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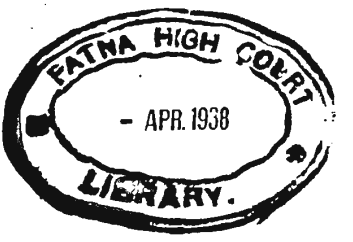
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1937

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PATNA SERIES

VOLUME XVI.

INDEX.

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SYED ALI KHAN, B.L. (*Assistant Reporter*).

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PATNA.

1937.

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Mr. Baldeo Sahay (*Advocate-General from* 16*th August*, 1937).

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PATNA SERIES.

J. C.*
1936.

July, 29.

PRIVY COUNCIL.

SOMESHWARI PRASAD

v.

MAHESHWARI PRASAD.

On Appeal from the High Court at Patna.

Hindu Law—Impartible Estate—Incorporation of property with Estate—Khorposh—Purchase of Khorposhdar's interest by holder of estate—Effect of purchase.

The interest of a khorposhdar in the land granted to him for maintenance by the holder of an impartible estate is not an impartible estate and the purchaser of that steps into the shoes of the khorposhdar and holds it as partible property subject to the ordinary rule of succession. The mere fact of the purchase of the khorposhdar's interest by the holder of the ancestral impartible estate does not cause a merger of the estate purchased in the ancestral estate.

Decree of the High Court [*Someshwari Prasad Narain Deo* v. *Maheshwari Prasad Narain Deo*(1)] modified.

Appeal (no. 87 of 1934) from a decree of the High Court (February 26, 1931) which modified a decree of the Subordinate Judge of Patna (August 22, 1925).

The material facts are stated in the judgment of the Judicial Committee.

*Present: Lord Thankerton, Sir Shadi Lal and Sir George Rankin.
(1) (1931) I. L. R. 10 Pat. 630.

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Dunne, K. C. and *Hyam*, for the appellants.

DeGruyther, K. C. and *Wallach*, for the respondents.

In the course of the argument *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*(1) was referred to and distinguished on the facts.

The judgment of their Lordships was delivered by—

SIR SHADI LAL.—The dispute in this appeal relates to the succession to an estate, situate in the Province of Bihar, which is known as the Dhanwar Estate. The succession opened on the death of Ran Bahadur Narain Deo, which took place on the 6th October, 1900. He left surviving him, two sons, Ishwari Prasad Narain Deo and Harihar Prasad Narain Deo. It appears that the Court of Wards had taken possession of the estate in the lifetime of the deceased, but released it after his death to his elder son Ishwari Prasad.

The suit was commenced in 1917 by the younger son for a partition of the estate, and subsequently his sons and other persons were added as plaintiffs. The claim was resisted on the ground that the estate was impartible, and that the succession to it was governed by the rule of lineal primogeniture. It was pleaded that the plaintiff, Harihar Prasad, being a junior member of the family, was entitled, not to a share in the estate, but only to maintenance. The Courts below, the Subordinate Judge who tried the suit, and the High Court at Patna, who heard the appeal from his judgment, have upheld this plea; and the principal question for determination is whether the estate descends according to the rule of lineal primogeniture.

Now, the Dhanwar Estate is an estate of considerable age, and, apart from the traditions which rest upon doubtful material, there is abundant documentary evidence to show that in the first half of the 18th

(1) (1932) I. L. R. 59 Cal. 1399; L. R. 59 I. A. 331.

century, it consisted, not only of 17 nankar (revenue free) villages and 53 khalsa (revenue paying) villages, but also of other territories. The estate was, at that time, known as Pargunnah Kharagdiha, and was held by Mode Narain, an ancestor of Ran Bahadur. Mode Narain was evicted in 1752 by one Kamdar Khan, who was succeeded by his son Ekbal Ali Khan. In 1774, Ekbal Ali Khan rebelled against the East India Company, who had acquired the Diwany of the Province of Behar, with the result that he lost the estate by forfeiture. Mode Narain's grandson, Girwar Narain, had helped the Company in suppressing the rebellion; and he was rewarded in 1775 with the grant of 17 nankar villages. In 1805, one khalsa village, Mandhirkha, was settled with him; and this was followed in 1810 by the settlement of other khalsa villages, 52 in number. These villages (both nankar and khalsa) formed part of the estate, which had descended to Mode Narain from his ancestors, and from which he was expelled by force in 1752.

The pedigree table of the family which is not in dispute, shows that Girwar Narain had a younger brother Sobh Narain; but all the villages were granted to the elder brother, who provided only maintenance for his younger brother.

After Girwar Narain's death, the whole of the estate, comprising seventy villages, devolved upon his elder son Khem Narain, and upon the latter's death descended to his son Ran Bahadur. It appears that during Ran Bahadur's tenure several immovable properties were purchased out of the income which accrued from the ancestral estate, and it is a matter for consideration whether the properties so acquired are governed by the same rule of succession as is applicable to the ancestral estate.

The Courts below have discussed the evidence in detail and reached the conclusion that the ancestral estate is impartible, and that its devolution is governed by a family custom under which it passes to a single

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heir according to the rule of primogeniture. The learned judges of the High Court, in concurrence with the Subordinate Judge, hold that the following facts have been established:—

(*1*) The estate, prior to 1752, partook of the nature of a Raj and descended to a single heir in accordance with the rule of lineal primogeniture.

(*2*) The same incidents of impartibility and descent to a single heir continued after the grant made by the East India Company to Girwar Narain.

(*3*) The junior members of the family received only maintenance out of the estate. They did not assert their right to a share in the estate, or if some of them asserted that right, they failed in their attempt.

These conclusions are supported by evidence, and their Lordships are not prepared to depart from their usual practice of not disturbing concurrent findings on issues of fact recorded by the Courts in India. It is clear that these findings fully establish the custom of primogeniture invoked by the defendants. In view of this custom the plaintiffs' claim to a share in the ancestral estate must fail.

There remains, however, the question of whether they are entitled to a share in the properties acquired by Ran Bahadur. In the plaint they asked for a partition of the entire estate left by him and considered it unnecessary to make any distinction between the ancestral estate and the self-acquired properties. The trial judge dismissed the suit *in toto*, but the High Court, while holding that the custom proved by the defendants operated as a bar to their claim *quoad* the ancestral estate, remitted the case to the Subordinate Judge for the determination of their right to succeed to the self-acquired properties. The Subordinate Judge, thereupon, directed the plaintiffs to submit a list of the properties, which, according to them, were acquired during the time of Ran Bahadur. He, however, refused to allow them to include in that list

any of the villages enumerated in lists *A* and *B* which they had filed with their plaint, on the ground that both those lists mentioned only the ancestral estate, and did not include any self-acquisitions. This view of the learned judge was affirmed by the High Court.

Their Lordships do not think that the plaintiffs should be debarred from proving that there are some properties in those lists which were acquired in the lifetime of Ran Bahadur. List *A* comprises nankar villages, and list *B* enumerates the khalsa villages, but there is no warrant for the assumption that all of them are ancestral. As stated already, the plaintiffs claimed a share under the Hindu law in the entire estate of Ran Bahadur, and had no occasion to separate in their plaint the ancestral estate from the self-acquired properties. It was only after the remand by the High Court that it became necessary to specify the latter. It is possible that all the villages described in the lists are ancestral, but there is no reason why the plaintiffs should not be given an opportunity to assert and prove their claim.

Their Lordships are, therefore, of opinion that the plaintiffs should be allowed to specify the villages included in the lists *A* and *B*, which, they say, were acquired by Ran Bahadur. If their claim is denied by the defendants, the Court should consider such application, as may be made by them, for the discovery of the title deeds of those villages as contemplated by Order XI of the first Schedule to the Civil Procedure Code.

In compliance with the directions of the Court, the plaintiffs produced three lists of the properties, which were not included in the lists *A* and *B*, but were said to have been acquired in the lifetime of Ran Bahadur. The rule is firmly established that if any property acquired by the holder of an impartible estate is intentionally incorporated by him with the estate, it would not be governed by the ordinary rule of inheritance but would devolve on a single heir.

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The learned judges of the High Court have considered the contentions of both the parties with regard to the properties included in the lists submitted by the plaintiffs, and have disallowed their claim to some of those properties. The controversy is now confined to three items, and their Lordships proceed to deal with them.

The first of these three properties is a village called Sheor Mohammadabad. There is ample evidence to prove that this village was the ancient seat of Dhanwar Raj, and in view of its sentimental importance to the holder of the estate, it was only natural that Ran Bahadur should desire it to be impartible estate. The learned judges of the High Court have, upon a survey of the evidence, oral as well as documentary, arrived at the conclusion that Ran Bahadur did intend to incorporate this village with the ancestral estate; and their Lordships do not find any reason for dissenting from that conclusion.

The other two villages, namely, Telonari and Palangi, were acquired after Ran Bahadur had been adjudged a lunatic and the Court of Wards had assumed superintendence of his estate. No question of his intention to incorporate these villages with the ancestral estate can, therefore, arise, and the only matter for consideration is whether there are any special circumstances which would justify the view that they merged in the estate.

Now, these villages were two of the 17 nankar villages which originally formed part of the Dhanwar estate. They were granted by the holder of the estate to two cadets of the family as khorposh or maintenance. They were sold, in 1883 and 1879 respectively, in execution of decrees against the Khorposhdars, and purchased on behalf of Ran Bahadur by the Manager of the estate.

It is common ground that a village granted to a junior member in lieu of maintenance is resumable on

failure of his male line, but until that event takes place, the grantor has no interest in the property. The grantee is the absolute owner thereof, and has an unrestricted power of transfer. If a transfer is made, the transferee holds the property as a full proprietor, and the grantor has no right to interfere with him until the extinction of the male line of the grantee. When that incident takes place, the tenure of the grantee comes to an end, and the property reverts to the grantor.

The interest of the Khorposhdar in the land granted to him for maintenance is not an impartible estate, and the purchaser of that estate steps into the shoes of the Khorposhdar and holds it as a partible property subject to the ordinary rule of succession. There is no warrant for the proposition that the mere fact of the purchase having been made by the holder of the ancestral estate causes a merger of his self-acquisition in that estate.

There is neither a statutory provision in India nor any rule of common law which can be cited in support of merger in a case of this character. Nor can merger be established on the doctrine of justice, equity and good conscience. Even in cases where a lesser interest vests in a person who holds the greater interest, merger would depend upon the intention of that person. If no intention is expressed or implied, or the party is incapable of expressing his intention, the Court has to consider what is beneficial to him. In the present case, it would not be to the advantage of Ran Bahadur that these self-acquired villages should merge in the ancestral impartible estate, as merger would not only deprive him of his unrestricted power of disposal over them, but also operate as a gift to the elder son and rob the junior members of the family of their right of inheritance under the ordinary law.

Their Lordships cannot endorse the decision of the High Court with regard to Telonari and Palangi,

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and hold that both these villages shall be added to the list of the properties to be partitioned among the persons who are Ran Bahadur's heirs under the Hindu law.

The result is that the appeal is allowed to the extent indicated above, and the decree made by the High Court modified by including the villages Telonari and Palangi among the properties to be partitioned and by referring to the trial Court under Order XLI. r. 25, of the Code of Civil Procedure the questions whether any villages to be specified by the plaintiffs from lists *A* or *B* were the self-acquired properties of Ran Bahadur and if so, whether any such self-acquired villages were incorporated by him with the estate. The appellants having failed on the main issue must pay the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitors for respondents: *Watkins and Hunter.*

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Sept., 8, 9, 10, 11, 14, 18.

APPELLATE CRIMINAL.

Before Fazl Ali and Dhavle, JJ.

BIPAT GOPE

v.

THE KING EMPEROR.*

Trial by jury—Code of Criminal Procedure, 1898 (*Act V* of 1898), *sections* 282, 283—*Sessions Judge, inherent power of, to discharge a jury—*

The Sessions Judge discharged the jury, after the trial had proceeded for five days as he considered that absolute impartiality might not be evinced by them, and empannelled a fresh jury.

*Death Reference no. 29 of 1936 with Criminal Appeal no. 198 of 1936, directed against the order of P. Chaudhury, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 11th August, 1936.

Held that the power of the Sessions Judge to discharge a jury was not confined to cases of misconduct or to provisions of sections 282 and 283 but he had inherent power to discharge a jury and empannel another.

Rahim Sheikh v. *Emperor*(1), *followed.*

Even if the High Court considered the order unjustified, the only relief the High Court could give was to order a fresh trial, which had already been done in the case.

Abdur Rashid v. *Emperor*(2), followed.

Reference under section 374 of the Code of Criminal Procedure.

The facts of the case material to this report are set out in the judgment of the Court.

Yunus (with him *K. Sahai* and *R. J. Bahadur*), for the appellants.

Assistant Government Advocate, for the Crown.

FAZL ALI AND DHAVLE, JJ.—The twelve appellants were tried by jury before the Additional Sessions Judge of Patna on charges of rioting with murder and causing hurt individually with bhalas. The jury returned a unanimous verdict of guilty on all the charges except the direct charge of murder under section 302, I. P. C. The Additional Sessions Judge accepted this verdict, and under section 302, I. P. C. read with section 149, I. P. C. sentenced eight of the appellants to death and the other four appellants—Karamchand, Ramu, Chintaman and Sheolochan—to transportation for life, and considered it unnecessary to pass any separate sentences under sections 147, 148 or 324, I. P. C. The matter is now before us under section 374 of the Code of Criminal Procedure for confirmation of the death sentences and also on appeal by the twelve convicted persons.

(1) (1923) I. L. R. 50 Cal. 872.

(2) (1929) I. L. R. 56 Cal. 1032.

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FAZL ALI AND DHAVLE, JJ.

Bikku Kahar, the son of a Kurmi father and a Kaharin mother, according to the case of the prosecution, used to side with the Kurmis of his village Jamuara in the disputes that had been going on between them and the Goalas of the village. The appellants are all Goalas, appellant Bipat being the *barahil* of the entire body of landlords of the village. Nakat Mahto, nephew of Bikku's father, was jethraiyat under M. Shamsuddin, one of the landlords of the village, and had been repeatedly complaining (along with other Kurmi raiyats) to him of the Goalas uprooting and destroying their crops. On the morning of the 29th of February last, Bikku was going past the house of Bipat when appellant Karamchand, son of a cousin of Bipat's, began to cough loudly, Bikku responding to the gesture by twisting his moustaches. An actual assault was, however, prevented by the intervention of two villagers.

