAT. 122; (1922) A. I. R. (PAT.) 340 **871**

——— **s. 145**—Order passed against head of joint Hindu family, whether binding on family. *see* LIMITATION ACT, 1908, SCH. I, ART. 47 **402**

——— **s. 145**—*Possession adjudged—Disturbance of possession—Maintenance of peace—Fresh proceedings under s. 145—Wrong exercise of judicial discretion.*

Where by an order passed under section 145, Criminal Procedure Code, the possession of a party has been once adjudged, the duty of the Magistrate is to see that the unsuccessful party does not disregard the order and disturb the possession without having recourse to law. Therefore, if, instead of maintaining the possession, he initiates fresh proceedings under section 145, Criminal Procedure Code, for maintaining the peace, he does not exercise a proper judicial discretion. **C** ARAN SARDAR *v.* HARA SUNDAR MAJUMDAR, 27 C. W. N. 171, 37 C. L. J. 39; (1923) A. I. R. (C.) 95; 24 CR. L. J. 97 **225**

——— **s. 145**—*Preliminary order—No finding as to possession—Revision.*

Where in a preliminary order made by a Magistrate in a proceeding under section 145 of the Criminal Procedure Code, there is no finding regarding possession of the property in dispute, but there are very general observations in regard to the ownership of the property, the order constitutes an infringement of the provisions of sections 145 and 146, and being without jurisdiction, the High Court is justified in setting aside such order, in the exercise of its revisional jurisdiction, as null and void. The mere fact that the order purports to be passed under section 145, will not bring it within that section. **M** SINANAN SHUKULATHI ROWTHER *v.* GULAM MOIDEEN, 16 L. W. 338; (1922) M. W. N. 689; (1823) A. I. R. (M.) 21; 24 CR. L. J. 150 **508**

——— **s. 145**, *proceedings under—Dispute settled—Proceedings whether can be renewed—New proceedings on same materials unjustified.*

Proceedings under section 145 of the Criminal Procedure Code cannot be renewed after the dispute has been settled and an order has been made that the case be struck off, nor would a new proceeding be justified only on the materials upon which the previous proceeding was based. **L** GHULAM MUHAMMAD *v.* EMPEROR, 3 L. 403; (1923) A. I. R. (L.) 81; 24 CR. L. J. 160 **512**

——— **s. 145**, *proceedings under—Possession of parties not continuous—Proceedings, whether proper.*

An enquiry under section 145 of the Criminal Procedure Code must be directed to the decision of the absolute continuing possession of either party of the subject-matter of dispute.

A *hat* which is held on one day a week is not a proper subject-matter for proceedings under section 145 of the Criminal Prodecure Code between the proprietor thereof and the stall-holders where the latter do not lay any claim to actual possession of any stall for the other days in each week. Under such circumstances an order of the Magistrate under section 145 declaring the stall-

holders to be in possession of the stalls is without jurisdiction.

In proceedings under section 145 of the Criminal Procedure Code, the element of continuity of possession is an ingredient which is necessary, at any rate, in cases where interruption is not due to seasonal variations. **C** NAYAN MANJURI DASI *v.* FAZLEY HUQ SARDAR, 49 C. 871; (1992) A. I. R. (C.) 5 2; 24 CR. L. J. 175 **527**

——— **s. 145, 146**—*"Land," meaning of—House, furnished, dispute concerning—Furniture, attachment of.*

In a proceeding under section 145 of the Criminal Procedure Code, the jurisdiction of the Magistrate to attach the subject of dispute is confined to "land;" and where this "land" consists of a furnished house he can attach the house but not the furniture or other moveable property in it. **A** GAJRAJ SINGH *v.* EMPEROR, 20 A. L. J. 906; (1922) A. I. R. (A.) 528; 24 CR. L. J 85 **213**

——— **ss. 145, 146**—*Presumption of possession arising from title, when can be applied—Evidence as to possession equally unreliable on both sides—Principle, whether applicable—Attachment of subject-matter of dispute.*

Where in a proceeding under section 145 of the Code of Criminal Procedure a Magistrate finds on each side evidence, which in itself is reliable and he finds that the evidence on the one side and the evidence on the other side is equally balanced and he is unable to conclude from such evidence which party is in possession, then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he has found to be in that side. The principle, however, does not apply to a case when the Magistrate has come to the conclusion that the evidence as regards possession is equally unreliable on both sides. In such a case the Magistrate should attach the subject-matter in dispute by putting in force the provisions of section 146 of the Code. **C** AKSHOY KUMAR BHATTACHARJEE *v.* BROJESWAR GHATTAK, 28 C. W. N. 1000; 24 CR. L. J. 141; (1923) A. I. R. (C.) 303 **365**

——— **ss. 145, 439**—*Dispute concerning land—Delivery of possession under decree of Civil Court, effect of—Failure to maintain possession under decree—Illegality.*

A recent delivery of possession by a Civil Court binds a Criminal Court in a proceeding under section 145 of the Criminal Procedure Code, and the Criminal Court must uphold that possession. The failure of a Criminal Court to maintain such possession in a proceeding under section 145 of the Criminal Procedure Code amounts to an error of jurisdiction which vitiates the order of the Magistrate. **Pat.** PRATAB UDAI NATH SAHA DEO *v.* SUNDERBANS KOER, 3 P. L. T. 62; (1923) A. I. R. (PAT.) 76; 24 CR. L. J. 279 **999**

——— **ss. 145, 439**—*Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Revisional powers of High Court.*

Where there is initial want of jurisdiction, proceedings, though they may purport to be under section 145 of the Criminal Procedure Code, are not really proceedings under that section and the High Court can interfere under section 439 of the Criminal Procedure Code. But if the proceedings were properly started, the High Court can interfere only under section 107 of the Government of India Act on the ground of irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it, serious enough to vitiate the order.

Section 145 does not apply where the parties have joint possession. Where in proceedings under section 145, a perverse finding is arrived at by a Magistrate after getting rid of the documentary evidence by incorrectly saying that it relates to the legal title only, and by getting rid of oral evidence by saying, without assigning any reason, that it is unnecessary to enter into it, there is no judgment or finding which a Court can accept and the High Court will interfere.

Kist receipts and *pattas* are not only evidence of legal right but strong evidence of possession which a Court cannot lightly disregard. **M** THYLAYEE AMMAL *v.* SRIRANGAROYA GOUNDAN, 24 CR. L. J. 100; 31 M. L. T. 202; 16 L. W. 497; (1922) M. W. N. 629; 43 M. L. J. 624; (1923) A. I. R. (M.) 60 **228**

——— **ss. 148 (3), 386,** *scope of—Costs awarded in proceeding under s.* 145—*Delay in applying to realize costs—Magistrate, power of, to refuse to realize costs—Limitation.*

Section 148 (3) of the Criminal Procedure Code merely points out the way in which costs awarded in a proceeding under section 145 are to be recovered, and does not give a Magistrate a discretion to refuse to recover such costs.

Inasmuch as a person to whom costs have been awarded has a period of six years within which to apply for the recovery thereof, the mere fact that there is delay, not exceeding such period, in applying to recover the costs, would not justify a Magistrate in refusing the application.

The use of the words "may in his discretion" in section 386 of the Criminal Procedure Code cannot be used for the purpose of interpreting the words "may be recovered" in section 148 of the same Code. The discretion in section 386 of the Code only refers to cases where there has been a conviction and sentence. **Pat.** HARENDRA KRISHNA BAGCHI *v.* BAL KUMAR, 3 P. L. T. 762; (1923) A. I. R. (PAT.) 57; 24 CR. L. J. 126 **254**

——— **s. 181 (2)**—*Criminal breach of trust, offence of—Forum—Jurisdiction of Criminal Courts.*

Accused was employed by a firm at Singapore, but had to account for all monies received by him at Calcutta; the firm filed a complaint against him of criminal breach of trust before the Presidency Magistrate at Calcutta, and it was contended that as the alleged offence was committed at Singapore, the Calcutta Court had no jurisdiction:

Held, that inasmuch as the accused had to account at Calcutta, the Calcutta Court had jurisdiction to adjudicate upon the complaint. **C** ABDUL LATIF YUSUF *v.* ABU MOHOMED KASSIM, 26 C. W. N. 175; (1922) A. I. R. (C.) 46; 24 CR. L. J. 113 **241**

——— **s. 183**—*Theft committed during journey—Jurisdiction—Place of trial.*

Criminal Procedure Code—contd.

Where a theft is committed in a train during the course of a journey the offence can, under the provisions of section 183 of the Criminal Procedure Code, be enquired into and tried by any Court having jurisdiction over any part of the territory through which the train passed in the course of that journey.

Accused, a Railway Guard, committed a theft in a train running from Delhi to Bhatinda. He was convicted by a Magistrate of the First Class exercising jurisdiction within the Ferozepore District. An appeal was preferred to the Sessions Judge and a doubt arose whether he was competent to hear the appeal;

Held, that inasmuch as a portion of the line between Delhi and Bhatinda passed through the Ferozepore District, the Sessions Judge of Ferozepore had jurisdiction to hear the appeal. **L** LAZARUS MIGH NATH *v.* EMPEROR, 24 CR. L. J. 253 **797**

——— **s. 195** —*Sanction to prosecute—Appellate Court, power of, to take additional evidence.*

An Appellate Court acting under section 195 (6) of the Criminal Procedure Code has ample power to examine any number of witnesses, or to take any evidence it thinks fit in order to satisfy itself whether it should or should not grant sanction or direct the prosecution of any person. **Pat.** RAMDHARI AHIR *v.* EMPEROR, (1922) PAT. 291 (1922) A. I. R. (PAT.) 52, 4 P. L. T. 370; 24 CR. L. J. 477 **997**

——— **s. 195** —*Sanction to prosecute—Death of applicant—Legal representative, whether can continue proceedings.*

In the case of an application for sanction to prosecute for an offence under section 193 of the Penal Code, if the applicant dies, sanction cannot, on that application, be granted to his legal representative. **M** GULAM MOHIDEEN *v.* AHAMADULLA BEGAM, 16 L. W. 581; (1922) M. W. N. 810; 44 M. L. J. 66; (1923) A. I. R. (M.) 206; 2 M. L. T. 102; 24 CR. L. J. 2; 46 M. 88 **49**

——— **s. 195**—*Sanction to prosecute—Deputy Tahsildar, whether "Court"—Document, forged, produced before Deputy Tahsildar—Sanction, whether necessary.*

A Deputy Tahsildar is a Revenue Court, and the sanction of that Court is necessary for parties to proceedings before him to be proceeded against with reference to a forged document filed before that Court, even though the inquiry in those proceedings was conducted through the Revenue Inspector. **M** MATTAN SHINNA VIRAIAH *In re*, 16 L. W. 534; (1923) A. I. R. (M.) 87; 24 CR. L. J. 15 **63**

——— **s. 195**—*Sanction to prosecute—Proceeding in contemplation before Criminal Court—False evidence, abetment of—Prosecution—Sanction, whether necessary—Pleader for accused, prosecution of, while proceedings pending, advisability of.*

Where a person instigates certain others to give false evidence in a criminal proceeding which is about to come before a Magistrate and does in fact come before that Magistrate, sanction, under section 195 of the Criminal Procedure Code, is necessary before a Court can take cognizance of a complaint against that person of the offence of having abetted the giving of false evidence,

Criminal Procedure Code—contd.

The prosecution of a Pleader defending an accused person for abetment of the giving of false evidence while the trial is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence has been appreciated by the Court, is inadvisable. If such a prosecution is to be started it ought to be started after the principal proceeding, in relation to which the offence is said to have been committed, has terminated. **B** VASUDEO RAMCHANDRA JOSHI, *In re*, 24 BOM. L. R. 1153; 24 CR. L. J. 171; (1923) A. I. R. (B.) 105 **523**

——— **s. 195** —*Sanction to prosecute—Sanction whether restricted to particular individual.*

A sanction for prosecution given by a Court under section 195, Criminal Procedure Code, 1898, is not a personal privilege granted to a petitioner but a decision that the case is one suitable for magisterial investigation, and, therefore, a sanction for prosecution does not lapse on the death of the person who obtained it.

Once a sanction is given by competent authority, there is nothing in section 195, Criminal Procedure Code, to restrict the sanction to the particular individual to whom it is granted. **L** GOPAL SINGH *v.* EMPEROR, (1922) A. I. R. (L.) 221, 24 CR. L. J. 185 **601**

——— **ss. 195, 439** *Order revoking sanction to prosecute—Revision—Sanction, grant of—Principles underlying*

An order revoking a sanction to prosecute might be treated, in effect, as an order refusing to grant the sanction and, whether section 195 (6) or section 439 of the Criminal Procedure Code is applied, the propriety of the order revoking the sanction or refusing to grant it can be considered by a High Court in revision.

The power to grant sanction under section 195 of the Criminal Procedure Code is included among the powers which can be exercised in revision under section 439 of the Code; and if this power can be exercised in a proceeding arising out of a trial in any of the lower Courts, it can also be exercised for discharging an order made by a Subordinate Court revoking the sanction granted by a Trying Magistrate.

No one should be permitted to use the penal law to satisfy his own private ends or personal spite; and if there is a *prima facie* ground for thinking that a charge is prompted by improper motives and is false and vexatious, the necessary elements to justify the grant of a sanction to prosecute are made out.

A sanction to prosecute granted by the Trial Court against a person instituting criminal proceedings ought not to be lightly set aside because of the mere existence of a possibility of the charge and the evidence adduced in support of it being true. **O** BRIJ KUMAR *v.* MANNA LAL MISRA, (1922) A. I. R. (O.) 18; 25 O. C. 153; 9 O. L. J. 662; 24 CR. L. J. 217 **681**

——— **s. 195 (b)**, *offences under—Sanction to prosecute—Abetment of offence—General sanction to prosecute, whether sufficient.*

A Court taking cognizance of any of the offences mentioned in section 195 (b) of the Crimi-

nal Procedure Code, when that offence has been committed in, or in relation to, any proceeding in or in any Court, or a Court taking cognizance of a conspiracy to commit such an offence, or of abetment, or attempt to commit such an offence, cannot do so unless sanction has been given not only to the *factum* but to cover the case of each person who is charged with having committed it. **A** RAM BILAS *v.* LACHMI NARAIN, 20 A. L. J. 694; (1923) A. I. R. (A.) 84; 45 A. 140; 24 CR. L. J. 220 **684**

——— **s. 195 (6)** *Sanction to prosecute Period of sanction, extension of—High Court, jurisdiction of Revocation of sanction, application for—Proceedings in pursuance of sanction, whether barred.*

The period of six months referred to in sub-section (6) of section 195 of the Code of Criminal Procedure begins to run from the date on which the sanction to prosecute is given by the Court to which the application for sanction was made.

The words used in sub-section (6) of section 195 of the Code of Criminal Procedure are wide enough to give the High Court jurisdiction to extend the time mentioned in that sub-section though the period of six months has expired and the sanction is no longer in force.

The High Court when considering an application for extension of the period of sanction, ought to be very careful not to extend the time unless it is clearly shown that "good cause" for extending the time exists within the meaning of the section.

An application for the revocation of sanction is no bar to the institution by the complainant of proceedings in pursuance of the sanction.

Where such proceedings are instituted, it is open to the Court to stay them pending the decision of the application for revocation. **C** RAM SARAN SINGH *v.* CHANDRA MOHUN SAHA, 24 CR. L. J. 94 **222**

——— **s. 195 (6), (7)**—*Sanction to prosecute Order of single Judge of High Court Appeal to Bench if lies.*

For the purpose of section 195, sub-section (6) Criminal Procedure Code, a Judge sitting on the Original Side is subordinate to the Bench hearing appeals from him.

An appeal lies to a Division Bench of the Appellate Side hearing appeals from the Original Side of the High Court, Madras, from an order of a Single Judge sitting on the Original Side giving, under section 195, Criminal Procedure Code, sanction for prosecution for an offence committed in relation to proceedings before him.

Per *Schwabe, C. J.*—An order granting sanction is made in the exercise of criminal jurisdiction and is not a judgment within the meaning of clause 15 of the Letters Patent

The expression "that is to say" in section 195 clause (*a*), is not comprehensive but is only illustrative and to some extent limits the effect of the preceding words. The correct construction of the section is that power to revoke sanction is granted to a Court which ordinarily hears appeals from the sanctioning Court, and where there are two Courts having the function of hearing appeals, or where there is no Court, power to revoke is given to that Court to which the sanctioning Court is subordinate.

Per *Coutts-Trotter, J.*—The expression "that is to say" in section 195, sub-section (7), means "in particular." **M** MUNISWAMI MUDALIAR *v.* RAJARATNAM PILLAI, 16 L. W. 305, 43 M. L. J. 375; (1922) M. W. N. 594, 31 M. L. T. 287, 24 CR. L. J. 78 **126**

——— **s. 196**—*Evidence Act (I of 1872), ss. 78, 79, application of—Sanction to prosecute signed for Chief Secretary, if evidence of authority of Local Government—Presumption—Magistrate initiating proceedings, if disqualified to receive complaint.*

A letter issued from the office of the Chief Secretary to the Government conveying sanction, under section 196, Criminal Procedure Code, to a prosecution under section 294 A of the Penal Code, which is not signed by the Chief Secretary, but by some other officer on his behalf is no legal proof that the Local Government has ordered or authorised the prosecution. The capacity of the Chief Secretary in such a case being that of a delegate of the head of the Local Government, the order could not be certified on his behalf. In such a case the order must be proved according to the provisions of section 78 of the Evidence Act.

There is no bar to a Magistrate receiving a complaint by reason of the fact that he submitted a report to Government for the purpose of obtaining the sanction required under section 196 of the Criminal Procedure Code. **C** MAHAMMAD OZIULLAH *v.* BENI MADHAB CHOWDHURY, 26 C. W. N. 878; 36 C. L. J. 180; (1922) A. I. R. (C.) 298; 24 CR. L. J. 111; 50 C. 135 **239**

——— **s. 197**, *order under, nature of—Reasons, whether should be recorded—Notice to accused unnecessary.*

An order of sanction under section 197 of the Criminal Procedure Code is more of the nature of an executive than a judicial order, and a Magistrate is not bound to record reasons for such an order, but the order should refer to some distinct offence and not be so vague as to make it obvious that the Magistrate had not come to a decision of his own that reasonable grounds existed for the prosecution.

It is not necessary that the accused should have notice before sanction is granted under section 197, Criminal Procedure Code. **M** KAKARLA CHINNA CHENDRAVVA *v.* MADDUKKURI SUBBARAYUDU, 17 L. W. 226; (1923); M. W. N. 77, 24 CR. L. J. 116; (1923) A. I. R. (M.) 338 **244**

——— **ss. 199, 345, 439**—*Prosecution under s. 498, Penal Code—Complaint by agent of absent husband—Competency of agent to compound offence—Acquittal on composition by agent—Subsequent complaint by husband, whether maintainable—Revision—Order of acquittal—Miscarriage of justice.*

An agent prosecuting under the powers granted by section 199 of the Criminal Procedure Code for the alleged abduction of another person's wife, under section 498 of the Penal Code, is not

Criminal Procedure Code—contd.

legally competent to compound the case under section 345 of the Criminal Procedure Code on behalf of the husband, whose interests would not be affected by the composition; and an order of acquittal based on such a composition is not justified.

Where, therefore, during the absence of a husband in jail his wife was enticed away, and his aunt instituted a complaint under section 498 of the Penal Code, but, subsequently, before the framing of a charge, withdrew it, whereupon the Magistrate, acting under section 345 of the Criminal Procedure Code, acquitted the accused:

Held, that the aunt of the husband was not competent to compound the offence; that the order of acquittal was not justified; and that the husband on release from jail was entitled to institute a complaint against the same accused and to have that complaint adjudicated upon.

The High Court will, in revision, interfere to set aside an order of acquittal which is illegal, having been passed on a composition which was invalid. **Peshi.** HARNAM SINGH *v.* SAIN DASS, 24 CR. L. J. 120 **248**

——— **s. 209**—*Discharge of some accused—Reasons not recorded before end of trial of others—Irregularity*

Where, during the course of a trial of several accused, some of them are discharged by the Magistrate, the discharge is not illegal merely because the reasons for discharge are not recorded till the end of the trial.

Per *Krishnan, J.*—A Magistrate is not bound to frame a charge of dacoity merely because there is evidence, if he thought that portions of that evidence essential for such a charge were not reliable. He has a discretion to weigh the evidence and discredit it when it is unacceptable. **M** NARAMBAN, *In re*, 15 L. W. 552; (1922) M. W. N. 320; (1922) A. I. R. (M.) 197, 24 CR. L. J. 260 **877**

——— **s. 226** *Sessions Court, power of, to frame additional charge.*

It is on the facts disclosed by the Magisterial inquiry, and on those facts alone, that any action under section 226 of the Criminal Procedure Code can be taken by the Sessions Judge.

Where the facts appearing in the Magisterial enquiry warrant the framing of a charge omitted by the Committing Magistrate, the Sessions Court has the power to add the charge so omitted. **L** MULA SINGH *v.* EMPEROR, 24 CR. L. J. 177 **593**

——— **ss. 233, 235**—*Charge—More than one distinct offence included—Offences arising out of same transaction—Trial, whether vitiated.*

A charge which relates to more than one distinct offence, is a bad charge under the law. But where in a trial the distinct offences included in the charge were one series of acts so connected together as to form the same transaction, and the accused could have been charged with, and tried at one trial for, each such offence, the fact that the charge contravened the law, would not vitiate the trial C RADHA NATH *v.* EMPEROR, 36 C. L. J. 149; (1922) A. I. R. (C.) 573; 24 CR. L. J. 72; 50 C. 94 **120**

Criminal Procedure Code—contd.

——— **ss. 235, 239**—*Gang taking part in several dacoities—Same object—Joint trial of offences and persons.*

Where a gang of dacoits assemble on a public highway and commit several acts of dacoity, each act of crime is committed in pursuance of the same object, it being immaterial whether all the members of the gang took an active part in each dacoity, or whether as many as five of them took an active part in any one dacoity. **A** RAM PARSHAD *v.* EMPEROR, 20 A. L. J. 926; (1923) A. I. R. (A.) 137; 24 CR. L. J. 153 **505**

——— **s. 236.** *See* CHARGES, MISJOINDER OF **214**

——— **s. 239**—*Joint trial—Prosecution, duty of—Dacoity and dishonest possession of property stolen—Joint trial, whether permissible.*

A separate trial being the rule and a joint trial the exception, it is always for the prosecution to justify a joint trial.

Where the evidence establishes an offence of dacoity and two offences of dishonest possession of stolen property knowing it to have been stolen in the commission of dacoity, all the offences must be held to have been committed in the same transaction, and a joint trial of the several persons participating in such offences is permissible under the provisions of section 239 of the Criminal Procedure Code. **A** DURGA PRASAD *v.* EMPEROR, 20 A. L. J. 981; (1923) A. I. R. (A.) 126; 24 CR. L. J. 149; 45 A. 223 **501**

——— **s. 239**—*Public Gambling Act (III of 1867), ss. 3, 4, offences under—Same transaction.*

The offence of keeping a common gaming-house and the offence of using it as such are offences committed in the same transaction. The trial, therefore, of the owner or keeper of a common gaming-house under section 3 of the Public Gambling Act, together with the trial of persons found gaming, or present for the purpose of gaming in such house under section 4 of that Act in one trial is not illegal. **A** GANESHI LAL *v.* EMPEROR, 20 A. L. J. 967; (1923) A. I. R. (A.) 88; 24 CR. L. J. 155 **507**

——— **s. 247**—*Case fixed for judgment—Complainant not directed to be present—Absence of complainant—Order of acquittal, whether legal.*

Where on the conclusion of a trial the case is adjourned to a subsequent date for delivery of judgment, without an express direction to the complainant to appear on the adjourned date, and the complainant fails to appear, the Magistrate is not justified in acquitting the accused under section 247 of the Criminal Procedure Code as that section is not applicable after the hearing of a case is concluded. **N** EMPEROR *v.* JANGUSINGH, 24 CR. L. J. 205; 19 N. L. R. 48; (1923) A. I. R. (N.) 158 **669**

——— **s. 250**—*Witnesses of complainant not examined—Order directing payment of compensation, legality of.*

Though compensation under section 250 of the Criminal Procedure Code can be awarded in exceptional cases before all the evidence for the complainant has been recorded, when there are witnesses present whom the complainant wishes to produce, the Magistrate should examine them

before passing an order awarding compensation. **L** DEWA SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 194; 24 CR. L. J. 251 **795**

——— **ss. 250, 107**—*Application to take security rejected—Order for compensation, whether can be made.*

A person whose application for security for keeping the peace, under section 107, Criminal Procedure Code, is rejected, cannot be ordered to pay compensation under section 250 of the Code. **A** RAM BADAN SINGH *v.* JANKI, 21 A. L. J. 207, (1923) A. I. R. (A.) 332; 24 CR. L. J. 228 **692**

——— **ss. 256, 537, (a)**—*Warrant-case—Accused, right of, to state his case before and after framing of charge—Irregularity.*

Where in a warrant-case the accused is examined only before the charge is framed, and not also after the prosecution witnesses have been re-called for further cross-examination under section 256 of the Criminal Procedure Code, the procedure cannot be regarded as a mere error, omission or irregularity such as is contemplated in section 537 (*a*) of that Code, because the accused is entitled to an opportunity of stating his case both before and after the charge is framed. **M** MARRUDA MATHU VANNIAN, *In re*, 16 L. W. 420; 43 M. L. J. 402; (1922) M. W. N. 601; 44 M. 820; (1922) A. I. R. (M.) 512; 24 CR. L. J 124 **252**

——— **s. 260**—*Summary procedure, adoption of, in middle of regular trial—Prejudice to accused.*

A Magistrate cannot, to the prejudice of the accused, change his procedure in the middle of a trial. Consequently, a Magistrate cannot, after examining the prosecution witnesses-in-chief in the regular manner, change his procedure to that allowed for summary trials, if such procedure prejudices the accused. **C** GOSTO BEHARY BASU *v.* BAISTOM DAS DENRE, 26 C. W. N. 831; 37 C. L. J. 105; (1923) A. I. R. (C.) 105; 24 CR. L. J. 157 **509**

——— **ss. 263, 370, 441** *S.* 441, *scope and effect of—Presidency Magistrate—Reasons for conviction, omission to record—Grave irregularity—High Court, when will interfere.*

Section 441 of the Criminal Procedure Code merely allows a Presidency Magistrate to supplement the reasons which have already been stated, under sections 263 and 370, for convicting an accused person. The effect of the section is not to abrogate the terms of section 263 or section 370, and the omission to record reasons is a grave irregularity which, in most cases, would be sufficient to warrant interference by the High Court. But where the reports submitted under section 441 of the Code contain good grounds for the decision, they may be considered as setting forth the reasons for the conviction, and if no substantial failure of justice has resulted, the High Court will not interfere. **M** DERVISH HUSSAIN, *In re*, 17 L. W. 18; 44 M. L. J. 84; (1223) A. I. R. (M.) 185; 32 M. L. T. 100; 24 CR. L. J 84; 46 M 253 **212**

——— **s. 342**—*Examination of accused—Proper time—Omission to examine at the proper stage—Illegality or irregularity.*

The duty of a Magistrate to examine an accused under section 342 of the Code of Criminal Procedure arises when the witnesses for the prosecution have been examined, cross-examined and re-examined.

The fact that an accused person pleads not guilty and promises to file a written statement, does not in any way exonerate or exempt the Court from examining him at a later stage as required by section 342.

A mere discussion between the Magistrate and the Counsel for the defence as to the number and nature of the witnesses to be examined on behalf of the defence is not a compliance with the provisions of the section, as it is necessary that the accused should be brought face to face solemnly with an opportunity given to him to make a statement in order that the Court may have the advantage of hearing his defence, if he is willing to make one, with his own lips.

To ask an accused for his defence before he has the whole of the prosecution evidence in front of him, is not a compliance with the section.

A trial becomes illegal from the moment when, without compliance with section 342 of the Criminal Procedure Code, the Magistrate calls upon the accused to enter on his defence. **C** PROMOTHA NATH MUKHOPADHYA *v.* EMPEROR, 27 C. W. N. 389; (1923) A. I. R. (C.) 470; 24 CR. L. J. 248 **792**

——— **s. 342**—*Omission to examine accused, effect of.*

A Magistrate is bound, under section 342 of the Code of Criminal Procedure, to question an accused after all the witnesses for the prosecution have been examined.

Therefore if a witness is examined after questioning the accused and the accused is not questioned again after the examination of that witness, his conviction is illegal. **C** GULZARI LAL, *v.* EMPEROR, 49 C. 1075; 24 CR. L. J. 3; (1923) A. I. R. (C.) 164 **51**

——— **ss. 342, 537**—*Examination of prosecution witness after statement of accused—Irregularity, whether curable.*

An error which in no way prejudices a person convicted and is not fatal to the validity of the decision and is concerned with the proceedings, rather than the mode of trial may be condoned under the provisions of section 537 of the Criminal Procedure Code.

The examination of a witness for the prosecution after recording the statement of the accused is an error, but if the case has been decided correctly on the merits, the error in no way affects the result so as to vitiate the trial. **A** BECHU CHAUBE *v.* EMPEROR, 20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 CR. L. J. 67; 45 A. 124 **115**

——— **s. 342 (1)**—*Examination of accused—Provisions whether mandatory.*

The provisions of section 342 (1) of the Code of Criminal Procedure are mandatory and the time at which the Court shall question the accused generally on the case is after the witnesses for the prosecution have been examined, cross-examined and re-examined, that is, after the prosecution case is completed and before the accused is called on for his defence.

Criminal Procedure Code—contd.

Obiter dicta.—To take the depositions in on case and have them copied and used in another case, is, generally speaking, not a course which should be adopted in trials of criminal cases.

A Magistrate who undertakes the trial of a criminal case, and who also hears the witnesses give their evidence should, if possible, finish the case himself. **C** MAZAHAR ALI *v.* EMPEROR, 36 C. L. J; 417; 27 C. W. N. 99; 24 CR. L. J. 198; (1923) A I. R. (C.) 196; 50 C. 223 **662**

——— **s. 350 (1)**—*Proceeding in warrant-case before charge—Enquiry or trial.*

A proceeding in a warrant-case before a charge is framed is merely an inquiry and not a trial and section 350 (1) of the Criminal Procedure Code is applicable to such a case. **M** RAMANATHAN CHETTIAR, *In re*, 17 L. W. 412; 32 M. L. T. 217; 24 CR. L. J. 192 **608**

——— **s. 364**—*Accused, examination of—Evidence elicited by putting leading question—Value.*

Where the examination of an accused is not such as is contemplated by the Criminal Procedure Code but is really a cross-examination it should be left out of consideration.

No value should be attached to eviden e elicited by the prosecution by putting a leading question to its witness. **Pat** NIRU BHAGAT *v.* EMPEROR, 1 PAT. 630; (192.) A. I. R. (PAT.) 582; 4 P. L. T. 76; 24 CR. L. J. 91 **219**

——— **s. 367,** *scope of—Defective judgment.*

All that section 367 of the Criminal Prodedure Code requires is, that the point for determination should be stated, the decision thereon and the reasons for the decision. It cannot be assumed that, because a Magistrate has not referred to the oral evidence, but has drawn inferences from documents and from probabilities, therefore, he has not considered the evidence; if he gives strong and legal reasons for his conclusions, it cannot be said that his judgment is defective. **Pat** DURGA SINGH *v.* EMPEROR, 24 CR. L J. 181 **597**

——— **ss. 367, 537**—*Trying Magistrate unable to come to Court—Judgment written and signed by such Magistrate pronounced by another Magistrate—Irregularity.*

Where a Magistrate after finishing the trial of a case, but before delivering the judgment, is physically incapacitated to come to Court, and, therefore, writes and signs his judgment and sends it to be delivered by another Magistrate, who delivers it, the wrong procedure thus adopted is a mere irregularity and is completely covered by section 537 of the Criminal Procedure Code.

Obiter.—(1) Where a Magistrate is so hoarse as not to be able to pronounce his judgment personally, and asks some one to read it out in his presence, that is a compliance with section 367, Criminal Procedure Code.

(2) If a Magistrate reads his judgment into a Gramophone and then sends it for reproduction in the Court that would be a compliance with the letter of the law (section 367, Criminal Procedure Code).