In the afternoon, at about 2 o'clock, Bikku happened to be going towards his "bút" field, plot no. 1651, in the block called Punai Khandha. Immediately to the east of this field was a plot of one Karmu Mahto, plot no. 1650, which was lying fallow at the time. Four of the appellants—Sundar, Karamchand, Chintaman and Ramu—were grazing their buffaloes in this parti field and feeding them with gram plants uprooted from Bikku's plot. Bikku protested against this and was assaulted by Sundar and Karamchand with lathis. He fled north-east towards his khesari field, plot no. 1750, in Behera Khandha, about 110 *bans* (say 300 yards) away, chased by the four appellants who had been grazing the buffaloes. The other eight appellants then came up—Bipat from Bighapar on the north-east and the remaining seven from beyond a stream called the Lokain river which lay to the south. Four of these eight men—Ghuran, Raghu, Bimal and Sheolochan—had bhalas, and the rest lathis. The appellant Sundar caught Bikku in the khesari field, Bipat ordered an assault, Raghu and Ghuran felled Bikku with their bhalas, and then all

the appellants surrounded him and assaulted him with bhalas and lathis. They next carried him from the khesari field past the stream to the sandy portion on the south, and then dragged the body to a *mirchai* field, plot no. 1808, about 50 paces farther off. The commotion brought several Kurmis of the village to the northern side of the stream, and when Khublal Mahto, who after working as dafadar of the circle for 26 years had on account of old age been replaced by his son, began to cross the stream, the appellants ran away, leaving the body of Bikku in the *mirchai* field. Bikku expired as the ex-dafadar fetched some water in his gamcha from the Lokain and put it into Bikku's mouth. Information of the occurrence was given at the thana of Hilsa, five miles away, at 5-30 that afternoon by Firangi Kahar, son of Bikku, who happened to have heard of it from Firangi Mahto, a man who had protested against the appellants' assault on Bikku and had thereupon been struck by the appellant Sheolochan on the right leg with a bhala. The Sub-Inspector arrived on the scene in due course and had the dead body of Bikku sent for the post mortem examination. The Assistant Surgeon of Bihar who made the post mortem examination found a very large number of injuries " probably caused by a hard and rough blunt substance and a pointed sharp-edged weapon ", and pronounced the death to be due to the consequent shock and haemorrhage.

The defence was that the appellants had been falsely implicated on account of the enmity with the Kurmis, and that they were none of them except Ghuran in the village at the time of the murder but were working in *khandhas* at a distance from the village. As to appellant Ghuran, the story given by him in his examination before the Sessions Judge, was that he and one Bakhori had found the buffaloes of Bikku and Motar Mahto grazing, unattended by any cow-herd, in Ghuran's " bút " field in Punai Khandha and an adjoining field of Bakhori in Behera Khandha, that they were taking the trespassing

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cattle to the pound, when Bikku came and raised a hullah which brought eight or nine other men, presumably Kurmis, on the scene, that Firangi Mahto aimed a blow at Ghuran with a *khanti*, which, however, was snatched away by Bakhori and used upon Firangi, that on the cries of Ghuran eight or nine men came up from the neighbouring tolas of Gosainpur, Maheshpur, etc., and that there was an exchange of lathi-blows between them and Bikku in the *mirchai* field, while Ghuran went away and impounded the cattle in the Hilsa pound.

We have already referred to the verdict of the jury. As death sentences have been passed, the appeal is not, as in ordinary cases tried by jury, confined to matters of law but extends to matters of fact as well, even in respect of persons not sentenced to the extreme penalty of the law. This does not, however, mean that the verdict of the jury is to be lightly ignored.

Generally speaking, no exception has been taken to the charge of the learned Judge to the jury, nor have we been able to find any misdirection in it or any misunderstanding of the law as laid down by the Judge in the verdict of the jury.

The only point of law raised on behalf of the appellants is that the Judge, so it is contended, erred in the exercise of his discretion in discharging the jury before which the trial had begun and proceeded for five days and trying the case with a fresh jury. It is further contended that this error on the part of the learned Judge entitles the appellants to another trial by jury. What appears to have happened is that after the cross-examination of M. Shamsuddin, one of the landlords of the village, the foreman of the jury then trying the case sought to put to the witness the question

"Do you belong to Nataul where the Muhammadan landlords have been fighting with the Goalas of the village ?"

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'Asked why he wanted to put this question, the foreman said that he desired to find if the witness was to be believed or not, and further, that if the witness was from the village of Nataul, he would be disbelieved because he was giving evidence against the Goala accused in the case out of previous enmity. The learned Judge then stopped the trial and took time to consider the position. On the following day the foreman was further questioned; and as a result, the learned Judge came to the conclusion that while there was no ground for holding that the foreman had been guilty of any misconduct, "his position in the jury box must be viewed with concern", and that the circumstances gave "cause for apprehension that absolute impartiality which is expected of the jury may not be evinced while giving the verdict at the end of the trial". He accordingly discharged the jury and summoned a fresh jury for the trial to begin a week afterwards. A petition was at once filed on behalf of the accused persons, 'praying for legal assistance at the cost of the Crown, and further praying that the advocates who had already worked on their behalf be appointed for the defence at the re-trial; and the Judge ordered that a copy of the petition be forwarded to the District Magistrate for necessary action. On the day fixed for the new trial none of the defence lawyers was present, nor had the District Magistrate appointed any lawyer to defend the accused—on the ground, as appeared from the reply subsequently received from him, that the accused did not appear to be entitled to the concession prayed for as they had so far been defending themselves at their own cost. The Public Prosecutor drew the attention of the learned Judge to a rule in the Treasury Manual under which the Sessions Judge was empowered to engage a pleader for the defence at the cost of the Crown, and the learned Judge exercised this power and appointed the seniormost lawyer from the Crown list found willing to defend the accused, who was also agreed to by the accused. So far, therefore, as

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it has been contended on behalf of the appellants that they were prejudiced by the second trial because they could not be properly defended, it is clear that the appellants have no reasonable grievance, and indeed it was conceded that the learned Judge had done the best he could for the accused in the circumstances. It is beyond question that while the Code of Criminal Procedure does not provide for discharging a jury during the continuance of a trial except in the circumstances mentioned in sections 282 and 283, " where the question of misconduct on the part of the jury or other similar cause arises ", as Buckland J. put it in *Rahim Sheikh* v. *Emperor*(1), " the Sessions Judge has inherent power to discharge a jury and empannel another ". It has, however, been argued for the appellants that the case referred to is no authority for discharging the jury except for misconduct, that in the present case the Judge had expressly found that there was no misconduct on the part of the foreman but had merely acted on the apprehension of the Public Prosecutor that " the foreman may be prejudiced against the prosecution case on account of his personal knowledge of facts outside the scope of the trial ", and that this was no valid ground for discharging the jury. It was further urged that it was open to this Court to consider the sufficiency of the reasons which led the Judge to discharge the jury, and if the reasons be found insufficient, to order a fresh trial. In support of these contentions, reliance was placed on the observations of Graham J. in *Abdur Rashid* vs. *Emperor*(2) that " Suspicion in the mind of a Public Prosecutor can never be recognised as a good and valid ground for discharging a jury. Something much more tangible and definite than that is necessary ", and of Suhrawardy J. in the same case that " In view of the wide provisions of section 439

(1) (1923) I. L. R. 50 Cal. 872.

(2) (1929) I. L. R. 56 Cal. 1032.

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FAZL ALI AND DAVIS, JJ.

of the Code of Criminal Procedure, it is difficult to say that this Court is debarred from enquiring into the validity of the reasons for discharging a jury ". But Graham J. himself went on to observe " But though, I think, the order (discharging a jury) cannot be supported, it seems to me to be quite out of the question to set it aside ", and later on " There may be some doubt as to whether we can set aside such an order when once it has been made. But we can, and I think, ought to direct a de novo trial before a fresh jury, and if possible before another Judge "—this was in a case where a rule had been obtained against the order discharging the first jury and before the accused had been tried by a fresh jury. Suhrawardy's view that the order discharging a jury during the continuance of a trial can be questioned in the High Court does not seem to have been shared by any other Judge of the High Court, though the matter has been considered in Calcutta on various occasions. And in any case it is obvious that even if an order discharging a jury in the exercise of the inherent power of a Sessions Judge were to be found unjustified, the only relief that the High Court could give would be to order a fresh trial before another jury. The appellants have had such a trial already, so that there can be no further grievance in the matter of the discharge of the first jury. Nor is the contention that the learned Judge acted merely on the apprehension of the Public Prosecutor that the foreman may be prejudiced supported by the facts on record, as was the case in the decision of *Abdur Rashid* v. *Emperor*(1). The learned Judge only referred to this contention of the Public Prosecutor and said that there was some force in it, but it is quite clear that he came to his own conclusion that there was in the circumstances " cause for apprehension " that the jury may not evince absolute impartiality. The inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct, as is clearly

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shown by the dictum of Buckland, J. already quoted, and plainly extends to cases where the Judge finds reason for doubting the impartiality of the jury. It is also clear that the learned Judge below did not lightly arrive at such a finding. Both the sides were agreed in the lower court that " if the impartiality of the foreman of the jury is doubted, all the jurors should be discharged ", and it cannot be, and has not been, suggested that the Judge should have discharged the foreman only. The only point of law raised on behalf of the appellants thus fails altogether.

* * * * *

[Their Lordships then discussed the evidence in the case.]

* * * *

Thus in our opinion the case for the prosecution as to the origin of the occurrence is substantially true and the jurors were quite justified in accepting it. Assuming, however, for the sake of argument, that Bikku was assaulted as is suggested on behalf of the defence in trying to rescue his buffaloes which had been seized by Ghuran and Bakhauri, it is clear that the persons who are proved to have taken part in assaulting Bikku cannot even on this supposition escape conviction, because there is no evidence on the record to show that the field of Ghuran or Bakhauri had been grazed or that there was any other justification for their seizing Bikku's buffaloes. The charge which has been drawn up in this case states that the object of the unlawful assembly of which the accused are said to be members was to assault Bikku and this charge can be sustained even on the supposition that the occurrence originated in the manner suggested by Ghuran.

We will now turn to the most important question, namely, whether any of the appellants and if so which of them had taken part in the assault on Bikku. In this connection we shall deal first with the cases

of the three appellants, namely, Bipat, Sheolochan and Chintaman whose names were not mentioned in the first information report. As we have already stated, the information was lodged by Firangi Kahar, a son of the deceased, and one Deolal Mahto (P. W. 3) was also with Firangi Kahar when he lodged the information. It is true that Firangi Kahar was not an eye-witness of the occurrence but at the same time it cannot be overlooked that Firangi Kahar had derived his information from Firangi Mahto who not only claims to have seen the occurrence but had himself been assaulted. Firangi Mahto himself has stated that he named all the assailants of Bikku to Firangi Kahar and that he had done so in the presence of Deolal. He further states that he had named all the 12 appellants to him. From the evidence of the Sub-Inspector, however, it appears that Deolal Mahto also had named those persons only who had been mentioned by Firangi Kahar in his first information report. If Firangi Kahar alone had gone to the thana it was possible to hold that he might not have remembered the names of some of the accused persons who had been named to him by Firangi Mahto. In the present case, however, Firangi Kahar and Deolal went together to the thana and it seems very unlikely that they would have made the same mistake and that both of them would have mentioned only 9 persons although they had been furnished with the names of 12 assailants. As we have already stated, the appellant Bipat Gope is a barahil of the maliks and to him the prosecution witnesses have also assigned the important part of ordering the assault on Bikku. It seems to us very unlikely that the name of this important accused person would have been omitted by both Deolal and Firangi Kahar, if his name had been mentioned in the first instance to them by Firangi Mahto. Curiously enough Pragasi Mahto, who was also one of the eye-witnesses and who has stated before the Sessions Judge that Bipat had come from Bighapur and ordered the assault, did not implicate him before the investigating officer. Beside

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Deocharan Mahto (P. W. 8) and Gobind Mahto (P. W. 12) two of the witnesses who were on the scene of the occurrence soon after the assault on Bikku have also not named Bipat although they say that they saw a number of accused persons with bhalas and lathis on the south of the river. In this state of the evidence it appears to us that the conviction of Bipat cannot be sustained.

The case against Sheolochan also appears to us to be not free from doubt. As we have already stated, the prosecution case is that Firangi Mahto was assaulted by Sheolochan with a bhala soon after the occurrence. Both Firangi Kahar and Deolal have stated that when they met Firangi Mahto they noticed a bleeding injury on his leg and it is not likely that if he had named Sheolochan specifically to them as having inflicted the injury they would not have mentioned his name at all to the police. It is true that Firangi Kahar has stated in the first information report that he did not remember the name of the person who had assaulted Firangi Mahto, but on a careful reading of the document it would appear to be implied that his assailant was one of the nine persons who had been named by him. Another remarkable fact which may be mentioned in this connection is that the injury which was found on Firangi Mahto was an incised injury and according to the medical report it was caused by a sharp cutting weapon. The case, however, which is put forward in court is that it was caused by a bhala. It is true that the doctor has stated that the injury might be caused by a bhala if the blade of the bhala was sharp, but it appears to us that in this respect the statement made by Ghuran that the injury on Firangi Mahto had been caused by means of a *khanti* is more probable than the statement of Firangi Mahto that it was caused by a bhala. We think that both Bipat Gope and Sheolochan are entitled to the benefit of the reasonable doubt which has arisen in their case and should be acquitted. We cannot also reasonably

differentiate their case from the case of Chintaman, a young man of 22, whose name also does not appear in the first information and we think that in the circumstances of the case it would be unsafe to uphold the conviction of this appellant also.

We shall now deal with the case of two other appellants, namely, Ramu and Bimal, who belong to the same family as Aklu, Bipat and Raghu, the other appellants before us. The fact that these five appellants exhaust the entire stock of the direct descendants of Mangal Bhagat must put us on our guard in scrutinising the evidence against these two men. We cannot, therefore, lightly pass over any palpable discrepancy relating to their participation in the occurrence. The only discrepancy which need be mentioned here with regard to these accused persons is a two-fold one. In the first place we find that according to one version Ramu was armed with a lathi and Bimal with a bhala and according to another version Ramu was armed with a bhala and Bimal with a lathi. This by itself is a small point and would not have weighed with us; but we further find that while on the one hand Pargash and Rambaran, two of the eye-witnesses, have definitely stated that Ramu was one of the four persons who were grazing the buffaloes in the field of Karmu Mahto and that he was also one of the four persons who had chased Bikku in the first instance, Firangi Mahto, who is the most important eye-witness in the sense that his presence at the time of the occurrence has been admitted even by Ghuran Gope, has stated in his evidence that this accused person had come from the side of the Lokain river along with Ghuran, Raghu and several other appellants and there is a similar discrepancy in the case of Bimal also. In the case of Ramu there is the further fact that he does not appear to have been named by Pragash one of the eye-witnesses, before the police, or by prosecution witnesses nos. 8, 12 and 15 in Court. In our opinion the cases of Ramu and Bimal are so inter-connected

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with each other that it is not possible to reject the evidence as against one and accept the evidence as against the other. In these circumstances we think that both these accused persons should be given the benefit of doubt and acquitted.

FAZL ALI AND DHAVLE, JJ.

As regards the remaining seven appellants the evidence against them appears to be fairly strong and we think that they have been rightly convicted. On a reference to the post-mortem report it would appear that although none of the injuries on Bikku taken by itself was fatal, yet he had numerous injuries on his body and had been assaulted in a most merciless manner. Among the more serious injuries on him may be mentioned punctured wounds on the top of his head and on the right side of his face, compound fractures of the left ulna and the left tibia and a fracture of the left fibula. Having regard to the number of injuries on Bikku and the manner in which he was assaulted we have no doubt in our mind that his assailants must have either intended to cause his death or were at least aware of the fact that the injuries inflicted upon him were likely to cause his death and were also sufficient in the ordinary course of events to cause death and the jurors were, therefore, justified in holding that an offence under section 302 read with section 149 of the Indian Penal Code was committed by such of the persons as were members of the unlawful assembly in prosecution of the common object of which Bikku has been so brutally assaulted.

Now turning to the question of sentence we have no hestitation in confirming the sentence of death on Raghu Gope and Ghuran Gope who are both proved to have been armed with bhalas and to have taken a prominent part in the assault. With regard to the remaining appellants the evidence is of a somewhat general character and it is possible that some of them may not have actually assaulted the deceased. In any case as these persons were

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armed with lathis only and as none of the blows said to have been caused by lathis was either fatal by itself or was delivered on a vital part of the body, we think that the ends of justice will be served by sentencing them to transportation for life.

FAZL ALI AND DHAVLE, JJ.

The result is that the appeals of Bipat Gope, Sheolochan Gope, Chintaman Gope, Ramu Gope and Bimal Gope are allowed, their convictions and sentences are set aside and they are acquitted. As to the remaining seven appellants while the sentences of death on Raghu Gope and Ghuran Gope are confirmed, the remaining five persons are sentenced to transportation for life.

J. K.

REVISIONAL CRIMINAL.

Before Fazl Ali and Dhavle, JJ.

KUMAR CHOUDHURI

v.

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Penal Code, 1860 (*Act XIV of* 1860), *sections* 196, 197 *and* 198—*knowingly using false certificate as true—certificate granted by Chairman of Municipality based on Death Register, if a certificate contemplated by sections* 197 *and* 198—*prosecution, if can be based on evidence not shown to be in existence under section* 196.

The petitioner in support of his defence produced a certificate granted by the Chairman of the Cuttack Municipality which was based on an entry in the Death Register and also summoned the family astrologer to produce an almanac, to prove the date of his father's death. The Small Cause Court Judge found the date of death in the certificate to be incorrect and the petitioner was tried and convicted.

*Criminal Revision no. 3 of 1936 (Cuttack), against an order of A. N. Banerji, Esq., Sessions Judge of Cuttack, dated the 10th December, 1936, modifying the order of P. C. Patra, Esq., Magistrate 1st class, Cuttack, dated the 13th September, 1935.

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Held :—(*i*) that the certificate in question was not a certificate contemplated by sections 197 and 198 of the Penal Code as it was a certificate not required by law to be given or signed.

Mahabir Thakur v. *The King-Emperor*(1), followed.

(*ii*) in order to convict a person of an offence under section 196 of the Penal Code it was necessary to show that the evidence which he used or attempted to use as true or genuine was in existence at the time, and the almanac not having been shown to be in existence the charge was untenable.

Katari Veeranna, In re(2), followed.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Mahapatra, for the petitioner.

C. M. Acharjya, for the Crown.

FAZL ALI, J.—This is an application on behalf of one Kumar Choudhuri who was prosecuted by the Munsif of Cuttack for offences under sections 196 and 198 of the Indian Penal Code and having been found guilty of these offences, has been sentenced to undergo rigorous imprisonment for 9 months under each of these sections and to pay a fine of Rs. 50. The sentences of imprisonment passed under the two sections have been made concurrent.

It appears that one Dr. Triguna Charan Roy, a private medical practitioner, instituted a small cause court suit against the petitioner and his brother for a sum of Rs. 59 and one of the questions which arose in that suit was whether the petitioner's father, Behari Choudhury, was alive on the 3rd of June, 1928, or had died before that date. In order to support his allegation that his father had died on the 12th of May, 1928, the petitioner produced in the court of the Munsif a certificate signed by the Chairman of Cuttack Municipality and also applied to

(1) (1916) 23 Cal. L. J. 423.
(2) (1916) 35 Ind. Cas. 820.

the Munsif for issuing summons upon one Lokenath Naik his family astrologer, to produce an almanac or diary in which, according to him, the date of his father's death had been noted. The Munsif, before he made up his mind to prosecute the petitioner, held an inquiry and was satisfied that the petitioner's father was alive on the 3rd of June, 1928, or in other words, he had not died on the 12th of May, 1928, as alleged by the petitioner. The conclusion arrived at by the Munsif has been upheld by both the courts below and the only question which was argued before us on behalf of the petitioner was whether the conviction of the petitioner under sections 196 and 198 of the Indian Penal Code could be sustained in law.

It may be stated here that the charge under section 198 of the Indian Penal Code was framed against the petitioner with reference to the certificate granted by the Chairman of Cuttack Municipality to him which runs as follows:—

"Certified that Behari Choudhury of Biswanath Lane died of 'Malarial Fever' on the 12th May 1928 and that his death was entered in the Death Register of Ward no. II on the same date."

His age is shown as above 50 years. This certificate was, as it purports to be, based upon an entry in the death register maintained by the Municipality and in the course of the trial it was found that the date noted in the register as the date of Behari Choudhury's death tallied with the date in the certificate. As, however, the courts below were satisfied that the petitioner's father, Behari Choudhury, was alive on the 12th May, 1928, they held that by producing this certificate which contained an incorrect statement with regard to his death, the petitioner had committed an offence under section 198. Section 198, as will appear presently, must be read along with section 197. Section 197 runs as follows:—

"Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence."

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Section 198 provides that

" Whoever corruptly uses or attempts to use any such certificate, as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence."

FAZL ALI, J.

Now, upon reading these sections it is manifest that the certificate which is referred to in section 198 must be one which is either " required by law to be given or signed " or " is by law admissible in evidence ". It appears to me, however, that the certificate with reference to which the offence under section 198 is said to have been committed by the petitioner does not fulfil any of these requirements. It is not suggested on behalf of the prosecution that it is a certificate which is required by law to be given or signed, but it is strongly contended that because such a certificate can be used in evidence when formally proved, it fulfils the second requirement of section 197. In my opinion, however, this contention is not sound. The expression " by law admissible in evidence " was construed by a Division Bench of the Calcutta High Court in *Mahabir Thakur* v. *The King-Emperor*(1) and it was pointed out there that what section 197 contemplates is that " the certificate " should by some provision of law be admissible in evidence *as such a certificate without further proof*. In the present case it is not disputed that the certificate could not be treated as evidence, unless it was formally proved by the Chairman who had granted it and even then it would be only secondary evidence of the entry in the death register relating to the date of the death of Behari Choudhury. It appears to me, therefore, that whatever other offence the petitioner may have committed, he did not commit an offence under section 198 of the Indian Penal Code.

I will now deal briefly with the other charge which has reference to the almanac which Lokenath Naik was summoned to produce before the Munsif.

(1) (1916) 23 Cal. L. J. 423.

It is to be noted in this connection that though Lokenath seems to have appeared in the court of the Munsif in obedience to the summons issued on him, he was neither examined nor asked to produce the almanac before the prosecution was started against the petitioner. Thus there was no material before the Munsif to enable him to hold that the almanac which Lokenath had been called to produce was in existence or that it contained any false entry relating to the death of the petitioner's father. The question which is raised on behalf of the petitioner upon these facts is that the charge under section 196 also has not been brought home against him. Section 196 runs as follows :—

"Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence."

From the mere reading of the section it seems to me to be clear that an offence under the section can be held to have been committed only if it is shown that the evidence which the accused used or attempted to use as true or genuine was in existence at the time. This view is also supported by the decision of the Madras High Court in *Katari Veeranna, In re*(1). In the present case although Lokenath had been summoned to produce the almanac, he never produced it and we do not know whether he was in possession of any almanac containing a false entry as to the date of the death of the petitioner's father. It is said that even though there may not have been an actual user of fabricated evidence in this case there was at least an attempt on the part of the petitioner to use such evidence. Here again the prosecution is faced with the same difficulty because a person cannot be properly charged with attempting to use as evidence something which is not proved to be in existence. The prosecution is confronted with a further difficulty so far as this charge is concerned, because the complaint made by the Munsif makes no reference to the almanac or to the

(1) (1916) 35 Ind. Cas. 820.

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fact that an offence under section 196 had been committed by the petitioner in his attempt to use the almanac in evidence. Under section 195 of the Criminal Procedure Code the courts are debarred from taking cognizance of any offence punishable under section 196 of the Indian Penal Code when such offence is alleged to have been committed in, or in relation to, any proceeding in any court except on the complaint in writing of such court or of some other court to which such court is subordinate. But as I have already stated, the Munsif has made no reference in his complaint to the almanac or to the fact that the petitioner had committed any offence in relation to the almanac. In my opinion, therefore, the charge under section 196 also cannot be sustained in law.

I would, therefore, allow this application and set aside the conviction of the petitioner as well as the sentence passed on him. I might, however, observe that I do not consider it necessary to express any opinion as to whether the petitioner is liable to be prosecuted for any other offence or offences or whether by calling for the death register from the Municipality he did not commit an offence under section 193 or section 196 of the Indian Penal Code. It is for the Crown to decide whether these offences have been committed or not and if they have been committed whether the petitioner should be prosecuted for the commission of these offences.

DHAVLE, J.—I agree. The calling for the municipal register, or for the *panji* of Lokenath Naik, also seems to me to fall short of an attempt to use as true or genuine evidence which the offenders knew to be false or fabricated and to go no further than the earlier stage of preparation. The offences with which the accused were to be charged in a case of this kind should have been carefully formulated with reference to the provisions of the Penal Code, and the failure to do so has led to this abortive trial.

Conviction and sentence set aside.

J. K.

APPELLATE CIVIL.

Before Wort and James, JJ.

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Sept., 23, 24, 25.

LIQUIDATOR, BAGHA CO-OPERATIVE SOCIETY

v.

DEBI MANGAL PRASAD SINHA.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 20—*payment by debtor without specification—appropriation by creditor must be taken as payment out of interest "as such"—payment "as such", whether applies to payment towards interest or towards principal.*

Held, that under section 20 of the Limitation Act if the creditor relies upon a payment of interest it must be a payment of interest "as such", but as regards a payment towards principal no such specification is necessary.

Udayapal Singh v. *Lakhmi Chand*(1), dissented from.

Where the creditor relied on a certain payment as an acknowledgment of payment within the meaning of section 20 of the Limitation Act, 1908, and the debtor contended that the payment having been made without specifying whether it was towards principal or interest the payment could not save limitation;

Held, that the creditor having appropriated the payment towards interest and the debtor having consented it must be assumed that the amount was paid on account of interest "as such" within the meaning of section 20 of the Limitation Act.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Wort, J.

B. N. Mitter and *S. N. Banarji*, for the appellant.

N. K. Prasad no. II, for the respondents.

*Appeal from Appellate Decree no. 1070 of 1933, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Muzaffarpur, dated the 8th of June, 1933, reversing a decision of Babu Parmeshwari Dayal, Munsif of Bettiah, dated the 30th of January, 1932.

(1) (1935) I. L. R. 58 All. 261, F. B.

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WORT, J.—This appeal is against the decision of the Subordinate Judge in an action in which the Bagha Co-operative Society claimed a certain sum of money—a loan taken by Munshi Muna Lal. The Judge in the Court below held that the action was barred by limitation.

I must say that when the case was first opened, it seemed impossible to support the contention of Mr. Mitter, appearing on behalf of the plaintiff-appellant, that the letter of the 3rd of February, 1928, upon which he relies gave a fresh start to limitation, and I am bound to add that I found some difficulty in coming to a conclusion in the matter. The question in the case was whether by the letter of the 3rd of February, 1928, a fresh start to limitation was given under section 20 of the Limitation Act. The facts which it is necessary to state are very few. Although Munshi Muna Lal actually borrowed the money from the Bagha Co-operative Society, it has been found by the Court below that it was taken by Munshi Muna Lal on behalf of defendant no. 1, in other words, the defendant no. 1 was the debtor.

Before dealing with the main point in the case I propose to refer to two arguments addressed to us by the learned Advocate for the respondents, who were defendants in the Court below. The first is as regards limitation and the second is with regard to the nature of the liability of defendant no. 1. So far as limitation is concerned, it was contended that this Court ought to hold, supporting the judgment of the Court below, that the action was in any event barred by limitation, that is to say, that the action was already barred when the letter of the 8th of September, 1927, upon which this claim rests, was written. There is certainly nothing on the face of the record to entitle this Court to come to any such conclusion, and indeed it was never suggested in either of the Courts below that the action was so barred. The only question was whether the period

of limitation between the 8th of September, 1927, and the date upon which this action was brought was such as to bar the action, and, as I have already indicated, the only way the plaintiff could get out of that case was to show that by the letter of the 3rd of February, 1928, a fresh start to limitation had been given.

As regards the other question—the nature of the liability of defendant no. 1—it was contended by the learned Advocate appearing on behalf of the defendant-respondents that the Court below had no right to come to the conclusion that defendant no. 1 was the debtor, that is to say, that it was on his behalf that the money had been advanced. But as I have already said, the basis of the claim was the letter of the 8th September, 1927, which is to the effect:

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"In obedience to your letter, dated 8th September, 1927, I beg to state that I hold responsible myself regarding the payment of the dues against Munshi Muna Lal, a member of the Bagha Co-operative Society, by the 15th January, 1928."

The letter is then signed by defendant no. 1.

It is rather difficult to ascertain from the plaint exactly what the case of the plaintiff is whether it is a case of the defendant no. 1 being a surety, whether defendant no. 1 was to be looked upon as a principal debtor, or whether Munshi Muna Lal was to be looked upon as the principal debtor. But one matter is perfectly clear and that is that the letter of the 8th of September, 1927, does not put the defendant no. 1 who wrote the letter in the position of a surety; he becomes by that letter on its proper construction the principal debtor whatever the position may have been prior to the date upon which the letter was written. In my judgment, therefore, that point cannot avail the respondents.