(3) The maxim *"qui facit per alium, facit per se"* (he who does a thing by the agency of another does it himself), applies where a Magistrate who is himself unable to come to Court writes and signs his judgment in a criminal case and gets it pronounced by another Magistrate. A NUR MUHAMMAD KHAN *v.* EMPEROR, 21 A. L. J. 137; 24 CR. L. J. 173; (1923) A. I. R. (A.) 276 **525**

——— **ss. 369, 520**—*Conviction for theft set aside on appeal—Property not restored to accused—Omission accidental—Subsequent order for restoration, validity of.*

Where in setting aside a conviction for theft, an Appellate Court omits to pass orders under section 520 of the Criminal Procedure Code for restoration of the property taken from the accused, if the omission is accidental, it can be subsequently corrected under section 369 of the Code. **M** SUBBA RAIDU, *In re*, 15 L. W. 664; 43 M. L. J. 87; (1922) M. W. N. 494; (1922) A. I. R. (M.) 329; 31 M. L. T. 367; 24 CR L. J. 159 **511**

——— **ss. 407, 520**—*Court of Appeal—Sub-Divisional Magistrate hearing appeals, competency of, to make order under s. 520.*

A Sub-Divisional Magistrate who hears appeal under section 407 of the Criminal Procedure Code is a Court of Appeal within the meaning of section 520, and is competent to pass orders on an application made under that section for the disposal of the property concerned in the case, treating such application as part of the proceedings in the appeal. But before disposing of such an application, notice thereof should be given to the complainant, unless there is good reason for dispensing with such notice. **M** ARUNACHALA THEVAN *v.* VELLACHAMI THEVAN, 44 M L. J. 56; 17 L. W. 462; 32 M. L. T. 104; 24 CR. L J. 162; (1923) A. I. R. (M.) 324; 46 M. 162 **514**

——— **ss. 423, 439**—*Appeal heard in the absence of Counsel—Revision, whether competent.*

A High Court has no power; under section 439 of the Criminal Procedure Code, to set aside the judgment of a Court below merely upon the ground that the Counsel on behalf of the petitioner was prevented from being present in Court in time and therefore, could not be heard. **Pat** OLAYAT KHAN *v*; EMPEROR, 1 PAT. 589; (1922) A. I. R. (PAT.) 587; 4 P. L. T. 98; 24 CR. L. J. 118 **246**

——— **s. 423 (1) (d)**—*Order excusing delay whether consequential or incidental order.*

An Appellate Court cannot excuse the delay in presenting an appeal, under section 423 (1) (*d*), Criminal Procedure Code, as an order excusing the delay is neither a consequential nor an incidental order.

Any power conferred by section 423 can be used only after the stage at which section 423 becomes applicable to the proceedings has been reached. Therefore, the application of the section is legitimate only after the preliminary stage indicated in sections 421 and 422 has been passed; that is, after the appeal has been admitted and after the notice referred to in the latter section has been given. **M** MITTOR MOIDEEN HAJEE, *In re*, 43 M. L. J. 561; 16 L. W. 764; (1923) A. I. R. (M.) 95; 24 CR. L. J. 89 **217**

——— **s. 435,** *proceedings under—Person convicted not contesting propriety of conviction.*

Under the very extensive powers contained in section 435 of the Criminal Procedure Code, the High Court can call for and examine the record of proceedings if the necessity for so doing has been brought to its notice in any manner, and it is satisfied that there are *a priori* grounds for apprehending a miscarriage of justice, but it should be loath to interfere on behalf of a person convicted in a criminal case, if that person is an adult of ordinary intelligence when that person himself in no way contests the propriety of his conviction. **A** NARAIN PRASAD *v.* EMPEROR, 20 A. L. J. 909; (1923) A. I. R. (A.) 85; 24 CR. L. J. 115; 45 A. 128 **243**

——— **s. 435**—*Revision competent to lower Court—High Court, whether should entertain application.*

Where an application can be made in revision to a lower Court, the High Court should not, under ordinary circumstances, entertain an application in revision, unless an application has already been made to the lower Court. **O** SAT NARAIN SINGH *v.* EMPEROR, 25 O. C. 37; 24 CR. L. J. 257; 9 O. L. J. 280; (1922) A. I. R. (O.) 147 **995**

——— **ss. 435, 439**—*Acquittal, order of—Revision, powers of High Court in.*

The High Court has power to interfere, in revision, with orders of acquittal, sections 435 and 439, Criminal Procedure Code, placing no such restriction. Such powers are not ordinarily exercised at the instance of private parties, save in exceptional cases involving important questions of law or relating to the personal status of particular communities. **M** NARANTAKATH AVULLAH *v.* PARAKKAL MAMMU, (1922) M. W. N. 662; 16 L. W. 626; 43 M. L. J. 663. (1923) A. I. R. (M.) 171; 45 M. 936; 24 CR. L. J. 17 **65**

——— **s. 437**—*Further enquiry—Sufficient ground—Notice.*

The mere fact that the District Magistrate does not agree with the decision of the Trying Court is not a sufficient ground for ordering a further enquiry under section 437, Criminal Procedure Code, nor should action be taken under this section without giving notice to the accused. **A** UMRAO KHAN *v.* EMPEROR, 21 A. L. J. 194; 24 CR. L. J. 184 **600**

——— **s. 437**—*Magistrate finding no case established—District Magistrate disagreeing with finding—Further enquiry, whether should be ordered.*

Where a Magistrate after proper enquiry finds that there is no case established against an accused person, the mere fact that the District Magistrate does not agree with that opinion is no reason for directing further enquiry under section 437 of the Criminal Procedure Code, especially where there is no suggestion that any further evidence is available, or should be taken. **A** UDAI RAJ SINGH *v.* EMPEROR, 44 A. 691; (1922) A. I. R. (A.) 429; 24 CR. L. J. 176 **528**

——— **s. 437**, *proceedings under—Accused, whether entitled to notice—Member of Frontier Constabulary, whether Police Officer—Admission made to such officer, relevancy of.*

Although section 437 of the Criminal Procedure Code does not specifically mention that notice must be issued to the accused to show cause why a fresh inquiry should not be ordered, yet such notice is proper. The mere omission to issue such notice, however, would not vitiate a trial following upon an order under section 437, unless the accused can be shown to have been prejudiced by the fact of not having been given an opportunity of being heard in the proceedings under that section.

A member of the Frontier Constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police Officer, and an admission made to him, and not in the presence of a Magistrate, by an accused person cannot be proved against the latter. **Pesh.** KHWAJA HASSAN *v.* EMPEROR, 24 CR. L. J. 136 **360**

——— **s. 439**—*Revision against acquittal—Non-compoundable case—Compromise—Acquittal order passed without consideration of evidence—Interference in revision on application of private party.*

As a rule an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial.

Therefore, if in a non-compoundable case, instituted on a private complaint, after completion of the prosecution evidence and the framing of the charge, the parties file a compromise stating that they have settled all their differences and have no further dispute left requiring determination, and upon this the Trying Magistrate acquits the accused without an appreciation of the evidence and a consideration of the merits of the case, there is a patent error or irregularity which justifies interference in revision with the order of acquittal. **O** ZAHIR-UD-DIN *v.* NASIR-UD-DIN, 24 CR. L. J. 186 **602**

——— **s. 439**—*Revision—Charge, setting aside of.*

A High Court has the power to set aside in revision an order of a Magistrate charging an accused person with an offence, but it should exercise that power only in very exceptional cases **L.** BUTA SINGH *v.* EMPEROR, 5 L. L. J. 36; 24 CR. L. J. 118; (1923) A. I. R. (L) 278 **246**

——— **s. 439**—*Two counter-cases of rioting—Stay of proceedings in one before disposal of other, whether proper.*

Proceedings in one of two counter-cases of rioting arising out of the same occurrence cannot be stayed merely on the ground that the prosecution witnesses in one case if examined as witnesses before the trial of the other case, in which they are the accused, will be seriously prejudiced in their defence, nor can proceedings in one of such cases be stayed on the ground that after the disposal of that case it may not be necessary to try the counter-case. **C** RAJENDRA NATH GHOSE *v.* AMRITA LAL CHAKARVARTI, 24 CR. L. J. 233 **697**

——— **s. 440**—*Applicant released on bail—Disappearance of applicant—Right to be heard.*

A person who applies for revision to the High Court and on being released on bail disappears and is not to be found, is not entitled to be heard through his Pleader, and the High Court may refuse to proceed with his application. **A** HAR

Criminal Procedure Code—contd.

NARAIN PRASAD *v.* EMPEROR, (1923) A. I. R. (A.) 327; 24 CR. L. J. 240 **704**

——— **ss. 470, 471 (1)**—*Acquittal on ground of lunacy—Duty of Court — Proper order—Subsequent sanity of accused, whether concern of Court.*

When an accused person is acquitted on the ground of lunacy, it is the duty of the Court to decide whether or not, at the time the act constituting the offence was committed, the accused was capable of understanding the nature of his act, and if the Court is satisfied that he was not, an absolute duty is imposed on it to make an order to declare him to be a criminal lunatic within the meaning of Act IV of 1912, and direct him to be kept in safe custody, even if he is not of unsound mind on the date of his acquittal, inasmuch as the fact that he has become comparatively well or sane is not a matter which concerns the Court. **A** ANANDI *v.* EMPEROR, (1923) A I. R. (A.) 327; 45 A. 329; 24 CR. L. J. 225 **689**

——— **s. 476**, *application of—"Committed before it," meaning of.*

The words "committed before it" in section 476 of the Code of Criminal Procedure are qualified by the words "in the course of a judicial proceeding."

Where an application for the return of a document is made after the suit in which the document was filed has been finally disposed of and there is nothing pending before the Court, the latter has no jurisdiction to take action under section 476 of the Criminal Procedure Code, if the signatures on the application turn out to be forged. **C** GIRIJA NANDA KALI MITTER *v.* EMPEROR, 26 C. W. N. 660; 24 CR. L. J. 202 **666**

——— **s. 476**—*"Court", whether includes successor.*

The word "Court" in section 476 of the Criminal Procedure Code includes the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. **L** KHAN MUHAMMAD *v.* EMPEROR, 24 CR. L. J. 180; 4 L. 58 **596**

——— **s. 476** — *Direction for prosecution under s. 199, Penal Code — Assignments of perjury, whether necessary—Sanction to prosecute—Revision —High Court's power to set aside sanction.*

An order directing, under section 476, Criminal Procedure Code, the prosecution of a person under section 199, Indian Penal Code, is bad if it does not contain the assignments of perjury, inasmuch as the accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of the charge under section 199, Indian Penal Code.

If on the facts of a case the High Court is of opinion that a prosecution for perjury shall be infructuous, it may, in exercise of its revisional jurisdiction, set aside the order sanctioning or directing prosecution. **A** ABDUL WAHID KHAN *v.* ABDULLAH KHAN, 21 A. L. J. 211; 24 CR. L. J. 1971 (1923) A. I. R. (A.) 325 **661**

——— **s. 494**—*Withdrawal allowed — Sufficient reasons recorded—Revision.*

Criminal Procedure Code—contd.

An order allowing a case to be withdrawn under section 494, Criminal Procedure Code, is open to revision but the High Court will not interfere if sufficient reasons are recorded by the Court allowing the withdrawal.

In the matter of the withdrawal of a case section 494, Criminal Procedure Code, controls the other sections of the Code relating to the trial of cases committed to the Sessions Court. **C** BEPIN BEHARI GHOSE *v.* HARI PADA GHOSE, 24 CR. L. J. 5 **53**

——— **s. 494 (a)**—*Application by Public Prosecutor for withdrawal from prosecution—Duty of Court.*

In according or withholding sanction to an application for withdrawal made by the Public Prosecutor under the provisions of section 494 (*a*) of the Code of Criminal Procedure, the Court acts in a judicial capacity, and for such order so judicially made the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. **C** JAGAT CHANDRA ROY *v.* KALIMUDDI SARDAR, 26 C. W. N. 880; 24 CR. L. J. 229 **693**

——— **s. 517**—*Goods, pawned, stolen by pawnor from pawnee—Transfer to third person for consideration—Conviction for theft—Restoration of goods to pawnee—Further enquiry—Discretion of Court.*

If a pawnor removes from the possession of the pawnee the articles pawned by him and passes them on to a third person for good consideration, on pawnor's conviction of theft the Trial Court is justified to direct, in the exercise of its discretion under section 517, Criminal Procedure Code, that the stolen articles be returned to the pawnee, who was the proper person to recover their possession because he had a lien on them.

Newbould, J.—Barring exceptional cases only where an enquiry may be necessary, as a general rule a Magistrate acting under section 517, Criminal Procedure Code, should pass orders according to his discretion without making any further enquiry.

Suhrawardy, J.—An order for the disposal of property under section 517, Criminal Procedure Code, is in the discretion of the Court, but that discretion is to be used judicially, and unless the High Court is satisfied that it has not been so used it has no right to interfere with it in revision. **C** GOUR MOHAN DALUI *v.* BANSIDHAR BYAS, 42 CR. L. J. 238 **702**

——— **s. 526**— *Transfer of case—Grounds for transfer.*

It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts and if a person has reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias a transfer should be directed.

Where the Public Prosecutor of a District was virtually the complainant in a case and the proceedings had been instituted under the orders of the Additional District Magistrate, who was himself a witness in the case as was another Magis-

trate who was subordinate to him and the Trying Magistrate who was on friendly terms with the Additional District Magistrate had shown an undue desire to expedite the trial and had refused an adjournment when it should have been granted:

Held, that the apprehension of the accused that he would not obtain a complete, fair and impartial trial in the District could not under the circumstances be called unreasonable and that the case should be transferred to some other District for trial. **L** SARDARI LAL *v.* EMPEROR, 3 L 443; (1923) A. I R (L.) 264; 24 CR L. J. 280 **1006**

——— **s. 528**—*Transfer by District Magistrate—Notice—Reasons, record of.*

Although, strictly speaking, it is not necessary to issue notice before transferring a case under section 528 of the Criminal Procedure Code, the practice is to do so.

The order of a District Magistrate transferring a case under section 528 of the Criminal Procedure Code without recording reasons for the transfer is bad and is liable to be set aside. **L** SARDARA *v.* EMPEROR, 24 CR L. J. 187; 5 L. L. J. 230; (1923) A. I. R. (L.) 380 **633**

——— **s. 533** — *Statement of accused recorded in English, admissibility of—Informality, whether curable.*

Where a Magistrate records the statement of an accused in English in a narrative form, after the Police is removed from the Court-room, and he is satisfied that the accused is not tutored by anybody and the statement is translated to the accused who admits it to be correct and fixes his thumb-mark thereto, the statement is admissible in evidence and any formal defects that might have been made in the recording of it are cured by section 533 of the Criminal Procedure Code. **A** DEO DATT *v.* EMPEROR, 20 A. L. J. 915; (1923) A. I R. (A.) 90; 24 CR. L. J. C; 45 A. 166 **54**

——— **s. 540**—*Court witnesses — Prosecution witnesses examined on initiative of Court—Statements of witnesses to be accepted or rejected in entirety.*

A witness whom the prosecution declines to examine and who is examined by the Court on its own initiative is a witness called by the Court within the meaning of section 540, Criminal Procedure Code.

Where a prosecution witness is, on the application of the Public Prosecutor, called as witness by the Court, so that both parties may cross-examine him he is not a Court witness properly so-called and his evidence stands on the same footing as that of a hostile witness and should be accepted or rejected *in toto*. **C** EMPEROR *v.* SATYENDRA KUMAR DUTT CHOWDHURY, 37 C. L. J. 173; 24 CR. L. J. 193; (1923) A. I. R. (C.) 463 **657**

——— **s. 556** — *Case initiated by Municipal Commissioner—Trial by Bench of Honorary Magistrates—Municipal Commissioner member of Bench—Trial, legality of.*

A Municipal Commissioner invited the attention of the Executive Officer of the Committee to the infringement of a Municipal Bye law by the accused. The Executive Officer called the attention of the

Health Officer, who instituted a prosecution against the accused. The case was tried and the accused convicted by a Bench of Honorary Magistrates of which that Municipal Commissioner was a member:

Held, that the conviction could not be quashed on the ground that the Municipal Commissioner was personally interested in the success of the prosecution within the meaning of section 556 of the Criminal Procedure Code, or was a party to the prosecution in the sense that he had caused it to be instituted. **A** NANOO *v.* EMPEROR, 24 CR. L. J. 135 **359**

——— **s. 556**—*Sessions Judge allowing prosecution of accused as Insolvency Judge—Competency to hear appeal from conviction — Knowledge of case.*

A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in a case where, as an Insolvency Judge, he allowed the prosecution to proceed. But a Judge may object to hearing such a case if he remembers being acquainted with it before. **A** SRI KRISHNA SONAR *v.* EMPEROR, 21 A. L. J. 90; 24 CR. L. J. 114; (1923) A. I R. (A.) 193 **339**

——— **s. 559**— *Transfer — Prosecution ordered by Cantonment Magistrate acting as Secretary, Cantonment Committee—Advisability of other Magistrate to try case.*

Where a prosecution is ordered by a Cantonment Magistrate in his capacity as Secretary of the Cantonment Committee, it is advisable that the case should be tried by some Magistrate other than the Cantonment Magistrate. **A** HIRA LAL *v.* EMPEROR, 20 A. L. J. 911, (1922) A. I R. (A.) 528; 24 CR. L. J. 128 **256**

——— **s. 562**, applicability of. *See* Public Gambling Act, 1867 **62**

——— **s. 562**, *applicability of—"Misappropriation," meaning of—"Cheating," meaning of—Penal Code (Act XLV of 1860), ss. 403, 404, 405, 417, 418, 419, 420.*

The word "misappropriation" in section 562 of the Criminal Procedure Code covers the offences punishable under sections 404 and 405 of the Penal Code as well as section 403, and the word "cheating" covers the offences punishable under sections 418, 419, 420, as well as section 417 of the Penal Code. **N** EMPEROR *v.* JIVALAI BHOI, (1923) A. I R (N) 158; 24 CR. L. J. 251 **795**

Custom — *Alienation—Remote reversioner, whether can sue in presence of near collateral.*

Where a male owner who has alienated ancestral property has sons living who are not minors, a remoter reversioner has no *locus standi* to challenge the alienation unless he can show that the sons have waived their rights or have consented to the alienation or have colluded with the alienor. **L** SUBA SINGH *v.* GOPAL SINGH **841**

——— *Alienation—Sonless proprietor — Rohtak Tahsil, Rohtak District.*

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land. **L** UGGAR SAIN *v.* TELU, (1923) A. I. R. (L.) 193; 4 L. 113 **829**

Custom—contd.

——— *Ancestral property—Land acquired by pre-emption.*

Land acquired by pre-emption, even although it belonged at one time to an ancestor of the person so acquiring it, is not ancestral in the hands of the latter. **L** PHUI *v.* DEVATIA, (1923) A. I. R. (L.) 210 **561**

——— *House tenants—Permanent right of residence—Hoti (Mardan)—Non-payment of rent—Long possession—Presumption—Open assertion of right of permanent residence.*

In the village of Hoti, house tenants, who have built houses themselves, cannot be evicted from those houses by persons who have no other interest except ownership of the site.

Where a tenant is not able to show that the house occupied by him was built by his ancestors or rebuilt by himself, the mere fact that he has never paid rent or delivered manure or even rendered certain definite and special services, is not enough to establish a permanent right of residence in the house. In cases of this kind, mere length of possession cannot be held to operate as prescription and the presumption is that the tenant's possession is permissive.

There can be no question of any title to permanent tenancy adverse to the landlord unless such title is openly asserted and the right of the landlord to evict the tenant is definitely challenged. **Pesh** RAHI MUDDIN *v.* SHAHBAZ KHAN **812**

——— *Pre-emption*—Wajib-ul-arz, *construction of*—Qarib ekjaddi, *meaning of*—*Person alienating share bound to offer same to* qarib ekjaddi *co-sharer*—*Share, whether must be offered to nearest* qarib ekjaddi—*Pre-emption, right of, proof of.*

A great-grandfather's descendant is not a distant but a near descendant of the same common ancestor, and, therefore, can be fairly described as a *qarib ekjaddi*, that is, a near descendant of the same common ancestor.

Where by a custom recorded in the *Wajib-ul-arz* of a village a co-sharer wishing to alienate his share is bound to offer the share in the first instance to a *qarib ekjaddi* co-sharer, he is not obliged to offer the option of purchase in the first instance to the descendant of a nearer common ancestor or a near descendant of the same common ancestor, but is entitled to choose any co-sharer from amongst the whole body of persons who can fairly be described as descendants of the same common ancestor with himself.

Obiter.—A plaintiff claiming pre-emption on the basis of a particular custom must satisfy the Court not merely as to the existing custom of pre-emption binding on the parties, but as to the particular custom on the strength of which he claims preference over the vendee.

Quaere.—Whether the words *qarib ekjaddi* ought to be interpreted as meaning the nearest male agnate for the time being, *i. e.*, in existence at the time of the sale. **A** KUNDAN *v.* SOBHAN RAM **655**

——— *Succession*—Pagwand *and* Chundawand—*Jats of* Mauza *Rajada, Tahsil and District Gurdaspur.*

Custom—concld.

The normal custom in the Punjab prescribes a division according to the *pagwand* rule, and the *onus* lies heavily upon the person who relies upon the *chundawand* rule.

Jats of *Mauza* Rajada in the Gurdaspur Tahsil follow the *pagwand* rule. **L** SHANKAR *v.* BAHADUR, (1923) A. I. R. (L.) 37; 5 L. L. J. 212 **864**

——— *Succession—Sister v. Collaterals—Khotis of Tahsil Pind Dadan Khan, District Jhelum—Burden of proof.*

In questions of succession to non-ancestral property between collaterals of the eighth degree and sisters the *onus* of proving that they have a preferential right is, in the first instance, on the latter especially where the entry in the *riwaj-i-am* is against them.

Among *Khotis* of Tahsil Pind Dadan Khan, Jhelum District, a sister is not entitled to succeed to the ancestral property of her brother in preference to collaterals of the eighth degree. **L** HAYAT *v.* AHMUN **201**

Declaratory decree—*Discretion of Court.*

The question of the granting of a decree in a declaratory suit is always in the last resource a matter of discretion with the Court, and that discretion has to be exercised upon proper and legal principles. **A** RAM RAGHUBIR LAL *v* DIP NARAIN SINGH, 21 A. L. J. 168; 9 O. & A. L. R. (A.) 446, (1923) A. I. R. (A.) 287 **749**

Decree *ex parte*—*Service of summons—Presumption.*

No legal decree can be passed *ex parte* without the Court being satisfied of the due service of the summons, but where there is nothing to indicate that the Court which tried the suit had not satisfied itself of the service of summons, it must be presumed that the Court was so satisfied. **Pat** HARNARAIN PANDEY *v.* NANDKESWAR PANDEY, 1 P. L. R. 127 **573**

———, *suit based on—Decree not acted upon for long time—Court, whether competent to ignore it.*

Plaintiff obtained an *ex parte* decree for confirmation of possession over certain land but did not apply for its execution. After the lapse of about 10 years he brought another suit for confirmation, or in the alternative, for possession, of the same land and relied upon the decree formerly obtained by him. The lower Courts refused to give effect to the decree on the ground that it was not acted upon and that the plaintiff could not rely upon it after such a long time. They went into the question of title and dismissed the claim. On second appeal:

Held, that the mere fact that the decree was not put into execution could not affect the declaration of title made therein, that the decree could not cease to have effect unless it was set aside, that the lower Courts were in error in going into the question of title again and that the plaintiff's suit should have been decreed on the production of the decree if there was no other objection to it. **Pat** JHUMAK SINGH *v.* MAHENDRA SINGH **560**

DEFINITIONS:—

Accessible to public. *See* PUNJAB MUNICIPAL ACT, S. 3 (13)

DEFINITIONS—concld.
Breach of the peace. *See* CRIMINAL PROCEDURE CODE, S. 106 691
Case. *See* CIVIL PROCEDURE CODE, S. 115 173
Cess. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 13 432
Cheating. *See* CRIMINAL PROCEDURE CODE, S. 562 795
Committed before it. *See* CRIMINAL PROCEDURE CODE, S. 476 666
Co-occupant. *See* BERAR LAND REVENUE CODE, S. 203 30
Court. *See* CRIMINAL PROCEDURE CODE, S. 476 596
Day. *See* LIMITATION ACT, S. 12 556
Enforcing right. *See* PENAL CODE, S. 96 605
Fixed. *See* PROBATE AND ADMINISTRATION ACT, S. 59 816
Haq-i-shufa jaiz hai. *See* PRE-EMPTION 1025
Heir. *See* MUHAMMADAN LAW—SHIA 621
House. *See* REGISTRATION ACT, S. 17 619
Jamabandi. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH II, ART. 13 432
Joint mortgagors. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 42 393
Land. *See* CRIMINAL PROCEDURE CODE, S. 145 213, 236
Loss. *See* RAILWAYS ACT, S. 72 609
Maintaining right. *See* PENAL CODE, S. 96 605
Malik. *See* HINDU LAW—WILL 748
May. *See* RAILWAYS ACT, S. 77 614
May issue Commission. *See* CIVIL PROCEDURE CODE, S. 115 530
Might and ought to have been made ground of attack or defence. *See* CIVIL PROCEDURE CODE, S. 11 109
Misappropriation. *See* CRIMINAL PROCEDURE CODE, S. 562 735
Possession. *See* MADRAS ABKARI ACT, S. 55 (1) 504
Section of His Majesty's subjects. *See* PRESS ACT, S. 4 519
Serai. *See* PRE-EMPTION 145
Siwai. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH, II, ART. 13 432
Street. *See* PUNJAB MUNICIPAL ACT, S. 3 (13) 775
Time. *See* LIMITATION ACT, *s.* 12 556
The Government by law established in British India. *See* PRESS ACT, S. 4 519
Valuation of the Original Suit. *See* BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT, S. 12 1014
Dying declaration—*Record made in absence of accused—Proof, method of.*
Where a dying declaration is recorded, in the absence of the accused, by a Magistrate who has since died the writing made by the latter cannot be admitted to prove the declaration, it must be proved in the ordinary way by a person who heard it made, and if he swears that the written statement correctly re-produces the words used by the deceased, and was read over to the deceased who admitted its correctness, this is sufficient to prove that the deceased did use the words contained in that statement. **C** EMPEROR *v.* BALARAM DAS, 49 C. 358; (1922) A. I. R. (C.) 382 685
———, *value of.*
A difference between a dying declaration and the First Information report renders it necessary to examine both pieces of evidence with extra care, but such a difference alone does not necessarily render a dying declaration wholly unworthy of credence. **L** MULA SINGH *v.* EMPEROR, 24 CR. L. J 177 593
Easement—*Long user—Evidence of grant—Encroachment, removal of.*
Long user may certainly with other circumstances, and in some cases even by itself, be good evidence of an agreement or grant.
Where a person has encroached on the plaintiff's property by building a portion of his own wall on the top of the plaintiff's wall, it is entirely unnecessary for the plaintiff to prove the extent of the encroachment or the weight of the burden imposed by it. He is clearly entitled to claim that any portion, however small, of the defendant's wall that projects on his own property, shall be removed. **N** SONBA *v.* DATTATRAYA, (1023) A. I. R. (N) 192 831
———*Right of way over waste land—Absence of regular and defined pathway—Acquisition of right by prescription.*
The fact that there is no regular and defined pathway over a piece of waste land, would not prevent the acquisition of a right of way over that land by prescription.
If the plaintiff in a suit to establish such a right states the two *terminii* of the pathway, his right ought not to fail simply on the ground that the pathway passes over a piece of waste land in different tracks. **C** HARIDAS GHOSE *v.* GOURI CHARAN GHOSE 309
Ejectment, *suit for—Defendant admitting plaintiff's superior title—Burden of proof—Bengal Tenancy Act (VIII of 1885), s. 85—Fixed rate tenant—Permanent under-tenure, creation of.*
Plaintiff sued to eject the defendant on the allegation that the plaintiff was a *raiyat* at fixed rates of the land in dispute and the defendant was a transferee of the heirs of one *B.* with whom a Permanent Settlement had been made by the widow of the plaintiff's predecessor some 10 or 12 years before suit, that the widow had no right to make a Permanent Settlement, and that on the death of *B*, the plaintiff had become entitled to recover possession. The defendant admitted the superior title of the plaintiff but alleged that the Permanent Settlement was made with *M*, the father of *B*, that it created a transferable interest and that he was not liable to ejectment. The lower Appellate Court holding that the plaintiff had failed to prove that settlement was made by the widow with *B* some 10 or 12 years ago, dismissed the suit. On second appeal:
Held, that as the defendant admitted the plaintiff's superior title to the land, it was for him to prove the existence of a tenancy entitling him to retain possession, that the plaintiff's main case was that the defendant was a trespasser and had no right to remain on the land and the finding that the plaintiff's case as regards settlement had not been proved was not sufficient for the dismissal of the suit.

Ejectment—concld.

Section 85 of the Bengal Tenancy Act does not bar a *raiyat* at fixed rates from making a Permanent Settlement with the under-*raiyats* or giving the under-*raiyats* a transferable and heritable interest in the land. C PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI 319

Estoppel. *See* HINDU LAW 287

Estoppel.

The principle of estoppel cannot be invoked to defeat the plain provisions of the statutory law or to validate that which the law expressly declares to be void and unenforceable.

Estoppel is a rule of evidence and creates no substantive rights.

The law relating to estoppel must be read with and subject to other laws in force, such as those relating to contracts. To allow the principle of estoppel to operate in the case of a minor so as to preclude him from proving his minority at the time of the contract is indirectly an attempt to bind him by a contract that is void.

There is no estoppel against an Act of the Legislature.

To constitute an estoppel it is necessary that the statement or conduct charged should be intentional with the object of inducing the other party to change his position in consequence.

As regards the application of the rule of estoppel to a minor there is no distinction in principle between a minor plaintiff and a minor defendant.

Per *Kemp, A. J. C.*—The law of estoppel as found in section 115, Evidence Act, is a provision in a Code of adjective law which regulates the proofs of rights and liabilities existing under the substantive law. No provision in the Evidence Act can operate to create a cause of action where none exists in law. The Court cannot ignore the fact of minority and by applying the law of estoppel bind itself to the real status of any party. S HURI *v.* ROSHAN KHUDABUX, (1923) A. I. R. (S) 5 161

Estoppel.

The strictness of the rule of estoppel by deed has been much relaxed in recent times, and it has been maintained that where both parties to an indenture either know or had the means of knowing that it is executed for an immoral purpose or in contravention of a Statute, or of public policy in general, neither will be estopped from proving facts which will render the instrument void *ab initio*. C RAGHUPATI CHATTERJEE *v.* NARISHINGHA HORI DAS, 36 C. L. J. 491; (1923) A. I. R. (C.) 90 1

———*Mortgage suit—Mortgagor, whether can set up* jus tertii.

For the purpose of determining the issues in a mortgage suit the Court is not concerned with the question whether some third party has a title adverse to that of the mortgagor.

A mortgagor is estopped from denying, in answer to a suit on the mortgage, the interest which he represented in the mortgage-deed as his own proprietary right.

Obiter.—Even where a mortgagor is a trustee acting in a public capacity and not for his own benefit he is estopped from denying his title to the mortgaged property and cannot set up as a defence against the mortgagee that the property mortgaged is trust property which he had no right to mortgage. **Pat** BRIJ RATAN DAS *v.* RAGHUNANDAN GIR, (1923) PAT. 49; 1 P. L. R. 225; 4 P. L. T. 457; (1923) A. I. R. (PAT.) 203 944

Estoppel—concld.

Evidence—*Affirmative proposition — Conflicting evidence tendered against proposition—Proposition, whether established—Circumstantial evidence —Pleader—Compromise of case*—Pardanashin *lady, transaction by—Protection of law—Evidence, nature of.*

An affirmative proposition is not established by showing that the evidence of witnesses who depose to a contrary negative proposition is not reliable. The proposition that a person consented to a compromise is an affirmative proposition, and if there is a conflict of evidence on the point of consent, some witnesses asserting that he did consent, some to the contrary, it would be perfectly legitimate to take into consideration circumstantial evidence with a view to show that evidence of the first class was true and that of the second class false.

Where a Vakil is appointed by a power-of-attorney to argue the case of the executant, to inspect records, execute documents and deposit and withdraw monies and do all such other acts, such power-of-attorney does not endow the Vakil with power or authority to compromise the suit he is thus retained to argue.

Owing to the secluded life *parda nashin* ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them. In the case of deeds and powers, therefore, executed by such ladies it is requisite that those who rely on them should satisfy the Court, by the strongest and most satisfactory evidence, that they have been explained to and understood by those who executed them, and that the transaction was real and *bona fide* and that disinterested and competent persons, with a fair understanding of the whole matter, advised the lady to execute it. P C SARATKUMARI DASI *v.* AMULLYADHAN KUNDU 17 L. W. 481; (1923) A. I. R. (P. C.) 13; 32 M. L. T. 137; 27 C. W. N. 629; 25 BOM. L. R. 548; 37 C. L. J. 501; (1923) M. W. N. 393 632

——— elicited by putting leading question—Value. *See* CRIMINAL PROCEDURE CODE, 1898, s. 364 219

——— *Witnesses, voluntary, value of.*

Witnesses, who voluntarily come forward, whether as friends or associates of an accused, to give him a good character, must not be brushed aside, unless they are discredited as regards their good faith and honesty just as witnesses in any other proceeding must be discredited before they are rejected by a Tribunal. A ANGNOO SINGH *v.* EMPEROR, 20 A. L. J. 881; (1923) A. I. R. (A) 35; 45 A. 109; 24 Cr. L. J. 257 865

Evidence Act (I of 1872), s. 24—*Confession—Evidentiary value of retracted confession—Principles applicable.*

It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his

Evidence Act—contd.

guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually, unless the confession is corroborated by credible independent evidence.

A retracted confession should carry practically no weight as against a person other than its maker. **C** EMPEROR *v.* BISESWAR DE, 26 C. W. N. 1010; 24 CR. L. J. 145; (1923) A. I. R (C.) 217 **497**

——— **ss. 25, 26,** application of. *See* PENAL CODE, S. 399 **360**

——— **s. 32** - *Gestures by wounded person, relevancy of—Opinions of witnesses as to gestures, whether admissible in evidence*

Where a woman, with her throat partially cut and unable to speak, makes gestures in answer to questions put by a Sub-Inspector, Police, and indicates the person who has wounded her, the gestures are admissible in evidence under section 32 of the Evidence Act. The interpretation of the gestures is for the Court alone and the opinion of witnesses as to such gestures is not evidence **Pat** CHANDRIKA RAM *v.* EMPEROR, 1 PAT. 401; 3 P. L. T. 771; (1922) A. I. R. (PAT) 535, 1 P. L. R 77 CR; (1923) PAT. 20, 24 CR. L. J. 129 **353**

——— **ss. 32, 159, 160**—*Statement of date of birth in horoscope or deed of adoption - Relevancy—Proof of date of birth.*

A statement of date of birth in a horoscope is not relevant under section 32 of the Evidence Act.

A horoscope can be used to help in proving the date of birth stated in it only under section 159 or 160 of the Evidence Act, if the person who wrote it or a person who read it soon after it was written, is examined as a witness. Very nearly the same remark applies to other documents in which the age of a person is stated such as a deed of adoption or of initiation as a *chela*. **N** SHANKERGIR GURU MOTIGIR *v* CHINNUJI, (1923) A. I. R. (N.) 164 **140**

——— **s. 34**—*Account books, entries in—Proof.*

In order to obtain a decree on the basis of entries in books of account it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of business, the entries themselves must also be proved, unless the necessity for such proof is removed by the admission of the opposite party. **L** ABDUL HAQ *v* FIRM SHIVJI RAM-KHEM CHAND, (1922) A. I. R (L.) 338 **259**

——— **s. 35**—*Evidence, admissibility of—Certificate of guardianship, nature of—Certificate, whether admissible to prove minority—Order for appointment of guardian of minor—Admissibility to prove age of minor.*

A certificate of guardianship is not a public record or register of any kind, but is a document issued to a particular person, giving to that person and only to him, a particular kind of authority, and cannot be regarded as evidence of minority under section 35 of the Evidence Act.

An order made by a Court for the appointment of a guardian of a minor, which contains a recital that the latter was born on a particular date, is inadmissible in evidence to prove the date of birth of the minor. **C** HARA KUMAR DE *v* JOGENDRA KRISHNA RAY **336**

——— **s. 42**—*Judgment deciding question of adoption, whether admissible between third persons.*

A judgment of a Civil Court deciding a question of adoption is not admissible between third parties as evidence of the truth of the matters decided therein. **Pat** GURU MAHADEO ASRAM PRASHAD SAHI *v.* JAGATRAJ KUER **929**

——— **ss. 63 (5), 114 ill. (g)**—*Secondary evidence of contents of document—Person unable to read document, whether can give evidence—Non-production of document—Old document—Presumption.*

It is settled law that in a suit for redemption the plaintiff must prove the mortgage which he sets up.

Under clause (5) of section 63 of the Evidence Act secondary evidence as to the contents of a document, written in Persian characters, cannot be given by a witness who is unable to read Persian.

Unless it is established that a document is in the possession of a party and has been wilfully suppressed, a Court is not entitled to presume that the contents of the document, if produced, would have been unfavourable.

In the case of a very old document the possibility of its having been lost and being no longe in existence is naturally much greater than in the case of a document of recent date. **A** RAMJI DAS *v* MIHIN LAL **651**

——— **s. 65 (c)**—*Secondary evidence of contents of document- Execution of original, proof of—Discretion of Court—Appellate Court, interference by.*

Under section 65 (*c*) of the Evidence Act secondary evidence of the contents of a document may be given when the party offering that evidence cannot, for any reason not arising from his own default or neglect, produce the original in reasonable time.

The question of the admissibility of secondary evidence is a point properly to be decided by the Trial Court, and is treated to be depending very much on its discretion. The conclusion of the Trial Court on this point should not be overruled by the Court of Appeal except on a clear case of miscarriage of justice.

A party producing secondary evidence of a document is not relieved from the duty of proving the execution of the original. **L** CHUHA MAL *v.* RAHIM BAKHSH **568**

——— **s. 68**—Mortgage bond—Attesting witnesses—Proof, mode of. *See* TRANSFER OF PROPERTY ACT, 1882, S. 59. **390**

——— **s. 77**—*Settlement Record, entries in, proof of—Certified copy—Statement of* Kanungo.

An entry in a public document, such as a Settle-

Evidence Act—contd.

ment Record, can be proved only by the production of the original or by a certified copy.

The statement of a *Kanungo* is not relevant as evidence of what is contained in the Settlement Record. **L** RAM LAL *v.* GHANISHAM DAS, (1923) A. I. R. (L.) 150 **825**

——— **s. 92**—*Bond—Condition precedent—Oral agreement, admissibility of.*

An oral agreement which constitutes a condition precedent to the attaching of any obligation under a bond, may be proved under section 92 (3) of the Evidence Act, but not an oral agreement inconsistent with and contradicting the terms of the written agreement. **N** TATYA *v.* SAWANTA, (1923) A. I. R. (N.) 135 **477**

——— **s. 92**—*Evidence of acts and conduct, admissibility of.*

Evidence of the acts and conduct of parties to a document is not admissible between them to show that the document is really not what it purports to be. **C** KAMALA KANT *v.* ANNANDA CHANDRA CHAKARABURTTY **1030**

——— **s. 92**—*Written agreement—Oral evidence—Construction of document—Agreement for sale—Document to be prepared by Vakil—Agreement, whether subject to condition—Completed agreement—Provisional arrangement—Test*

Oral evidence to show, what took place on the occasion when an agreement for sale was drawn up, is inadmissible in evidence under section 92 of the Evidence Act.

Where an agreement for the sale of certain property contains the condition that the bargain paper in respect of the sale shall be made through a Vakil, it does not mean that it is a condition to which the bargain is subject but that it is only one of the terms of the contract.

The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations took a concrete shape. **P C** HARICHAND MANCHARAM *v.* GOVIND LUXMAN, (1923) A. I. R. (P. C.) 47; 17 L. W. 572; 44 M. L. J. 68; 32 M. L. T. 175; 37 C. L. J. 440; 25 BOM. L. R. 531; 47 B. 335. **763**

——— **s. 92, Pro. (2)**—*Sale—Consideration less than entered in sale deed—Evidence, oral, admissibility of.*

It cannot be proved that a sale really took place for a lesser price than that mentioned in the sale-deed. **A** LALA SINGH *v.* HASDEO **768**

——— **ss. 93, 96**—*Ambiguity—Latent and patent—Oral evidence, admissibility of.*

A patent ambiguity in a document cannot be explained under section 93 of the Evidence Act by oral evidence, but a latent ambiguity can be cleared up by extrinsic evidence under section 96 of the same Act. **N** MAHARASHTRAYA JNAN KOSH MANDAL, LTD. *v.* BIJULAL, 19 N. L. R. 36; (1923) A. I. R. (N.) 182 **436**

——— **s. 105. Exceptions**—*Burden of proof—Presumption.*

Under section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case of an accused person within any of the general Exceptions in the Penal Code, is on the accused, and the Court shall presume the absence of such circumstances. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general Exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the Exception. **A** ANANDI *v.* EMPEROR, (1923) A. I. R. (A.) 327; 45 A. 329; 24 Cr. L. J. 225 **689**

——— **s. 106 ill. (a).** *See* Penal Code, 1860, s. 373 **232**

——— **s. 107**—*Presumption of death — Hindus Rule of Hindu Law, whether applicable.*

The rule of Hindu Law, of allowing 12 years to elapse before a person who is absent is to be taken as dead, is no longer applicable to Hindus after the passing of the Evidence Act. **M** PONDURI ADEYYA *v.* JALADI BURRAYYA, 43 M. L. J. 725; 16 L. W. 676; (1923) M. W. N. 49; (1923) A. I. R. (M.) 185; 32 M. L. T. 6 **305**

——— **s. 115**—*Estoppel—Minor—False representation as to age—Innocent representation—Fraudulent representation—Specific Relief Act (I of 1877), s. 41—Suit to set aside contract by minor—Compensation—Restitution—Equity.*

By *Full Bench.*—If a minor, representing himself to be of age, enters into a contract and subsequently sues to set it aside, he is not estopped from pleading that he was minor at the time of the contract.

Per *Kennedy, J. C.*—If a minor enters into an agreement by making a false representation as to his age be the representation fraudulent or innocent—and the property which he has received in consideration of the agreement is in his possession, whether that property is in specie or even funds ear-marked, or otherwise easy of identification, the Court will compel him to restore such property before giving him the relief of setting aside the agreement. Where, however, there are no goods in specie or immoveables or ear-marked or easily identifiable funds in possession of the minor, the Court will not in all cases compel him to make necessarily compensation in part or in whole to the other contracting party. The Court will at least direct the restitution by the minor of such part of the consideration of a void agreement, as may be in his hands. Even in the case of innocent misrepresentation the minor is bound to refund the property over which he has control.

Quære.—Whether the Court has power in a proper case to order compensation as distinguished from restitution.

Per *Raymond, A. J. C.*—The word "person" in section 115, Evidence Act, includes a minor.

In the case of an innocent representation by a minor the party entering into a contract with him is not entitled to claim compensation if the contract is held to be void owing to minority, and, therefore, set aside by Court, but if the representation is found to be fraudulent and the property which the minor has obtained as a result of his fraud is traceable, then equity may order him, as a condition precedent to being granted relief, to make restitution on the principle that he who seeks equity must do equity. That is to say, if an infant is old and cunning enough to contrive and carry out a fraud, he ought not to be permitted to take advantage of his own fraud and if the property which he has obtained still exists in specie, he may be compelled to restore it, but if he has obtained money which has probably been spent, and there is no possibility of tracing it, and, therefore, of restoring the very thing obtained by the fraud, it would be enforcing a void contract if he were made to re-pay it. In other words, a distinction must be observed between restitution and re-payment

The minor would only be required to restore property which he still retains and not to re-pay money which has been lent to him and he has spent. To compel him to re pay the money he has spent would be to compel him to perform the very obligation the law says is void.

A minor plaintiff praying for relief must perform equity if he seeks equity and the Court may, therefore, under section 41, Specific Relief Act, require him to restore any property in his possession, which he has obtained by his misrepresentation Such compensation does not extend to moneys received and spent by the minor.

Failure to make such enquiries as an ordinary prudent man would make as to the age of a minor, may, under certain circumstances, be evidence of the fact that the person to whom the misrepresentation was made was not actually deceived. **S** HURI *v.* ROSHAN KHUDABUX, (1923) A. I. R. (S.) 5 **161**

— — — **s 154**— *Hostile witness reasons for declaring - Evidence of hostile witness, whether can be believed in part and disbelieved in part*

That a prosecution witness is a tenant of a relative of the accused is no reason at all for treating him as a hostile witness.

That the statement of a prosecution witness before the Committing Magistrate differs from the statement recorded by the Police shortly after the occurrence and that the cross-examination of the witness would help the Court to assess the exact value of the different parts of his testimony is not a sufficient reason for allowing the cross-examination of the witness by the Public Prosecutor as an hostile witness

If a Counsel is given permission to cross-examine his own witness it must be done to discredit the witness altogether, and not merely to get rid of part of his testimony, because if that which is suggested shall be elicited, it will show that he is not trustworthy at all. Therefore, his whole evidence must be rejected and it cannot be believed in part and disbelieved in part. **C** EMPEROR *v.* SATYENDRA KUMAR DUTT CHOWDHURY, 37 C. L. J. 173; 24 CR. L. J. 193; (1923) A. I. R. (C.) 403 **657**

Execution — *Application for sale of property— Subsequent application for arrest of judgment-debtor— Subsequent petition whether continuation of previous application.*

An application for execution can only be considered as a continuation of a previous application, when it is similar in scope and character to the former application.

An application for the arrest of a judgment-debtor cannot be said to be in continuation of a previous application which was for sale of the property of the judgment-debtor. **Pat** RAMESHIVENDRA NARAYAN OJHA *v* AUDH BEHARI SARAN, 4 P. L. T. 303 **332**

Execution of decree — *Default in payment — Interest, liability to pay—Waiver— Appropriation of payments—Contract Act (IX of 1872), ss. 60, 61.*

Where a date is fixed for payment of a sum and default is made in payment, the creditor is entitled to interest by way of compensation, even if there is no express agreement to pay interest from the date of default under the Interest Act.

Execution of a decree is only a mode of realisation and where interest is payable under a decree if default is made in payment of the decretal amount by a certain date, the failure of the decree-holder to execute the decree on default, does not disentitle him to get interest from the date of default. Nor does the fact that the decree-holder has accepted sums paid to him in part payment of the decree after the date of default show that he has waived his right to claim interest from the date of default.

The rule that, in the absence of a stipulation to the contrary, the creditor is entitled to appropriate payments made to him first towards interest, and the balance, if any, towards principal, applies to payments made towards satisfaction of a decree whether the decree is an ordinary decree or an instalment decree provided interest in payable under the decree. **Pat** BARCLEY *v.* DHONDAI, 4 P. L. T. 112; (1923) PAT. 194; (1923) A. I. R. (PAT.) 322 **937**

— — — — *Suspension of proceedings — Application for revival after three years, maintainability of.*

Where proceedings in the execution of a decree are suspended by the Execution Court through no act or default of the decree-holder, an application to revive and carry through the pending proceedings will not be time-barred, even if presented more than three years after the order of suspension was passed. Such an application is not one to initiate a new proceeding. **A** AMJAD ALI KHAN *v.* MOHAMMAD USMAN **963**

Ex parte decree — *Appeal — Decree confirmed— Application to set aside ex parte decree—Trial Court, jurisdiction of.*

Where an appeal against an *ex parte* decree has been dealt with and decided on the merits by the Appellate Court, the Court which made

Ex parte decree—concld.

the *ex parte* decree has no jurisdiction to entertain an application to set that decree aside. **Pat** AJODHYA KUWAR *v.* DURGA PRASAD, 4 P. L. T. 115; (1923) PAT. 145; (1923) A. I R (PAT) 331 **383**

Fatal Accidents Act (XIII of 1855), s. 1—*Bengal Municipal Act (III of 1884), s. 201 · Negligence—Question of fact—Suit for damages for death caused by accident—Valuation of life lost.*

In a suit under the Fatal Accidents Act for damages for death caused by an accident attributed to the negligence of the defendant, the death of one of the plaintiffs does not necessarily diminish the total amount to be distributed as loss among the survivors.

In such cases the question of negligence or no negligence is very largely a question of fact.

Where a person loses his life as the result of an accident the value of his life does not depend on the number of his dependants but on his earnings capacity **C** SADAQ REZA *v.* KHOSHMOHINI DASI (1922) A. I. R. (C) 317 **346**

Fees, *non-payment of—Pleader whether can decline to conduct case—special agreement entitling him to do so* Onus.

In the absence of proof of any special agreement to that effect, the mere fact that no fee is tendered or paid is no justification for the Pleader's refusal to attend to the client's interests.

A Pleader, who does not intend to appear for his client, is bound to give the latter reasonable notice so as to afford him an opportunity of obtaining other legal assistance.

If a Pleader stipulates for payment of fees before he does any work he is not bound to do such work without such payment. If, however, he accepts a *vakalatnama* without such stipulation, that is, gives credit to his client he must proceed to represent him, even though unpaid his fees until either his client discharges him or he properly discharges himself. **C** EMPEROR *v.* RAJANI KANTA BOSE, 35 C. L. J. 356; 26 C. W. N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 Cr. L. J 33 **81**

Fraud—*Advantage of one's own fraud.*

A litigant cannot be allowed to prove his own fraud in his own favour. **A** LALA SINGH *v.* BASDEO **768**

———— *Decree, setting aside of—False claim—Suppression of service of notice—Pleadings.*

The mere fact that notice was not served is not necessarily fraud which would justify the setting aside of a decree. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to any scheme of alleged fraud, then such suppression of notice would be clearly fraud Further, it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground **C** JOGESH CHANDRA GHOSE *v.* PROSANNA KUMAR TALUKDAR **962**

———— *Suit to set aside decree—Burden of proof—Service of summons—Presumption.*

The test as to whether a suit lies to set aside a decree on the ground of fraud is whether there was

Fraud—concld.

fraud practised in relation to the previous proceedings in Court by which the party seeking to set the decree aside was prevented from placing his case before the Court.

In a suit to set aside a decree on the ground of fraud, if the Court comes to the conclusion that in the previous proceedings the summons was not in fact served upon the defendant it is at liberty to examine the evidence in that case with a view to find out whether there was any foundation for the previous suit. But that is only for the purpose of enabling it to decide whether the failure to serve the summons was accidental or deliberate.

But the *onus* is on the party seeking to set the decree aside to show that there was no foundation for the previous suit, and not on the opposite party to establish the validity of the decree obtained by him.

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistent with the allegations of the plaintiff as with the denial of the defendant a case of fraud is not established.

A Court must assume, until the contrary is proved, that a summons was in fact served in the mode stated in the report of the peon. **Pat** DAMODAR PRASAD *v.* RAM SARUP, 4 P. L. T. 102; (1923) PAT. 137; 1 P. L. R. 252; (1923) A. I. R (PAT) 327 **843**

Fraudulent transfer—*Fraud accomplished—Transferee, whether entitled to recover possession from transferor—Equity—Rule of decision.*

On no principle of justice, equity and good conscience is a transferee, under a fictitious and fraudulent conveyance never intended to pass title and executed without consideration to defraud the creditors of the transferor, entitled to recover from the transferor possession of the property through the Court, if the fraudulent purpose has in fact been accomplished.

The balance of authority in such cases is in favour of permitting the defendant to set up the true transaction ; the maxim *nemo allegans suam turpitudinem audiendus est* gives way to the maxim *in pari delicto, potior est conditio possidentis.*

Where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of Equity, following the rules of law as to participators in a common crime, will not interpose to grant any relief, and will leave the parties where they find them giving no relief and no countenance to claims of this sort. In other words, wherever two or more persons are engaged in a fraudulent purpose to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct.

If the purpose for which a fraudulent assignment is made, is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to take his property back from the assignee who has given no consideration for it. **C** RAGHUPATI CHATTERJEE *v.* NARSINGHA HOTI DAS, 36 C. L. J. 491; (1923) A. I. R (C) 90 **1**

———— *Fraud not carried into effect—Fraud, whether can be pleaded against innocent person.*

Fraudulent transfer—concld.

It is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between the transferor and the transferee.

Fraud cannot be pleaded successfully against an innocent person. **A** MUSTAFAI BIBI *v.* MUHAMMAD SHABBIR, (1923) A. I. R. (A.) 164 **273**

Frontier Crimes Regulation (III of 1901), s. 40 —*Surety.*

To stand surety for a man under section 40, Frontier Crimes Regulation, argues a very personal and intimate connection. **Pesh** LOK NATH *v.* THAKAR DAS **20**

General repute, *evidence of—Vague and indirect evidence.*

Evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances, is not sufficient in itself to justify an order.

Vague reputation, unaccompanied by direct evidence personally affecting each accused person or accompanied by direct evidence which breaks down is not sufficient in itself to justify an order. **A** ANGNOO SINGH *v.* EMPEROR, 20 A. L. J. 881; (1923) A. I. R. (A.) 35; 45 A. 109; 24 CR. L. J. 257 **865**

Gift, *not affirmed—Validity.*

A gift is valid until it is avoided by the donee it does not cease to be operative because it is not affirmed by him. **N** BAKARAM *v.* RAMCHANDRA, (1923) A. I. R. (N.) 96 **39**

Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—*Abuse of process of Court—Interference by High Court.*

When legal proceedings are taken under the Code of Criminal Procedure which amount to an abuse of process of the Court and the object of which is only to harass the party who has got a previous order of the Magistrate in his favour, the High Court has ample jurisdiction to interfere and ought to interfere under section 107 of the Government of India Act. **C** ARAN SARDAR *v.* HARA SUNDAR MAJUMDAR, 27 C. W. N. 171; 37 C. L. J. 39; (1923) A. I. R. (C.) 95; 24 CR. L. J. 97 **225**

——— **s. 107**—*Revisional powers of High Court* See CRIMINAL PROCEDURE CODE, 1898, ss. 145, 439 **228**

Guardian—*Successive applications for removal on same facts, not entertainable—Mother appointed guardian—Residence of second husband of mother in same house with minor, whether ground for removal.*

The duly appointed guardian of the person of a minor ought not to be called upon to resist successive applications for his or her removal upon the same set of facts.

Where a mother is appointed the guardian of the person of her minor son, and she re-marries, the fact that her second husband resides in the house which she continues to occupy as guardian of her minor son, is not a sufficient cause for her removal from such guardianship. **A** BHAGWAN DAS *v.* MANGALIA, 20 A. L. J. 959; (1922) A. I. R. (A.) 540; 45 A. 196 **416**

Guardians and Wards Act (VIII of 1890), s. 17—*Selection of guardian—Minor's welfare paramount consideration—Presumptive heir to minor's property, if suitable guardian.*

Where the claims of distant relations for the guardianship of a minor have to be compared, there is no question of preference other than what arises from a consideration of the minor's welfare.

A presumptive heir to the properties of a minor is not a suitable person to be appointed guardian of his person. **M** NARASAYYA *v.* VENKATAPPA, 17 L. W. 97; 44 M. L. J. 62; (1923) M. W. N. 12; (1923) A. I. R. (M.) 359 **298**

——— **ss. 17, 19, 25**—*Minor—Father not unfit—Guardian, appointment of—Father, suit by, for custody of minor, competency of.*

No order declaring or appointing a guardian of a minor's person can be made under section 19 of the Guardians and Wards Act during the lifetime of the minor's father unless, in the opinion of the Court, he is unfit to be such a guardian.

The provisions of section 19 of the Act are not subject to those of section 17, but expressly override them.

There is no provision under the Guardians and Wards Act by which a father can obtain the custody of his minor child who has never been in his custody before. **N** DHAN KUMARI DEVI *v.* MAHENDRA SINGH, 19 N. L. R. 45; 6 N. L. J. 111; (1923) A. I. R. (N.) 199 **443**

——— **ss. 34 (a), 39 (b), (e)**—*Appointment of guardian—Failure to give security.*

An order appointing a guardian, in the sense that it can be appealed against, is a complete order as soon as it is made, but it does not become operative till security is put in by the person who is appointed a guardian. So long as the security is not put in the guardian is debarred from acting as such.

A person who is appointed a guardian is liable to be removed under clause (*b*) or clause (*e*) of section 39 of the Guardians and Wards Act if he fails to furnish security. **L** KHUSHAL DEVI *v.* SUKH DIAL **572**

Hindu Law—*Local law—Personal law.*

Prima facie, any Hindu residing in a particular Province of India is held to be subject to the particular doctrine of Hindu Law recognised in that province. But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it; consequently, where any such family migrates, to another province governed by another law, it carries its own law with it. **N** RAMBHABAI *v.* TOTARAM (1923) A. I. R. (N.) 188 **727**

——— *Mortgage by Hindu father before birth of son—Antecedent debt.*

A mortgage by a Hindu father before the birth of a son, that is, when there was no joint family in existence, and, therefore, no joint family property, is a valid antecedent debt which cannot be challenged by the son. **A** TIRLOK SAITHWAR *v.* LALSA SAITHWAR **466**

——— *Settlement by father adopted and acted upon by sons—Sons, whether can go behind settlement as reversioners—Estoppel.*

Hindu Law—contd.

On the death of a separated Hindu, who left surviving him two daughters, a dispute arose between his two first cousins and daughters as to the succession of his property. The parties settled this dispute by a private settlement under which the property of the deceased was divided by mutual consent into four equal shares and each of the four claimants got possession of one separate share. One of the cousins sold his share and on the death of the other his sons adopted the settlement and continued in possession of the share which had come to their father. After 14 years, on the death of one of the two daughters, they claimed the property of the deceased daughter as reversioners:

Held, that, though they were not parties to the settlement, under which their father had acquired a share in the estate of his deceased cousin, yet, they were estopped from going behind that settlement and claiming one-fourth share as reversioners. **A** BAHADUR SINGH *v.* RAM BAHADUR, 21 A. L. J. 140; (1923) A. I. R. (A.) 204; 45 A. 277 **405**

——— **Alienation**—*Gift by widow—Assent by next reversioner—Estoppel—Relinquishment.*

A reversioner's assent to a gift by a widow does not estop him from challenging the validity of the gift.

The consent of a next reversioner does not validate a gift which is a transfer without consideration, nor can his assent amount to a relinquishment, because, as a reversioner he has no vested interest to relinquish. **A** RAM DAYAL *v.* MITHOO LAL, **287**

——— *Gift by widow in favour of reversioner—Nearest reversioners interested—Remote reversioner, suit by, for declaring gift invalid, whether maintainable.*

A remote reversioner is entitled to challenge a gift by a Hindu widow, if the nearest reversioners are interested in maintaining the gift even though the donee is a nearer reversioner to the plaintiff. **A** JAGDEO TIWARI *v.* KUBER NATH PANDEY, (1923) A. I. R. (A.) 312 **755**

——— v. **Custom**—*Converts to Hinduism for generations—Hindu Law and usages—Adoption.*

A family of non-Hindu origin which became converted to Hinduism at least 100 years ago is sufficiently Hindu to make succession by adoption, even if non-existent in non-Hindu times, come in with the rest of Hindu Law, and this though the family may still retain some relics of non-Hinduism. **P. C.** SAHDEO NARAIN DEO *v.* KUSUM KUMARI, 4 P. L. T. 217; (1923) A. I. R. (P. C.) 211; 44 M. L. J. 476; 32 M. L. T. 121; 37 C. L. J. 369; 25 BOM. L. R. 560; (1923) M. W. N. 377; 2 PAT. 230 **769**

——— **Debt** *incurred by father as surety for payment of money lent—Liability of son.*

Where a Hindu father becomes surety for the payment of money lent, after his death his son is liable under the Hindu Law to pay the debt. **N** MAYARAM *v.* BHAIRON PRASAD, 19 N. L. R. 29; (1923) A. I. R. (N.) 115. **351**

——— **Debt** *incurred by father—Sons, liability of.*

Hindu Law—contd.

A decree-holder is entitled to proceed against any ancestral property in the hands of the son of his deceased judgment-debtor which, under the Hindu Law, is liable for the payment of the debts, unless and until the son can prove either that there was in fact no debt at all, or that the debt was tainted with immorality. **A** RAMANAND SHUKAL *v.* CHHOTEY LAL, 20 A. L. J. 969; (1923) A. I. R. (A.) 124 **417**

——— **Decree** *for damages against father—Liability of sons.*

A Hindu son is not bound to pay the damages decreed against his father for a tort, provided the decree was in respect of any act amounting to such immorality as would free the son of the wrong-doer under the Hindu Law from liability for the debt.

The right to enforce payment of a Hindu's debts against his son is a different matter from that Hindu's right to alienate his son's share in the family property himself for the satisfaction of those debts. **N** RAMPRASHAD *v.* BANSILAL, 19 N. L. R. 6; (1923) A. I. R. (N) 117; **17**

——— **Impartible Jagir** — *Succession — Joint family property or separate property — Senior branch renouncing by arrangement right of succession—Non-division of status—Effect of arrangement.*

Succession to an impartible estate under the Hindu Law is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is a separate property; and if the rule of survivorship applies, the senior member of the senior line is entitled to succeed.

In an impartible *jaghir*, one of the *jaghirdars* was succeeded not by his first son who was of a weak mind but by his second son, and under an arrangement the succession of the *jaghir* thereafter for nearly 100 years and for four generations continued in the junior branch. An unsuccessful attempt was once made by a member of the senior branch by litigation to get back the *jaghir*. There was no partible property belonging to the family besides the *jaghir*. Members of both the branches of the family resided in the ancestral homes though separately. There was no distinct or positive act of division of status and the last *jaghirdar* in the junior line died without male issue. In a suit by the mother against the senior member of the senior branch who got into possession of *jaghir*:

Held, that the effect of the family arrangement was merely to substitute the junior line for the senior line to succeed to the Poligarship, but did not affect the *jaghir* being held as joint family property, and the rights of survivorship subsisting in the senior branch. The possession of the second line being consistent with the continuance of the joint family rights did not make the *jaghir* the separate property of the second line by adverse possession. The family continued to be joint in status and on the death of the last *jaghirdar* without male issue, the senior member of the senior branch was entitled to succeed by right of survivorship in preference to the mother.

Per *Ramesam, J.*—When the individuals of a line renounce their right to an impartible estate and those of another take by a family arrangement, the persons who take the estate by the arrangement do so by an act not hostile in the sense that the members of the former line cease to be members of the joint family but hostile only to the extent that, as long as the latter line lasts, the members of the former line cannot claim it. A litigation as to the right to hold the estate between two such lines does not necessarily effect a complete separation.

The holder of an impartible estate cannot, by giving a notice to the junior members that he intends to be divided in status as regards all the partible and impartible properties, put an end to the rights of the junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties. **M** ANNADANA JADAVA GOUNDER *v.* KONAMMAL, 17 L. W. 107; (1923) M. W. N. 15; (1923) A. I. R. (M.) 402 **533**

——— **Inheritance**—*Blindness, congenital—Exclusion from inheritance.*

Under the Hindu Law congenital and incurable blindness causes exclusion from inheritance, and this rule of law has not become obsolete. **N** NANA *v* JOGILAL, 19 N. L. R. 69; (1923) A. I. R. (N) 151 **566**

——— **Joint family**—*Alienation—Legal Necessity—Burden of proof—Member on trial on serious charge—Legal necessity—Declaratory decree—Discretion of Court.*

When a creditor wants to enforce on the joint family property a charge created by one member of the joint undivided Hindu family, and the charge is challenged by the other members of the family on the ground that it was created without legal necessity, it is for the creditor to make out a *prima facie* case of legal necessity. However, in a case where it is not the creditor who is enforcing his charge against the family property, but it is one of the members of the joint family who is seeking a declaration that the charge created upon the family property by one or some of the members of the family should be declared null and void on the ground that it was created without legal necessity, it is for such member to make out a *prima facie* case that the charge was without legal necessity.

Therefore, where a member of a joint Hindu family, who is on his trial on a serious charge, *e.g.*, of murder, raises money by hypothecating the joint family property and another member of the joint family brings a suit to have the mortgage declared null and void on the ground that it was created without consideration and legal necessity, it is for the plaintiff before the mortgagee can be called upon to give evidence with regard to the validity of his document, to establish, by some *prima facie* evidence, that the deed was fictitious and without consideration.

If a member of a joint Hindu family is standing his trial on a serious charge of murder and wants funds to defend himself and raises funds by creating a charge on the family property, he does so under necessity which may be called legal necessity under the Hindu Law. And there is no difference in principle whether a *karta* or a younger member of the family, in case he is in trouble, borrows money by hypothecating the family property in order to defend himself.