The only other question—the main question in the case—is whether the payment has been made and acknowledged within the meaning of section 20 of

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the Limitation Act. The letter of the 3rd of February, 1928, is a letter signed by Debimangal Prasad Sinha and its relevant portion is to this effect:

> "I would like to bring to your kind notice that on 30th January, 1928, I had been to Bettiah for paying respect to you and depositing money on behalf of Munshi Muna Lal, but to my great misfortune I could not see you. The money has been deposited."

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Now, certain payments had been made towards this debt on behalf of Munshi Muna Lal, and the one with which we are concerned is a payment of Rs. 394 odd entered in the Books of the Society as paid on account of interest. That is to say, it appears that a payment was made to the Co-operative Society, the creditor, which appropriated it towards interest, and it must be assumed that the debtor consented to that appropriation. Being the debtor he had the first option; he could have appropriated the amount towards principal or he could have appropriated it towards interest according to his own wish. But as I have said, the creditor having appropriated it and the debtor having consented I suppose it must be assumed that the amount was paid on account of interest, and it might be held to be paid "as such" within the meaning of section 20 of the Limitation Act. That this payment of Rs. 394 odd was made there can be no doubt and the amount was paid on account of this debt which in the first instance had been incurred by Munshi Muna Lal. Now the question is whether the statement in the letter of the 3rd of February, 1928, that 'the money was deposited on the 30th of January, 1928' can, in the circumstances of the case, be held to be an acknowledgment of payment within the third sub-clause of section 20 of the Act. The learned Judge in the Court below did not address his mind to this question as it was not raised. He held merely that the action was barred by limitation as the period of three years had elapsed from the 8th of September, 1927. Now, as this point arises in the case, there are two courses open to this Court, first, to remand the case to the

learned Judge in the Court below to determine this question as a question of fact and, secondly, to investigate the matter for itself under the powers given to it by section 103 of the Code of Civil Procedure. It is the latter course that we propose to take.

Looking at the evidence a number of facts have in my judgment been clearly proved. First, that a payment was made on the 30th January, 1928, of Rs. 394 odd. I think also that it would not in any way be straining the evidence to hold that this was the payment made on the 30th of January, 1928, and placed against interest in the manner which I have already indicated. It is also proved by the evidence of the plaintiff that the account was recorded in the name of Munshi Muna Lal as to do otherwise would have been contrary to the Rules of the Society. We then come to the letter of the 3rd of February, 1928, itself. The letter clearly admits a payment. It was contended by the learned Advocate for the respondents that the word used was 'deposited'. But I think it would be taking a very strange view of the letter if we held that when the writer says 'money was deposited' he did not mean that he had paid the money. He admits having paid the sum on the 30th of January, 1928. There can be no doubt whatever on the evidence taken as a whole of his having paid the amount against the account of Munshi Muna Lal. Taking the evidence as a whole there can be no doubt in my judgment that the payment referred to by the letter of the 3rd of February, 1928, was this payment of Rs. 394 odd. There was one point taken by the learned Advocate for the respondents and it was this that the letter of the 3rd of February, 1928, does not admit a payment by the debtor as such, but admits a payment on behalf of Munshi Muna Lal. To give effect to that argument would in my judgment be placing words into section 20 of the Limitation Act which are not there. All that is required by the section is an acknowledgment of the payment by the debtor. We are not dealing

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here with the question of agency otherwise certain very difficult questions would have arisen. As I have said, all that is required is an acknowledgment of the payment by the debtor, and in this case the person who wrote the letter of the 3rd of February, 1928, has been held to be the debtor. I do not think there can be any doubt in this case that in the discussion which took place, in the evidence the payment which is referred to in the letter of the 3rd of February, 1928, was the payment which the plaintiff had proved, and in my opinion it would be taking a somewhat grotesque view of the evidence to hold otherwise. I have already stated in the course of my observations that from one point of view it might be taken that the payment of Rs. 394 odd referred to in the letter of the 3rd of February, 1928, was the payment of interest as such within the meaning of section 20 of the Limitation Act. I do not propose to come to any definite conclusion on that, although I have the gravest possible doubt whether that could be said to be the case having regard to the plain construction of section 20. When it speaks of an acknowledgment of the payment of interest, I am of the opinion (although perhaps it is unnecessary to decide the point definitely in this case) that the writing which is the acknowledgment of the payment of interest must also contain the description of the payment as a payment of interest. But it is unnecessary, as I have observed, to decide that question having regard to the view that I take of section 20 as a whole. In this connection I must refer to the Full Bench decision of the Allahabad High Court in *Udaypal Singh* v. *Lakhmi Chand*(1). This case is relied upon by the learned Advocate for the respondents to support his contention that the letter of the 3rd of February, 1928, does not give a further period of limitation as it is not an acknowledgment within the meaning of section 20 of the Limitation Act because there is no payment within

(1) (1935) I. L. R. 58 All. 261, F. B.

that section. The learned Chief Justice of the Allahabad High Court construing this section came to this conclusion at page 276 of the Report:

"I have, therefore, come to the conclusion that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor apprropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of section 20, but there is a mere unspecified payment of money, which has subsequently by the act of the creditor become a payment of interest".

Thom, J., with one other of the learned Judges of the Court took an opposite view, but the majority concurring in the view taken by the Chief Justice, that view prevailed. But with great respect to the learned Judges the effect of the opinion there expressed would be to place words in section 20 of the Limitation Act which do not appear. The learned Chief Justice points out that where money is paid and there is no appropriation, or to put it more accurately, no specification—whether payment towards interest or towards principal—it cannot be a payment within the meaning of section 20 of the Act. Now, it is quite clear that under section 20 of the Limitation Act if the creditor is to rely upon a payment of interest it must be a payment of interest as such, but as regards a payment towards principal no such specification is necessary. Now the effect of the opinion expressed by the majority of the Judges of the Allahabad High Court would make it necessary, both in the case of payment towards interest and in the case of payment towards principal, for the payer to specify towards which items they were made. In my view, with great respect, the opinion expressed is a view that I cannot possibly take upon what seems to me to be the plain construction of section 20 of the Act. Having

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regard to the view I take of the letter of the 3rd of February, 1928, connected as it is with the payment of Rs. 394 odd, I am of the opinion that the action is not barred by limitation, and, therefore, the decision of the learned Judge in the Court below is wrong.

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The appeal is, therefore, allowed, the judgment of the learned Subordinate Judge is reversed and the judgment of the trial court restored with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

J. K.

APPELLATE CIVIL.

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Sept., 14, 17, 18, 28.

Before Khaja Mohamad Noor and Madan, JJ.

HET LAL.

v.

UPENDRA NATH BASU.*

Arbitration—Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II*, *paragraphs* 14 *and* 20—*reference to arbitration without intervention of Court—award, when requires registration—Registration Act*, 1908 (*Act XVI of* 1908), *section* 17—" *operate* ", *meaning of.*

The award sought to be made a rule of the court under Schedule II of the Code of Civil Procedure directed the payment of a certain sum with interest by *D* to *A* and further declared that the ownership of *A* in certain immoveable property should not cease till after the said payment. It was contended by *D* that the award could not be enforced for want of registration.

Held, that section 17 of the Registration Act did not apply as the document merely acknowledged a pre-existing right. The word " operate " refers to the immediate intention of the instrument and not to its ultimate consequences

*Appeal from appellate Order no. 188 of 1935 from an order of Babu Braj Bilas Prashad, Subordinate Judge of Patna, dated the 12th February 1935.

or collateral effects. It is only when there is an immediate intention to create, declare or assign title that the document requires registration.

Bageshwari Charan Singh v. *Jagarnath Kuari*(1) and *Imperial Bank of India* v. *Bengal National Bank, Ltd.*(2), followed.

Held, also that when a separable portion of an award is bad, the remainder of the award if good can be maintained.

Shaikh Mohammad Khalil v. *Shaikh Abdul Rahim*(3), followed.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Madan, J.

C. B. Agarwala and *P. Jha*, for the appellants.

S. N. Bose, *K. Dayal* and *S. Mustafi*, for the respondents.

MADAN, J.—This is an appeal by the plaintiff Babu Het Lall against an order of the Additional Subordinate Judge of Patna refusing to make a private award, dated the 1st October, 1930, a rule of the court and to pass a decree thereon. The relevant facts are that the plaintiff, defendant no. 2 and defendant no. 3 are the sons, and defendant no. 4 is the grandson, of one Rai Sahib Ishwari Prasad, who was resident in Benares City where defendant no. 1, Babu Upendra Nath Basu, also lives. In the year 1908 defendant no. 1 bought at a court sale the proprietary right in village Raitar which is in the Bihar subdivision of the Patna district. The property was subject to heavy encumbrances, and in the year 1912 defendant no. 1 borrowed from Ishwari Prasad, who is said to have been his close friend, a sum of Rs. 50,000 for paying off part of the encumbrances. No document was executed in favour of Ishwari Prasad, but there was an oral agreement

(1) (1931) I. L. R. 11 Pat. 272, P. C.
(2) (1931) A. I. R. (Cal.) 223.
(3) (1925) I. L. R. 4 Pat. 670.

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that if the money was not repaid Ishwari Prasad should become a half sharer in the property. In the year 1914 there was a further oral agreement, whereby Ishwari Prasad was recognised as half owner of the property which was valued at the sum of Rs. 1,34,000. The management remained with defendant no. 1, but thereafter Ishwari Prasad appeared as co-sharer in the zamindari papers first in his own name and then in that of Raghunathji, his family deity. In the year 1924 Ishwari Prasad died, and a dispute arose between the plaintiff and defendants nos. 2 to 4 over the division of his estate. The dispute was referred to the arbitration of Babu Chintamani Mukharji and Rai Sahib Jwala Prasad, and by their award, which is of February, 1926, the arbitrators divided the property into four parts, and their award was made a decree of the court. By this award Raitar was divided equally between the plaintiff and defendants nos. 2 to 4. As they had no title deed in respect of this property these persons approached defendant no. 1, who on the 25th April, 1925, made a written declaration to the effect that he had purchased the property in the year 1908 while it was heavily encumbered, that Ishwari Prasad had lent him the sum of Rs. 50,000 at six per cent. interest with the option of taking over a half share in the property, and that in the year 1924 the property had been divided accordingly. Defendant no. 1 expressed his willingness, after accounts had been made up, to execute such proper instrument as the plaintiff and defendants nos. 2 to 4 might unanimously wish, or in the event of difference between them such as might be reasonably required by an arbitrator appointed by them. Meanwhile the property was to remain with defendant no. 1. On the 28th December, 1927, defendant no. 1 executed a draft sale deed in respect of one quarter of the half share in favour of the plaintiff alone. It was recited therein that the annual income of the half share was Rs. 3,000, and that the plaintiff had agreed to accept a portion yielding an income of Rs. 750 as his own

share together with the sum of Rs. 2,000 paid in cash. This sale deed, however, was never formally executed probably because of further differences that arose between the heirs. The result of these differences was that on the 3rd April, 1928, there was an agreement between the parties to refer the matter to the same arbitrators who had decided the former dispute. The reference was in the following terms :—

" Whereas differences have arisen between us and the two parties aforenamed regarding the accounts and transfer of Raitar property in the district of Patna by Babu Upendra Nath Basu of the first party, we hereby of both the parties of our free will and accord refer our dispute to the arbitration of Rai Sahib Jwala Prasad, Chief Engineer, Irrigation, U. P. and Shrijut Babu Chintamani Mukerjee, Sonarpura, Benares, and faithfully promise and bind ourselves hereby to abide by any award they may make in respect of the said dispute and to abide by their decision, and we further authorise them to adopt whatever procedure they may deem fit and proper in order to settle our dispute."

On the 1st August, 1930, the arbitrators submitted their award which was registered before the Sub-Registrar of Benares, and, as the terms of this award have given rise to the present controversy, I quote them in full :—

" Know all men to whom it may concern that we.....give our award as follows :—

(*1*) That the amounts specified in the statement of accounts passed by us attached hereto and marked as exhibit *B* should be paid with interest at eight annas per cent. per month within three months of to-day after which period the rate of interest shall be ten annas per cent. per month on any balance unpaid till the accounts are fully paid up.

(*2*) That Babu Upendra Nath Basu requested us that in respect of transferring the above said Raitar property to the second party he may be allowed to pay any sum fixed by us in lieu thereof so as to save the property from being ruined, and we were asked by the party to fix the sum to be so paid by the first party to the second party. We accordingly direct that the said Babu Upendra Nath Basu do pay Rs. 15,350 to each of the four gentlemen of the second party, that is to say, a total sum of Rs. 61,400 as the equivalent of the share of the second party in the said property with interest at six per cent. per annum accruing from the 1st of October, 1930. If the said amount is not paid by the 1st of October, 1931, the rate of interest thereafter shall be 7½ per cent. per annum on the whole or any balance left unpaid.

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The ownership of the second party in one half of Raitar property shall not cease till after the above sum of Rs. 61,400 as well as the amounts mentioned in the statement exhibit *B* together with interest specified in respect of both be fully paid up."

Thereafter the plaintiff applied to the Subordinate Judge of Benares under paragraph 20, Schedule II, of the Code of Civil Procedure for filing the award in court and passing a decree thereon. Defendant no. 1 resisted the application on various grounds one of which was that the Subordinate Judge of Benares had no jurisdiction over the subject-matter of the award. The Subordinate Judge held that as the heirs of Ishwari Prasad were not at that time the legal owners of the half share in the property and as the effect of the award was merely to grant certain sums of money to the applicant and his co-heirs he had jurisdiction over the matter and he therefore ordered the award to be made a rule of the court, excepting the portion dealing with the ownership of the Raitar property which portion he treated as a nullity. On appeal the Allahabad High Court held that the award did determine that the heirs of Ishwari Prasad had a legal title to a half share in the Raitar property and that they were entitled to retain their ownership until they have received certain sums of money from the appellant. Their Lordships observed that the arbitrators in effect gave Ishwari Prasad's heirs a charge over the immoveable property until the specified sums were paid to them, and they allowed the appeal holding that the order of the Subordinate Judge of Benares was without jurisdiction. This decision is reported in *Upendra Nath Basu* v. *Het Lall*(1). The plaintiff accordingly refiled his application in the court of the Subordinate Judge of Patna with a further prayer that a mistake in the calculation of the arbitrators should be corrected, and that he and his co-heirs should be declared to be entitled to receive the sum of Rs. 16,800 each in place of the sum of Rs. 15,350 each awarded to them. This claim which was disallowed by the learned Subordinate Judge was not pressed before us. Defen

(1) (1933) I. L. R. 55 All. 542.

dant no. 1 again opposed the application on various grounds, and mainly because the arbitrators had failed to determine the most important question at issue between the parties, namely, what was the effect of a Will said to have been executed by Ishwari Prasad in the year 1923. He also claimed that the award inasmuch as it purported to create title in favour of himself in respect of immovable property required to be registered, and its registration by the Sub-Registrar of Benares was without jurisdiction. The learned Subordinate Judge rejected the contention of defendant no. 1 regarding the Will but upheld it on the ground of non-registration, and he therefore rejected the application. The plaintiff has now filed this appeal which has been contested by defendants nos. 1 and 4.