The question of the granting of a decree in a declaratory suit is always in the last, resource a matter of discretion with the Court, and that discretion has to be exercised upon proper and legal principles. **A** RAM RAGHUBIR LAL *v.* DIP NARAIN SINGH, 21 A. L. J. 168; 9 O. & A. L. R. (A.) 349; (1923) A. I. R. (A.) 287; 45 A. 311 **749**

——— **Joint family**—*Alienation—Mortgage—Antecedent debt—Sons, liability of.*

Per *Spencer, J.*—Under the Hindu Law, a personal covenant whether contemporaneous or previous, if it is part of a mortgage executed by a Hindu father, is not an antecedent debt, so as to validate the mortgage as against the sons.

Whether there is an antecedent obligation dissociated in time and fact from the sale or mortgage in any particular case is a question of fact to be decided on the facts of each case.

A negotiable instrument does not lose its character as such by the mere fact that title-deeds are deposited as collateral security.

Where the accounts show that money was first advanced, pro-notes executed and later on security taken, the debts are sufficiently dissociated in time and fact from the mortgage to constitute an "antecedent debt."

Obiter.—A personal covenant to pay which is outstanding in a mortgage document can sustain a subsequent alienation as an antecedent debt, though no decree has been passed to enforce it. **M** VADAMALAI PILLAI *v.* SUBRAMANIA CHETTIAR, 16 L. W. 936; (1923) M. W. N. 57; (1923) A. I. R. (M.) 262 **130**

——— *Bequest, powers of—Will by one or more members of joint family—Family settlement.*

A member of a joint Hindu family, if he is the absolute owner of the property, whether ancestral or self-acquired, can bequeath it by Will. Similarly, two or more Hindus, who own between themselves all the co-parcenary property, are competent to make a joint Will.

Where two joint Hindu brothers having no male issue and owning between themselves the whole of the co-parcenary property execute a document which provides that in the event of one party dying without any male issue, the name of his widow shall be entered in the public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever, the document is a joint Will valid under the Law. The document, besides, constitutes a valid family settlement

Hindu Law—contd.

as it embodies a mutual bargain supported by legal consideration whereby each party gives up the possibility of his surviving his brother, with the consequential financial advantage in that case, in consideration of obtaining for his wife a far more assured monetary position than she would otherwise have had as the widow of a deceased Hindu member of a joint family. **A** LACHHMI CHAND *v.* ANANDI, 21 A. L. J. 73; (1923) A. I. R. (A) 109; 45 A. 245 **574**

——— **Joint family**—*Debts—Legal necessity—Long series of transactions—Proof, nature of—Judgment-debt*—Prima facie *proof of necessity.*

In determining the existence of legal necessity for debts contracted by a Hindu joint family, where there has been a long series of transactions, it is not always possible to prove exactly the purpose for which any particular item was borrowed, and, in such a case, it will be sufficient for the creditor to show that the family was in chronic need of money, and that the moneys were advanced on the representation of the manager that they were needed for objects of necessity.

Where the necessity arises from the pressure of a judgment-debt, the person dealing with the manager of a joint family is entitled to treat the judgment as *prima facie* proof of necessity, and he is under no obligation to go behind the judgment in order to inquire whether the debt covered by the decree was for legal and binding necessity of the family. **Pat** DUKHIT OJHA *v.* JANKI SINGH, 4 P. L. T. 377 **489**

——— **Estate**—*Mother succeeding son—Liability to pay husband's debts—Son's successors, liability of—Extent of liability.*

There may be no pious obligation on a Hindu mother succeeding to the estate of her son for the payment of the debts due by her husband; but if the son has succeeded to the estate of his father, the person who succeeds such son is as much liable for the payment of the debts due by the father, to the extent of the family property, as a preson who would directly succeed to the property on his death. **O** SHEO NANDAN LAL *v.* SHEO BALAK, 9 O & A. L. R. (O) 204 **974**

——— Karta, *appointment of, as guardian, effect of.*

Although a mother, the natural guardian, is the proper person to be appointed guardian *ad litem* of a minor, the fact that, on the nomination of the plaintiff, the eldest brother of the minor, who is also *karta* of the joint family, is appointed, would not render the decree passed in the suit a nullity. **Pat,** RADHA KRISHNA GOPAL LALJI *v.* LAKSHMI NARAYAN, 1 P. L. R. 86; 4 P. L. T. 329; (1923) PAT. 159; 2 PAT. 273 **341**

——— Karta *whether can act as guardian.*

Obiter:—The *Karta* of a joint Hindu family can act, without specific appointment, as guardian of the minor. But a Court must decide whether or not he was acting in the interest of the minor. **Peah.** CHET RAM *v.* KANSHI RAM 7

——— *Manager and adult members made defendants—Minor members not impleaded—*

Hindu Law—contd.

Compromise-decree, whether binding on minor members—Effect of making adult members parties.

If the whole of a joint Hindu family is represented in a suit by the managing member of the family, the minor members must be taken to have been duly represented. It is not necessary that the managing member should be described as such in the plaint; nor is it necessary that every adult member should be made a party to the suit. It is sufficient if, in reality, the whole of the family is represented by the persons who are named as defendants in the suit. But if, for the sake of precaution, all adult members are made parties, that does not affect the nature of the suit; nor is it necessary to state specifically in the plaint that the members who have been made parties to the suit represent not only themselves but also the minor members of the family.

A compromise-decree passed against the manager of a joint family and the adult members made parties with the manager, is binding on the minor members of the family not made parties to the suit, if there is nothing to show that the adult members of the family did not properly represent the interest of the minor members. **A** TULSI *v.* BISHNATH RAI, 21 A. L. J. 175; (1923) A. I. R. (A.) 284 **623**

——— **Joint family**—*Mortgage by* **karta**—*Necessity—Interest, rate of—Burden of proof.*

It is incumbent on a person, supporting a mortgage made by the manager of a joint Hindu family, to show not only that there was necessity to borrow but that it was not unreasonable to do so at the rate and terms contained in the mortgage. **P C** RAM BUJHAWAN PROSAD SINGH *v.* NATHU RAM, 4 P. L. T. 29; (1923) A. I. R. 37 (P. C.); 32 M. L. T. 129; 44 M. L. J. 615; 25 BOM. L. R. 568; (1923) M. W. N. 382; 2 PAT. 285 **933**

——— Partition in status. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 62, 109, 120, 127 **177**

———*property—Alienation—Legal necessity—Benefit to the estate—Litigation for possible benefit, whether constitutes necessity.*

The borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is not recognised by Hindu Law as a legal necessity. A distinction should be drawn between litigation undertaken to protect the property and litigation the object of which is to obtain a possible benefit for the estate. The former relates to the security of that which has already been acquired and is in actual possession: the latter relates to that which may possibly be acquired; as a general rule, the former class of litigation would, no doubt, amount to legal necessity and in regard to the latter class of litigation it may be laid down that if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner on the analogy of the maxim 'he who enjoys the benefit ought to bear the burden also.'

An act, for which the character of 'benefit to the estate' or 'legal necessity' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property into possession, and which may or may not be successful under the chances attending upon litigation. **A** BHAGWAN DAS *v.* MAHADEO PRASAD, 21 A. L. J. 271; (1923) A. I. R. (A.) 298 **959**

——— **Joint family** *property—Ancestral property—Self-acquisitions—Nucleus — Burden of proof—Alienation by father— Validity.*

Per *Devadoss, J.*—If there is a large family nucleus and if the property in the possession of a member of the joint family can be traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of, and without detriment to, the family nucleus. The question of *onus* is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family nucleus and fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus.

Where a father transfers property intending to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being self-acquired is not sufficient to invalidate an otherwise proper transaction. **M** VADAMALAI PILLAI *v.* SUBRAMANIA CHETTIAR, 16 L. W 936; (1923) M. W. N. 57; (1923) A. I. R. (M.) 262 **130**

——— *Sale of family property—Re-purchase by one member, effect of.*

The doctrine that where there has been a mortgage of joint family property or a wrongful dispossession of the joint family and the property is subsequently redeemed or re-purchased by one member of the family the redemption or the re-purchase must be deemed to have been for and on behalf of the joint family, irrespective of the fact whether the money paid for the redemption or the re-purchase was paid out of joint family funds or was the private money of the member paying it, is inapplicable to a case where joint family property which has been sold by a valid and voluntary sale is subsequently re-purchased by one member of the family with his own private funds.

Where two brothers sold certain family property and subsequently went separately into insolvency and some time after the property sold was re-purchased by one of them in his own name with his private funds and was dealt with as his separate property by him and after his death by his widow to the knowledge of and without objection by the other brother or after him by his widow:

Held, that these facts indicated that there had been a division of status between the brothers prior to the re-purchase and that the property was the self-acquisition of the brother who had re-purchased it. **M** MAGDOOM MAHAMAD *v.* BANSI LAL, (1922) M. W. N. 824; (1923) A. I. R. (M.) 248 **855**

——— **Joint family** *Son's liability for debts of father—Partition, effect of.*

So long as a Hindu family remains undivided, a creditor can proceed against the interests of the sons in the ancestral property for the debts of their father not contracted for illegal or immoral purposes without proving family necessity or antecedent debt.

Obiter (*i*) Per *Spencer, J.*—If the sons effect a *bona fide* partition at a time anterior to the date when the debt is contracted, their responsibility is different and the father's creditor cannot then proceed against their divided shares. **M** KURUKUNDI SAMA RAO *v.* FIRM OF MARWADI VANNAPI VAJINJI, (1922) M. W. N. 708; 43 M. L. J. 745; (1923) A. I. R. (M.) 36; 32 M. L. T. 9; 17 L. W. 661; 46 M. 64 **153**

——— **Mitakshara** — *Inheritance — Father's sister's great-grandson.*

A father's sister's great-grandson of the propositus is not a *bhinna gotro sapinda* and cannot inherit his property. **A** SHEO NANDAN *v.* MUNNI, 21 A. L. J. 288 **1018**

——— *Partition—Grandmother's share on partition between grandsons.*

A grandmother gets an equal share with her grandsons on partition between them. **A** KANHAIYA LAL *v.* GORA **564**

——— *Succession—Sudras— Illegitimate son and widow.*

Under the Hindu Law, an illegitimate son of a Sudra is entitled to share equally with the widow. **P C** KAMULAMMAL *v.* VISVANATHASWAMI NAICKER, 17 L. W. 298; (1923) A. I. R. (P. C.) 8; 44 M. L. J. 465; 32 M. L. T. 48; 37 C. L. J. 363; 25 BOM. L. R. 577; 46 M. 167 **643**

——— **Mother**—*Properties given for maintenance —Estate taken—Property acquired from income, nature of.*

When on the death of a Hindu his widows agreed to let his mother hold certain properties which were described as having been given for maintenance;

Held, that the words used did not indicate an intention to make over the properties to the mother as an absolute gift and that the mother was only entitled to use their income for purposes of maintenance.

There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited, but absolute, exclusive and separate, in every sense of the term and devolves as such. There is no presumption that savings or purchases with savings effected by a widow are increments to the *corpus* of the husband's estate and pass together with it.

The same principles apply to a case where a Hindu female is given certain properties for the

Hindu Law—concld.

purpose of applying their income towards her maintenance. **L** MALAN *v.* KISHORE CHAND, (1923) A. I. R. (L.) 17 **833**

——— **Partition**—*Incomplete partition, allegation of—Burden of proof—Presumption*

Once it is admitted that a partition has taken place, the presumption is that all the property belonging to the joint family has been divided, and the burden of proving that some of the property was left undivided and continued to be joint, lies upon the person alleging it. **N** ANANDRAO *v.* DADA **43**

——— **Step-mother**, *whether guardian* de jure—*Transaction by* de facto *guardian—Legality—Test—Powers of delegation.*

Although under the Hindu Law, a step-mother is not the *de jure* guardian of her minor step-son, where she is the guardian *de facto* she has power to enter into transactions such as a prudent manager of the property would have entered into for legal necessity or benefit of the minor, and such transactions will be upheld by the Courts.

A *de facto* guardian of a minor has power to delegate his authority to an agent. **N** GANPAT *v.* FIRM OF BISSESSARLAL GOVINDRAM **491**

——— **Widow**—*Gift to next reversioner—Acceleration—Intention.*

A transfer by a Hindu widow to her daughter or other next reversioner will ordinarily be regarded as an acceleration of the next reversioner's interest, but this will not be the case when there are material portions in the particular document by which the transfer is effected to support the existence of different intention on the part of the widow **M** KARUMURI RAMALAKSHMI *v.* BODA NAGARATAM 17 L. W. 11; (1923) M. W. N. 172; 44 M. L. J. 677; (1923) A. I. R. (M.) 335 **343**

——— —*Sale to pay off husband's debt—Consideration slightly in excess of debt—Sale, setting aside of.*

A sale by a Hindu widow to pay off a legal debt due by her deceased husband cannot be set aside upon payment of the amount which it was necessary for her to raise to pay off the debt, simply because the sale was for a sum which exceeded by about one-sixth, the sum actually required for the debt. **N** ANANDRAO *v.* SARASWTIBAI, (1923) A. I. R. (N.) 125 **532**

——— **Will**—*Devise in favour of widow—Estate taken—"Malik," use of.*

The mere use of the word "*Malik*" in making a devise, if qualified by the surrounding context, does not exclude the possibility of merely a life-estate being conferred.

A Will made by a Hindu testator devised certain property in the following words:

"After my death my wife shall be the owner and possessor and after her death my daughters shall be the owners of the property in half shares and shall exercise proprietary rights over i:"

Held, that the widow took only a life-estate in the property. **L** RAM KISHEN *v.* BHAGIRTI, (1923) A. I. R. (L.) 304 **748**

Idol—Mahant, *minor—Suit for recovery of temple property—Guardian of minor, suit by, as next friend of idol, competency of.*

Where the *Mahant* of an idol is a minor and a person appointed to supervise the management appoints a guardian of the property on the minor's behalf, a suit brought by such guardian as next friend in the name of the idol and not in the capacity of a trustee or *Shebait* for recovery of property belonging to the idol is competent. **A** SHEO RAMJI *v.* SRI RIDHNATH MAHADEOJI, 21 A. L. J. 148; (1923) A. I. R. (A.) 160; 45 A. 319 **480**

Income-Tax Act (VII of 1918), ss. 3, 5, 33—*Non-resident firm making purchases in British India—Profits accruing abroad, whether liable to income-tax.*

Section 33 (1) of the Income-Tax Act, 1918, is not a charging section but a machinery section setting out the method by which the tax, if otherwise chargeable, is to be collected in certain cases where the direct beneficiary cannot be got at. It is not a section designed to declare some other gains taxable beyond what has been declared by section 5 of the Act to be taxable.

Section 33 (1) of the Income-Tax Act was not intended in any way to enlarge the scope of section 5 or bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connection in British India.

Section 33 (1) of the Income Tax is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India which are transmittabe and are transmitted through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent.

The condition precedent to assessability under section 3 (1) of the Income Tax Act is business in British India and not merely a business connection in British India, and it is not laid down in the Act that the two phrases are identical in meaning. The test is this:—Is the non-resident firm by its agency in British India making profits in British India which pass to it through the hands of its agent. If it is, then section 33 (1) of the Income-Tax Act applies. If not, then the section does not apply.

A non-resident firm which merely purchases raw material in British India through its agent for shipment and sale abroad and realises the profits from the sale abroad does not thereby carry on trade or business in British India and is not liable to assessment in respect of such profits. **M** SECY. TO THE BOARD OF REV. (INCOM. TAX), MADRAS *v.* MADRAS EXPORT CO., MADRAS, 17 L. W. 161; 44 M. L. J. 290; (1923) A. I. R. (M.) 422; 46 M. 360 **756**

Indian Soldiers (Litigation) Act (IX of 1918), s. 11 *applicability of.*

Section 11 of the Indian Soldiers (Litigation) Act applies only to those cases where the plaintiff is an Indian Soldier at the time when he files his suit; the section does not become applicable by the mere fact that the plaintiff was a soldier at the time when the cause of action arose. **L** MULA MAI *v.* PIARA SINGH 828

Injunction—*Jurisdiction to grant against person residing outside Court's territorial jurisdiction—Injunction when to be granted—Shrine—Worship—Use of property by its owner—Religious feelings and beliefs.*

A Court should not grant an injunction against a person residing outside its jurisdiction and not subject to its jurisdiction in cases where it has no means of enforcing the injunction. But where the acts complained of are acts committed or to be committed within the jurisdiction of the Court and the party proceeded against, although he resides outside the jurisdiction, has appeared in the suit and submitted personally to the jurisdiction of the Court, the Court has jurisdiction to make the order.

Before granting a temporary injunction the Court must be satisfied that the plaintiff has a fair question to raise as to the extent of the right alleged. It must also be satisfied that the defendant has infringed or is threatening an infringement of that right.

No person is entitled, to whatever religion he may belong, to enforce his religious views upon another or to restrain that other from doing any lawful act or making any lawful use of his property merely because it would not fit in with the tenets of his particular religion. The mere fact that the contemplated act of the owner of the property would shock the religious sentiments of the other is not in itself a matter which would give rise to a cause of action.

The right to worship at a shrine built on a hill, belonging to another with free access to the hill for the purpose of worship, is a right in *alieno solo*, and so long as it is not interfered with, the owner of the hill can do what he likes with his property.

Every one is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs. **Pat.** MAHARAJ BAHADUR SINGH *v.* HUKUM CHAND 4 P. L. T. 48; (1923) A. I. R. (PAT.) 209 11

Interest, *award of—No contract to pay interest—Equity—Interest Act (XXXII of 1839), whether exhaustive.*

The Interest Act is not exhaustive of cases where interest is allowable when no contract exists; but, apart from contract and the provisions of the Act, a Court is competent to decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it.

Where by the wrongful act of the defendant the plaintiff is deprived of money which was actually making interest, a Court of Equity, in an action for money had and received, is competent to award interest on the amount due.

Interest—concld.

In granting equitable relief the Court ought to look to the substance of the claim and not to the form of the action. **M** ARUNACHALAM CHETTIAR *v.* RAJESWARA SETUPATI, (1921) M.W.N. 873; 15 L. W. 63; 30 M. L. T. 81; 42 M. L. J. 74; (1922) A. I. R. (M.) 55 257

Interest Act (XXXII of 1839), whether exhaustive *See* INTEREST, AWARD OF 57

Interpretation of Statutes—*Distinct meanings—Duty of Court.*

When in a Statute, or in an official notification having the force of law, a term is used which is capable of two absolutely distinct meanings, it is for the Courts to determine which is correct. **Pesh** MUAZAM SHER *v.* FAZAL RAHMAN 312

Joint holding—*One co-sharer in possession of specific plot of holding—Possession of plot wrongfully taken by another co-sharer—Suit for exclusive possession—Partition in Revenue Courts, whether necessary.*

If in a suit for exclusive possession of a plot of land, it is proved that the land was the *khudkasht* of the plaintiff and that the defendant had wrongfully dispossessed him and taken possession of the property, the plaintiff is entitled to the decree prayed for and cannot be compelled to sue for partition in the Revenue Court. **A** KULDIP CHAUBE *v.* JAGNANDAN CHAUBE, (1923) A. I. R. (A.) 363 299

Jurisdiction—*Complaint, filing of, effect of—Revision—Complainant, whether can object to jurisdiction.*

The mere filing of a complaint invoking the jurisdiction of a Magistrate, does not invest the Magistrate with jurisdiction, if otherwise he had no jurisdiction to try the offence, and it is open to a complainant, in revision to the High Court, to object to the jurisdiction of the Magistrate. **M** RAMASAMI CHETTIAR *v.* MUTHUVELU MUDALI, 16 L. W. 562; 31 M. L. T. 420; 45 M. 843 (1923) M. W. N. 57; (1923) A. I. R. (M.) 191; 24 CR. L. J. 110 238

———*of Courts—Jurisdiction, meaning and divisions of—Jurisdiction as to person, how conferred—Judgment passed in disobedience of statutory provision, whether necessarily without jurisdiction—Defect in procedure—Merits of case not affected—Judgment, interference with, in appeal—Void and voidable judgments—Judgment, setting aside of, on ground of fraud—General allegations, value of—Suit to set aside judgment as passed without jurisdiction—Court, whether competent to go behind record of proceedings—External evidence, examination of.*

Jurisdiction is the authority of the Court to hear and determine a cause and is territorial, pecuniary, personal and of the subject-matter. Jurisdiction as to person is conferred on the Court by suing the person in a Court competent to try the cause as against that person, not by the mode which the Court adopts in bringing the person before the Court. Where the condition for the assumption of jurisdiction as against a person exists, the authority of the Court to try and determine the cause as against him is complete and the mode which the Court adopts to bring that person

Jurisdiction—contd.

before the Court, affects the exercise of jurisdiction and not its existence.

The mere fact that the Court has disobeyed any particular provision of the Statute is not sufficient to establish that there was no jurisdiction in the Court to render judgment in the case. But where as a consequence of the disobedience, there is no proper party to the suit, the case is different. The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code.

In order to establish that a judgment is a nullity, it must be established that there was a total lack of jurisdiction in the Court to render the judgment.

When the question is not one affecting the jurisdiction of the Court, but one affecting the regularity of the proceedings, the Appellate Court will not interfere, unless there is a defect on the merits.

There is a clear distinction between a judgment which is void and a judgment which is voidable. An erroneous judgment is one which, though regularly rendered, is contrary to law or facts and is, therefore, liable to be reversed by an Appellate Tribunal. An irregular judgment is also a voidable judgment, but the distinction between an erroneous judgment and a voidable judgment is this that, whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there is a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside and it can be completely disregarded whenever it is pleaded, either in support of a claim or in answer to a claim.

Though a suit does not lie to set aside a decree and a sale in execution of such decree, on the ground that none of the processes in the suit or in execution was served on the plaintiff, such a suit is maintainable, if the allegations in the plaint amount to an attack, not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit, in which the *ex parte* decree was obtained, as being a fraud from beginning to end.

It is a well settled principle as regards fraud that general allegations, however, strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. A fair test is to strike out from the plaint such words, as "fraud," "deceit," "illegal" and "fraudulent acts" and so forth and see whether a case of fraud can be founded on what remains.

Allegations in a plaint by a minor that none of the processes, in a suit or in the execution, was served on the plaintiff or on his guardian and that he was not properly represented in the action, do not, standing by themselves, amount to an averment of fraud,

Jurisdiction—contd.

but where there are allegations in the plaint which suggest that there was no foundation at all in the suit or that there was a fair defence to the suit, such allegations are sufficient to raise the presumption that the failure to serve processes on the defendant or to take steps to have a guardian assigned to the minor, was deliberate and part of a carefully planned campaign to snatch a decree in the absence of the defendant.

On a question of jurisdiction, the actual record or proceedings of the suit should in each case be decisive. Where on the face of the record a person qualified to act as the guardian appears as a guardian of the minor for the suit, the Court has no power, in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under O. XXXII, r. 3(4) were in fact served or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case. But where the record, on the face of it, shows that the minor was not represented by a guardian for the suit or was represented by a guardian disqualified from acting as guardian, the position is the same as if the minor were not a party to the suit and the judgment rendered by the Court is without jurisdiction and null and void. **Pat** SATDEO NARAIN *v* RAMAYAN TEWARI, 4 P. L. T. 147; (1923) A. I. R. (PAT.) 242; 2 PAT. 335 **705**

———*False allegations in plaint—Abuse of process of Court—Jurisdiction, general rule as to test of—Plaint designedly drafted falsely to give jurisdiction—Procedure.*

If a plaintiff makes allegations which he knows to be false and untrue, and makes them with the object of thereby inducing a Court to entertain the suit, and thereby assume to invest itself with jurisdiction, that is an abuse of the process of the Court, and is a fraud upon the Court which cannot be permitted.

As a general rule, the proper test of jurisdiction is the statements made in the plaint and the nature of the claim before the Court, but where a plaint is designedly drafted with known false allegations, inserted with the object of obtaining a hearing in a Court which in truth has no jurisdiction, the plaintiff is not entitled to a hearing on the merits, the proper course in such a case is for the Court to direct the plaint to be returned for presentation in the proper Court **A** ABDUL GHAFUR *v.* NURUDDIN AHMAD, 20 A. L. J. 984; (1923) A. I. R. (A.) 137; 45 A. 193 **411**

———*Suit by two plaintiffs — Dismissal — Appeal by one joining other as respondent—Appeal, acceptance of—Court, jurisdiction of, to show respondent as appellant.*

A Court has no jurisdiction to direct that a person who was never an appellant before it should be shown in the decree as an appellant.

Two persons, *H.* and *D*, brought a suit for profits which was dismissed. *H* alone appealed joining *D.* as respondent. The appeal was accepted, and the Appellate Court came to the conclusion

Jurisdiction—concld.

that a decree in favour of both *H* and *D* should be passed. By mistake, however, the decree was drawn up in the name of *H* alone. *D* applied for correction of the decree. Upon this the Appellate Court passed an order directing the name of *D* to be entered in the decree as an appellant. On revision :

Held, that the order was without jurisdiction and could not be sustained. **A** HARDEO PRASAD *v.* DAMODAR PRASAD, 20 A. L. J. 980; (1923) A. I. R. (A.) 119 **424**

Juristic person—*Idol—Idol, whether infant—Next friend, suit by, when competent.*

An idol who is being defrauded by his lawful guardian or trustee cannot be treated by a Court of Law on the footing of an infant, and any person claiming a benevolent interest in the fortunes of the said idol, cannot be permitted to maintain a suit in the name and as the next friend of the injured idol. The person maintaining the suit must make out that he has a right to act on behalf of the idol. **A** DARSHAN LAL *v.* SHIBJI MAHARAJ BIRAJMAN, 20 A. L. J. 977; (1923) A. I. R. (A.) 120; 45 A. 215 **420**

Jury trial—*Charge to Jury—Defective charge—Proposed amendments in law, reference to.*

Where in delivering his charge to the Jury the Judge omits to set out all the questions that require decision, and the charge offers extremely little guidance for arriving at a decision, the charge is defective.

Proposed amendments in the law, where they have not become part of the law, ought not to be referred to in charging a Jury. **C** ABDUL GAHUR *v.* EMPEROR, 36 C. L. J. 152; 26 C. W. N. 972; (1922) A. I. R. (C.) 505; 24 CR. L. J. 76 **124**

———*Misdirection—Unanimous verdict—Failure of justice.*

To justify the reversal of an unanimous verdict of a Jury on the ground that the Judge in his charge misdirected the Jury, it must be shown that the verdict has occasioned a failure of justice; that the verdict was due to the misdirection, and that, apart from this, the Jury would not have come to the same conclusion. **C** SUPERINTENDENT AND REMEMBRANCER, LEGAL AFFAIRS *v.* SHYAM SARDAR BHUMIJ, 26 C. W. N. 558; (1922) A. I. R. (C.) 106; 24 CR. L. J. 143 **367**

——— *Recording the heads of charge, meaning of.*

Although in a Jury trial the law requires the Judge only to record the heads of his charge these should be so recorded as to enable the High Court to know what was actually said. **C** ABDUL GAFUR *v.* EMPEROR, 35 C. L. J. 437; 26 C. W. N. 996; (1922) A. I. R. (C.) 192; 24 CR. L. J. 8 **56**

Lachmipur gadi—*District Bhagalpur, Bengal—Impartibility of estate—Custom.*

The holders of the *gadi* of Lachmipur Estate, District Bhagalpur, Bengal, comprising one of the *chawrasi gadis*, even supposing their origin to be non-Hindu, have adopted, in general, not only Hindu religion and Hindu social usages, but also the Hindu Law regulating the succession of landed property.

Although an estate only becomes impartible by custom, and the custom has in each case to be proved, the custom of impartibility affords no

Lachmipur gadi—concld.

evidence whereby to determine that a family does not follow Hindu Law as a whole. **P C** SAHDEO NARIAN DEO *v.* KUSUM KUMARI, 4 P. L. T. 217; (1923) A. I. R. (P. C.) 21; 44 M. L. J. 476; 32 M. L. T. 121; 37 C. L. J. 369; 25 BOM. L. R. 560; (1923) M. W. N. 377; 2 PAT. 230 **769**

Landlord and tenant—*Denial of landlord's title—Forfeiture.*

The denial of his landlord's title by a tenant in clear unmistakeable terms will operate to create a forfeiture of the tenancy and enable the landlord to resume possession, and the mere institution of a suit to recover possession is a sufficient expression of the landlord's intention to determine the tenancy.

The denial must, however, not only be of a clear and unambiguous nature but must be antecedent to the suit for possession the suit must be founded upon the denial. The denial cannot be extracted from the pleadings in the suit itself. **L** KEWAL RAM *v.* ABDUL HAI, (1923) A. I. R. (L.) 400 **779**

——— *Denial of landlord's title—Forfeiture—Necessity for landlord's knowledge.*

In order that a denial by a tenant of the landlord's title may work a forfeiture, it must be unequivocal and clear and must be brought home to the knowledge of the landlord prior to the institution of the suit. **M** THIRUMALASSERI KOTTAYIL SREEDHARAM VALIA RAJAH *v* PARAKKAT, (1921) M. W. N. 630; 41 M. L. J. 525 **270**

——— *Fixed-rate holding—Simple mortgage by tenant — Dispossession, forcible, by* Zemindar *—Possession not recovered — Holding, whether extinct — Mortgage, whether enforceable against* Zemindar.

If a tenant of a fixed rate holding mortgages his holding, and is thereafter forcibly dispossessed by the *zemindar* the mortgagee does not thereby lose his rights under the mortgage but can enforce the same against the *zemindar*, even if the tenant, intentionally or unintentionally, takes no steps to recover possession of the holding. The inaction of the tenant is equivalent to a surrender of the holding but the surrender will not affect the rights under the mortgage. **A** RAM KHELAWAN *v.* BRIJ LAL, 21 A. L. J. 206; (1923) A. I. R. (A.) 295 **931**

——— *Grove-holder allowing land to remain waste for 12 years—Abandonment.*

If a grove-holder cuts down the grove trees and allows the land to remain waste without trees or cultivation thereon for upward of 12 years, it amounts to abandonment and his descendants are not entitled to take possession of the land and re-plant a new grove thereon without the permission of the *zemindar*. **A** HAZARI LAL *v.* NIMAR, 21 A. L. J. 277; (1923) A. I. R. (A.) 295 **1038**

——— *Lease of agricultural land—Possession of whole leased area not given to lessee—Lessee's remedy—Reduction of rent—Suit for damages—Jurisdiction of Civil and Revenue Courts.*

A lessee of agricultural land, if not given possession of a portion of the leased area, cannot obtain a deduction of his rent from a Rent Court, though it is open to him to institute a suit in the Civil Court for damages for breach of contract by the lessor. **A** MUHAMMAD ALTAF ALI KHAN *v.* PHOOL KUNWARI, (1923) A. I. R. (A.) 367 **400**

Londlord and tenant—contd.

——— *Lease—Forfeiture on non-payment of rent—Penalty—Lessee, right of, to eject prior lessee—Notice.*

Where a lease stipulates that on non-payment of rent on the day fixed for payment the interest of the lessee would be forfeited and the landlord would have a right of re-entry, the stipulation amounts to a penalty and is deemed to have been intended as a mere security for the payment of the rent.

Courts have power to relieve against a forfeiture incurred under such a clause.

The right of a lessee to eject a previous lessee whose lease has expired is not affected by the fact that the latter did not have proper notice of the lease in favour of the former. L KALLAN *v.* JAWAHAR SINGH, 5 L. L. J. 99 **837**

——— Malikanadari *rights, how created*—Thakbast *map and* Khasra, *meaning of*—Thakbast khasra, *evidentiary value of—Claim to hold land rent-free—Onus—Non-collection of rent by* thekadar—*Adverse possession.*

A *malikanadari* right can only come into existence by arrangement with the village proprietor. A Regular Survey of a District is preceded by a preliminary measurement by an *amin* who lays down on a rough map the locality, without any guarantee of scientific accuracy and enters in a register particulars regarding the plots gathered from the people. The map is called the *thakbast* map, and the register the *thak khasra.*

The *thak khasra* is a rough register and statements entered in it have by themselves no evidentiary value. Where, therefore, a statement is made before an *amin* to the effect that within a *mauza* there are certain persons who hold *malikanadari* rights, an entry made to that effect in the *khasra* cannot be treated as evidence to support the claim, until it is proved that the person adversely affected thereby had notice of the statement and knowingly acquiesced in it.