Three points have been argued before us in this appeal (*1*) whether or not the sub-paragraph to clause II of the award required to be registered, (*2*) whether in that case it was open to the court to separate the sub-paragrah from the rest of the award and to pass a decree on the good portion of the award, (*3*) whether the whole award is bad as not determining the question of the Will. On the first point Mr. S. N. Bose for defendant no. 1 contended that the award did require registration because it created or at any rate declared title in immovable property worth more than Rs. 100. Now it is clear that at the time of the award the heirs of Ishwari Prasad had no legal title in the property inasmuch as there was no existing title deed in their favour. Their legal position was that of a party to a contract for sale in default of repayment of the money lent by Ishwari Prasad. A contract for sale does not require registration nor did the award, regarded as a release from the contract, require to be registered. The award does refer to the continuance of the " ownership " of the plaintiff and his co-heirs, but a document of this character cannot be treated exactly as though it were a formal instrument drawn up under the advice

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of lawyers who are expected to understand the exact legal position of the parties. The question before us is whether the arbitrators intended their award to operate as an instrument of title changing the status of the parties, or whether their intention was to reserve the existing right of the heirs, namely, the right to a conveyance of a half share in the property if their dues were not paid. In my opinion the language of the award itself, directing that the ownership of the heirs should " not cease " until the money had been paid, supports the latter alternative. It is not surprising if the arbitrators, seeing that the heirs were admittedly in possession of half of the property, described them as owner although actually they were not so, and the use of this word in the award must, I am satisfied, be ascribed to a defect in drafting on the part of the arbitrators, and not to an intention on their part to confer legal ownership on the heirs by changing the status of the parties. The position would have been different, had the arbitrators fixed a time limit for the payment of the money, on the expiry of which the heirs of Ishwari Prasad were to become the absolute owner of the property. In that case the award would have become a document of title requiring registration. In the absence of a time limit the arbitrators left it to the heirs to take action themselves for recovery of the money due in default of payment, or for obtaining a transfer of the property. For these purposes the award was not a document of title. In my opinion the observation of their Lordships of the Allahabad High Court that the award did in effect create a charge on the property must be construed in the light of the above observations, which are based on a consideration of the true legal position of the parties. In reality the award recognised an existing right, which did in effect amount to a charge on the property. It was argued for defendant no. 1 that the award still required to be registered as it did declare the existing title of the heirs in the property. This point arose in *Bageshwari Charan Singh* v.

Jagarnath Kuari(1) where it was held that section 17 of the Registration Act does not apply to cases where, as in the present case, a document is merely an acknowledgment of a pre-existing right. In *Imperial Bank of India* v. *Bengal National Bank, Ltd.*,(2) the word " operate " in section 17 has been held to refer to the immediate intention of the instrument in question, and not to its ultimate consequences or collateral effects. It is only where there is an immediate intention to create, declare or assign title that the document requires registration. In my opinion the award in this case did not create, assign or declare title, and it did not, therefore, require to be registered.

The question whether, assuming that the sub-paragraph in the award required to be registered, it was still open to the court to separate that sub-paragraph from the rest of the award and proceed to pass a decree was also argued at length before us. Mr. Agarwala for the plaintiff referred to Russell on arbitration, 11th edition, page 240, where cases are collected in which the English courts have held that the bad portion of an award is separable from the good portion. In *Selby* v. *Whitbread and Company*(3) there is a discussion (at page 747) on the same point and the same principle is affirmed. The matter also came before the Privy Council in the Oudh case of *Amir Begam* v. *Badruddin Hussain*(4) which was a case arising from a private award; their Lordships, holding in that case that a portion of the award bad for want of jurisdiction could be separated, observed (at page 342) " It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained." The same principle was followed in

(1) (1931) I. L. R. 11 Pat. 272.

(2) (1931) A. I. R. (Cal.) 223.

(3) (1917) 1 K. B. 736, 747.

(4) (1914) I. L. R. 36 All. 336, P. C.

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Shaikh Muhammad Khalil v. *Shaikh Abdul Rahim*(1) which was also a case where the arbitrators had exceeded their jurisdiction. Mr. S. N. Bose contended that this principle applies only to cases where the arbitrators had exceeded their authority, such as are referred to in paragraph 14, Schedule II, of the Code, and not to cases where the arbitrators had not gone beyond the terms of the reference. This point does not appear to have been dealt with in any reported decision of this Court, but it was raised in the Oudh case of *Mata Badal Singh* v. *Sheo Mangal Singh*(2). In that case King, C. J., and Smith, J. observed with reference to the Privy Council decision quoted above, that the dictum of their Lordships was couched in quite general terms and did not limit the applicability of the proposition enunciated by them to any particular set of facts and circumstances. I do not, however, find it necessary to decide the somewhat difficult question whether or not the award in this case is capable of being divided, in view of my finding already arrived at that the award did not require to be registered.

Lastly there is the argument that the whole award is bad as it does not deal with the question of the Will. Admittedly there is in existence a document purporting to be a Will executed by Ishwari Prasad in the year 1923. The Will not having been probated or attested is inadmissible in evidence in this case so far as it relates to the Raitar property, which is in this province. According to defendant no. 1 and defendant no. 4, whose case was argued before us by Mr. Bankim Chandra De, the question of the validity of the Will was uppermost in the minds of the parties at the time of the reference to arbitration. In that case it is remarkable that the reference itself contains no mention of the Will, nor do I find any passage from which it can reasonably be inferred that the question of the Will was to come

(1) (1925) I. L. R. 4 Pat. 670.
(2) (1936) A. I. R. (Oudh) 72.

before the arbitrators. The only matter for their decision was the dispute about the transfer of the property to the heirs of Ishwari Prasad, and in exhibit 7, a letter written by defendant no. 1 shortly before the reference, defendant no. 1 admitted his liability to execute a deed of relinquishment in favour of the heirs. Exhibit D is another letter written by defendant no. 1 to the arbitrators on the 19th October, 1928, with reference to the Will, but the letter itself shows that the Will was not part of the subject-matter of the reference. It is to the effect that defendant no. 1 had found that Ishwari Prasad had executed a Will, and he therefore asked, as a matter of justice to the parties, that the arbitrators should refer the question of the validity of the Will to the Allahabad High Court (although no such procedure is known to the law) before proceeding to determine the matters referred to them. This clearly implies that at that time defendant no. 1 himself did not consider that the Will was part of the reference to the arbitrators. The result of the letter was that the arbitrators did devote some consideration to the Will and examined one Kishun Chandra co-executor with defendant no. 4 under the Will, but the arbitrators did not decide about the Will as it was beyond the scope of their reference. This appears from the evidence of Rai Bahadur Jwala Prasad, one of the arbitrators, who has explained that the arbitrators did not decide about the Will as it was not in their terms of reference nor were they authorised to do so. In fact the arbitrators were not in a position to decide the matter at all, as Kishun Chandra, one of the executors, was not a party to the proceedings before them, a fact which defendant no. 1, who is a qualified lawyer, should have been fully able to appreciate. Again on the 9th January, 1931, defendant no. 1 wrote a post card, which is exhibit 17/C, to defendant no. 2, wherein he urged defendant no. 2, as having accepted the award, to get it filed in court without further delay. The post card shows that at that time defendant no. 1 himself

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accepted the award as complete and final between the parties. Under the Succession Act a Will executed in the United Provinces in the year 1923 did not require either probate or attestation in respect of properties situated in that province; but it is remarkable that in spite of this no step was taken in support of the Will for a period of more than twelve years. Defendant no. 4 in his evidence admitted that he himself had done nothing about it, nor was he aware that anything had been done by his co-executor. The Will is said to have been in favour of an institution called the Tulsi Technical Institute, but from the evidence of defendant no. 1 it appears to be doubtful whether any such institution really exists, and it is clear that the Will was disregarded by all the parties concerned. The evidence shows conclusively that the matter of the Will was not referred to arbitrators, nor were the arbitrators competent to decide it. The learned advocate for the plaintiff suggested that defendant no. 1, in collusion with defendant no. 4, has changed his attitude towards the Will as since the year 1928, the time of the reference, the value of landed property has fallen, and defendant no. 1 is now anxious to surrender the half share instead of paying the money. It is the case of defendant no. 1 that at the time of the arbitration he was really in doubt as to the effect of the Will, but admittedly defendant no. 1 has since executed a sale deed in respect of a half share of the property in favour of defendant no. 4, ignoring the rest of the heirs. The learned Advocate for defendant no. 1 found it difficult to defend this action of his client in turning round and supporting the Will against the legal heirs. The result has been unfortunate as Mr. Agarwala suggested that the plaintiff would still have been willing to settle the matter and take his share in the property in lieu of payment, had defendant no. 1 not put himself out of court by executing the sale deed, the bona fides of which are open to serious question. Since the award the plaintiff and defendants nos. 1 and 2 have filed a suit

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against the remaining defendants and the executors for the decision of all the matters in dispute between the parties including the question of the Will, but Mr. Agarwala explained that the suit was filed as a matter of precaution, in view of the result of the present proceeding in the lower court, and in order to save limitation. The filing of this suit is no obstacle to the plaintiff's success in this appeal, the result of which is that both the objections taken to the award must fail. I would, therefore, allow this appeal and direct that the award be filed and made a decree of the court. The plaintiff is entitled to costs of both courts against defendants nos. 1 and 4.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal allowed.

J. K.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Madan, JJ.

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Sept., 30.

DAROGA RAI

v.

BASDEO MAHTO.*

Hindu Law.—"legal necessity," meaning and significance of—female owner, whether entitled to alienate property for payment of time-barred debt incurred for legal necessity—karta, power of, whether differs from that of limited owner—appellate court, power of, to interfere with part of decree not appealed against—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 33.

In deciding the question of what constitutes "legal necessity" under the Hindu law, the court must include all

* Appeal from Appellate Decrees nos. 1110 and 1136 of 1933, from a decision of Maulavi Abdush Shakur Additional District Judge of Muzaffarpur, dated the 9th February, 1933, modifying a decision of Babu Haribar Charan, Subordinate Judge of Muzaffarpur, dated the 10th August, 1931.

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those " necessities " which the Hindu law-givers have recognised as legal, justifying an alienation of property by a limited owner.

Hindu law does not recognise law of limitation.

Held, therefore, that a female owner, having a limited interest, is entitled to alienate the property in her possession for the payment of a debt, incurred by her for legal necessity, although the debt may have become time-barred.

Makhanlal v. *Musammat Sardar Kunwar*(1), dissented from.

Ashutosh Sikdar v. *Chidam Mandal*(2), *Lala Soni Ram* v. *Kanhaiya Lal*(3) and *Hunnomanpersaud Pandey* v. *Musummat Babooee Munraj Koonwaree*(4), referred to.

The power of a karta of a joint family differs from that of a limited owner; the former acts under an implied authority of the co-parceners which authority does not extend to his paying a barred debt, but the latter, within certain limits, is an owner and there is nothing to debar her from paying up a debt which she has legally incurred.

Obiter.—Although the power of the appellate court is wide, the cases in which it should interfere with the decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed against that justice cannot be done unless the portion against which no appeal has been preferred is also interfered with.

Where, therefore, there are two distinct decrees against two different persons on two separate causes of action, although in form there is only one decree, the appellate court should not interfere with that part of the decree against which there has been no appeal.

Maharaja Bahadur Kesho Prasad v. *Narayan Dayal*(5) and *Musummat Chanda Bibi* v. *Mohanram Sahu*(6), referred to.

(1) (1932) A. I. R. (All.) 555.
(2) (1929) I. L. R. 57 Cal. 904.
(3) (1913) I. L. R. 35 All. 227; L. R. 40 Ind. App. 74.
(4) (1856) 6 Moo. I. A. 393.
(5) (1924) I. L. R. 4 Pat. 37.
(6) (1933) I. L. R. 13 Pat. 200.

Appeal no. 1110 by defendant no. 6.

Appeal no. 1136 by defendant no. 4.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

M. N. Pal and *Navadip Chandra Ghose*, for the appellants.

Dhyan Chandra and *R. J. Bahadur*, for the respondents.

KHAJA MOHAMAD NOOR, J.—These two appeals arise out of the same suit instituted by the plaintiffs for a declaration that two deeds, one a sudhbharna, dated the 3rd December, 1928, for Rs. 1,000 in favour of Halaku Rai (appellant in S. A. 1136 of 1933) and the other as sale for Rs. 1,100, dated the 6th December. 1926, in favour of Darogi Rai (appellant in S. A. 1110 of 1933) executed by Musummat Murni and her sister Musummat Sahodri, daughters of one Rampat, were without legal necessity and therefore not binding upon the plaintiffs who are the reversioners of Rampat. Rampat died leaving three daughters Musummat Murni, Musummat Sahodri and Musummat Jhapsi. The plaintiffs are the sons of his fourth daughter who predeceased him. Rampat was succeeded by his widow Jaimangal who died a few months later and then the three daughters succeeded him as limited owners. Two of them, namely, Murni and Sahodri executed the two deeds mentioned above. The learned Subordinate Judge who tried the suit held the documents to be valid in part, that is to say, the sudhbharna to the extent of Rs. 850 and the sale to the extent of Rs. 700 and invalid for the rest of the consideration. One of the defendants of the suit Darogi Rai who held the sale deed preferred an appeal. Halaku, the other defendant, the holder of the sudhbharna accepted the decree and preferred no appeal. The

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plaintiffs also remained satisfied with the decree and did not prefer any appeal, but in Darogi's appeal he filed a cross-objection not only against that portion of the decree which was in favour of Darogi, but also against that portion of it which was in favour of Halaku. The learned District Judge has held that the deeds were not valid to any extent whatsoever and while dismissing the appeal of Darogi, decreed the suit in its entirety not only against Darogi but against Halaku also. Darogi and Halaku have, therefore, preferred these two second appeals.

The two deeds which are exhibits *A* (sudhbharna) and *B* (the sale deed), were executed for consideration, a very large part of which as mentioned therein was utilized for payment of debts which are said to have been incurred for meeting the sradh expenses of Rampat and his widow. The learned trial court held that the payment of these debts constituted legal necessities under the Hindu Law for which the properties could be alienated. The learned District Judge on appeal though he has not found that in fact no money was borrowed for the sradh expenses or that the defendants were not paid out of consdieration money of the deeds in question has held the alienations to be illegal on two grounds, first, that it was no business of the daughters when their mother was alive to incur debt for the sradh of their father Rampat and, secondly, that when the two deeds were executed, the debts incurred for the sradh had become barred and, therefore, it was illegal to alienate properties to pay off those debts. Both these grounds of the learned District Judge have been assailed before us in these second appeals.

Regarding the first proposition the learned District Judge's objection is about the daughters borrowing for the sradh of their father Rampat when his widow was alive. The amount borrowed for his sradh was Rs. 800 out of which Rs. 400 with interest

thereon was paid by the sale and Rs. 400 with interest thereon by the sudhbharna. It seems that the widow of Rampat must have been very much advanced in age and naturally the daughters who were prospective heirs of their father must have been looking after the property. It is not disputed that it was the duty of the widow to perform the sradh of her husband. It is also not denied that the sradh was performed out of the money borrowed. This being the case, it is in my opinion of no importance that the loan was actually taken by the daughters who must have been acting on behalf of their mother. The debt was there and for all practical purposes it was a debt incurred by the widow for the sradh of her husband. It was, therefore, incumbent upon the daughters when they succeeded to the estate to pay off that debt. It is not denied, as it cannot be denied, that had the widow herself borrowed the money for the sradh of her husband, the daughters could have legitimately alienated the property for the payment of that debt and the fact that they incurred the debt for the sradh performed by the widow makes no difference whatsoever.

The next ground of the learned District Judge for dismissing the suit, namely, that the daughters could not alienate property for payment of debts incurred for legal necessities which had become barred, requires serious consideration. It is settled law that a widow can alienate her husband's property to pay up his barred debts. The recent decision in this connection is of the Calcutta High Court in *Ashutosh Sikdar* v. *Chidam Mandal*(1). Now the question is whether a limited female owner can legitimately alienate any portion of the estate to pay a debt legally incurred by her when the debt has become barred. The learned District Judge has relied upon a decision of the Allahabad High Court in *Makkhanlal* v. *Musummat Sardar Kunwar*(2). It was held in this

(1) (1929) I. L. R. 57 Cal. 904.
(2) (1932) A. I. R. (All.) 555.

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case that a widow is not entitled to alienate property of her husband for the payment of her own barred debt though the debt itself was of such a nature that alienation of property would have been justified at the time the debt was incurred. With my profoundest respect to the learned Judges who decided this case I beg to differ from the view taken by them as in my opinion it introduces into the Hindu Law considerations which are foreign to it, namely, the principles of the statute law of limitation. In deciding what are the legal necessities under the Hindu Law we must include all those "necessities" which the Hindu Lawgivers have recognised as legal, justifying the alienation of properties by a limited owner. Payment of an antecedent debt legally incurred is a legal necessity. Does this necessity cease to be "legal" under the Hindu Law when the debt has become barred under the statute law? If the Hindu Law authorizes a limited female owner to incur debt for certain purposes and also authorises her to alienate properties for the payment of that debt, the authority cannot be said to have come to an end simply because the enforcement of payment of that debt has become barred. Hindu Law does not recognize limitation. Mayne in his invaluable treatise on Hindu Law while dealing with this topic after referring to some earlier cases in which it was held that a Hindu widow was not entitled to alienate property to pay up her husband's barred debt says :—

> "This seems sensible enough as a matter of mundane equity, though it may be doubted whether a plea of the statute would be accepted in the court of the Hindu Radhamanthus. In more recent cases it has been repeatedly held that a widow's obligation to pay her husband's debts, and her right to alienate property, descended from him for that purpose, is not affected by the statute of limitations, or any similar contrivance for getting rid of his obligations."

Then he refers to the decision of the Judicial Committee in *Lala Soni Ram* v. *Kanhaiya Lal*(1) where it was held that a widow by acknowledgment cannot keep alive the debt of her husband and save it from limitation against the husband and says :—

"It is respectfully submitted that the validity of the acknowledgment might have been adequately and properly tested by those principles by which her dealings with her husband's property are ordinarily judged. If the widow can contract a debt when a case of necessity arises, so as to bind the reversioners she must obviously have a discretion in determining the mode and time of payment. Cases can be easily imagined when it may be more prudent to defer payment and to hold that even in such a case the widow could not prolong the period of limitation by her acknowledgment seems to introduce a rule fraught with serious risk to the estate."

The decision of the Judicial Committee was based on the construction of section 19 of the Limitation Act. Since then on the recommendation of the Civil Justice Committee the law has been changed by the Limitation (Amending) Act of 1927. Now a widow can by acknowledgment save a debt from limitation and this acknowledgment is binding upon the reversioners—(*See* Explanation to section 21 of the Limitation Act). It was open to the daughters in this case to keep the debts alive by renewing them and they would have been binding upon the plaintiffs as they were incurred for legal necessity. I see no reason why they should not be allowed to pay up the debts which they could have kept alive. No other decision except the one of the Allahabad High Court referred to above has been placed before us. Their Lordships have relied upon the decision of the Privy Council in *Hunnomanpersaud Panday* v. *Musammat Babooee Munraj Koonwaree*(2) for the definition of "legal

(1) (1913) I. L. R. 35 All. 227; L. R. 40 I. A. 74.
(2) (1856) 6 Moo. I. A. 393.

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necessity". That was a case of alienation by the guardian of an infant and the question was whether it was for the benefit of the estate. Their Lordships of the Judicial Committee in dealing with the power of the manager of an infant heir observed :—

"The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded". Their Lordships were considering "benefit to the estate" and not "legal necessity". The two partly overlap but do not always coincide. As was pointed out in the Calcutta decision above referred to [*Ashutosh Sikdar* v. *Chidam Mandal*(1)], pressure upon the estate is not the only ground upon which a limited owner can alienate the property. For instance, pilgrimage to Gaya or sradh justifies alienation though it cannot be said that they benefit the estate in its material sense or that they are pressure upon the estate which is to be averted. Legal necessity does not mean enforceable necessity. Hindu Law is very strict about the payment of debts. It makes a man's three generations liable for his debt though the descendant may have received no property from his ancestors. Under it there is no such thing as a barred debt. Even under the statute law of India a barred debt is a good consideration. The debt does not become extinct, only the remedy is barred.

It is true that a karta of a joint family as such cannot revive a barred debt though he can save it from becoming barred. But there is a difference between the powers of a karta and a limited female owner. The former acts under an implied authority of the coparceners which authority does not extend to his paying a barred debt, but the latter, within certain limits, is an owner and there is no reason to debar her from paying up a debt which she has legally incurred.

In view of my findings it is not necessary to consider how far the learned District Judge was

(1) (1929) I. L. R. 57 Cal. 904.

justified in reversing the decree in favour of Halaku in an appeal by Darogi when the former had not appealed. The circumstances under which a court of appeal is justified in interfering with that portion of the decree against which there is no appeal have been laid down in this Court in *Maharaja Bahadur Kesho Prasad* v. *Narayan Dayal*(1) and in *Musummat Chanda Bibi* v. *Mohanram Sahu*(2). Those circumstances were not present in this case, in which though in form there was one decree, but in effect there were two distinct decrees against two different persons on two separate causes of action. There were two documents executed no doubt by the same parties but in favour of two different persons. Though the power of the appellate court is wide, the cases in which it should interfere with the decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed against that justice cannot be done unless the portion against which no appeal has been preferred is also interfered with. Here there were two independent transactions, though the questions of law and fact involved in both of them were to some extent same. As, however, the decision of the learned District Judge is wrong on the main ground, this question need not be pursued further.

I would, therefore, allow these two appeals, set aside the decree of the District Judge and restore that of the trial court. Parties will bear their own costs in this Court and in the court of appeal below. The order for costs by the trial court will stand.

MADAN, J.—I agree.

S. A. K.

Appeals allowed.

(1) (1924) I. L. R. 4 Pat. 37.
(2) (1933) I. L. R. 13 Pat. 200.

FULL BENCH.

1936.

October, 12.

Before Courtney Terrell, C.J., Fazl Ali and James, JJ.

SUNDER PRASAD SINGH

v.

DEODHARI SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rules* 58, 63 *and* 100—*claim under rule* 58 *by usufructuary mortgagee dismissed for default—claim not maintainable—failure to bring suit under rule* 63, *whether bars application under rule* 100.

It is not necessary for a usufructuary mortgagee in possession to object, under Order XXI, rule 58, Code of Civil Procedure, 1908, to an attachment of the mortgaged property (which means an attachment of the equity of redemption, being the right, title and interest of the judgment-debtor) at the instance of a person who holds a money decree against the mortgagor, and, therefore, when such an objection is made and dismissed for default, and the mortgagee does not thereupon bring a suit, rule 63 of Order XXI does not debar the objector from subsequently making an application under rule 100.

Biswanath Patra v. *Lingaraj Patra*(1), approved.

Abdul Kadir Sahib v. *U. T. M. Somasundaram Chettiar*(2), referred to.

Application in revision by the decree-holder.

The facts of the case material to this report are set out in the following judgment of Agarwala and Rowland, JJ. referring the case to a Full Bench:—

AGARWALA AND ROWLAND, JJ.—In 1932 the petitioner instituted a suit for the recovery of money. On the 3rd April, 1933, the defendant in that suit executed in favour of the opposite party no. 1 a zarpeshgi of a certain property. On the 19th June, a decree was passed in the money suit, and the property which had been given in

* Civil Revision no. 350 of 1935, against an order of Babu Anjani Kumar Sinha, Subordinate Judge of Motihari, dated the 5th July, 1935.

(1) (1921) I. L. R. 1 Pat. 159.
(2) (1922) I. L. R. 45 Mad. 827, F. B.

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mortgage by the defendant was thereafter attached by the decree-holder. The zarpeshgidar then applied under Order XXI, rule 58, for release of the mortgaged property from attachment. This application was dismissed for default on the 27th of April, 1934. Eventually, on the 1st October, 1934, the property attached was purchased by the decree-holder in execution of his decree and possession was delivered to him on the 3rd March, 1935. The zarpeshgidar then made an application under Order XXI, Rule 100, complaining of his dispossession. This application has been allowed. The present application in revision is preferred by the decree-holder against the order allowing the application of the zarpeshgidar. It was first placed for hearing before James, J. who directed it to be laid before a Division Bench.

In *Biswanath Patra* v. *Lingaraj Patra*(1) a Division Bench of this Court held that a person in possession of property under an usufructuary mortgage is not entitled to object under rule 58, Order XXI, of the Code of Civil Procedure, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and, therefore, when such an objection has been made and disallowed, rule 63 does not debar the objector from making an application under rule 100. This decision is in conflict with the view taken in other High Courts. In this High Court Kulwant Sahay, J. distinguished it in the case of *Radhey Kishan Lal* v. *Rameshwar Prasad*(2). Rule 63 provides that

"where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive".

The view taken by Das, J. in *Biswanath Patra* v. *Lingaraj Patra*(1) apparently was that if an application is made under rule 58 by a person who is under no obligation to make it, an order passed against him is not final. Rule 63, however, appears to us to be quite clear that if an objection is in fact made under rule 58 the necessary consequence is that the order is final as regards the person against whom it is passed unless it is set aside by a suit. This is the view that has been taken in other Courts. As we disagree with the view taken in *Biswanath Patra* v. *Lingaraj Patra*(1), we refer this case to a Full Bench for final decision under Chapter V, Rule 4, of the High Court Rules. The questions to be decided are: (*1*) When a mortgagee in possession has filed an objection under rule 58, Order XXI, of the Code of Civil Procedure, against the attachment of immovable property, and has allowed the objection to be dismissed for default, is a subsequent application under Order XXI, rule 100, complaining of dispossession, after the property has been sold and possession delivered to the auction purchaser, barred by Order XXI, rule 63; (*2*) Was *Biswanath Patra* v. *Lingaraj Patra*(1) rightly decided?

On this reference:

S. N. Ray (with him *Thakur A. D. Singh*), for the petitioner: Where a usufructuary mortgagee

(1) (1921) I. L. R. 1 Pat. 159.
(2) (1927) A. I. R. (Pat.) 51.

1936.

SUNDER PRASAD SINGH v. DEODHARI SINGH.

prefers a claim under Order XXI, rule 58, Code of Civil Procedure, and the same is dismissed for default, he is not entitled subsequently to maintain an application under rule 100, if he has failed to avail himself of the remedy provided by Order XXI, rule 63. It makes no difference whether the claimant is a usufructuary mortgagee or fills any other character. It is the dismissal of the application that attracts the operation of rule 63 and the bar imposed by that rule does not depend upon the status of the person applying.

[FAZL ALI, J.—In the present case only the right, title and interest of the mortgagor could be attached. Therefore, the mortgagee had no locus standi to apply.]

It may be; but once he applies and the application is rejected, rule 63 comes into operation. The attaching decree-holder could have shown in that proceeding that the mortgage was a nominal one and that the mortgagee was in possession, not on his own account, but one behalf of the judgment-debtor. [Reliance was placed on *Debi Das* v. *Maharaj Rup Chand*(1).]

The rule does not make any distinction in the case of a usufructuary mortgagee. In *Radhey Kishan Lal* v. *Rameshwar Prasad*(2) it was, however, held that an application under Order XXI, rule 58 is maintainable at the instance of a mortgagee in possession. The case of *Bishwanath Patra* v. *Lingaraj Patra*(3) is wrongly decided.

Where, generally, an application under rule 58 is dismissed for default, rule 63 operates as a bar—*Sankar Nath Pandit* v. *Madan Mohan Das*(4).

[CHIEF JUSTICE.—This point is not disputed for the purposes of this case.]

(1) (1927) I. L. R. 49 All. 903.
(2) (1927) A. I. R. (Pat.) 51.
(3) (1921) I. L. R. 1 Pat. 153.
(4) (1909) 11 Cal. L. J. 61.

[*B. C. De*, for the respondent, at this stage drew their Lordships' attention to *Mukhram Pandey* v. *Arjun Missir*(1).]

The case of *Mukhram Pandey* v. *Arjun Missir*(1) is distinguishable, as in that case the claimant was found to have no interest in the property at the date of attachment.