Once a landlord has proved that the land which is sought to be held rent-free, lies within his regularly assessed estate or *mahal*, the onus is upon the person claiming to hold the land free of the obligation to pay rent to show by satisfactory evidence that he has been relieved of this obligation either by contract or by some old grant recognised by Government.

Where a *mahal* has all along been held by a *thekadar*, if the latter who collects the rents and pays a fixed sum to the proprietor, fails to collect the rent from any individual tenant, it would not create adverse possession against the proprietor.

Mere non-payment of rent or discontinuance of payment of rent cannot by itself create adverse possession. P C JAGDEO NARAIN SINGH *v.* BALDEO SINGH, 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 36 C. L. J. 499; 32 M. L. T. 1; (1923) M.W.N. 361; 2 PAT. 38 **984**

——— *Occupancy holding—Fruit trees, enjoyment of.*

An occupancy tenant has, in the absence of a contract or custom to the contrary, the right to enjoy the fruits of the trees standing on his occupancy holding. A KAMPTA PRASAD *v.* SHEO PRASAD, 21 A. L. J. 292 **97**

Landlord and tenant—contd.

——— *Permanent tenure—Presumption.*

Where the origin and terms of a tenancy are unknown but it is found that (1) it was created more than 30 years ago; (2) the land was let for building purposes and that the lessee had constructed on it *pacca* houses, and that (3) the tenancy was transferred from time to time without any objection by the landlord, a Court is perfectly justified in holding that the land was originally let for building purposes on a permanent tenancy. A NOBIN CHANDRA BOSE *v.* BANDI **370**

——— Putni, *if can be created over another* putni—*Assignment of* Zemindar's *right to receive rent from* putnidar—*Interest of assignee, if can be sold under Putni Taluks Regulation (VIII of* 1819)—Putni *sale without jurisdiction—Purchaser, position of.*

The *zemindar* of a certain estate granted a *putni* lease of the entire 16-annas of the property to the defendants in 1881. *A.* who acquired an interest in 1-anna share of the *zemindary* in 1895 created a *putni* in respect of this share in favour of *B* Thereafter, there was a sale of the interest of *B* under Regulation VIII of 1819 which was purchased by the plaintiff who then sued the defendants for rent of the *putni* to the extent of 1-anna share:

Held, (1) that the plaintiff had no right to recover rent from the defendants and the relationship of landlord and tenant did not exist between the parties;

(2) that the whole scheme of the Putni Taluks Regulation was that the *putnidar* was the only person whose interest could be sold under the Regulation and not the interest of a person in the position of *B*. by whatever name it might be called. The mere giving of the name of *putni* to the interest of *B*. would not make it a *putni* as contemplated by the Regulation so as to bring into play all the provisions of the law. Therefore, the sale under Putni Taluks Regulation; VIII of 1819 at which the plaintiff had purchased was without jurisdiction and the plaintiff had acquired no title.

The idea of a *putni* being created over another *putni* is absolutely foreign to the scheme of the Putni Taluks Regulation. There can, however, be no objection to the assignment of the right of the *zemindar* to receive rent from the *putnidar* which he is entitled to get under the *Putni* Settlement, for example, he may create an *ijara* or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the *zemindar's* interest would be entitled to recover rent from the *putnidar* by virtue of the assignment. C RAJENDRA NARAYAN CHAUDHURY *v.* ABU NASAR AHIYA, 27 C. W. N. 189; 37 C. L. J. 141; (1923) A. I. R. (C.) 189; 50 C. 146 **327**

——— *Repudiation of liability by tenant—Landlord, whether can sue for rent of whole period of tenancy.*

A landlord is entitled to sue for the rent of the whole period of the tenancy as damages where the tenant repudiates his liability to pay rent under the lease, and is not bound to wait

Landlord and tenant—concld.

until any particular date when the rent would become due under the terms of the lease. **L** BUDHA MAL *v.* SHIB DAYAL, **826**

——— *Suit for rent – Collection paper, evidentiary value of.*

Rent collection papers which are not proved by persons who made the collections, cannot be treated as independent evidence of the fact that the rent was realised at the rate mentioned in those papers. **C** FAIJADDIN *v.* AGNI KUMAR SARMA **300**

——— Thekedar, *powers of—Creation of tenants in spite of prohibition—Damages, provision for, effect of.*

Normally, and unless there is something against it in the terms of the *theka*, a *thekedar* of proprietary rights has all the powers and privileges that a landlord has in respect of his tenants and in respect of creating tenants.

A *thekedar's* powers may be limited by conditions in the *theka*.

A distinct prohibition does not cease to be a prohibition because the person who acts against the terms of that prohibition is made liable for damages.

A person, who has been created a tenant by a *thekedar* in spite of the prohibition in the *theka*-deed against the creation of tenants cannot claim to be a tenant against the wishes of the proprietor simply because the lease-deed provides that if the lessor suffered in consequence of the action of the *thekedar* in creating tenants he might sue the *thekedar* for damages. **N** MULLOO *v.* KUNDANLAL, (1923) A. I. R. (N.) 130 **868**

Legal practitioner—*Dismissal from profession—Re-instatement—Procedure—High Court, inherent powers of.*

When a legal practitioner is debarred from further practice by a High Court, the latter has jurisdiction to rescind the order and re-instate him under its inherent powers. But before exercising such powers, the Court should be clearly convinced, not by mere protestations of repentance and regret, but by actual facts that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession.

In such a case, the legal practitioner should apply to a Bench presided over by the Chief Justice and ask for a rule in the matter. The Bench may, if a *prima facie* case is made out, direct that a rule be issued and call upon the Government Advocate to show cause why the applicant should not be re-instated. The matter will then come up before, and be determined by a Bench specially constituted. **Pat** MATHURA PRASAD, *In the matter of*, 1 PAT. 684; (1922) A. I. R. (PAT.) 604; 24 CR. L. J. 74; 4 A. L. T. 303 **122**

Legal Practitioners Act (XVIII of 1879), ss. 13, 14—*Suspension of Pleader, reference for—Invalid reference—High Court, power of, to take action.*

Under section 13 of the Legal Practitioners Act, the High Court has absolute power, after such enquiry as it thinks fit, to suspend or dismiss a Pleader or *Mukhtar* from practice, even though the matter is referred to it under section 14 of

Legal Practitioners Act—contd.

the Act by a Court having no jurisdiction to refer it under that section. **Pat** BANAMALI DAS, *In the matter of*, 1 PAT. 680; (1922) A. I. R. (PAT.) 608; 4 P. L. T. 235; 1 P. L. R. 57; 24 Cr. L. J. 81 **209**

——— **ss. 13, 14**—*Civil Proceaure Code (Act V of 1908), O. III, r. 4—Unprofessional conduct—Boycott of Courts*—Vakalatnama, *acceptance of—Pleader, obligations of—Discharge of Pleader—Notice to client—Permission of Court.*

Where a Pleader, after accepting a *vakalatnama*, fails, without justifying necessity, to appear on behalf of his client on the date fixed for the hearing of the case, he is guilty of unprofessional conduct within the meaning of section 13 of the Legal Practitioners Act and proceedings can be drawn up against him accordingly.

A Pleader is not justified to abstain from the Court under threat of social boycott and in pursuance of a resolution passed at a public meeting to boycott the Courts to express dissatisfaction with Public Administration. Where a Pleader accepts a *vakalatnama* in general and common terms, he is not justified to decline to attend the Court merely because no fee is tendered or paid to him.

Per *Sanderson, C. J.*—The acceptance of a *vakalatnama* in a suit by a Pleader entails a duty upon the Pleader to attend the Court on the dav fixed for the hearing of the suit, unless it is proved that his obligations towards his client entailed by the acceptance of the *vakalatnama* were limited by a special arrangement, accompanying the acceptance of the *vakalatnama*. The onus of proving such special arrangement lies on the Pleader concerned.

A Pleader has a duty not only towards his client but also towards the Court, and it is his duty to co-operate with the Court in the orderly and pure administration of justice.

Per *Woodroffe, J.*—If a person becomes a legal practitioner, and holds himself out for and accepts employment, he becomes an officer in a judicial system in which his position, rights and duties and the authority to which he is subject are determined. He cannot act or combine with others to act against such authority. He cannot join in an action to boycott the Court or any particular Judge because of any grievances, real or alleged, whether touching the Courts or of a political or other character.

It is open to any legal practitioner for reasons personal to himself, to refuse to practise in a particular Court or before a particular Judge. But he can only adopt this course either by refusing briefs in such Court, or before such Judge, or if he has accepted a brief or *vakalatnama*, by first properly discharging himself on due notice to the client and in the latter case to the Court. But concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct of the administration of justice generally is not permissible, because the Bar in any such case cannot constitute itself an authority to adjudge on such greivance and its duty is not to impede the administration of justice by collective abstention from Court, but to make its

Legal Practitioners Act—concld.

representation through (if there be one) its Association to the High Court which has superintendence in such matters.

A Pleader cannot be charged with grossly improper professional conduct because by reason of circumstances not under his control, he was prevented from doing a duty towards his client.

It would not be possible to charge a legal practitioner with grossly improper conduct if he omitted to carry out his duty to his client by reason of his genuine fear of any real and substantial injury, physical or otherwise, to himself or family. Nor would it make any difference if such fear were in fact, unfounded if, in fact, it was sincerely entertained.

Per *Mookerjee, J.*—The failure of a Pleader to appear to conduct the case before he has discharged himself in the manner prescribed by law, unless such failure can be justified, renders him liable to disciplinary action by the Court. It is not practicable to have a complete enumeration of justifying circumstances which must necessarily depend upon the facts of each case. It may be successfully urged as a justifying reason for failure to attend to a case, that the absence was in fact due to overriding pressure of circumstances beyond the control of the Pleader, notwithstanding an honest desire on his part to perform his duty towards his client and towards the Court.

A Pleader is more than a mere agent or servant of his client. He is also an officer of the Court, and as such he owes the duty of good faith and honourable dealing to the Courts before which he practises his profession.

Any attempt on the part of a Pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device, constitutes ground for disbarment or suspension. **C** EMPEROR *v.* RAJANI KANTA BOSE, 35 C. L. J. 356; 26 C. W. N. 580; 49 C. 732; (1922) A I. R (C.) 515; 24 CR. L. J. 33 **81**

——— **ss. 13 (b), (f), 14 (c)**—*Court subordinate to High Court—Additional District Magistrate—Report of misconduct through Sessions Judge, legality of.*

The Court of an Additional District Magistrate is a Court subordinate to the High Court within the meaning of section 14 of the Legal Practitioners Act. Where an Additional District Magistrate is invested with all the powers of a District Magistrate under the Criminal Procedure Code he is competent to draw up a charge against a Legal Practitioner alleging misconduct within the terms of sections 13 (*b*) and 13 (*f*) of the Act, and to forward his report under section 14 (*c*) to the High Court. It is not essential, however, that the report should be submitted to the High Court direct, it can be properly submitted through the Sessions Judge. **C** MOHINDRA LAL ROY, *In the matter of*, 27 C. W. N. 88; (1922) A. I. R. (C.) 550; 24 Cr. L. J. 209 **673**

——— **s. 14**, *inquiry under—Court, jurisdiction of.*

The inquiry contemplated by section 14 of the Legal Practitioners Act can only be made by the Court in which the misconduct is alleged. A Court superior to that Court has no jurisdiction to hold such an inquiry. **Pat** MANAZIR-UL-HUQ *v.* EMPEROR, 4 P. L. T. 97. (1923) PAT. 45; (1923) A. I. R. (PAT.) 185; 24 Cr. L. J. 239 **703**

Letters Patent (Lahore), cl. 10—*Order refusing to set aside dismissal of appeal in default, whether judgment—Discretion of Court—Interference.*

An order of a Single Judge refusing to set aside an order dismissing an appeal in default is a "judgment" within the meaning of clause 10 of the Letters Patent of the Lahore High Court and is appealable under that clause.

The discretion exercised by a Single Judge in refusing to set aside an order dismissing an appeal in default cannot be interfered with in an appeal under the Letters Patent merely on the ground that the case appears to be a fit one for restoration. **L** NANAK CHAND *v.* SAJJAD HUSSAIN **824**

Limitation Act (IX of 1908), s. 5, *application of—Appeal under special enactment.*

Section 5 of the Limitation Act cannot be utilised by an Appellate Court in dealing with an appeal under a special enactment. **M** MITTOR MOIDEEN HAJEE, *In re*, 43 M. L. J. 561; 16 L. W. 764; (1923) A I. R, (M.) 95; 24 CR. L. J. 89 **217**

——— **s. 5**—*Court Fees Act (VII of 1870), ss. 4, 28—Appeal, presentation of—Copy of order appealed against unstamped—Delay in filing appeal—Sufficient cause—Negligence of clerk—Duty of Counsel.*

Having regard to the provisions of sections 4 and 28 of the Court Fees Act an appeal cannot be regarded as having been validly presented if the copy of the order appealed against is not properly stamped.

It is the duty of Counsel when filing an appeal to see that all documents which require a stamp are properly stamped. He cannot shelter himself behind his clerk and if his clerk has been guilty of any carelessness he is responsible for it.

Where an appeal is returned as incomplete and is again filed after the expiry of limitation, it is not a sufficient cause for admitting it within the meaning of section 5 of the Limitation Act, that the mistake was made by the Counsel's clerk who put in the appeal. **L** SHAHADAT *v.* HUKAM SINGH, **736**

——— **s. 9, Sch. I, Art. 135**—*Mortgage—Suit for possession—Limitation.*

Defendant executed a deed of possessory mortgage in favour of plaintiff in 1894. Out of the mortgage-money a sum of Rs. 500 was left with the mortgagee to pay off a prior mortgage which was without possession. There was a clause in this mortgage entitling the mortgagee to claim possession in the event of a default in payment. The mortgagee failed to make the payment and the prior mortgagee obtained a decree for possession in 1903, in execution of which he obtained possession of the mortgaged property. In 1917 defendant paid off the prior mortgage and took possession of the land. In 1918 plaintiff brought a suit for possession as mortgagee on payment of Rs. 500:

Held, (1) that, inasmuch as on the date of the execution of the plaintiff's mortgage the mortgaged property was in the possession of the mortgagor, time began to run against the mortgagee from that date;

(2) that limitation having begun to run, the mere fact that possession of the mortgaged property was subsequently taken by the prior mortgagee did not stop it from running;

(3) that the period during which the prior mortgagee had remained in possession could not be excluded from the computation of the period of limitation prescribed for the suit, inasmuch as no such ground of suspension or extension was recognised in the Limitation Act;

(4) that, therefore, the suit was barred by time under Art. 135 of Schedule I, to the Limitation Act.

No suspension or extension of limitation is allowable unless it is provided in the Limitation Act. **L** HUKAM CHAND *v.* SHAHAB DIN, 4 L. 90 **495**

——— **ss. 12, 19**—*Acknowledgment—Limitation, computation of—Exclusion of day of signature of acknowledgment.*

The word "time" in section 19, and the word "day" in section 12 of the Limitation Act have the same meaning.

In computing the period of limitation for a suit under section 19 of the Limitation Act for a debt acknowledged in writing, the day on which the acknowledgment was signed must be excluded under section 12 of the same Act. **N** JAINARAYAN BAPU *v.* VITHOBA, (1923) A. I. R. (N.) 143 **556**

——— **s. 18**—*Fraud—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution sale—Sale confirmed—Application to set aside sale—Fraud—Limitation.*

Under section 18 of the Limitation Act where irregularities affecting the validity of an execution sale have, by the fraud of the decree-holder or third parties, been kept concealed from the judgment-debtor, the judgment-debtor is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application if any, under O. XXI, r. 90, Civil Procedure Code, as he may be entitled to make, and his time for making it will be computed from the time when the fraud first became known to him. The confirmation of the sale cannot be allowed to be used as a shield for the fraud by which the Court has been induced to make the sale itself. **A** SHEO RAM KOERI *v.* IKRAMUNNISSA BIBI, 21 A. L. J. 176; (1923) A. I. R. (A) 282; 45 A. 316 **631**

——— **s. 19**—*Hindu joint family—Acknowledgment by one member, whether binding on others.*

An acknowledgment made by a member of a joint Hindu family, who is not the manager of the family, is not binding on the other members of the family, except those who claim through him, for instance, his sons. **L** RAM KISHAN *v.* HIRDE RAM, (1923) A. I. R. (L.) 135 **737**

——— **s. 20**—*Payment within period of limitation—Statement after expiry of limitation—Limitation, extension of.*

A payment whether towards interest or principal by a debtor before the expiry of the period of limitation extends the period of limitation under section 20 of the Limitation Act, even though the written statement as to payment is made after the expiry of the period of limitation. **N** RAMPRASHAD *v.* BANSILAL, 19 N. L. R. 6; (1923) A. I. R. (N.) 117. **17**

——— **Sch. I, Art. 11,** *applicability of—Order refusing to investigate claim to attached property—Suit to establish title—Limitation*

The period of limitation prescribed by Art. 11 of Schedule I to the Limitation Act, is applicable to a suit to establish a right to property attached in execution of a decree brought after disallowance, without investigation, of an objection to such attachment. **N** NARSAYYA *v.* LAXMINARAYAN, 19 N. L. R. 34; (1923), A. I. R. (N.) 187 **404**

——— **Arts. 12, 144**—*Execution of decree—Sale of house occupied by non-proprietor—Suit by proprietors to recover site—Limitation.*

Article 12 of Schedule I to the Limitation Act applies only to the parties to an auction-sale.

Where the plaintiff in a suit for possession of property sold in execution of a decree, is the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties he is entitled to ignore the sale altogether, and his suit is governed by Art. 144 and not by Art. 12 of Schedule I, to the Limitation Act.

The site under the house of a non-proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is void.

A suit by the proprietors to recover possession of a site sold in execution of a decree against a non-proprietor, to which the plaintiffs were not parties would, therefore, be governed by Art. 144 and not by Art. 12 of Schedule I to the Limitation Act. **L** AZIM KHAN *v.* KARIM **822**

——— **Art. 30**—Jagir—*Life grant—Presumption—Resumption of life* jagir, *suit for—Limitation.*

Unless clear words indicating a different intention appear in the instrument, a *jagir* grant conveys only an estate for life.

A suit for the resumption of a life *jagir* must, under Art. 130 of Schedule I to the Limitation Act be brought within twelve years of the death of the grantee. **Pat** GURU MAHADEO ASRAM PRASHAD SAHI *v.* JAGATRAJ KUER **929**

——— **Arts. 30, 151**—*Suit against Railway for damages for short delivery—Limitation applicable—Commencement of limitation.*

A short delivery of goods is equivalent to loss of the portion undelivered. Therefore, a suit against a Railway Company for damages for short delivery is governed by Art. 30 of Schedule I to the Limitation Act, and time begins to run from the date when the short delivery was made. **Pat** RAMESHWAR DAS MALI RAM *v.* E. I. RY. CO., LTD., 4 P. L. T. 331; (1923) A. I. R. (PAT.) 298 **565**

Limitation Act—contd.

——— **Sch. I, Art. 47**—*Possession taken forcibly by unsuccessful party—Declaratory suit—Limitation—Criminal Procedure Code (Act V of 1898), s. 145—Order passed against head of joint Hindu family, whether binding on family.*

Where proceedings under section 145, Criminal Procedure Code, end in an order maintaining the possession of a person in certain property, his opponent can sue for recovery of possession of the property in dispute within three years from the date of the order, under Art. 47, Schedule I to the Limitation Act; and it is not open to him to enlarge that period of limitation by taking the law into his own hands and forcibly ejecting the person in possession and then bringing a suit, not for recovery of possession of the property but for a declaration that he is the owner in possession of the property in dispute.

An order under section 145, Criminal Procedure Code, passed against the head of a joint Hindu family, is binding on the whole family, whether it was passed against him in his personal capacity or as the managing member of the family. **A** RAM SAHAI *v.* BINOD BEHARI GHOSE, 21 A. L. J. 102; (1923) A. I. R. (A) 151; 45 A. 306 **402**

——— **Arts. 61, 85,** *applicability of—Mutual, open and current account, meaning of.*

In order to prove a mutual, open and current account under Art. 85 of Sch. I to the Limitation Act, it is sufficient to prove mutual dealings between the parties creating mutual duties or reciprocal demands on either side.

A person was appointed the agent of a mosque under a *karar* authorising him to collect dues payable to the mosque, pay the outgoings, take his remuneration, advance monies of his own to the mosque whenever necessary and keep an account of all transactions. In a suit by the agent for money mainly made up of advances made by him to or for the benefit of the mosque:

Held, that the obligations being mutual and the dealings reciprocal, the account was a mutual, open and current account to which the proper Article to apply was not 61 but 85 of Schedule I to the Limitation Act. **M** KUNHIKUTTIALI *v.* KUNHAMMAD, 44 M. L. J. 184; 17 L. W. 243; (1923) M. W. N. 81; (1923) A. I. R (M.) 278 **466**

——— **Arts. 62, 109, 120, 127**—*Hindu joint family—Partition in status—Subsequent collection by some members of profits and outstandings—Suit for account and delivery of plaintiff's share—Limitation—Cause of action.*

By the Full Bench.—Where members of a Hindu co-parcenary have divided in status but have not effected an actual partition by metes and bounds, and some of the members collect thereafter the rents and outstandings due to the family, a suit for account and delivery of his share by a co-sharer plaintiff is governed by Art. 120 of the Limitation Act, or by Art. 89 if the facts establish that the persons who collected acted with the consent, express or implied of the other co sharers so as to constitute them their agents To such a suit neither Art. 62, 109 or 127 is applicable.

Limitation Act—contd.

The cause of action for such a suit arises and time begins to run not from the date of the receipt of the profits by the defendants but from the time of demand and refusal or from the time when the defendants asserted a hostile title to the knowledge of the plaintiff.

Per *Schwabe, C. J.*—If the facts be that the moneys, and rents and profits were received with the consent of all concerned by the various persons in possession pending final settlement by division, then, in the absence of evidence to the contrary, each of such persons should be considered as receiving as agent for himself and his co-owners; he would have authority, express or implied, to receive and would be acting on that authority on behalf of the co owners and not on his own behalf adversely to them. In such a case a suit for an account against the persons who made the collections would be governed by Art. 89 of the Limitation Act.

Per *Kumaraswami Sastri, J.*—In a suit for partition where a claim is made for an account being taken of the moveable properties, outstandings and collections made by a member in respect of properties in which the parties were once joint but became subsequently separate in status the proper Article to apply is Art. 120 of the Limitation Act. The period of limitation will run from the demand of the share by the plaintiff or the refusal by defendant. The receipt by a co-tenant is not wrongful and, consequently, his possession cannot be wrongful till he refuses to deliver the share of the co-tenant he has received or sets up a hostile title to the knowledge of the co-sharer.

A mere separation in status cannot by itself make possession by one member hostile to the others or by itself amount to an ouster.

Per *Devadoss, J.*—The position of the members of a Hindu joint family after division in status and before division of property by metes and bounds or allocation or collection of outstandings is not the same in all cases. Each case will depend upon the intention and conduct of the members.

The principle applicable to such cases may be put thus:

If *A* collects what belongs to *B*, knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without deduction for expenses, charges, &c., and loss by theft cannot be pleaded in bar of *B*'s claim. *A* has no duty to collect *B*'s money and being a volunteer cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum, if *A* collects the whole without being *B*'s agent implied or express, there is a presumption that he does so for *B*'s use and Art. 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects the others before they are allocated to *A* or *B*, neither *A* nor *B* can be said to collect for the other's use and a suit for account is the proper form of action and Art. 62 would not apply. **M** YERUKOLA *v.* YERUKOLA, (1922) M. W. N. 215; 30 M. L. T. 279; 42 M. L. J. 507; 15 L. W. 595; 1922) A. I. R. (M.) 150; 45 M. 648 **177**

——— **Art. 85**—*Mutual, open and current account.*

Limitation Act—contd.

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions. An account current is an open or running account between two or more parties, or, an account which contains items between the parties from which the balance due to one of them is, or, can be, ascertained.

Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.

An account under which one party has merely received and paid monies on account of the other, is not a mutual account, properly so-called. Each party must receive and pay on account of the other.

A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality.

The mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the books of the plaintiffs does not make the account between the parties a mutual account in which there have been reciprocal demands between the parties.

Where a plaintiff makes cash advances to a defendant and also makes purchases on his behalf and the latter consigns goods to the former for sale on commission and interest is charged both on the credit and debit side, the account between the parties is a mutual, open and current account within the meaning of Art. 85 of Schedule I to the Limitation Act. **L** ABDUL HAQ *v.* FIRM SHIVJI RAM-KHEM CHAND, (1922) A. I. R. (L.) 338 **259**

——— **Sch. I, Art. 120** *See* MONEY WRONGLY RECOVERED UNDER AUTHORITY OF DECREE **42**

——— **Art. 134,** applicability of. *See* MUHAMMADAN LAW—*Wakf* **646**

——— **Art. 134,** *applicability of—Mortgage—Transferee with notice, position of.*

A transferee from a mortgagee who claims to be the owner of the property, must, in order to avail himself of Art. 134 of Schedule I to the Limitation Act, show that he neither had knowledge nor reason to believe that his transferor's title in the property transferred was not a full proprietary one. If it can be shown that a transferee from a mortgagee knew that the title of his transferor was not free from doubt and such transferee took no steps to clear up that doubt, Art. 134 would not apply. **L** SRI RAM *v.* MATWALA RAM, (1923) A. I. R. (L.) 219 **577**

——— **Arts. 142, 144**—*Adverse possession—Burden of proof.*

In a suit for recovery of immoveable property where the plaintiff alleges dispossession by the defendant it is Art. 142 of Schedule I to the Limitation Act that applies and not Art. 144.

Possession which can be referred to lawful title should be so referred. Therefore, where there is nothing to show the unlawful ouster of the plaintiff from the land, his suit for possession must fail. **A** JHARAP RAI *v.* JAINT RAI **1033**

Limitation Act—contd.

——— **Sch. I, Arts. 144, 143**—*Mortgage—Redemptoin by co-mortgagor—Suit by co sharer to recover his share—Limitation—Adverse possession.*

Art. 148 of Schedule I to the Limitation Act refers only to a suit against a mortgagee and has no application to a suit against a charge-holder.

A co-mortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co-owners but becomes merely a charge-holder. A suit by one of the other co-owners to recover his share of the property on payment of his share of the charge is governed by Art. 144 and not by Art. 148 of Schedule I to the Limitation Act.

The rule that, ordinarily, one co-sharer cannot hold adversely against another co-sharer proceeds upon a rebuttable presumption that the co-sharer in exclusive possession is holding on behalf of the other co-sharers. This presumption is rebutted when it is shown that the co-sharer in possession denies the right of the other co-sharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed. **L** WAZIR *v.* GIRDHARI, (1923) A. I. R. (L.) 311 **847**

Limitation and Code of Civil Procedure (Amendment Act (XXVI of 1920), *applicability of—Abatement of appeal—Death taking place before commencement of Act.*

The provisions of Act XXVI of 1920 regarding the abatement of appeals are not meant to apply only to cases where the deaths have occurred after the coming into force of that Act, *viz.*, 1st January 1921.

In the Central Provinces there is no hardship in applying the provisions of Act XXVI of 1920 as regards abatement of appeals, to cases of deaths occurring before the date of coming into operation of the said Act as it was published in these Provinces more than three months before the date of its coming into force. **N** NIMBA *v.* JANKI, (1923) A. I. R. (N.) 100 **176**

Madras Abkari Act (I of 1886), s. 55 (2)—*"Possession," meaning of.*

The term "possession" in section 55 (2) of the Madras Abkari Act means actual, and not constructive, possession. Consequently, only those persons who are in actual possession of contraband liquor without a license are punishable under the section. **M** JAYARAMULU *v.* EMPEROR, (1922) M. W. N. 570; 16 L. W. 496; 31 M. L. T. 310; 43 M. L. J. 553; 45 M. 842; (1923) A. I. R. (M.) 50; 24 CR. L. J. 152 **504**

Madras High Court Insolvency Rules, rr. 133, 136—*Costs in insolvency proceedings—English Law.*

Under rr. 133 and 136 of the Madras High Court Insolvency Rules, in all insolvency proceedings, unless an order is made to the contrary, the successful party is entitled only to half the ordinary fees allowed on the Original Side, whether the costs are directed to be paid out of the insolvent's estate or by a third party.

The rule under the English Bankruptcy Law which allows full costs in cases in which proceed-

Madras High Court Insolvency Rules—concld.

ings are between the Official Assignee and third parties cannot be imported into cases governed by the Madras Insolvency Rules. **M** OFFICIAL ASSIGNEE OF MADRAS *v.* DORAIAPPA AIYAR, 17 L. W. 350; 44 M. L. J. 411; 32 M. L. T. 172; (1923) M. W. N. 350 **1056**

Madras Local Boards Act (XIV of 1920), ss. 57, 199, Sch. X, r. 10—*Taluk Board—Election of President—Outgoing President, term of, extension of—District Judge conducting election inquiry, whether persona designata or Court—Finality of orders deciding election disputes.*

Section 57 of the Madras Local Boards Act and the Rules for deciding election disputes which provide that the decisions of the District Judge are "final," prohibit only a right of appeal to the High Court and do not bar a right of revision; when revisional powers are intended to be taken away it must be done by express words to that effect.

A District Judge acting under the Rules framed under section 199 of the Madras Local Boards Act for decision of election disputes is not a *"persona designata"* but a Civil Court exercising judicial functions and is subject to the superintendence of the High Court in its revisional jurisdiction.

When jurisdiction is given to a Court, without defining the procedure to be followed it will attract the ordinary procedure of that Tribunal. When any existing Tribunal is given a right to determine certain matters, the presumption is that that Tribunal is to determine such matters as a Court. The party who contends that the matters referred to the Tribunal were not referred to it as a Court of Law must make good that position. In such cases the jurisdiction of the Tribunal is enlarged but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.

The legal effect of rule 10 of the Rules in Schedule X of the Madras Local Boards Act of 1920 is to extend the term of office of the outgoing President of a Taluk Board as such till the election or appointment of a new President under the new Act, and not to extend the President's term of office or a member of the Board.

When a section says that a certain order shall be final it only means and intends that it shall not be open to appeal, and the intention is not to take away the revisional powers. Finality can be attached only to orders passed with jurisdiction, as those passed without jurisdiction are in reality nullities. **M** RAMASAMI GOUNDER *v.* MUTHU VELAPPA GOUNDER, 16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 133; (1923) A. I. R. (M.) 192 **1039**

Madras Sub-Division of Zemindari Act (I of 1876), ss. 6, 2—*Permanently settled estate—Ownership of portion transferred—Separate registration and assessment—Decree.*

Against a person who has become the owner of a portion of a permanently settled estate, the Zemindar is entitled to a decree for separate registration and assessment of that portion, and the decree cannot be refused on the ground that it will result in imposing a new burden on the land. **M** INNGANTI RAJAH GOPAL RAO *v.* CHELIKANI VEN ATASURYA RAO, 17 L. W. 6; 44 M. L. J. 64; (1923) A. I. R. (M.) 368 **200**

Madras Sub-Division of Zemindari Act—concld.

Madras Town Nuisances Act (III of 1889), s. 3 (12), *offence under, whether cognizable by Bench of Honorary Magistrates.*

Inasmuch as an offence under section 3 (12) of the Madras Town Nuisances Act falls within clause (2) of r. 1 of the Rules for the guidance of Honorary Magistrates, a Bench of Honorary Magistrates has power to entertain a complaint in respect of such an offence. **M** RAMASAMI CHETTIAR *v.* MUTHUVELU MUDALI, 16 L. W. 562; 31 M. L. T. 420; 45 M. 843; (1923) M. W. N. 57; (1923) A. I. R. (M.) 191; 24 CR. L. J. 110 **238**

Money *wrongly recovered under authority of decree—Proper remedy—Suit—Limitation Act (IX of 1908), Sch. I, Art. 120.*

For the refund of money wrongly recovered under the authority of a decree, the proper remedy is a regular suit and the limitation for such suit is six years under Art. 120 of Schedule I to the Limitation Act. **N** LAXMAN *v.* BISRAM BIRJU, (1923) A. I. R. (N.) 94 **42**

Mortgage—*Subrogation—Intention—Principles applicable.*

Where there is nothing on the record to show that a subsequent mortgagee who paid off a prior charge on the property intended to keep it alive for his benefit, the prior charge must be deemed to have been extinguished on payment.

In a Court of Equity, it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well-established that he retains the benefit of it against the inheritance for although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, Equity will, in the absence of any declaration of intention, destroy it, but if there be any reason for keeping it alive, such as the existence of another incumbrance, Equity will not destroy it. **Pat** JAI PRAGASH SINGH *v.* RUPMANJARI DASI, 4 P. L. T. 91; (1923) A. I. R. (PAT.) 190 **940**

——— (*usufructuary*) *of sir land—Separate covenant to pay interest if possession not given—Possession never given—Redemption—Interest covenanted for, whether payable.*

Where a usufructuary mortgage of *sir* land is executed with a further separate covenant that if possession is not given to the mortgagee the principal mortgage-money shall be re-paid with interest at a fixed rate, and possession is not given in fact,

Mortgage—concld.

the mortgagor cannot be allowed to redeem the mortgage without paying the interest which he had covenanted to pay in case of his failure to give possession. **A** JANKI RAM *v.* MISRI LAL (1923) A. I. R. (A.) 377 **382**

Mortgage *with possession—Agreement by mortgagor to pay fixed sum for expenses to be incurred by mortgagee, validity of—Fixed payment in respect of variable charge—Tender—Formal tender, when unnecessary.*

There is nothing to prevent a mortgagor from entering into an agreement to pay the mortgagee a fixed sum for certain expenses to be incurred by the latter when in possession of the property mortgaged to him. Such an agreement merely provides for a fixed payment in respect of a variable charge and is valid even though the amount is not fixed so as to prejudice the mortgagee.

The practice of the Courts is not to require a party to make a formal tender where from the facts it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. **P C** CHALIKANI VENKATARAYANIM GARU *v.* VENKATASUBADRAYAMMA JAGAPATI, 17 L. W. 383; (1923) A. I. R. (P. C.) 26; 32 M. L. T. 70; 44 M. L. J. 631; 25 BOM. L. R. 541; 46 M. 108 **1035**

Mortgage-decree —*Execution—Option of decree-holder to proceed against any of mortgaged properties—Subsequent purchaser of equity of redemption, rights of—Contribution, suit for—Rateable distribution—Execution proceedings.*

The holder of a mortgage-decree has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties, or in any of them, may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Each parcel of the mortgaged properties is liable rateably to its value, and the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security, but an enquiry as to rateable distribution of mortgage-debt cannot be made in execution proceedings without serious complications; therefore, the equity must be left to be worked out in a properly constituted suit between the parties. **Pat** SARJU LAL *v.* BAIJ NATH PRASAD SINGH, (1923) PAT. 6; (1923) A. I. R. (PAT.) 44 **26**

Mortgage-deed —*Execution, proof of.*

Per *Devadoss, J.*—It is open to the High Court to find that the execution of a mortgage was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. **M** KURUKUNDI SAMA RAO *v.* FIRM OF MARWADI VANNAPI VAJINJI, (1922) M. W. N 708; 43 M. L. J. 745; (1923) A. I. R. (M.) 36; 2 M. L. T. 9, 17 L. W. 601; 46 M. 64 **153**

Mortgagee —*Lien*

The lien of a mortgagee may subsist for such portion of the consideration as h s passed. **Pesh** LOK NATH *v.* THAKAR DAS **20**

Muhammadan Law *Muhammadans, who are—Ahmadiyas, whether Mussulmans - Penal Code (Act XLV of 1860), ss. 79, 494—Bigamy—Muhammadan joining Ahmadiya sect, whether becomes apostate—Wife of convert re-marrying, whether commits offence of bigamy—Good faith, plea of—Mens rea absence of, whether good defence.*

The Ahmadees are a sect of Mussulmans, and a Mussulman who joins the Ahmadee faith does not become a *murtad* or apostate.

The wife of a person who joins the Ahmadiya sect and re-marries during the lifetime of her first husband without obtaining a divorce from him commits the offence of bigamy punishable under section 494, Indian Penal Code.

The plea of good faith and absence of *mens rea* is not a proper defence to a charge of bigamy. The fact that the accused acted in good faith and ignorance of law is no answer to the charge, though it may be considered in mitigation of sentence.

Per *Krishnan, J.*—The Ahmadiyas are only a reformed sect of Muhammadans. **M** NARANTAKATH AVULLAH *v.* PARAKKAL MAMMU, (1922) M. W. N. 662; 16 L. W. 626; 43 M. L. J. 663; (1923) A. I. R. (M.) 171; 45 M. 986; 24 CR. L. J. 17 **65**

——— **Dower** —*Remission—Burden of proof—Marz-ul-maut—Pregnancy.*

When a claim for dower is met by the reply that the dower has been remitted, it is for the person who claims dower to prove that the alleged remission was vitiated because it was made by a person suffering by mortal illness.

It is not the Muhammadan Law that a woman who is pregnant is considered to be suffering from a mortal disease According to that law the danger does not begin until the pains of labour begin. Therefore, to apply the doctrine of *marz-ul-maut* to the relinquishment of her dower by a woman, it is essential to establish that the relinquishment was made after the pains had come on. **A** SHAMSHUL HASAN *v.* SYED HASAN, (1923) A. I. R. (A.) 173 **296**

——— **Gift**—*Delivery of possession.*

In order to complete a gift under Muhammadan Law the donor must, even if only for a time, abandon possession of the property gifted in favour of the donee.

Where, however, the donor and the donee are present on the premises and an intention on the part of the donor to transfer has been unequivocally manifested, no formal entry by the donee or actual physical departure of the donor is necessary to complete the gift. **Pat** DALPHEROO MIAN *v.* BANGALI MALI, 4 P. L. T. 397 **897**

——— **Marriage**—*Apostacy, effect of.*

A Muhammadan marriage is dissolved by the apostacy of either the husband or the wife.

The question to be determined in such cases is not whether the adoption of the new religion by the alleged apostate is efficacious or not, but whether or not he has renounced the Muhammadan religion. **L** BAKHO *v* LAL **830**

——— **Marz-ul-maut**—Pregnancy. *See* MUHAMMADAN LAW—DOWER **289**

Muhammadan Law—contd.

———— **Pre-emption.** *See* PRE EMPTION 318

—— — Talab-i-istish had (*2nd demand*), *requirements of.*

In making the affirmatory demand (*Talab-i istishhad*), it is necessary to call upon the witnesses who accompany the pre-emptor to the premises to bear witness to the fact that the immediate demand (*Talab-i-mawasibat*) had already been made. The mere making of the *Talab-i-istishhad* in the presence of the witnesses, in whose presence the *Talab-i-mawasibat* was made, is not a sufficient compliance with the requirements of the Muhammadan Law. **A** SADIQ ALI *v.* ABDUL BAQI KHAN, 21 A. L. J. 109; (1923) A. I. R (A.) 251 460

—— — **Shiah** (*Imamia*) *sect—Succession—Daughter's descendants and collaterals—Direct heir disqualified—Succession of next heir, whether barred—Construction of document—Deed of* wakf—*"Heir," meaning of.*

Under the Shiah Law daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals; nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar, under the Muhammadan Law, to the succession of the next heir, the heir presumptive.

A *wakfnama* executed by a Mussulman belonging to the Shiah (Imamia) sect, after declaring a certain individual to be the *mutwalli* of the dedicated property proceeded, "In the case of the death or dismissal of the *mutwalli*, if any heir belonging to the Imamia sect and competent enough to administer the *wakf* property be not left to the *mutwalli*, selection shall be made of a competent person from among the heirs of me, the executant." The *mutwalli* died and was succeeded in the office by his widow. The widow too died, survived by a daughter and a grand-daughter. The daughter was found to be *non compos mentis* and the plaintiff, a son of the author of the *wakf*, claimed that, as the direct heir to the widow was insane and incompetent, the governance of the *wakf* had passed to the line of the dedicator:

Held, dismissing the claim, that under the *wakfnama* so long as the deceased *mutwalli* left an heir competent to inherit to him and otherwise qualified to administer the *wakf*, the office of *mutwalli* could not revert to the dedicator's heirs and that the word "heir" used in the *wakfnama* was not confined strictly to a person entitled to take in direct succession to the deceased *mutwalli*. **P C** AKHTARI BEGAM *v.* DILJAN ALI, (1923) A. I. R. (P. C.) 11; 32 M. L. T 185; 45 M. L. J. 193 621

———— **Wakf,** *incidents of—Provision for benefit of settlor's family, effect of—Mortgage for purposes foreign to* wakf—*Mortgagee, claim by, nature of—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 134, *applicability of.*

Under the Muhammadan Law the moment a *wakf* is created all rights of property pass out of the *wakf* and vest in God Almighty. The curator, whether called *mutwalli* or *sajjadanashin*, or by any other name, is merely a manager.

Where a valid *wakf* is created, the whole property dedicated passes out of the ownership of the settlor for the purposes he has declared and not merely such portion of it as will suffice to produce the part of the income which he has expressly dedicated to pious and charitable purposes.

Therefore, in the case of a *wakf* containing a provision for the benefit of the family of the settlor, where the *wakf* property is mortgaged for purposes foreign to the *wakf*, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. Nor is the property itself to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole.

For an advance of money, otherwise than to satisfy the legitimate needs and purposes of the *wakf*, no part of the property held in *wakf* is chargeable either by the settlor or by the Court. In such a case any claim by the person who advances money must be in the nature of a claim *in personam*, and cannot be secured by holding liable the *wakf* property itself.

The period of limitation prescribed by Art. 134 of Schedule I to the Limitation Act does not apply to a *wakf*. **P C** ABDUR RAHIM *v.* NARAYAN DAS AURORA, (1923) A. I. R. (P. C.) 44; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441 646

———— **Widow**—*Possession in lieu of dower.*

A Muhammadan widow whose dower remains unpaid is entitled to retain possession of the properties of her husband which she obtained lawfully without force or fraud even though without the consent of, or any agreement with, the husband or his heirs. **L** MALAWA RAM *v.* SUNARAN 820

———— **Will**—*Legacy to one heir—Consent—Burden of proof.*

The Muhammadan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share. The burden of proving such consent is on the legatee. **P C** SALAVJEE *v.* FATIMA BIBI, (1922) A. I. R. (P. C.) 391; 44 M. L. J. 332; 25 BOM. L. R. 301; 32 M. L. T. 96; 37 C. L. J. 302; 1 R. 60; 18 L. W. 44; 2 Bur. L. J. 1; (1923) M. W. N. 522 753

Negotiable Instruments Act (XXVI of 1881), ss. 63, 83—Hundi *payable on demand—Presentment.*

Sections 63 and 83 of the Negotiable Instruments Act do not apply to a *hundi* payable on demand, inasmuch as the only presentment necessary in the case of a bill payable on demand is presentment for payment and not a presentment for acceptance. **A** NAND LAL *v.* FIRM GULAB RAI-NARAIN DAS, (1923) A. I. R. (A.) 345 610

———— **s. 87**—*Pro-note—Alteration of name originally written—Material alteration.*

As a matter of law, the alteration of the name originally written in a promissory-note, is a material alteration within the meaning of section 87 of the Negotiable Instruments Act. **A** KAMAL KHAN *v.* NIZAMUDDIN, 20 A. L. J. 987; (1923) A. I. R. (A.) 123 41

N. W. P. Land Revenue Act (XIX of 1873), s. 66—*U. P. Land Revenue Act (III of 1901), s. 86—Customary due—"Cess"—Custom—Proof.*

A fixed number of cow-dung cakes and a bundle of chaff, claimed annually by a *zemindar* from his tenant as a customary due, not connected with land, is a "cess" within the meaning of the second part of section 66 of the old Land Revenue Act (XIX of 1873), and section 86 of the U. P. Land Revenue Act (III of 1901).

A "cess" levied in accordance with village custom is only recoverable if recorded by the Settlement Officer and generally and specially sanctioned by the Local Government; and the person claiming it must prove that in the particular case these conditions are fulfilled.

If the custom of levying such a "cess" or a customary due is recorded by a Settlement Officer, it should be recorded in the *wajib-ul-arz* or the *Dasturdehi*, and not in the *jamabandi*. However, if it is recorded in the *jamabandi* it cannot be considered as a record of a custom by the Settlement Officer; nor can the Local Government be taken to have sanctioned it merely because the Settlement was confirmed by it.

The evidence that for 20 or 30 years the *zemindar* has been receiving dues paid by his tenants is insufficient to establish a custom even in a Province where a custom need not necessarily be immemorial. **A** MUHAMMAD ASGHAR ALI KHAN *v.* RAMMON, (1023) A. I. R. (A.) 378 **432**

Oaths Act (X of 1873), ss. 8, 9—*Special oath—Ordinary oath—Agreement to have suit decided on ordinary oath of party, legality of.*

An agreement between the parties to a suit providing that the suit may be decided according to the evidence of one of the parties taken on an ordinary oath—and not on a special oath within the meaning of sections 8 and 9 of the Oaths Act, is not without consideration or illegal. **A** KESHO RAM *v.* PEARE LAL, 21 A. L. J. 209 **761**

Oral Agreement *to lease—Unregistered document executed subsequently—Oral evidence, admissibility of, to prove oral agreement.*

An unregistered deed of lease cannot be given in evidence in proof of the terms of the lease and its existence excludes all extrinsic evidence on the point. Oral evidence of the execution of such a document is admissible in proof of the oral agreement to lease made before the execution of the document, in order to support a claim for specific performance of the oral agreement. **N** CHAGANLAL *v.* KASHIRAM, (1923) A. I. R. (N.) 76 **33**

Oudh Estates—*Summary Settlements of 1856 and 1858—Proprietary title—Grant—Absolute estate—Succession—Personal law—Hindu Law—Mitakshara—Alienation—Mortgage by* karta *without legal necessity—Partition—Mortgage, whether operative against* karta's *share—Transfer of Property Act (IV of 1882), s. 43, application of.*

The first Summary Settlement of estates in Oudh made in 1856 did not finally decide the proprietary title of the persons who had engaged only temporarily to pay a fixed revenue to Government. The proprietary rights were settled by the second Summary Settlement of 1858 and all such rights were grants from the Government and started fresh titles to the property. These titles were not free from the personal law of the grantees as regards succession and title of heirs; and the Sanads issued to emphasize the fact of these grants did not confer any new rights, but only declared the rights already determined in the Summary Settlement of 1858.

The expression "you and your heirs" in a grant is the usual expression for conferring an absolute estate on the grantee, and where such a grant is made it is subject to the personal law of the grantee as regards succession and title of heirs.

An absolute grant to a person governed by the Mitakshara Law is self-acquired property in the hands of the grantee, but in the hands of his son it becomes joint ancestral property of the family.

If the *karta* of a joint Hindu family mortgages the joint family property without legal necessity, the mortgage is void for want of the mortgagor's title. But if during the period of the mortgage the property is partitioned and a certain share comes to the mortgagor, the principle of section 43, Transfer of Property Act, applies and the mortgage operates on that share of the mortgagor. **O** RAM RATAN *v.* GANGA BUKHSH SINGH, 9 O. & A. L. R. 222 **581**

Oudh Estates Act (I of 1869)—*Widow, succession to—Reversioner, status of.*

Under the Oudh Estates Act the succession to collaterals of a Hindu deceased male holder opens on the death of his widow just as under the Hindu Law, and inasmuch as a reversioner has no more than an expectancy, he has no interest which he is competent to transfer or bind. **P C** HARNATH KUER *v.* INDAR BAHADUR SINGH, (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. (P. C.) 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 340; 45 A. 279 **629**

Partition Act (IV of 1893), ss. 2, 3, *applications under—Proper time.*

The various provisions of the Partition Act indicate that, if any action can be taken under the Act, it can only be taken in the Court of first instance before a decree for partition has been actually made. After a decree for partition has been confirmed by the lower Appellate Court, a co-sharer cannot avail himself of the provisions of sections 2 and 3 of the Partition Act, and ask the final Court of Appeal to do for him what the Court might have done if he had moved it when the case was under trial. **A** ABDUL HAQ *v.* MOTI LAL, (1923) A. I. R. (A.) 293 **983**

Partition proceedings—*Compromise effected pending proceedings—Compromise given effect to by Revenue Court and acted upon by parties.*

An agreement of partition, if acted upon, is admissible and binding, even if it is unstamped and unregistered, and a party to it cannot be allowed to resile from it. **A** SITA RAM *v.* HAR SAHAI **619**

Partition suit—*Final decree not appealed against—Appeal—against preliminary decree, if maintainable.*

An appeal against a preliminary decree in a suit for partition presented after the passing of a final decree in the suit is not maintainable unless there is also an appeal against the final decree **C** MANOHAR PESHAKAR *v.* HARAN CHANDRA KARMAKAR **280**

Partnership—*Death of partner—Surviving partners, whether can sue for debts—Contract Act (IX of 1872), s. 45, applicability of.*

Debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. Section 45 of the Contract Act has no applicability to such cases. **L** MOOL CHAND *v.* MOOL CHAND, (1923) A. I. R. (L.) 197 **951**

Penal Code (Act XLV of 1860), ss. 96, 97, 99, 141—*Right of private defence of person—Extent of right—Force to be used—Unlawful assembly—Distinction between "enforcing" and "maintaining" right.*

The accused, who were in peaceful possession of their land, apprehended from their past experience that at some time or another the complainant's party would make an attempt to seize the land by force. Therefore, when they went to plough their land they took the precaution to take with them their *lathis* to protect themselves as well as their property, and as they were fewer in number than the complainant's party, they also took the precaution to see that the men working in the neighbouring fields were also armed with *lathis*, so that, if necessary, they could come to their assistance. They did not know on what day they might be attacked. One day, when they were engaged in ploughing their land, they were suddenly set upon by the complainant's party, who attacked them with *lathis* causing injuries to all of them, and who, but for their leader being grievously injured, would have persisted in the attack until they had recovered possession of the land. A large number of the complainant's party got hurt in the fight:

Held, that the accused were protected by both clauses of section 97, Indian Penal Code, as they had a right to defend their persons as well as their property against the complainants, who committed or attempted to commit the offence of criminal trespass.

There is a distinction between "enforcing" a right and "maintaining" a right.

If a man is entitled to protect his own life by using a *lathi*, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, in "golden scales," and to adjudicate with great nicety as to the exact amount of force which would be justified; provided always that no undue advantage is taken. **A** HIRA *v.* EMPEROR, 24 CR. L. J. 109; (1923) A. I. R. (A.) 194; 45 A. 250 **605**

———— **ss. 143, 447**—*House trespass by member of unlawful assembly — Composition of offence under s. 447—Conviction of accused under s. 143, legality of.*

In the case of a house trespass by members of an unlawful assembly the conviction of the accused under section 143 of the Indian Penal Code is not illegal even though the offence under section 447 had been compounded.

The essence of the offence under section 143, Indian Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that purpose constitutes in itself an offence distinct from the criminal offence which these persons agree and intend to commit. **M** MATHI VENKANNA, *In re*, 17 L. W. 451; 24 CR. L. J. 114; 40 M. 257 **242**

Penal Code—contd.

———— **s. 149**—*Unlawful assembly — Principal offender convicted of one offence—Remaining members whether can be convicted of another offence.*

Where the principal offender of an unlawful assembly is convicted of one offence, the remaining members of that assembly cannot be convicted of another offence. **Pat** RAM PRASAD SINGH *v.* EMPEROR, 1 PAT. 753; 4 P. L. T. 213; (1923) A. I. R. (PAT.) 50; 24 CR. L. J. 65 **113**

———— **s. 182**—*False report to Police—Motive—Offence.*

Accused made a report to the Police that his horse had strayed, when, as a matter of fact, he had previously sold it to another, who in turn had sold it to a third person; the report was made to enable him to make a false charge against this last person, and this he subsequently made:

Held, that an offence under section 182 of the Penal Code was made out, as in making the report the accused clearly gave false information to the Police which he knew to be false and that he knew that it was likely that he would thereby cause the Police Authorities, if they found the horse answering to his description, to take it from the possession of its rightful owner. **A** INCHA RAM *v.* EMPEROR, 44 A. 647 (1922) A. I. R. (A.) 272; 24 CR. L. J. 88 **216**

———— **ss. 232, 235**—*Counterfeiting coin—Possession of implements for counterfeiting—Separate sentences.*

Where a person is convicted of counterfeiting coin and also of having in his possession implements and materials for the purpose of using them for counterfeiting, separate sentences under sections 232 and 235 of the Penal Code cannot be passed upon him, inasmuch as the possession of the implements and materials is part and parcel of the transaction of counterfeiting. **L** BISHAN DAS *v.* EMPEROR, 5 L. L. J. 272; 24 Cr. L. J. 236 **700**

———— **ss. 300, Excep. 1, 302, 304, 457**—*Culpable homicide not amounting to murder — Wife discovered* in flagrante delicto *with another man—Provocation, grave and sudden.*

When a husband finds his wife *in flagrante delicto* with another man, he is deprived of the power of self-control by grave and sudden provocation and if he kills the wife in the heat of the moment, his case falls within section 300, Exception (1) of the Penal Code, and he is guilty of the offence under the first part of section 304 and not under section 302 of the Code. Further, there is a very small distinction between the actual sight of an adulterous act and the realization of evidence which completely proves the most recent adultery. For instance, the feelings of a man who has just seen his wife's paramour leave her room and who finds her lying naked on the bed, must be taken to be identical with those of a man who has seen the adultery itself. **Peah** SHARIF *v.* EMPEROR, 24 CR. L. J. 273 **998**

Penal Code—contd.

——— **s. 302** — *Murder — Concerted attack by armed men — Injuries inflicted resulting in death — Penalty, proper.*

Where a number of men armed with *lathis* make a concerted attack upon another man and practically kill him on the spot, inflicting injuries to the head, the result of blows which must have been struck either with the intention to kill, or, at any rate, with the intention to cause hurt such as the strikers must have known to be imminently likely to result in the death of the person struck, the penalty prescribed by the law as the proper penalty in cases of murder should be inflicted on the ring-leader, at least, of such an assault. **A** SIPAHI SINGH *v.* EMPEROR, 20 A. L. J. 909; (1923) A. I. R. (A.) 88; 24 CR. L. J. 100; 45 A. 130 **234**

——— **ss. 325, 304** — *Blow aimed at woman causing death of child — Offence.*

Accused attempted to enter a house in order to beat the owner of the house. The latter's wife, who was carrying her infant in her arms, tried to bar accused's passage by shutting the door. The accused forced open the door and aimed a *lathi* blow at the woman which struck the child and killed it. It was found that it was too dark for the accused to have perceived that the woman was carrying a child :

Held, (1) that the accused could only be convicted of the offence of striking the woman;

(2) that inasmuch as the accused used a *lathi* and struck the blow with some force he must be held to have intended to cause grievous hurt, **L** DYAL SINGH *v.* EMPEROR, 24 CR. L. J. 4; 5 L. L. J. 228 **52**

——— **s. 333** — *Constable firing upon rioters in flight — Injury caused to constable by rioters in snatching gun away — Self-defence, plea of.*

A constable, pursuing a number of rioters in order to arrest them after the riot was over, fired upon them whereupon some of them turned round and caused him serious injury in order to snatch away his gun. These were charged with an offence under section 333 of the Penal Code :

Held, that, as the constable exceeded his lawful rights in firing upon the men, the accused exercised only their right of self-defence in snatching away the gun from him and were not guilty of the offence with which they were charged. **L.** KHANUN *v.* EMPEROR, (1922) A. I. R. (L.) 75; 24 CR. L. J. 201 **665**

——— **s. 352** — *Assault — Search of house by Police Officer outside his Circle — Assault to prevent search, whether offence.*

Inasmuch as a Sub-Inspector of Police has no right to enter or attempt to search a house, which is situate outside his Circle, if he does so, no offence is committed if the inmates assault him in order to prevent him from entering the house. **A** PITAM LAL *v.* EMPEROR **996**

——— **s. 352** — *Criminal force, use of, to Police Constable executing warrant — Warrant technically defective — Offence.*

The use of criminal force towards a Police Constable, acting honestly within the scope of his authority, to prevent the execution of a warrant containing a technical defect, but of which neither he, nor the person using such force, had knowledge, is an offence punishable under section 352, Penal Code. **A.** COKAL *v.* EMPEROR, 20 A. L. J. 921; (1923) A. I. R. (A.) 87; 24 CR. L. J. 151; 45 A. 142 **503**

——— **ss. 372, 373** — *Age of girl kidnapped — Prosecution, duty of.*

In a trial upon charges under sections 372 and 373 of the Penal Code, it is the duty of the prosecution to prove that the girl is under the age of 16 years. **C** ABDUL GAHUR *v.* EMPEROR, 36 C. L. J. 152; 26 C. W. N. 972; (1922) A. I. R. (C.) 505; 24 CR. L. J. 76 **124**

——— **s. 373** — *Intention or knowledge — Inference from circumstances — Burden of proof — Evidence Act (I of 1872), s. 106, Ill (a).*

Proof of intention or knowledge, such as are mentioned in section 373 of the Penal Code, must be almost entirely a matter of inference from circumstances.

Where in a prosecution under section 373 of the Penal Code against a woman all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose, the burden lies upon the woman of proving that she intended to wait until the girl had reached the age of majority. **C** KHETERMANI DASI *v.* EMPEROR, 35 C. L. J. 451; (1922) A. I. R. 539; (C.) 24 CR. L. J. 104 **232**

——— **s. 379** — *Theft, what constitutes — Removal in bona fide assertion of right.*

If there is a taking under a colour of right, or, in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft. It is immaterial whether the claim is good or bad.

It may be material in considering, as a question of fact, whether the claim was a *bona fide* claim, to consider whether or not there was any right at all, because the complete absence of right and circumstances, such as the Court would be justified in saying could not have led any reasonable man to a belief that he had a right, would be cogent matters to consider in arriving at the conclusion whether the claim was a *bona fide* claim or not.

A certain kind of long grass growing in a village-tank used to be divided among the proprietors. One of the latter sold his land to accused. The latter asserted his right to a share in the grass but his vendor and the other proprietors denied this right. When the grass was being cut, accused removed a portion of it, and it was not found that the portion removed was in excess of the share claimed by him :

Held, that the removal being under a *bona fide* claim the accused could not be held to have **M** SRINIVASALU REDDIAR *v.* GOVINDA GOUNDAN, 17 L. W. 104; 44 M. L. J. 138; (1923) M. W. N. 182; 32 M. L. T. 153; (1923) A. I. R. (M.) 239; 24 Cr. L. J. 254 **798**

——— **ss. 379, 447, 511** — *Intention to commit theft — Trespass — Attempt.*

Accused was caught at night in the vicinity of some cattle which were tethered on complainant's

Penal Code—contd.

land and near which complainant and his brother were sleeping:

Held, that it could reasonably be inferred that accused intended to commit theft and was, therefore, guilty of the offence of criminal trespass, but that he could not be held guilty of an attempt to commit theft. **L** NAURANGA *v.* EMPEROR **782**

——— **ss. 384, 385**—*Picketting of shop—Levy of fine—Loss in trade and profits—Offence—Picketting, when criminal.*

Where a person causes loss in trade and profits to a trader by picketting his shop and forces him to pay a fine for persisting in the sale of foreign goods, he is guilty of extortion and may be convicted under section 384 or 385 of the Penal Code.

Picketting is not only harmless but even laudable where a certain number of well-intentioned and law-abiding persons wish to argue in a legitimate and peaceful manner with a man pointing out to him that in his own advantage he should not follow a certain course and the fear of it would not be fear of injury within the meaning of the law. But when the word "picketting" is associated with another word "boycotting" and when the boycotting is apt to proceed from ostracism to active annoyance and when the active annoyance has been known, in many instances, to culminate in bodily injury, a man who is threatened with picketting is put in fear of injury within the meaning of section 385 of the Penal Code. **A** CHATURBHUJ *v.* EMPEROR, 20 A. L. J. 1005; (1923) A. I. R. (A.) 118, 9 O. & A. L. R. (A.) 146; 45 **A.** 137 **110**

——— **s. 391**—*Dacoity—Robbery with violence.*

Taking the words of section 391 of the Penal Code in the most literal sense and strongly in favour of the Crown, they point to a robbery with violence by five or more persons.

Where there is no evidence that five or more persons combined together to rob the complainant with violence, and the evidence merely shows that three of the accused stood by and encouraged three others who were making a sort of raid on the complainants' property, and, when the latter tried to re-take what was taken from him, tried to prevent him from re-taking the property, there is no *prima facie* case to go to a Jury on a charge of dacoity and an order of commitment to the Sessions on such evidence is illegal. **M** NARAMBAN, *In re*, 15 L. W. 552; (1922) M.W.N. 320, (1922) A. I. R. (M) 195; 24 Cr. L. J. 269 **877**

——— **s. 399**—*Preparation for dacoity—Preparation, whether must be by five or more accused—Evidence of previous conduct of accused, admissibility of—Evidence Act (I of 1872), s. 15.*

Where in a trial upon a charge under section 399 of the Penal Code the accused plead that their presence at a particular spot, armed and in company was accidental and innocent it is open to the prosecution to rebut the plea, and section 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon the acts of the accused which in themselves might or might not be preparation for dacoity, and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible for the purpose.

Penal Code—concld.

In order to establish an offence under section 399 of the Penal Code, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise, it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law. **Pesh** KHWAJA HASSAN *v.* EMPEROR, 24 CR. L. J. 136 **360**

——— **ss. 411, 414**, joinder of charges under, legality of *See* CHARGES, MISJOINDER OF **214**

——— **s. 457**—*House trespass for theft, charge of—Conviction for house trespass with other object—Charge, amendment of—Prejudice to accused.*

Although it cannot be laid down as a general rule that in all cases a prosecution for house trespass with the alleged object of theft must fail if that object is not proved yet when a charge has been definitely framed in which theft is alleged the accused cannot be convicted of house trespass with some other object without an amendment of the original charge, unless the Court is satisfied that he has not in any way been prejudiced in his defence by the omission to amend the charge. **C** HAJARI SONAR *v.* EMPEROR, 26 C. W. N. 344; 24 CR L. J. 119 **247**

——— **s. 494**—Bigamy—Good faith, plea of—*Mens rea*, absence of, whether good defence. *See* MUHAMMADAN LAW **65**

——— **s. 494**—*Bigamy—Hindu marriage—Fraud.*

A Hindu marriage tainted by fraud is a voidable transaction, but it is binding until it is set aside by a competent Court. Unless it is declared to be invalid, it can sustain an indictment for bigamy. **L** GAJJA NAND *v.* EMPEROR, (1922) A. I. R. (L.) 139; 24 CR L. J. 87 **215**

Pleadings—*Appeal, second—Acquiescence—Question of fact or law.*

The findings of a lower Appellate Court are final upon the facts from which acquiesence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found. **N** SHANKER *v.* RANGUBAI **942**

——— *New point in appeal.*

A Court of Appeal will not allow a new point to be raised, if it involves the determination of questions of fact. A new point may be allowed to be raised by a party for the first time in appeal or second appeal, if it is a pure question of law and does not take his opponent by surprise. But the position is very different when the new plea raises a question of fact or mixed question of fact and law. **C** SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY, 36 C. L. J. 336; (1923) A. I. R. (C.) 247 **849**

——— *Suit for ejectment of tenant—Denial of plaintiff's title—Tenancy not proved—Ownership found in plaintiff—Decree for ejectment, whether may be passed—Fraudulent transfer—Fraud carried out—Advantage of one's own fraud—Estoppel.*

Pleadings—concld.

Where in a suit for ejectment of a tenant the defendant denies the title of the plaintiff to the property, the latter, if he proves his ownership, is entitled to a decree for ejectment even though he fails to prove the specific tenancy set up by him, as in such a case the defendant cannot be said to have been taken by surprise.

If an owner of a certain property transfers it fraudulently in order to defeat his creditors and thus succeeds in compounding the claims of all his creditors for much smaller amounts than they were entitled to, he is precluded from subsequently putting forward his own title to the property by taking advantage of his own fraud. **A** LACHMAN DAS *v.* MULCHAND **441**

Pledge—*Pledgee, rights of*—*Sub-pledge.*

A pledgee has a perfect legal right to deal with the pledged property in any manner he chooses, so long as he is within the rights that a bailee can exercise as regards bailed property.