B. C. De (with him *D. L. Nandkeolyar* and *A. D. Sinha*), for the respondent, not called upon.

S. A. K.

COURTNEY TERRELL, C.J.—This case comes before the Full Bench on a reference by two learned Judges of this Court to whom as a Bench the case had been referred when the matter first came before a single Judge of this Court sitting in civil revision. The facts which have given rise to the discussion which has come before us for solution are simple.

In 1932 the petitioner brought a money suit against defendants 2 to 7. Before a decree was granted, that is to say, on the 3rd April, 1933, the defendants mortgaged certain property of theirs to the opposite party no. 1. On the 19th June, 1933, the petitioner got his money decree and proceeded to execute it by the sale of the property which had been mortgaged. The opposite party no. 1 under Order XXI, rule 58, of the Code of Civil Procedure instituted a claim case. That claim case was on the 27th April dismissed for default; but it is obvious that the claim case even if it had been heard on the merits must necessarily have been dismissed because in the circumstances Order XXI, rule 58, had no application whatever to the facts. Under a money decree the judgment-creditor could merely sell the right, title and interest of the judgment-debtor in the property to be sold, that is to say, all he could do would be to put up for sale the equity of redemption. The rights of the mortgagee, if any, could

(1) (1934) I. L. R. 13 Pat. 765.

1936.

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COURTNEY TERRELL, C. J.

merely be asserted by virtue of his mortgagee's rights and the threatened sale by the judgment-creditor could not affect his rights even if he were the mortgagee in possession, because if Order XXI, rule 54, be examined it will be seen that the effect of the attachment was merely to prohibit the judgment-debtor from transferring or charging the property in any way and the only thing which could be transferred or charged was the equity of redemption in the mortgage. Accordingly Order XXI, rule 58, being inapplicable to the circumstances of the case, Order XXI, rule 63, has also no application and could not be used by the mortgagee. Order XXI, rule 63, enables a person whose claim has been dismissed under Order XXI, rule 58, to sue in order that he may have his rights determined, that is to say, if the claimant and the judgment-creditor are in conflict as to the rights in a certain property and if a decision has been given on the merits in the claim case, should the party who loses the claim case desire to push his claim further, he must have resort to a suit for that purpose. In this case the mortgagee was merely claiming in respect of his mortgage rights which were not threatened and the judgment-creditor could merely claim in respect of the right to put up for sale the equity of redempiton, that is to say, they were not fighting about the same property at all and there could in the circumstances be no decision which could be made the subject of litigation under Order XXI, rule 63.

The next stage in the proceedings was that on the 1st October, 1934, the property, that is to say, the equity of redemption, being the right, title and interest of the judgment-debtor was put up for sale and purchased by the decree-holder himself and on the 3rd March, 1935, the decree-holder obtained delivery of possession. The mortgagee then had resort to Order XXI, rule 100, that is to say, he said, " I being dispossessed by the decree-holder, am entitled to have the merits of my claim heard under that

rule ". The objection was taken by the decree-holder purchaser that whereas the mortgagee had already taken proceedings under Order XXI, rule 58, and whereas the claim by the mortgagee had been dismissed for default, the mortgagee not having had recourse to Order XXI, rule 63, that is to say, not having brought a suit as contemplated by that rule, he could not now be heard to press his claim for possession under Order XXI, rule 100. To put it at its best, this is but an exceedingly technical plea and moreover it is wrong on the merits. Order XXI, rule 58, had no application, Order XXI, rule 63, had therefore no application whatever and in that case the only remedy properly left to the mortgagee was to press his claim under Order XXI, rule 100. This has always been the view of this Court and it was so decided in the case of *Biswanath Patra* v. *Lingaraj Patra*(1). The learned Judges who referred this case had some doubt as to whether the reasoning of the decision in that case was correct; but, in my view, it was correct and the Full Bench decision of the Madras High Court in *Abdul Kadir Sahib* v. *U. T. M. Somasundaram Chettiar*(2) indirectly supports this view.

It is sufficient to say that the abortive proceedings under Order XXI, rule 58, did not bar the subsequent proceedings by the mortgagee, under Order XXI, rule 63, and that the case I have referred to in *Biswanath Patra* v. *Lingraj Patra*(1) was correctly decided.

The judgment-creditor must, therefore, pay the costs throughout.

FAZL ALI, J.—I agree.

JAMES, J.—I agree.

S. A. K.

Rule discharged.

(1) (1921) I, L. R. 1 Pat. 159.
(2) (1922) I. L. R. 45 Mad. 827, F. B.

FULL BENCH.

1936.

October, 12, 13, 20.

Before Courtney Terrell, C.J., Fazl Ali and James, JJ.

BISHWANATH SAO

v.

THE OFFICIAL RECEIVER.*

29 Pat. 713.

Provincial Insolvency Act, 1920 (*Act V of* 1920), *sections* 2(*d*), 28(2) *and* 59—"*property*" *meaning of—Hindu father adjudicated insolvent—Court or Receiver, whether empowered to sell son's interest in family property for the proper debts of the father.*

When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the Receiver, but the Court or the Receiver has power to sell the joint family property, including the interest of the minor son or sons of the insolvent, for the payment of his antecedent debts not incurred for immoral or illegal purposes.

The power or the right which the father has under the Hindu Law to sell his son's interest for the payment of his proper debts is "property" within the meaning of sections 28(2) and 59 of the Provincial Insolvency Act, 1920.

Nilkantha Narayan Tewari v. *Debendra Nath Ray*(1), overruled.

Chairman, District Board, Monghyr v. *Sheodutt Singh*(2), and *Bhola Prasad* v. *Ramkumar Marwari*(3), approved.

T. S. Balavenkata Seetharam Chettiar v. *Official Receiver, Tanjore*(4), *Anand Prakash* v. *Narain Das Dori Lal*(5), *Haridas Himatlal* v. *Lallubhai Mulchand Mehta*(6) and *Khem Chand* v. *Narain Das*(7), followed.

Sat Narain v. *Behari Lal*(8) and *Sat Narain* v. *Sri Kishen Das*(9), explained.

* Appeal from Original Order no. 29 of 1936, from the orders of R. B. Beevor, Esq., I.C.S., District Judge of Bhagalpur, dated the 4th November, 1935, and 20th December, 1935.

(1) (1935) I. L. R. 15 Pat. 363.
(2) (1926) I. L. R. 5 Pat. 476.
(3) (1931) I. L. R. 11 Pat. 399.
(4) (1926) I. L. R. 49 Mad. 849, F. B.
(5) (1930) I. L. R. 53 All. 239, F. B.
(6) (1930) I. L. R. 55 Bom. 110.
(7) (1925) I. L. R. 6 Lah. 493.
(8) (1924) I. L. R. 6 Lah. 1, P. C.
(9) (1936) I. L. R. 17 Lah. 644, P. C.

Appeal by the minor sons of the insolvent.

The facts of the case material to this report are set out in the following judgment of Agarwala and Rowland, JJ. who referred the case to a Full Bench:

The appellants before us are minor members of a joint Hindu family. Insolvency proceedings were initiated against the members of the family on a petition by creditors and was numbered as Insolvency Case no. 11 of 1933. Subsequently two other creditors applied for the same debtors to be adjudicated insolvent and on this application Insolvency Case no. 20 of 1933 was started The two cases were amalgamated by an order of the District Judge of Bhagalpur. Subsequently the present appellants were expunged from the record of the insolvency proceedings on the ground that as minors they could not be adjudicated insolvent. At a later stage an order of adjudication was passed on the admission of the adult members of the family that they were not able to meet their debts. Receivers were appointed on the 20th February, 1935, and took possession of the movable and immovable properties of the family. On the application of the Receivers a guardian ad litem was appointed for the minor members of the family who are the present appellants, and notice was issued on the guardian to show cause why the properties of the family should not be sold. The guardian sought an opportunity to produce evidence to show that some of the debts had been incurred for a new speculative business and to obtain production of the account books of the karta of the family. These prayers were rejected by the Court on the ground that the question sought to be raised was irrelevant to the question before the Court. The Court directed the Receiver to proceed with the sale of the properties, and against that order the present appeal has been preferred.

The principal question that arises is whether the Receiver appointed in the insolvency proceeding has power to sell the interest of the minors in the joint family property. It is contended that their interest in the property has not vested in the Receiver and also that the right which their father had to sell their interest in satisfaction of his own debts not incurred for illegal or immoral purposes has not vested in the receiver.

This is a question which has been before this Court on various occasions and is a question of considerable importance to those administering the insolvency law in this province. Under paragraph 1 of Chapter V of the High Court Rules, and with the consent of the learned Chief Justice, we refer to a Full Bench the following question of law:—

(*f*) When the father of a Hindu joint family has been adjudicated insolvent under the Provincial Insolvency Act, has the Insolvency Court or the Receiver power to sell the property of the joint family including the interest of the minor sons of the insolvent?

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(2) Having regard to the decision of the Judicial Committee of the Privy Council in *Sat Narain* v. *Behari Lal*(1) is the law correctly stated in the decisions of this Court in *Chairman, District Board, Monghyr* v. *Sheodutt Singh*(2) and *Bhola Prasad* v. *Ramkumar Marwari*(3)?

(3) Was the case of *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(4) correctly decided?

Pending the hearing of the appeal the Receiver will remain in possession of the property, but will not have power to sell it or any part of it.

On this reference

A. B. Mukherjee (with him *M. Rahman*), for the appellants: On the insolvency of the father the son's interest in the joint family property does not vest in the Receiver and the Court or the Receiver has no power to sell the son's interest to pay off the insolvent's debts—*Sat Narain* v. *Behari Lal*(1), *Sant Prasad* v. *Sheodutt Singh*(5), *Allahabad Bank, Limited, Bareilly* v. *Bhagwan Das Johari*(6). The Privy Council case of *Sat Narain* v. *Sri Kishen Das*(7), was decided by reference to the provisions of the Presidency Towns Insolvency Act, and the case with which we are dealing relates to the Provincial Insolvency Act, provisions whereof are not quite similar.

(Sections 2 and 28 of the Provincial Insolvency Act referred to.)

Section 52 of the Presidency Insolvency Act does not correspond with section 28 of our Act. Section 52 (2) has no corresponding provision in the Provincial Insolvency Act. The definition of the word "property" is identical in both the Acts. Their Lordships of the Judicial Committee make a distinction between "property" and "the power of the

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1926) I. L. R. 5 Pat. 476.
(3) (1931) I. L. R. 11 Pat. 399.
(4) (1935) I. L. R. 15 Pat. 363.
(5) (1923) I. L. R. 2 Pat. 724.
(6) (1925) I. L. R. 48 All. 343.
(7) (1936) I. L. R. 17 Lah. 644, P. C.

father to sell ". It may well be that the power to sell may vest in the Receiver under section 52(2) of the Presidency Towns Insolvency Act, but our Act does not contemplate the vesting of a property of this kind. In *Sat Narain* v. *Behari Lal*(1), their Lordships do say that under section 52(2) the Receiver may have the power to sell the son's interest, which power the father possessed, but they do not say that this power exists independently of section 52(2) or by virtue of the mere declaration of the father's insolvency. [Reliance was placed on *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(2).] The view of Agarwala, J. is that the power to sell the son's interest is not " property " within the meaning of the Provincial Insolvency Act, and I submit that this view is supported by the decision in *Sat Narain* v. *Behari Lal*(1). Power is a thing quite distinct from dominion over property. This was conceded before Agarwala, J. All the cases against me concede that " property " is one over which the debtor has unconditional power of disposal. But they proceed on to say that when we come to section 28(2), we should read and construe " property " apart from its definition in the Act.

[FAZL ALI, J.—The definition of the word " property " in the Act is not exhaustive.]

In *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(2) the decisions of the other High Courts have been fully considered, and I submit that it is correctly decided. The authority of this decision is in no way impaired by the pronouncement of their Lordships in *Sat Narain* v. *Sri Kishen Das*(3).

Sushil Madhab Mullick (with him *D. L. Nandkeolyar*), for the respondents: On the insolvency of the father, the court or the Receiver has got the power

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1935) I. L. R. 15 Pat. 363.
(3) (1936) I. L. R. 17 Lah. 644, P. C.

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to sell the joint family property to pay off the insolvent's debt not tainted with illegality or immorality. The authority of the various decisions of the High Courts remain unimpaired by the pronouncement of the Judicial Committee in *Sat Narayan* v. *Behari Lal*(1). This case has been explained in several cases of different High Courts and we ought to follow this long course of decisions. [Reference was made to *T. S. Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore*(2), *Anand Prakash* v. *Narain Das Dori Lal*(3), *Haridas Himatlal* v. *Lallubhai Mulchand Mehta*(4) and *Khem Chand* v. *Narain Das*(5).]

The question whether the Official Assignee had the power to sell the entire family property including the interest of the son for the payment of the just debts of the father did not arise before their Lordships of the Judicial Committee.

The definition of the word "property" in the Provincial Insolvency Act is not exhaustive. That being so, the power of the father to sell his son's interest for the payment of his just debt is "property" within the meaning of section 28(*2*), read with section 59. The language of section 2(*d*) is wide enough to cover this definition. The passage in the decision of *Sat Narain* v. *Behari Lal*(1), referring to section 2(*e*) of the Presidency Towns Insolvency Act, has been generally misunderstood. Their Lordships intended to point out that the apparent meaning conveyed by the words used in section 2(*e*) could not be their real meaning.

The matter has been further set at rest by the recent decision of the Privy Council in *Sat Narain* v. *Sri Kishen Das*(6), which is based not only on section

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1926) I. L. R. 49 Mad. 849, F. B.
(3) (1930) I. L. R. 53 All. 239, F. B.
(4) (1930) I. L. R. 55 Bom. 110.
(5) (1925) I. L. R. 6 Lah. 493.
(6) (1936) I. L. R. 17 Lah. 644, P. C.

52(2)(b) of the Presidency Towns Insolvency Act, but also on section 17 of the Act which corresponds to section 28 of the Provincial Insolvency Act.

I venture to submit, therefore, that the case of *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(1), based as it is on a wrong interpretation of *Sat Narain* v. *Behari Lal*(2), is not correctly decided and that the view expressed in *Chairman, District Board, Monghyr* v. *Sheodutt Singh*(3) and *Bhola Prasad* v. *Ramkumar Marwari*(4) is correct.

A. B. Mukherjee, in reply.

Cur. adv. vult.

S. A. K.

FAZL ALI, J.—The principal question to be decided in this reference is whether upon the father of a Hindu joint family being adjudicated insolvent under the Provincial Insolvency Act, the Insolvency Court or the Receiver has power to sell the property of the joint Hindu family including the interest of the minor son of the insolvent.