In the absence of a condition to the contrary in the contract of pledge, it is quite open to a pledgee to make a sub-pledge of the pledged property. **O** SARJU PRASAD *v.* EMPEROR, 9 O. L. J. 421; (1922) A. I. R. (O.) 280; 26 O. C. 4; 24 Cr. L. J. 10 **58**

Precedents—*Punjab rulings, preference of, to those of other High Courts.*

In the North-West Frontier Province there is invariably a presumption that Punjab rulings should be followed in preference to those of the United Provinces **Pesh** AYA RAM *v.* PARSHOTAM LAL **145**

Pre-emption—*Custom* — Wajib-ul-arz, *interpretation of*—"Haq-i-shufa jaiz hai," *meaning of.*

A recital in a *wajib-ul-arz* that "*haq-i-shufa jaiz hai*" only means that the right of pre-emption can be asserted according to Muhammadan Law but it does not show that the custom of pre-emption obtains in the village. **A** SHYAM LAL *v.* PADAM SINGH, (1923) A. I. R. (A.) 296 **1025**

———*Decree ordering payment out of Court*—*Payment in Treasury without informing Court*—*Decree whether complied with.*

In a pre-emption suit a decree was obtained and the plaintiff was to pay to the defendant within thirty days a specified sum; in the event of the latter refusing to accept the money when tendered, the plaintiff was given the option of depositing it in Court. The plaintiff did not tender the money out of Court. The defendant, well within the period limited by the decree, applied to the Court that the plaintiff was present with the money and that he might be asked to make the payment. The plaintiff, however, was not to be found when called but he deposited the money, which he had been ordered to pay out of Court, in the Treasury on the same day, without informing the Court of the deposit or asking it to issue notice to the defendant that the money was lying to his credit in the Treasury:

Held, that there had not been any effective compliance with the provisions of the decree. **A** AJUDHIA PRASAD *v.* GOBIND PRASAD, 21 A. L. J. 63; (1923) A. I. R. (A.) 250; 45 A. 276 **1034**

———**Mokarrari** *land*—*Muhammadan Law.*

There is no right of pre-emption in *mokarrari* land.

Pre-emption—contd.

Unless the proprietary possession is transferred, the right of pre-emption does not accrue.

The law of pre-emption is founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property. It is, therefore, purely a creature of the Muhammadan Law, and, as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammadan Law, or beyond the decision of the Courts. **Pat** DHIRAKSHAN SINGH *v.* TRILOKI PRASAD SINGH, (1923) PAT. 22; (1923) A. I. R. (PAT.) 217 **318**

———*Partition, perfect*—Hissadar *in village*—*Pre-emption of sale in different* mahal.

After a perfect partition, a person who is merely a *hissadar* in the village, has no right to pre-empt the sale of a share sold in a *mahal* in which he himself is not a co-sharer.

After a perfect partition in a village there is no community of interest between the co-sharers of one *mahal* and the co-sharers of another *mahal*, and none of them can, in any sense of the word, be regarded as a co-sharer of the property of the others. **A** RUP SINGH *v.* BHULLAN SINGH, 20 A. L. J. 956; (1923) A. I. R. (A.) 52 **408**

———*Property misdescribed in sale-deed*—Serai, *meaning of*—*Single building, whether divisible as pre-emptive and non-pre-emptive.*

Where in a sale-deed property is deliberately misdescribed with a view to defeating pre-emption, it is permissible to look outside the terms of the deed to ascertain its real character, and where the property is described as a house which is said to be a *serai*, the mere size of the property would not raise the presumption that it is a *serai*.

The essentials of a "*serai*" are that there is general access to the interior by the public, and that it is used for the temporary accommodation of travellers. A building containing rooms let out to different persons for extended periods is not *prima facie* a "*serai*," and is, therefore, not excluded from pre-emption as being a "*serai*."

A single building ought ordinarily not to be divided into pre-emptive and non-pre-emptive portions. It must follow the main characteristics of the whole. If the principal use of the building is residential, the whole building will be pre-emptible, notwithstanding that a small portion may also be used as a shop. Conversely, if the main characteristic is the use of a portion of it for a shop the whole building will be non-pre-emptible

Where the shop is an insignificant portion of the whole building, and of an inconspicuous description, and its use as a shop is not a permanent feature of the building, the property is, for purposes of pre-emption, indivisible and must follow its main characteristics as residential premises, and the whole *including* the small shop is pre-emptible. **Pesh.** AYA RAM *v.* PARSHOTAM LAL, **145**

———*right to enforce, accrual of*—*Pre-emptor and vendee, rights of, how governed.*

The right of pre-emption is an antecedent right and the rights of the parties are governed by their

Pre-emption—concld.

positions *inter se* at the time of a sale, and not by something which springs into being for the first time on a sale.

Where a sale-deed recites that ownership has actually passed from the date of the deed, the sale is complete on that date, and the postponement of payment of consideration, though it may give rise to equities and restrictions in favour of the vendor, does not operate to prevent the vendee's proprietary title being complete, as the mere omission to pay the whole of the consideration does not necessarily prevent ownership from passing

The right to *enforce* pre-emption arises immediately a sale takes place, subject to the restriction that the pre-emptor himself must maintain his quality as a pre-emptor up to the institution of his suit ; he cannot be prejudiced by the action of the vendee subsequent to the sale. This rule, however, is subject to the exception where a vendee, prior to the institution of a suit for pre-emption re-transfers the property to a person who has equal rights with the plaintiff. **Pesh.** AYA RAM *v.* PARSHOTAM LAL **145**

——— *Sale, involuntary—Right to pre-empt.*

A pre-emptor cannot be deprived of his right by the fact that the sale was an involuntary sale. **A** BIRJ NARAIN RAI *v.* KEDAR NATH, 20 A. L. J. 918; (1923) A. I. R. (A) 57; 45 A. 180 **836**

——— Sheikhs *notified as agriculturists, who are —Conversion of* Sikh *to Islam - Assumption of title of* Sheikh *-Convert, whether member of agricultural tribe.*

The Local Government of the N.-W. F. Province in notifying the Sheikhs as members of an agricultural tribe, intended, by the term "Sheikhs," to designate certain tribes who had been settled in those districts under conditions similar to those of other tribes and who owned land and followed the profession of agriculture ; it did not intend to include non-agriculturists who became "Sheikhs' by conversion. A Sikh, therefore, who, on his conversion to Islam, is given the honorific title of "Sheikh" does not thereby come within the notification and place himself in the category of Sheikhs notified as an agricultural tribe, so as to entitle him to claim pre-emption in respect of agricultural land.

In the N.-W. F. Province Sikhs are not members of an agricultural tribe. **Pesh** MUAZAM SHER *v.* FAZAL RAHMAN **312**

——— **suit** *-Pre-emptor joining as co-plaintiff pre-emptor inferior to vendee—Effect.*

A pre-emptor's suit must fail if he joins with him as co-plaintiff a person having an inferior right of pre-emption to that of the vendee. **A** RAHIMA *v.* RAZZAK ALI, 21 A. L. J. 184; (1923) A. I. R. (A,) 256 **562**

Press Act (I of 1910), s. 4—*Article in newspaper, objectionable—Good faith of Editor or writer, when material—" The Government established by law in British India," meaning of—" Section of His Majesty's subjects," meaning of.*

In deciding the question whether the words of an article published in a newspaper may or may not have the tendency to produce the objectionable

Press Act—concld.

effect described in the various clauses of sub-section (1) of section 4 of the Press Act, it is immaterial whether the Editor or writer acted in good faith, or what was the motive of the writer. Such matters are material only in connection with comments expressing disapproval of the measures of the Government.

The phrase " the Government established by law in British India " includes the collective body of men authorised by law to administer executive Government in British India as distinguished from any particular set of administrators or individuals administering the country for the time being. A few Police Officials employed at a particular station cannot be identified with the Government or the general body of rulers, nor can these officials, either individually or collectively, be regarded as " the Government established by law in British India ".

There is a clear distinction between the Government and individual officers employed under the Government, words bringing the former into hatred or contempt constitute sedition, but similar words directed against the latter only infringe the law of libel.

The expression " section of His Majesty's subjects " in clause (*c*) of section 4 of the Press Act signifies a distinct portion of His Majesty's subjects: a fortuitous concourse of one or two Inspectors or Sub-Inspectors and a few Policemen, who happen to be employed at a particular place, cannot be designated a section of His Majesty's subjects, much less a class thereof. **L** RAJ PAL *v.* EMPEROR, 3 L. 405; (1923) A. I. R. (L.) 61; 24 CR. L. J. 167 **519**

Principal and agent—*Suit for damages—Suit for recovery of money—Suit for accounts—Agent and his representatives, liability of—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 62, 89, 90, 115.*

The representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs.

If, however, the principal can prove that he has suffered loss owing to the defalcation or breach of duty of the agent, the heirs would be liable to the extent of the assets of the deceased agent in their hands for the loss occasioned to the principal. The burden of proof in such a case rests upon the principal.

A suit against the representatives of a deceased agent to recover damages for loss occasioned to the plaintiff by reason of a breach of duty by the deceased agent is governed by Art. 115 of Schedule I to the Limitation Act, and limitation begins to run from the date of the alleged breach.

A suit against the representatives of a deceased agent to recover monies received by the latter on behalf of the plaintiff and not accounted for is governed by Art. 62 of Schedule I read with section 2 of the Limitation Act.

A suit by a principal against his agent for the recovery of monies received by the latter on behalf

Principal and agent—concld.

of the former and not accounted for is governed by Art. 89 of Schedule I to the Limitation Act. Where the agency is continuous limitation for such a suit commences to run from the date on which the agent refuses to account for the monies.

A suit by a principal against an agent to recover damages for loss occasioned to the principal by the negligence or breach of duty of the agent is governed by Art. 90 of Schedule I to the Limitation Act, and limitation for such a suit commences to run from the date when the neglect or breach becomes known to the principal.

Articles 89 and 90 of Schedule I to the Limitation Act do not apply to suits by a principal against the representatives of a deceased agent. **Pat** RAMESHWAR SINGH *v.* NARENDRANATH DAS, (1923) A. I. R (PAT) 259 **916**

Principal and surety—*Change in agreement without consent of surety—Discharge of surety.*

Petitioners obtained a money decree against one *K* and the respondent became surety for the payment of the decretal amount by *K*. At that time the entire property of the judgment-debtor was under attachment. Subsequently, the judgment-debtor obtained permission with the consent of the decree-holders to effect a private sale or mortgage of his properties and to pay the proceeds into Court. The surety had no knowledge of this:

Held, that a change had been brought about in the original agreement to the prejudice of the surety without his consent and he was, therefore, entitled to be relieved from his undertaking. **L** DARSHAN RAM-GANESH DAS *v.* KHAIR DIN-ALLAH BAKHSH **783**

——— *Surety for amount of decree—Principal, death of—Decree against estate—Surety, liability of.*

Where a surety renders himself liable for any decree which might be passed against his principal, the mere fact that the latter dies before any decree is passed, does not absolve the surety from performing his contract. **L** MAULA DAD *v.* WADHAWA SINGH **46**

Probate and Administration Act (V of 1881), ss. 56, 57—*"Fixed", meaning of—Railway employee stationed for twenty years at one place—Place of residence, whether fixed—Deceased, leaving moveable property—Application for Probate—Jurisdiction*

The word "fixed" in section 56 of the Probate and Administration Act does not mean "permanent."

An employee of a Railway Company had, for twenty years prior to his death, been stationed at a station on the Railway and resided there in Railway quarters:

Held, that he had a fixed abode within the meaning of section 56 of the Probate and Administration Act at the station, although he was liable to be transferred from there to another station.

A District Judge has full discretion to entertain an application for Probate if the deceased has left some moveable property within his jurisdiction. **N** GOVIND *v* ANANT, 19 N. L. R. 54; (1923) A. I. R. (N.) 145 **816**

Probate and Administration Act—concld.

——— **s. 89**—*Criminal proceeding—Death of injured party—Abatement.*

The principle laid down in section 89 of the Probate and Administration Act has no application to a criminal prosecution.

A criminal prosecution cannot abate merely on account of the death of the injured party. **L** EMPEROR *v* MAUJ DIN, 24 CR. L. J. 29; 4 L. 77

——— **ss. 112, 116**—*Succession Act (X of 1865), ss. 292, 296—Legacy—Vested interest—Legacy, transfer of—Assent of executor.*

Where a Will creates a vested interest in a legatee in the subject-matter of a legacy, he has a transmissible interest, subject to the reservation that the legacy, whether in his hands or in the hands of his transferee, may be imperilled to the extent necessary for the due administration of the estate by the executor.

As a protection to the executor, the law ordains that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect; before such assent, however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered; and in the case of the outlawry of the legatee it is subject to the forfeiture.

Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the Will, and hence if the legacy is void, the assent avails nothing. The position cannot consequently be maintained that, till the executor has signified his assent, express or implied, the legatee has no interest whatever in the subject-matter of the legacy. Before such assent by the executor, the legacy can form the subject-matter of a valid mortgage by the legatee. **C** KHAGENDRA NATH MUKHERJEE *v.* KHETRA NATH PAL, 30 C. J. 21; (1923) A. I. R. (C.) 21; 50 C. 171 **314**

Procedure—*Counter-complaints—Process issued in one and other postponed till its disposal—Revision.*

Where, of two counter-complaints filed before a Magistrate, process is issued in one while the other is ordered to be put up after its disposal, the Magistrate does not contravene any rules of procedure and a High Court cannot interfere in revision with the discretion exercised by him. **Pat** LALJI SINGH *v.* NAURANGI LAL, 3 P. L. T. 764; (1922) PAT. 304; 4 U. P. L. R. (PAT.) 112; (1922) A. I. R. (PAT.) 618; 24 CR. L. J. 120 **248**

——— *Criminal proceedings, institution of—Issue involving adjudication by Civil Court—Criminal proceedings premature.*

The criminal law ought not to be set in motion for the purpose of adjudicating upon an issue which clearly is within the province of a Civil Court to decide. In such a case the civil adjudication should precede, and not succeed, an adjudication by a Criminal Court. **Peshi** KHEM CHAND *v.* EMPEROR, 24 CR. L. J. 245 **789**

——— *Inspection by Magistrate—Note of inspection, record of—Prejudice to accused.*

Though there is no provision in the Code of

Procedure—concld.

Criminal Procedure for making a local inspection, or for keeping a note of such inspection, if made, a Magistrate must invariably put on record a note of his inspection.

An accused is prejudiced in his trial, if the Magistrate uses knowledge derived from a local inspection, without putting a note of such inspection on the record. In such a case the conviction of the accused must be set aside. **Pat** ATHAR HUSSAIN *v.* EMPEROR, (1922) PAT. 27; (1922) A. I. R. (PAT.) 51, 24 CR. L. J. 234 **698**

Proceedings *for unprofessional conduct*– Quasi *criminal proceedings.*

Proceedings against Pleaders under section 13 of the Legal Practitioners Act are *quasi*-criminal in the sense that they may result in penalties.

Quasi-criminal proceedings are not criminal proceedings in the sense that all rules of procedure applicable in criminal trials are necessarily in force in a *quasi*-criminal proceeding.

Where it is shown that a Pleader has accepted a *vakalatnama* in a general and common form and refused to act, this is sufficient to start a proceeding against him under the Legal Practitioners Act.

Proceedings against a Pleader under the Legal Practitioners Act are not of a criminal nature. They are neither civil suits nor criminal prosecutions. They are special proceedings resulting from the inherent power of the Courts over their officers.

A Pleader against whom a charge of unprofessional conduct is brought must be allowed an opportunity of making his defence unless he does not choose to make any.

When in answer to a charge made against a Pleader, a written statement has been filed in a proceeding under section 14 of the Legal Practitioners Act, it is not obligatory on the Court to rule out all conceivable hypothetical grounds, which could have been, but had not been, set up in answer. The justice of the case may ordinarily be met, if the enquiry proceeds on the basis of the charge and the answer. **C** EMPEROR *v.* RAJANI KANTA BOSE, 35 C. L. J. 356; 26 C. W. N. 589; 49 C. 732; (1922) A. I. R. (C.) 515; 24 CR. L. J. 33 **81**

Pro-note, *suit on—Execution admitted—Consideration—Burden of proof.*

When a defendant admits the execution of a pro-note and pleads want of consideration the *onus* is on him to substantiate his plea. **L** MUHAMMAD HUSSAIN *v.* RAM LAL, 25 L. L. J. 198 **783**

Provincial Insolvency Act (V of 1920), ss. 3 (1), 75 (1)—*Subordinate Court invested with insolvency jurisdiction — Appeal, whether lies to District Court.*

The provisions of an Act conferring jurisdiction for a particular purpose cannot by implication affect or modify the provisions of an Act creating a status for general purposes.

Although the Provincial Insolvency Act of 1920 provides that so far as original proceedings under it are concerned a Subordinate Court specially invested with insolvency jurisdiction shall exercise it concurrently with the District Court, yet an appeal from the decision of such a Subordinate Court lies to the District Court. **N** MADHORAO *v.* NAGO, (1923) A. I. R. (N.) 80 **37**

Provincial Insolvency Act—concld.

——— s. 4—*Title, question of—Decision by Insolvency Court, finality of.*

The decision of an Insolvency Court, on a question of title relating to any property attached by the Receiver as the property of an insolvent, is final, and the matter cannot be re-agitated in the Civil Court, even if the Insolvency Court permits the claimant to do so. **A** BASRA BEGAM *v.* SHEO NARAIN, (1923) A. I. R. (A.) 293 **979**

——— s. 53—*Fraudulent transfer, annulment of — Receiver not appointed.*

Proceedings to annul a transfer, under section 53 of the Provincial Insolvency Act, should be taken in the name of the Receiver, but where no Receiver is appointed the Insolvency Court can itself move on the matter being brought to its notice by any of the creditors.

A person impeaching a transaction under section 53 of the Act has only to prove that it took place within two years of the insolvency of the transferor, and when this has been done the *onus* is shifted on to the transferee to establish the *bona fides* of the transaction which he seeks to maintain. **N** BANSILAL *v.* RANGLAL, 19 N. L. R. 32; (1923) A. I. R. (N.) 161 **418**

Provincial Small Cause Courts Act (IX of 1887), s. 17 (1) Prov.—*Application for restoration—Unregistered bond of immoveable property given on date of application—Cash security deposited next day, whether sufficient compliance with proviso.*

It is not a sufficient compliance with the requirements of the law if the applicant files with his application for restoration an unregistered, and, therefore, invalid security-bond, purporting to hypothecate immoveable property, and the next day on being directed by the Court deposits the amount in cash. **A** BADRI SINGH *v.* PANTHU SINGH, 21 A. L. J. 173; 90 O. & A. L. R. (A.) 433; (1923) A. I. R. (A.) 270 **474**

——— s. 25, Sch. II, Art. 35 (ii)—*Plea of want of jurisdiction not taken in lower Court—High Court, whether bound to entertain—Suit for damages for trees wrongfully cut—Defendant claiming trees as his own—Application of Art. 35 (ii).*

If a plea of want of jurisdiction is not taken during the trial of a suit in the Small Cause Court, the High Court is not bound to entertain it in the exercise of its powers under section 25 of the Provincial Small Cause Courts Act.

Where in a suit for damages for trees wrongfully cut, the defendant pleads that the trees are his own property and not the property of the plaintiff, the case is not covered by the Exception mentioned in Art. 35 (*ii*) of the Second Schedule to the Small Cause Courts Act. **A** KUNWAR PAL *v.* MADAN MOHAN, 21 A. L. J. 213 **645**

——— Sch. II, Art. 13—*Suit to claim "cess" as customary due—Nature of suit—"Cess" "sawai," "jamabandi," meaning of.*

A suit for recovery of a "cess" as a customary due, and not as originating from a contract, is covered by clause 13 of the Second Schedule to Act

Provincial Small Cause Courts Act—concld.

IX of 1887 and, therefore, is not a Small Cause suit.

The words "cess", *"siwai"*, and *"jamabandi"* explained. **A** MOHAMMAD ASGHAR ALI KHAN *v.* RAMMON, (1923) A. I. R. (A.) 378 **432**

——— **Sch. II, Art. 42**—*Two persons mortgaging property belonging to one of them—"Joint mortgagors"—Personal liability.*

Where two persons join in mortgaging the property belonging to one of them, they are "joint mortgagors" within the meaning of Art. 42, Schedule II, to the Provincial Small Cause Courts Act.

A mortgage carries with it a personal liability. **A** AMAR DEO PANDE *v.* GAYA PANDE **393**

Public Gambling Act (III of 1867)—*Criminal Procedure Code (Act V of 1898), s. 562, applicability of—Warrant of arrest and search not addressed to any person—Irregularity.*

Section 562, Criminal Procedure Code, has no application to offences committed under the Public Gambling Act, III of 1867.

A warrant issued under the Public Gambling Act, for search and arrest which does not contain the name of the person to whom it is issued, and to whom authority to make the search and arrest are given, is irregular. **O** EMPEROR *v.* SHANKAR DAYAL, 25 O. C. 111; (1922) A. I. R. (O.) 224; 9 O. L. J. 667; 24 CR. L. J. 14 **62**

Punishment—*Fine, levy of—Capacity to pay.*

However, serious may be the offence of which an accused person is convicted, a fine should not be imposed which it is wholly impossible for him to pay without ruining himself and inflicting great hardships upon his family.

The maximum fine to be imposed upon any individual should depend in every case upon his position in life and should be within his capacity to pay, and this more especially because no option is allowed under the Penal Code and the liability to pay the fine is not terminated by the serving of a sentence of imprisonment.

If the offence is of an aggravated type a sentence of imprisonment is more suitable than a fine. **L** ABDULLA *v.* EMPEROR, 5 L. L. J. 271; 24 CR. L. J. 278 **998**

Punjab Excise Act (I of 1914), s. 75—*Complaint by Police Officer, whether cognizable.*

Inasmuch as all Inspectors and Sub-Inspectors of Police have, by a notification under section 2 of the Punjab Excise Act, been invested with the powers of an Excise Officer of the First Class, a Court is competent to take cognizance of a complaint of an offence under that Act made by a Police Inspector. **L** NIHAL SINGH *v.* EMPEROR, (1922) A. I. R. (L.) 220; 24 CR. L. J. 183 **599**

Punjab Land Revenue Act (XVII of 1887), ss. 3 (2), 111, 117, 158—*Custom—Partition—Widow—Burden of proof—Question of title—Procedure—Civil suit—Jurisdiction of Civil and Revenue Courts.*

Section 111 of the Punjab Land Revenue Act merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying for partition, which she may or may not be entitled to obtain by virtue of her life-estate.

Where the right of a widow to obtain partition is contested, the proper course for the Revenue Officer to adopt is to proceed under section 117 of the Punjab Land Revenue Act, and either to stay the proceedings for the determination of the question of title by a competent Court or to determine the question himself as if he were a Civil Court.

The mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title, which has not been disposed of during the partition proceedings, is barred.

Section 3, sub-clause (2) of the Punjab Land Revenue Act, read with section 111 of the Punjab Land Revenue Act, makes it clear that a widow is a joint owner of land though with limited rights of ownership, and as such is possessed of a statutory right to demand partition. The onus is upon the party who disputes her right to obtain partition to prove that such right does not exist. **L** SANT SINGH *v.* BASANT KAUR, (1923) A. I. R. (L.) 81 **28**

Punjab Municipal Act (III of 1911), ss. 3 (13), 189, 193—*"Street"—"Accessible to public," meaning of—Application for sanction to build—Conditional sanction, grant of.*

The expression "accessible to the public" in the definition of "street" in section 3 (13) of the Punjab Municipal Act does not mean merely physical access, but such access coupled with the right of access.

Under section 193 of the Punjab Municipal Act, a Municipal Committee can take advantage of an application for sanction to erect a new building to attach a condition to this sanction, for instance, that an existing wall be removed. **L** MUNICIPAL COMMITTEE, DELHI *v.* ABDUL HUSSAN KHAN **775**

Punjab Pre-emption Act (I of 1913), s. 5 (2)—*Shop or house—Test.*

The question whether a building is a shop or residential house for purposes of pre-emption must be decided with reference to the chief or most important purpose to which the building is devoted.

Where it was found that two of the principal rooms of the building in suit had been converted into shops which opened into a regular Bazar full of other shops and had been continuously used as such for several years, and that the primary value of the building lay in those shops, the rest of it being neglected and of comparatively insignificant value:

Held, that the building must be regarded as a shop within the meaning of section 5 (2) of the Punjab Pre-emption Act and no right of pre-emption arose on a sale of it. **L** LAL CHAND *v.* BEGAM, 3 L. 433; (1923) A. I. R. (L.) 262; 5 L. L. J. 193 **746**

——— **ss. 7, 16 (secondly)**—*Custom—Sub-division of town—Chuni Mandi, Multani Mohalla, Lahore City—Sale of site—Owner of building, right of, to pre-empt*

If in a definite *Mohalla* or sub-division of a town the custom of pre-emption exists it must be treated as existing throughout the whole of the sub-division.

Chuni Mandi is a part of the Multani Mohalla of the Lahore City and a custom of pre-emption exists in that *Mohalla*.

Punjab Pre-emption Act—concld.

Where the site of a building is sold the owner of the building has a right of pre-emption under section 16 (secondly) of the Punjab Pre-emption Act irrespective of the fact whether the site is a shop or a house. **L** ALLAH DIN *v.* SHANKAR SHAH **893**

——— **s. 30**—*Property sold in possession of vendee before sale—Physical possession—Limitation.*

Where prior to a sale the vendee is in physical possession of the property sold as a tenant physical possession of the property under the sale cannot be given to him *under the sale* within the meaning of Art. 30 of the Punjab Pre-emption Act of 1913, and the property must be treated as not admitting of physical possession being given. In such a case limitation begins to run from the date of attestation of mutation. **L** MISRI KHAN *v.* SHAHJI **823**

Punjab Tenancy Act (XVI of 1887), s 4 (5) Muqarridar, *whether tenant.*

A *muqarridar* of the Attock District is a tenant and not an inferior proprietor. **L** KANSHI RAM *v.* SHAH NAWAZ, (1923) A. I R. (L.) 295 **811**

Putni Taluks Regulation (VIII of 1819), interest of assignee of *zemindar's* right to receive rent from *Putnidar* if can be sold under. *See* LANDLORD AND TENANT **327**

Railways Act (IX of 1890), s. 72—*Risk-Note, Form "B"—Word "loss," meaning of.*

In section 72 and the following sections of the Railways Act, as also in the Risk-note Form "B", which is one of the forms drawn up under the provisions of the Act, the word "loss" means "*loss by the Railway*", and cannot mean "*loss to the owner*" in the sense of injury to him arising out of his being deprived of his goods. **A** SECRETARY OF STATE FOR INDIA *v.* FIRM JIWAN AND ABDULLA, 21 A. L. J. 220; 45 A. 380 **609**

——— **ss. 77, 140**—*Notice to Railway Company—Service on Agent's subordinate, whether sufficient—S. 140 of Act IX of 1890, whether exhaustive.*

Notice to a subordinate of the Agent of a Railway Company, *e. g.*, the General Traffic Manager, is not the notice contemplated by section 77 of the Railways Act, unless it is established that the Agent had invested him with the authority to receive service on his account.

Section 140 of the Railways Act is not exhaustive, and if it can be established that, as a matter of fact, the Agent of a Railway Company has received notice of a claim against the Company in a way not mentioned by that section, such notice is sufficient or the purposes of section 77 of the Railways Act. **L** AGENT, B. B. & C. I. RAILWAY BOMBAY *v.* FIRM MANOHAR LAL-PARWIN CHAND, 5 L. L. J. 3; (1923) A. I. R. (L.) 84; 4 L. 46 **469**

——— **ss. 77, 140**—*Notice of suit—Service—Subordinate officer—"May" in section 140, meaning of.*

The language of section 140 of the Railways Act is imperative and the word "may" in the section must be read as "must." The meaning of the section is that where any notice or document has to be served on a Railway Administration that service must be made in one or other of the ways referred to in clauses (*a*), (*b*) and (*c*) of the section.

A subordinate official entrusted by the Agent of a Railway Company with authority to dispose of claims brought against the Company is not empowered to receive notice of suit such as is required by section 77 of the Railways Act. Therefore, a notice given to such an officer is not good and sufficient within the meaning of the Act. **A** CAWNPORE COTTON MILLS CO., LD. *v.* GREAT INDIAN PENINSULAR RAILWAY, 21 A. L. J. 223; (1923) A. I. R. (A.) 341; 45 A. 353 **614**

Receiver—*Property in possession of Receiver, whether liable to judicial process—Status of Receiver—Execution proceedings—Refusal to implead Receiver as party—Material irregularity.*

There can be no attachment and sale of property in the possession of a Receiver in execution of a money-decree without the leave of the Court appointing the Receiver, as property in his hands is exempt from judicial process, except to the extent permitted by the appointing Court.

A Receiver appointed by the Court takes possession of property on behalf of the Court, and is not the legal representative of any party, nor is he a new party to the proceedings He represents all the parties and his duty is that which is assigned to him by the Court.

A Receiver in a partition suit is entitled to be added as a party in execution proceedings in a mortgage suit concerning the properties in his possession, and in refusing to add him as a party the Court acts with material irregularity, within the meaning of section 115 of the Civil Procedure Code. **M** FRASER *v.* KRISHNASWAMI IYER, 43 M. L. J. 211; 16 L. W. 322; 31 M. L. T. 290, (1922) M. W. N. 745, (1923) A. I. (M.) 144 **293**

——— *Remuneration—Assets available for distribution, meaning of—Notification 35-B-XIX (19th April 1920).*

Where any part of an insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution within the meaning of Notification 35-B-XIX, dated the 19th April 1920. If the Receiver sells the property free from the mortgage and realises the purchase money, the whole of it is not assets available for distribution, but only such part as remains in his hand after paying off the mortgage. He is not entitled to a percentage on the whole of the purchase-money. **N** GOVINDA *v.* ABDUL KADIR, (1923) A. I R. (N.) 150 **558**

Registration—*Agreement to give share of property in consideration of assistance in recovering it, whether registrable—Suit for specific performance, whether maintainable — Limitation,* terminus a quo.

A written agreement whereby a person agrees to give another a share in certain property in consideration of that other's advice and assistance in recovering the property through the Court does not by itself create or extinguish any right in immoveable property and is not compulsorily registrable to render it admissible in evidence, and a suit for

specific performance of such an agreement is maintainable.

Where in such an agreement no particular date is fixed for giving the share of the property, limitation for a suit for the recovery of the property would commence when the final order in the case is passed. **N** SHRIRAM *v.* BABAJI, (1923) A I R. (N.) 47 **40**

——— *Notice—Presumption*

In order to bind the subsequent transferees of a property with prior lien the law of registration has been enacted so that the subsequent transferees may have an opportunity to ascertain whether the property transferred to them was subject to any prior encumbrance or not; and, once that prior encumbrance is effected by means of a registered document, the subsequent transferees are presumed to have notice of the same and are in law bound by it. **Pat** WAJIBANNISSA BEGUM *v.* VALMIKI SAHAY, 1 P. L. R. 80 **589**

Registration Act (XVI of 1908)—*Agreement to Lease—Registration.*

Where a letter is not merely the evidential record of an oral agreement but states in so many words that it embodies the terms and conditions agreed upon, and that it is the letter which is to be the binding, formal, unalterable record of the conditions for creating the lease in question, it is a document in the nature of an agreement to lease within the meaning of sections 2 (7) and 17 (1) (*d*) of the Registration Act, and is inadmissible in evidence if unregistered, even if it is stated therein that a proper lease containing full details will be executed and registered before a fixed date. **A** NOOR MAHOMED VEERJIBHAI VEELMAHOMED *v.* NATWAR LAL, (1923) A. I. R. (A.) 112; 45 A. 220 **452**

——— **ss. 2 (7), 17**—*Agreement to lease—Registration.*

An agreement to lease within the meaning of section 2 (7) of the Registration Act is compulsorily registrable under section 17 of the Act only if it creates an immediate interest in the property agreed to be leased out, even before any other document has been executed

The distinction between agreements to lease which are covered by section 2 (7) of the Registration Act and those which are not, lies in the fact of the lease itself being intended to begin at once or at some time in the future. Every promise to grant a lease must in its nature create or declare or assign some interest in the property to be leased, but unless the promise is to grant an immediate lease which is to come into existence at once, even before any other document has been executed, it is an agreement to lease outside the class of such agreements of which section 2 (7) of the Registration Act speaks. **N** SONOO *v.* BHADARIA, (1923) A I. R. (N.) 171 **468**

——— **s. 12**—*Memorandum, unsigned, of mortgage—Registration.*

The Registration Act presumes throughout that a document tendered for registration has been executed. Before a document can be treated as such for purposes of registration, it must be executed, *i. e.*, signed.

A memorandum made in the account-books of a mortgagor reciting the names of the parties, the account of the charge, the period of the mortgage and the names of witnesses but not signed by any body is not a mortgage-deed and does not require registration under section 17 of the Registration Act **L** TIRKHA *v.* SOHLU, 5 L. L. J. 75; (1923) A I R. (L.) 42 **739**

——— **s. 17**—*Evidence Act (I of 1872), s. 92—Registration—Equitable mortgage, document creating—Oral evidence inadmissible—Receiver mortgaging without authority—Mortgage, whether valid.*

Where a deposit of title-deeds is accompanied by a document containing the terms of the mortgage, the document being the only repository and appropriate evidence of the agreement of the parties, constitutes an instrument by which the equitable mortgage is created, and comes within section 17 of the Registration Act.

The general rule that a deposit of a document of title, without writing or word of mouth, will create in equity a charge upon the property, does not apply where the deposit is accompanied by an actual written charge. In such a case oral evidence is not admissible and the terms of the document must be referred to.

Where a Receiver mortgages certain property, when the order appointing him does not authorise him to do so, the mortgage is *ultra vires* **P. C.** SUBRAMANIAN *v.* LUTCHMAN, (1923) A.I R (P. C) 50, 44 M. L. J. 602; 32 M L T. 184; 25 BOM L. R. 582, 1 R. 66; 2 BUR. L J. 25; 38 C. L. J. 41 **650**

——— ——— **s. 17**—*Compromise—Registration—"House," meaning of.*

If, pending an application for partition in a Revenue Court, the parties effect a compromise and the Revenue Court gives effect to that compromise by making it part of the order in mutation and the parties take possession of the divided property in accordance with it, the compromise is admissible in evidence, though it is neither stamped nor registered, inasmuch as such a compromise does not by itself create any title in the parties but is only an information given to the Revenue Court of the compromise at which the parties have arrived out of Court.

In its ordinary acceptance the term "house" is not confined only to the site, excluding the materials. **A** SITA RAM *v.* HAR SAHAI **619**

——— **s. 17 (2) (v)**—*Equitable mortgage—Memorandum—Registration.*

An equitable mortgage is created only by the act of deposit of title-deeds, and any memorandum accompanying, preceding or contemporaneous with the deposit, is only evidence of the *factum* of deposit and a memorandum which contains no words purporting to pass any interest in immoveable property does not require registration. **M** VADAMALAI PILLAI *v.* SUBRAMANIA CHETTIAR, 16 L. W. 936; (1923) M. W. N. 57; (1923) A. I. R. (M.) 262 **130**

Registration Act—concld.

——— **ss. 23, 77** *Registration, postponement of, beyond period allowed by law, validity of—Registration of executed document, how enforced*

An agreement for the postponement of the registration of an executed document beyond the time allowed by the Registration Act for the purpose cannot be enforced.

Registration of an executed document can only be enforced by the proper proceedings under the Registration Act, followed, if necessary, by a suit under section 77 of the Act, but not by a suit of any other kind. **N** CHAGANLAL *v.* KASHIRAM, (1923) A. I. R. (N.) 76 **33**

——— **s. 49 (c)** *Document declaring intention to separate—Registration.*

In order to effect a disruption in the status of a joint Hindu family, an agreement between all the co-parceners is not essential; the separation, so far as the separating member is concerned, is a matter of individual volition, and evidence may be given of acts of parties or declarations independent of any document. But the intention to separate must be unequivocally and clearly expressed to the other members of the family. A document, therefore, which merely contains a declaration or affords evidence of conduct does not itself create a division in status, and although the document is unregistered it is admissible in evidence for the purpose of proving the declarations of the conduct of the executant, as such document is not tendered as evidence of a transaction, but in evidence, and is unaffected by the prohibition contained in section 49 (*c*) of the Registration Act **M** ATLURU SARASWATAMMA *v.* ATLURU PADDAYYA, 44 M. L. J. 45; (1923) A. I. R. (M.) 207; 46 M. 340 **274**

——— **ss. 58, 60**—*Evidence Act (I of 1872), s. 79—Certificate of registration—Proof—Certificate, whether proof of execution — Co-sharers — Adverse possession.*

The genuineness of a certificate of registration must be presumed under section 79 of the Evidence Act, and the evidence of the Registering Officer is not necessary to prove it.

Section 58 (*a*) of the Registration Act does not require a Registering Officer to endorse an admission of execution. Therefore, a certificate of registration is not, under section 60 (2) of the Act, evidence of such admission even though the admission is in fact mentioned in the endorsement.

Where a co-sharer in possession of joint property has by an overt act shown to his co sharers his intention of holding the property for himself alone, his possession does not cease to be adverse to the other co-sharers merely because the names of the latter are subsequently entered in the revenue papers as co-sharers.

Obiter dictum:—The possession of a tenant does not become adverse by the mere fact of his repudiating the tenancy unless his repudiation is accepted by the landlord. **L** MUHAMMAD HASSAN *v.* SOHARA **805**

Remand—*Inadmissible evidence forming basis of decision—Decisions supported by other evidence.*

Where the lower Appellate Court in coming to a decision in a case is materially influenced by a piece of evidence which is found to be inadmissible by the High Court, the case should be remanded to the Court below for a proper consideration of the evidence which is admissible and come to a decision on it.

But there need not be a remand where, after excluding the inadmissible evidence, the conclusion of the Court below is supported by other evidence on the record. **C** FAIJADDIN *v.* AGNI KUMAR SARMA **300**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, S. 11 **307**

——— *Mortgage-suit—Prior mortgagee made party—Priority disputed—Civil Procedure Code (Act V of 1908) s. 11, Expl. IV.*

Where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace his prior title and to postpone it to the title of the plaintiff, it is the duty of the prior mortgagee to prove his prior mortgage. If he fails to contest the suit, the decision in the suit will operate as *res judicata* against him. **Pat** LAL BIHARI SINGH *v.* GUR PRASAD SINGH, 4 P. L. T. 108; (1923) PAT. 118; 1 P. L. R. 238, (1923) A. I. R. (PAT.) 290, 2 PAT. 435 **948**

——— *question of—Revision whether competent.*

An application for revision should not be entertained upon the question of *res judicata*, unless the decision is so manifestly illegal and inequitable as to amount to a miscarriage of justice. **Pesh** AKHTAR HAZRATGUL **1009**

Revision *Court failing to apply its mind to real question High Court, jurisdiction of.*

Where a Court fails to apply its mind to the real question requiring adjudication, the High Court has jurisdiction to interfere in revision. **A** ABDUL NASAR RASHIDUDDIN AHMAD *v.* LALTA PRASAD, 21 A. L. J. 102; (1923) A. I. R. (A.) 315 **1018**

Revision, *criminal—Questions of fact findings on—High Court, practice of—Interference, when permissible.*

Inasmuch as a criminal revision is not a second appeal on questions of fact, it is the practice of the High Courts to accept facts as found unless there is any thing on face of the record against that course being adopted or the accused have been prejudiced by the action and procedure of the Courts below. **N** SURYABHAN *v.* EMPEROR, 24 CR. L. J. 203; (1923) A. I. R. (N.) 155 **667**

——— *High Court, duty of—Evidence of either party equally good—Order whether quashed.*

For purposes of revision, a High Court is not a Court of Appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant

If the evidence for the defence is equally good as that for the prosecution, a High Court may quash the order in revision. **A** ANGNOO SINGH *v.* EMPEROR, 2 A. L. J. 881; (1923) A. I. R. (A.) 35; 45 A. I. C. 24 CR. L. J. 257 **865**

——— *Order recurring point.*

Interference in revision is ordinarily inadvisable with an order passed on appeal from an order

Revision—concld.

of the Trial Court returning a plaint for presentation to the proper Court, and should only be exercised in exceptional cases to remedy an injustice. **L** JAGAN NATH-DIWAN CHAND *v.* JAGAN NATH-MOTI LAL **38**

——— *Wrong view of law.*

An alleged wrong view of the law is not a ground for interference in revision. **N** BARI BAHU *v.* KUNDAN SINGH, (1922) A. I. R. (N.) 264 **31**

Sale-deed—*Recitals — Evidence — Hindu Law— Alienation by daughter to pay off mother's debts—Reversioners, whether bound.*

The mere recital in a deed of sale is evidence.

An alienation by a daughter to pay off her mother's debts cannot operate against the interests of reversioners. **A** SITA RAM *v.* REWA RAM, (1923) A. I. R. (A) 366 **390**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, 1898, s. 195 **49, 63**

——— *See* CRIMINAL PROCEDURE CODE, 1898, s. 195 (6) **222**

——— *Public interest—Notice, whether necessary.*

It is the duty of a Judge to grant sanction to prosecute, if he thinks it is in the public interest, independently altogether of any future grievance or complaint which the alleged delinquent may think he has a right to make.

There is no statutory obligation upon any Judge to issue notice to the person proposed to be charged, before sanction for his prosecution is granted. **A** ANGNOO SINGH *v.* EMPEROR, 20 A. L. J. 881; (1923) A. I. R. (A.) 35, 45 A. 109; 24 CR. L. J. 257 **865**

———*Sanction to prosecute granted by Munsif revoked by District Judge—Revision—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act (5 & 6 Geo. V, Ch. 61), s. 107—Criminal Procedure Code (Act V of 1898), s. 195 (6).*

Where a sanction to prosecute granted by a Munsif is revoked by a District Judge under section 195 (6), Criminal Procedure Code, the High Court can only interfere with the order of the District Judge either under section 115 of the Civil Procedure Code, or under section 107 of the Government of India Act, but such interference is not justified on the ground that the District Judge was wrong in revoking the sanction, because, in his opinion, the evidence was not strong enough for a successful criminal prosecution. **C** JAINUDDIN *v.* KERAMATULLA, 24 CR. L. J. 197 **595**

Second appeal—*Point of law.*

A High Court is justified, as an exceptional case, in permitting a point of law which goes to the root of the merits of the whole case, to be taken in second appeal. **A** RAM GAJADHAR *v.* SURTANI, (1923) A. I. R. (A.) 343 **381**

——— *Possession adverse or permissive—Inference drawn from documents or facts in evidence—Question of law—Weight to be attached to evidence, whether question of law.*

A question whether a possession is adverse or permissive may be one of legal inference to be drawn from documents or from undisputed facts in evidence, and when this is so it is a question of law and a High Court may interfere in second appeal. But where the question is mainly one of the weight to be attached to different items of evidence (*e. g.*, instances in which a certain right was or was not recognised), the question is one of fact and the High Court will not interfere in second appeal. **A** MOHAMMAD AHMAD *v.* BABU **762**

Second appeal—concld.

Shamilat — *Occupancy tenant— Adverse possession.*

An occupancy tenant who occupies a portion of the *shamilat* land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it is given, but if he diverts the site to other purposes, for instance, to build upon, and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the suit of the proprietors. **L** BHAG SINGH *v* KHUSHAL SINGH **618**

Specific Relief (Act I of 1877), s. 31. *See* COURT-FEES ACT, 1870, s. 7 (IV) (C) **31**

——— **s 41** *See* EVIDENCE ACT, 1872, s. 115 **161**

——— **ss 54, 55**—*Suit to restrain erection of building—Building erected during pendency of suit—Demolition of building, injunction for—Co-sharer in land, right of.*

Where a suit to restrain the defendant from building upon a certain land which the plaintiff claims as his own is dismissed, and the defendant, without waiting for the plaintiff to prefer an appeal against the decision, erects a building on the land, the plaintiff, on succeeding in appeal, is entitled to an injunction for the demolition of the building which the defendant erected with full knowledge of his claim.

Where a person builds upon land in which another is a co-sharer, and the latter seeks an injunction for the demolition of the building, the defendant cannot successfully urge that as plaintiff owns only a portion of the land, the whole building should not be demolished, for the plaintiff, as co-sharer, has a right in every portion of the land and is entitled to demand demolition of the entire building erected upon it. **L** HAYAT ALI SHAH *v.* TAJ-UL-NISSA, (1923) A. I. R. (L.) 205 **557**

——— **s. 54, ill. (s)**—*Business requiring use of hammer—Noise—Comfort of next door neighbour interfered with—Injunction.*

A person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country. But if in a town a person opens a business in the course of which hammers have to be used and the use of hammers causes noise which materially interferes with the comfort of his next door neighbour, he can be restrained by an injunction from carrying on the business in the process of which hammers are used. **A** HULAS RAI *v.* SOHAN LAL **620**

Stamp Act (II of 1899), s. 35, Sch. 1, Art. 1 —*Memorandum of account signed by debtor —Acknowledgment—Evidence of debt.*

A document in the form of a letter on a printed form in a book kept by the plaintiff, addressed to and signed by the defendant, which, after mentioning certain debits and credits, concludes with the statement that a certain sum of money is due from the defendant to the plaintiff, is an acknowledgment made in order to supply evidence of the debt within the meaning of Art. 1 of the First Schedule to the Stamp Act and, if unstamped, cannot be received in evidence under section 5 of that Act. **A** RAM DAS *v.* INAYATULLA, 21 A. L. J. 203; (1923) A. I. R. (A.) 297; 45 A. 374 **1027**

——— **s. 36**—*Document admitted by Trial Court on payment of penalty—Appellate Court, whether can interfere.*

Where a Trial Court holding that a certain document is an agreement to pay and not a pro-note, admits it in evidence on payment of the requisite amount of stamp and the penalty prescribed by the law, that admission, however erroneous, cannot, under the provisions of section 36 of the Stamp Act, be questioned in the Court of Appeal. **L** MELA RAM *v* PREM KAUR, (1923) A. I. R. (L.) 113 **42**

——— **s. 36**—*Document, insufficiently stamped, admitted in evidence—Subsequent removal from record, whether justified.*

When a document is admitted in evidence and exhibited, it is not open to the Court to remove it from the record of evidence on it being subsequently pointed out that it is not properly stamped. Such a procedure is prohibited by section 36 of the Stamp Act. **Pat** DASI CHAMAR *v.* RAM AUTAR SINGH **475**

Succession Act (X of 1865), ss. 292, 296. *See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 112, 116 **314**

Succession Certificate Act (VII of 1889)—*Certificate, grant of—Question of debts having already been discharged, consideration of—Joint debt—Certificate authorising collection of share of debt, whether valid.*

A person having a *prima facie* claim to represent the estate of a deceased person is entitled to obtain a Succession Certificate for the recovery of debts due to the deceased; and the question as to whether those debts have already been discharged is one which cannot be gone into in proceedings under the Succession Certificate Act.

A Succession Certificate cannot be granted authorising a person to collect a share of a debt. A Succession Certificate must be in favour of a single person, who would thereunder become authorised to collect the entire debt, subject to a liability to account for a share in the same to any person lawfully entitled to claim such share. **A** SAKAT MUL *v.* KATORI, 21 A. L. J. 122; (1923) A. I. R. (A.) 265 **376**

——— **s. 4**—*Failure to produce certificate—Procedure—Certificate produced in appeal—Appellate Court, duty of.*

Although section 4 of the Succession Certificate Act forbids a Court from passing a decree against a debtor of a deceased person for payment of a debt except on production of a certificate, there is nothing in the Act to prevent a Court from entertaining a suit and allowing time for the production of the necessary certificate.

Where a suit is dismissed owing to the non-production of a Succession Certificate and the Certificate is produced before the Appellate Court in appeal, the latter ought to accept it. **L** NANHA *v.* SUNDA **849**

Succession (Property Protection) Act (XIX of 1841), *action under—Prejudice to applicant, finding of, absence of — Revision — Civil Procedure Code (Act V of 1908), s. 115.*

Where a Court acts under Act XIX of 1841 without a definite finding to the effect that the applicant would be materially prejudiced if left to the ordinary remedy of a regular suit, the order is without jurisdiction and open to revision by the High Court. **M.** KOTHANDARAMA REDDY *v.* JAGATHAMBAL AMMAL, 16 L. W. 924; (1922) M. W. N. 74; (1923) A. I. R. (M.) 229 **32**

Tenancy—*Long possession by tenants—Rent uniform—Transfer with landlord's acquiesence—Tenancy, nature of—Question of law.*

Although the origin of a tenancy may not be known, yet, if there is proved the fact of long possession of the tenure and the payment of uniform monthly rent by tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature.

Whether a tenancy is a permanent or temporary one is a question of law. **M** ABDUR SALAM *v.* SAHIB KANDASWAMI CHETTIAR, 16 L. W. 473; (1922) M. W. N. 639; 43 M. L. J. 556, (1923) A. I. R. (M.) 54 **330**

———, *nature of—Question of law. See* TENANCY **330**

Title—*Long possession.*

In 1868 a decree was passed which declared that the rights of certain persons in an estate were *thekadari* and not proprietary or under-proprietary, but in all subsequent proceedings and in every subsequent public document relating to the estate those persons were regarded as under-proprietors In a suit for a declaration against them that they had no proprietary or under-proprietary rights:

Held, that, in spite of the decree, a title so long recognised could not now be overthrown. **P. C.** PIRTHIPAL SINGH *v.* GANESH DIN SINGH, 44 M. L. J. 29; (1922) A. I. R. (P. C.) 383; 37 C. L. J. 219; 9 O. L. J. 649; 25 O. C. 396; 32 M. L. T. 109; 9 O. & A. L. R. (P. C.) 541; 18 L. W. 41 **641**

Transfer of Property Act (IV of 1882)—*Principles, whether applicable where Act not in force—Forfeiture, relief against—Consent mortgage-decree—Period fixed, extension of, by Court.*

The principles embodied in the Transfer of Property Act are applicable, as principles of equity, justice and good conscience in places where the Act is not in force.

Transfer of Property Act—contd.

A Court is empowered to extend the period fixed for payment in a mortgage-decree by consent, the condition being that the property was to be foreclosed on default of payment as settled. **N** KISANLAL *v.* ABDULLA, (1923) A. I. R. (N.) 88 **421**

——— **s. 53**—*Gratuitous transfer — Intention to defeat creditors — Right of strangers to avoid transfer—Transferee offering payment of debt to creditor—Transfer, avoidance of—Gift not accompanied by delivery of possession — Question of validity, whether can be raised by strangers.*

A transfer which is gratuitous and made for the purpose of defeating the creditors of the transferor is not void but only voidable and that too at the instance of the creditor who has actually been defeated or delayed by it.

A creditor cannot be said to have been defeated or delayed if the transferee actually offers to pay the debt due to him, and he cannot, therefore, avoid the transfer under section 53 of the Transfer of Property Act.

A question about the validity of a gift not being accompanied by the delivery of possession of the property gifted can arise only between the donor and the donee and cannot be raised by a third party. **N.** KRISHNA BAI *v.* DEBISINGH, (1923) A. I. R. (N.) 195 **409**

——— **s. 53**—*Transfer with intent to defeat creditor —Delivery of possession to and payment of consideration by transferee—Transfer, setting aside of.*

A transfer will not affect the rights of a creditor if the intention of the transferor was to defeat or delay him, even where consideration has been paid and the possession transferred. But where the transferee had no notice of and did not share in the fraudulent intention, the transfer will not be set aside.

The proper way of dealing with a question of a transfer made with the intention of defeating and delaying a creditor is to consider the facts in relation to each other and weigh them as a whole. **N** PANDURANG BAPUJI *v.* BAPUJI, (1923) A. I. R. (N.) 103 **28**

——— **s. 53 (2)**—*Presumption.*

The second clause of section 53 of the Transfer of Property Act relates to a question of evidence and the presumption referred to in that clause is rebuttable. **Peshi** LOK NATH *v.* THAKAR DAS **20**

——— **s. 58 (c)**—*Mortgage by conditional sale—Mortgage in possession—Dispossession by landlord, if can operate as adverse possession against mortgagor.*

Where a mortgagee is in possession, his dispossession by the landlord cannot, by itself, operate as adverse possession as against the mortgagor during the continuance of the mortgage. Besides, the mortgagee cannot by suffering dispossession and having taken a new title from the landlord affect the right of the mortgagor in the property of which the mortgagee was put into possession under the mortgage. **C** KAMALA KANTA *v.* ANNANDA CHANDRA CHAKRABURTTY **1030**

——— **s. 59**—*Evidence Act (I of 1872), s. 68 —Mortgage-bond— Attesting witnesses — Proof, mode of.*

Transfer of Property Act—contd.

The provision in section 68 of the Evidence Act which requires that one at least of the attesting witnesses to a mortgage-bond should be called, if there is any alive, does not in any way affect the requirements of section 59 of the Transfer of Property Act that a mortgage-bond, in order to be valid, must be executed in the presence of two attesting witnesses. If one attestor only is called it is competent for him, or for any other witness to prove that the execution was in the presence of two attestors, and it is not necessary to call two attestors. When all the attesting witnesses are dead, the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses. **M** NAMBERUMAL CHETTIAR *v.* RAGHAVA CHARIAR, 14 L. W. 563 **390**

——— **s. 60**—*Mortgage—Prior mortgagee, suit by—Puisne mortgagee not impleaded—Subsequent mortgage, suit on—Prior mortgagee not made party — Auction-purchaser of prior mortgage heir of mortgagor—Integrity of mortgage, whether broken — Redemption — Purchaser of second mortgage, whether entitled to piecemeal redemption.*

If a prior mortgagee sues on his mortgage without impleading the subsequent mortgagee, and the property is sold and thereafter the subsequent mortgagee sues on his mortgage without making, prior mortgagee a party to the suit, the auction-purchaser of the second decree can sue for redemption of the first mortgage, and if, meanwhile, the original mortgagor dies leaving the first auction-purchaser as one of his heirs, the integrity of the mortgage is not broken up and the purchaser of the second decree is not entitled to redeem only a portion of the property on payment of proportionate amount. **A** ABDUL GHAFOOR *v.* QAMARUD-DIN, 21 A. L. J. 279; (1923) A. I. R. (A.) 397 **978**

——— **s. 76**—*Mortgage of land with Sindi trees —Mortgagee, liability of, to account for produce.*

It cannot be said as a rule that Tadi from Sindi trees is ordinarily a source of income and that the mortgagor of a land on which there are Tadi trees can claim any profits on account of Tadi which it is possible to tap from the trees. He can, however, claim the profits if it is proved that the trees were actually tapped in any year. **N** SHAMRAO DEWAJI *v.* PANDURANG, (1923) A. I. R. (N.) 137 **804**

——— **ss. 83, 84, 103**—*Deposit under s. 83— Minor mortgagee—Cessation of interest—Appointment of guardian.*

In the case of a deposit, under section 83, Transfer of Property Act, where the mortgagee is a minor, interest does not cease to run under section 84 of the Act, unless the depositor gets a guardian of the minor appointed under section 103 of the Act, inasmuch as no one can withdraw the deposit on behalf of the minor unless a guardian is appointed by the Court.

Where the mortgagee is a person who is unable to draw the money out of Court, it is necessary that a guardian *ad litem* should be appointed, and, therefore, unless such a guardian is appointed it cannot be said that the mortgagor has done all that was necessary for him to enable the mortgagee to draw the money.

Transfer of Property Act—contd.

Section 103 was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or a deposit, and it could not have been the intention of the section that the mere making of an application would be sufficient, but that there should be a person appointed by the Court to whom a tender could be made or by whom a deposit could be taken out of Court.

When a guardian has been appointed by the Court under section 103, Transfer of Property Act, it is open to the person making a deposit of the mortgage-money to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian, and in a case where such a deposit has been made and the full amount has been deposited on the date of the appointment of a guardian, further interest on the principal amount of the mortgage ceases under the provisions of section 84 of the Act. **A** KHUNNU MAL *v.* INDARPAL SINGH, 21 A. L. J. 39; (1923) A. I. R. (A.) 183; 45 A. 273 **278**

——— s. 106— *Tenant holding over— Tenancy from year to year—Notice—Bengal Tenancy Act (VIII of 1885), s. 103-B—Occupancy rights —Entry in Record of Rights— Presumption— Burden of proof.*

Where a tenant on the expiry of his lease continues in possession of the property with the assent and sanction of the proprietor, there is created, by the operation of law, a tenancy from year to year in favour of the tenant, and such tenancy can be put an end to only by a notice under section 106 of the Transfer of Property Act.

Under the general law a landlord is entitled to claim rent from every one shown to hold land within the ambit of his *Zemindari*, and if any of such persons relies upon any exception to the general rule it is for him to prove that he comes within the exception.

Where, however, a tenant is entered as an occupancy tenant in the Record of Rights, it is for the landlord to rebut the presumption arising under section 103-B of the Bengal Tenancy Act and not for the tenant to establish that the entry in the Record of Rights is correct. **Pat** STONEWIGG *v.* KEMESHWAR NARAYAN SINGH, (1923) PAT. 122; (1923) A. I. R. (PAT.) 340 **1022**

——— s. 111—*Lease — Surrender, implied or express—Lease, void, whether can determine prior lease.*

Where a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; in the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional, to be void in case the grant should be made void.

Where a Hindu widow grants a permanent lease of a plot of land at a fixed rent to a person who is already in possession under a prior lease, at a variable rent granted by the full owner and the grant is not intended to operate as a new lease, the object of the parties being merely to alter one of the most important incidents of the tenancy, that is, to fix the rent in perpetuity, the acceptance of the lease is not equivalent to an implied surrender of the prior lease. **C** JAMINI MOHAN SARKAR *v.* DEBENDRA NARAYAN SINGH **976**

Transfer of Property Act—concld.

——— s. 144—*Lease — Non-payment of rent— Forfeiture, relief against—Period of grace in lease, effect of—Failure to pay arrears in lower Court—Plea of payment—Failure to prove— Relief against forfeiture, grant of— Discretion of Court.*

The fact that a period of grace is allowed by a lease for the payment of rent is no bar to the granting of relief against forfeiture, as the law treats the condition of forfeiture as a penalty intended to enforce the payment of the rent and liable to be relieved against by the Court.

A Court of Appeal is not precluded from granting relief against forfeiture because the offer to pay the arrears was not made in the lower Courts.

The failure of a tenant to prove a plea of payment set up by him does not necessarily in itself disentitle him to the equitable relief against forfeiture.

But a Court does not exercise its discretion improperly in refusing to grant relief against forfeiture when there is the failure of the plea of the payment coupled with the failure to offer the arrears during the hearing in the lower Courts and particularly the fact that a sufficiently long period of grace given by the lease was allowed to pass without payment. **N** ARJUN *v* NARAYAN, 19 N. L. R. 50; (1923) A. I. R. (N.) 193 **445**

U. P. Land Revenue Act (XIX of 1873), ss. 50, 53 —Malikana *rights*—Sir *lands*—Zemindars, *transfers by, validity of.*

In villages where the proprietary interest consists of two bodies, the *zemindars*, who are entitled to receive a certain percentage on the rental as *malikana* rights and enjoy their *sir* at fixed concession rates, and the *muafidars* with whom the settlement is made and who collect rent, let out the land, pay Government revenue, and are in fact in full proprietary management in all other respects, the *malikana* rights, and the *sir* of the *zemindars* are not non-transferable. Section 53 and not section 50 of the Land Revenue Act applies to the case of such *zemindars*. **A** HANSRAJ *v.* BALDEO SINGH, 21 A. L. J. 289; (1923) A. I. R. (A.) 304 **1028**

U. P. Land Revenue Act (III of 1901), s. 233 (k)— *Partition proceedings—Question of proprietary title decided by Assistant Collector—Partition not confirmed by Collector—Suit in Civil Court.*

A suit to decide a question of proprietary title which has been raised in partition proceedings before a Revenue Court, cannot be entertained by a Civil Court unless and until it has authority from the Revenue Court to entertain it.

Where a question of proprietary title, raised in partition proceedings beforean Assistant Collector,

U. P. Land Revenue Act, 1901—concld.

is determined by that officer himself, but his decision is not confirmed by the Collector under section 131 of the U. P. Land Revenue Act, a suit to obtain title to the property is barred by section 233 (*k*) of the Act. **A** DEKOI DUBE *v.* UMA DAT, (1923) A. I. R. (A.) 369. **292**

——— **s. 233 (k)**—*Partition by Revenue Court — Civil suit to disturb title established in partition, maintainability of.*

In partition proceedings, started in 1911, the plaintiff was ordered to establish his proprietary title in a Civil Court. He instituted a suit which was dismissed by the First Court but was decreed by the lower Appellate Court on 9th April 1912. In between the decisions of the two Courts, the partition proceedings were completed. The plaintiff took no steps to bring the decision of the Civil Court to the notice of the Revenue Court either before or after the completion of the partition proceedings. In 1918 he sued for the recovery of possession of his share:

Held, that section 233 (*k*) barred the suit. **A** RAM CHARITRA *v.* MOHAN DEI, 21 A. L. J. 159; (1923) A. I. R. (A.) 210; 45 A. 309 **488**

U. P. Municipalities Act (II of 1916), s. 326—*Act done in official capacity—Refusal to pay amount of bill—Suit to recover amount—Limitation* terminus a quo.

Where some members of a Municipal Board, sitting in a matter concerning its finances, disallow an item from a bill, such refusal is a matter which concerns the carrying out of the duties of the Board and amounts to an "official act," within the meaning of section 326 of the U. P. Municipalities Act, and an action for the recovery of the sum so deducted must, under section 326, in order to succeed, be brought within six months from the date of the refusal. **A** ABDUL WAHID *v.* MUNICIPAL BOARD, ALLAHABAD, 21 A. L. J. 161; 9 O. & A. L. R. 327, (1923) A. I. R. (A.) 267 **1032**

——— **s. 326** — *Right to collect carcasses of dead animals, nature of—Suit relating to such right—Limitation.*

The right to collect carcasses of dead animals within a Municipality is not a right relating to immoveable property, and a suit relating to the collection of such carcasses must be brought within the special period of limitation prescribed by section 326 of the U. P. Municipalities Act. **A** JHUNWA *v.* MUNICIPAL BOARD, DHAMPUR 21 A. L. J. 101; (1923) A. I. R. (A.) 179; 45 A. 267 **291**

U. P. Town Improvement Act (VIII of 1919), ss. 56 to 59—*Question arising under Act—Reference by Land Acquisition Officer to District Judge—Jurisdiction to make or consider such reference—Improvement Trust Tribunal, decision as to existence of, legality of.*

A Land Acquisition Officer has no power to refer a question arising under the Town Improvement Act to a District Judge, nor has a District Judge jurisdiction to consider whether the Improvement Trust Tribunal has ceased to exist or not, and if he decides that it has ceased to exist his decision is in direct breach of the provisions of sections 50 to 59 of the Town Improvement Act. **A** SUKHRANI KUNWAR *v.* BRIJKAN SINGH, 21 A. L. J. 193; (1923) A. I. R. (A). 286 **628**

Will, *oral—Proof of exact words necessary—Probate or Letters of Administration, when can be granted.*

When an oral Will is pleaded it is necessary to prove, as far as possible, the exact words used by the testator.

Before a person is entitled to Probate or grant of Letters of Administration, he must show that he is an executor or that under the Will the property has vested in him.

A Will provided that the testator's two widows should adopt a boy named *T*; that if he was not available they should, in consultation with each other, adopt any other boy, and that in case of difference of opinion as to the boy to be adopted, the choice of the younger widow should prevail. The younger wife died during the lifetime of the testator; the elder adopted *T*. after her death:

Held, that the elder widow had the power to adopt *T*. which was not put an end to by the death of her co-wife. **N** AMBADAS *v.* KASHIBAI, (1923) A. I. R. (N.) 27 **979**

Witness — *Examination-in-chief—Cross-examination—Reply, admissibility of—Hostile witness.*

The evidence elicited from a prosecution witness under examination-in-chief in answer to a question which could only be put in cross-examination is inadmissible, unless before the question was put, the prosecution declared the witness to be hostile. **Pat** JAGDEO SINGH *v.* EMPEROR, 1 PAT. 758; 4 P. L. T. 232; (1923) A. I. R. (PAT.) 62; 24 CR. L. J. 69 **117**

———, *examination of, when completed.*

The examination of a witness cannot be regarded as completed, until the last stage at which the law authorises its continuance has been passed. **M** MARUDA MATHU VANNIAN, *In re*, 16 L. W. 420; 43 M. L. J. 402; (1922) M. W. N. 601; 44 M. 820; (1922) A. I. R. (M.) 512; 24 CR. L. J. 124 **252**

Workman's Breach of Contract Act (XIII of 1859) as amended by Act XII of 1920, *scope of—Joint contractors.*

The Workman's Breach of Contract Act is not confined in its scope to cases of advances to individuals, it also applies to cases of advances to more persons than one jointly. **M** KANDASWAMI MUDALI *v.* GURUSWAMI PILLAI, 16 L. W. 883; 31 M. L. T. 475; 44 M. L. J. 53; (1923) A. I. R. (M). 184; 24 CR. L. J. 13 **61**