If we act on the maxim " stare decisis " there can be no difficulty whatsoever in deciding this question, because in a long course of decisions under the present Insolvency Act as well as the enactments which preceded this Act it has been held that the Insolvency Court or the Receiver appointed by it has the same power over the joint family property as the insolvent had and can, therefore, sell not only the interest of the father who has been declared insolvent but also the interest of his son or sons in order to pay off such of his antecedent debts as are not shown to have been contracted for any illegal or immoral purposes. It is, however, contended before us that these decisions are not correct, and at any rate the matter requires further examination in view of the decision of the Privy Council in *Sat Narayan* v. *Behari Lal*(2). In that case a Hindu son instituted a suit to establish his right of pre-emption in respect

(1) (1935) I. L. R. 15 Pat. 363.
(2) (1924) I. L. R. 6 Lah. 1, P. C.
(3) (1926) I. L. R. 5 Pat. 476.
(4) (1931) I. L. R. 11 Pat. 399.

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of certain property which adjoined the ancestral property of the family to which he belonged; but the suit was resisted on the ground that his father having been declared an insolvent the whole property including his interest had vested in the Receiver and that consequently he was not entitled to pre-empt. This objection found favour with the High Court but their Lordships of the Judicial Committee, overruling the decision of the High Court, held that it was not the intention of the statute under which the case had been decided (that statute being the Presidency Towns Insolvency Act) that on the insolvency of a father the joint property of his family should at once vest in the Official Assignee. It may be stated here that the question whether the Official Assignee could sell the entire family property including the interest of the son for the payment of the just debts of the father did not arise directly before the Judicial Committee. Their Lordships, however, referred to section 2(*e*) of the Act which defines the word " property " and to section 52(*2*)(*b*) which provides that

> " the property of the insolvent divisible among his creditors shall comprise the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit."

Section 2(*e*) states that " property " includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit and after referring to this provision their Lordships observed as follows:—

> " The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property and section 2 seems to contemplate an absolute and unconditional power of disposal."

As to section 52 their Lordships said—

> " It may be that under the provisions of section 52 or in some other way that property (the joint property of the family) may in proper case be made available for the payment of the father's just debts."

The argument which is founded upon these observations is twofold—(*1*) that as the definition of the word "property" in the Presidency Towns Insolvency Act which was construed by the Privy Council is identical with the definition in the Provincial Insolvency Act, it can no longer be held that the power which the father has to sell the whole of the ancestral property including his son's interest in satisfaction of his just debts (debts which were not contracted for illegal or immoral purposes) is property of the insolvent within the meaning of the statute; and (*2*) that though, having regard to the language of section 52 of the Presidency Towns Insolvency Act, it might be possible to hold that under that Act the joint family property including the interest of the son is available for the payment of the father's legitimate debts, there being no similar provisions in the Provincial Insolvency Act, such property cannot be sold by the Court or the Receiver in cases arising under the latter Act. The argument is a plausible one and as it seems to have found favour with a Division Bench of this Court in *Nailkantha Narayan Tewari* v. *Debendra Nath Ray*(1) and several distinguished Judges of other High Courts, it becomes necessary to examine the matter with care.

The provisions of the Insolvency Act which are relevant to the present discussion are contained in section 28(*2*) and section 59. Section 28(*2*) runs as follows:—

"On the making of an order of adjudication, the whole of the property of the* insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors ....."

Again section 59 lays down—

"Subject to the provisions of this Act, the Receiver shall, with all convenient speed, realise the property of the debtor* and distribute dividends among the creditors entitled thereto, and for that purpose may sell all or any part of the property of the insolvent."

(1) (1935) I. L. R. 15 Pat. 363.
* The words have been underlined by the Court.

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It is quite clear from these provisions that the whole of the insolvent's property is available to the Receiver for the payment of his legitimate debts and, therefore, the crucial question to be considered is whether the power or the right which the father has under the Hindu Law to sell his son's interest for the payment of his proper debts is " property of the insolvent " within the meaning of the statute. Now, as I have already indicated, in section 2(*d*) of the Act it is stated that

> " ' property ' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit ".

The view which seems to have prevailed in all the High Courts in this country before the decision of the Judicial Committee in *Sat Narain's* case(1) was that this clause was wide enough to cover the power of the father to sell his son's interest for the payment of his legitimate debts. But in almost all the cases which have been decided recently it has been held that this view must be abandoned in the light of the observations of the Privy Council that the words quoted above seem to contemplate an absolute and unconditional power of disposal and not a power which could be exercised only upon proof that the property had to be sold for the payment of antecedent debts and that the debts had not been contracted for any illegal or immoral purposes. The actual words used by the Privy Council in this connection are these :—

> " The father's power to dispose of the joint property is not absolute but conditional on his having debts which are liable to be satisfied out of that property; and section 2 seems to contemplate an absolute and unconditional power of disposal. And if the later sections of the Act are examined, it becomes apparent that this cannot have been the intention of the statute " (the words " and " and " this " have been underlined by me).

(1) (1924) I. L. R. 6 Lah. 1, P. C.

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One of the arguments which was addressed to us was that this passage has been generally misunderstood and that what their Lordships intended to point out was that the apparent meaning conveyed by the words used in section (2)(e) could not be their real meaning, because such a meaning was not in consonance with the intention of the statute. This argument becomes plausible if we read the word '*and*' as '*but*' and if we remember that the underlined word 'this' could have reference only to what was said in the previous sentence as to the apparent meaning of section 2.

Assuming, however, that this interpretation of their Lordships' judgment is not correct, it seems to me to be quite clear that the definition of the word "property" in section 2(*d*) of the Provincial Insolvency Act is not exhaustive but was inserted only to emphasize the fact that certain kinds of property which in ordinary parlance may not be regarded as the property of the insolvent are to be treated as "property" for the purpose of the Insolvency Act. It is to be noticed that in defining the various words which were intended to be defined in section 2 sometimes the word "means" has been used and sometimes the word "includes" has been used. It seems to me to be clear that when in an interpretation clause it is stated that a certain term *includes* so and so, it is implied that the term retains its ordinary meaning whatever else it may mean. If, therefore, it is held that the definition of the word "property" in section 2 is not exhaustive, it becomes necessary to consider whether the peculiar right of disposal which the father has over his son's interest in the joint family property is or is not property within the ordinary meaning of the term. The word "property", as far as I am aware, has not been exhaustively defined in any Indian Statute, but to use the language of the Master of the Rolls "it is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of

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every possible interest which the party can have" [*see Jones* v. *Skinner*(1)]. I do not wish to encumber this discussion by referring to the wide range of rights and objects to which the word "property" has been held to be applicable, but I think that it can be legitimately held that the word "property" as used in the Provincial Insolvency Act includes, to use the language of the learned author of a well known text book "all valuable right or rights which may be turned into money or whose worth can be assessed in money (William's Principles of the Law of Real Property, 24th edition, 1926, page 4). This simple definition of the word "property" is, in my opinion, comprehensive enough to include the right which the father has of bringing to sale his son's interest to pay his own legitimate debts.

The position of the father in a Hindu joint family is a peculiar one and if we give a restricted meaning to the word "property" and construe it to mean only those objects and rights over which the father has an *absolute* power of disposal, the question as to what is the whole property of the father which vests in the Receiver under section 28 when he has been declared insolvent would be surrounded with many difficulties and it may even be questioned whether strictly speaking any property would vest in the Receiver. The question has been dealt with so exhaustively by Mukerji and King, JJ. in *Anand Prakash* v. *Narain Das Dori Lal*(2) that I shall content myself by reproducing the following passage from the judgment of King, J.—

"It must be remembered that the father's power of disposal of his own undivided share is no greater than his power of disposing of the entire coparcenary property. His undivided share only belongs to him in the sense that it would fall to his share in the event of a partition. I doubt whether his undivided share

(1) (1836) L. J. 5 Ch. 87.
(2) (1930) I. L. R. 53 All. 239, F. B.

can properly be said to be "vested" in him. The share is indefinite and fluctuating in extent. The ownership of the coparcenary property is vested in the whole body of coparceners. No individual member can claim that he has a definite share. The father's power of disposal of his undivided share is conspicuous by its absence. He cannot dispose of it by gift or by will. On his death intestate it does not pass to his heirs. He cannot even alienate it for value without the consent of his coparceners. In short his power of dealing with his undivided share is no greater than his power of dealing with the coparcenary property as a whole. Considering that the father can be said to "own" his undivided share in a very limited sense, and that he has no special power of disposing of that share, I think it will be very anomalous if only his undivided share vests in the receiver while his very valuable right and power of disposing of the joint family property for discharging his personal debts does not so vest."

I may state here that the decision of the Privy Council in *Sat Narain* v. *Behari Lal*(1) has been explained in a series of cases and almost all the High Courts are now agreed that the view which prevailed before that decision should be adhered to [*see T. S. Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore*(2); *Anand Prakash* v. *Narain Das Dori Lal*(3); *Haridas Himatlal* v. *Lallubhai Mulchand Mehta*(4); *Khem Chand* v. *Narain Das*(5)]. The matter has also been set at rest by the Judicial Committee in their recent decision in *Sat Narain* v. *Sri Kishen Das*(6) so far as cases arising under the Presidency Towns Insolvency Act are concerned. In that case it has been held that though upon the adjudication of a

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1926) I. L. R. 49 Mad. 849, F. B.
(3) (1930) I. L. R. 53 All. 239, F. B.
(4) (1930) I. L. R. 55 Bom. 110.
(5) (1925) I. L. R. 6 Lah. 493.
(6) (1936) I. L. R. 17 Lah. 644, P. C.

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Hindu father as insolvent the son's interest in the family property does not vest in the Official Assignee, yet the capacity to exercise the power of the insolvent father to sell the joint family property for his antecedent debts not incurred for immoral or illegal purposes vests in him under section 52(*2*)(*b*) of the Presidency Towns Insolvency Act. As I have already stated, there is no provision in the Provincial Insolvency Act corresponding to section 52(*2*)(*b*) of the Presidency Towns Insolvency Act, but their Lordships have at least in one passage referred to section 17 of that Act which does correspond to section 28 of the Provincial Insolvency Act. However that may be, I think that the Legislature could never have intended that while in the Presidency towns the Official Assignee should be able to sell the undivided share of the son to pay the father's debt, the Court or the Receiver should not have such a power in the mofassil towns. It is to be remembered that the Presidency Towns Insolvency Act was enacted in 1909, whereas the Provincial Insolvency Act was enacted eleven years later in 1920. In section 52 of the Presidency Towns Insolvency Act all that is enacted is that the *property of the insolvent shall comprise* the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge. This provision merely emphasizes that the capacity to exercise the powers referred to therein is a species of property. The mere absence, therefore, of words corresponding to those used in section 52 which merely refer to a species of property cannot restrict the meaning of the word "property". This word, as I have already stated, has ordinarily a very wide meaning and might, even without there being any express provision specifying what it does and what it does not comprise, embrace all those rights and interests which are said to be comprised within the term "property" according to section 52 of the Presidency Towns

Insolvency Act. As the law applicable to the Presidency towns was modelled on the English law, most of the provisions in the Presidency Towns Insolvency Act have been copied from the English Bankruptcy Act and section 52 of the former Act is almost a verbatim reproduction of section 38 of the latter Act. Some of these provisions, however, may not have been reproduced in the Provincial Insolvency Act because they were considered redundant or unnecessary.

I think that under the old decisions it was possible to take the view that under section 28 the whole property which the father could sell voluntarily to pay off his debts is by operation of law transferred to the Court or the Receiver. This view can no longer be taken because it has been definitely held by the Privy Council that upon the adjudication of a Hindu father the son's interests in the family property does not vest in the Official Assignee or the Receiver. This decision, however, does not affect the view that a Receiver, by his peculiar position under the Act, may be taken to represent the insolvent as well his creditors. If he represents the insolvent, it would be illogical to hold that he cannot exercise the power which the insolvent could exercise to pay off his debts; and similarly it would be contrary to principle to hold that though the holder of a simple decree against the father can attach and sell the joint family property including the interests of his sons, the Receiver is unable to do so. In my opinion the answer to the first question which has been submitted to us for decision should be given in the following terms:—

When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the Receiver, but the Court or the Receiver has power to sell the joint family property including the interest of the minor son or sons of the insolvent for the payment of his antecedent debts not incurred for immoral or illegal purposes.

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The second and the third questions which have been referred to this Bench have been formulated in these terms:—

"(2) Having regard to the decision of the Judicial Committee of the Privy Council in *Sat Narain* v. *Behari Lal*(1) is the law correctly stated in the decisions of this Court in *Chairman, District Board, Monghyr*, v. *Sheodutt Singh*(2) and *Bhola Prasad* v. *Ramkumar Marwari*(3)?

(3) Was the case of *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(4) correctly decided?"

In view of the aforesaid discussion, I think that our answer to these questions should be that the first two cases, namely, *Chairman, District Board, Monghyr* v. *Sheodutt Singh*(2) and *Bhola Prasad* v. *Ramkumar Marwari*(3) were correctly decided so far as the decision in these cases bear on the first question and that the third case, namely, *Nilkantha Narayan Tewari* v. *Debendra Nath Ray*(4) was not correctly decided.

COURTNEY TERRELL, C.J.—I agree.

JAMES, J.—I agree.

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SPECIAL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor, James, Dhavle and Varma, JJ.

GHANSHYAM DAS MARWARI

v.

RAGHO SAHU.*

Negotiable Instruments Act, 1881 (*Act XXVI of* 1881), *section* 48—*promissory note, assignment of, by registered instrument, whether valid—negotiable instrument, transfer of, whether can be effected otherwise than by endorsement*

* Civil Revision no. 155 of 1936, from an order of Babu N. C. Ghosh, Small Cause Court Judge, Monghyr, dated the 13th January, 1936.

(1) (1924) I. L. R. 6 Lah. 1, P. C.
(2) (1926) I. L. R. 5 Pat. 476.
(3) (1931) I. L. R. 11 Pat. 399.
(4) (1935) I. L. R. 15 Pat. 363.

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and delivery—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 137, *effect of*.

A negotiable instrument can be transferred otherwise than by endorsement and delivery.

Section 137 of the Transfer of Property Act, 1882, does not prohibit the transfer of a negotiable instrument by means of a separate written instrument.

Held, therefore, that an assignment of a promissory note by a registered instrument is valid and the assignee has the right to sue upon it in his own name.

Muthar Sahib Maraikar v. *Kadir Sahib Maraikar*(1), *Muthakrishnier* v. *Veeraraghaya Iyer*(2), *Benode Kishore Goswami* v. *Ashutosh Mukhopadhya*(3), *Palawan* v. *B. Kanu*(4), *Panna Lal Lachman Das* v. *Hargopal Khubi Ram*(5), followed.

Peary Pasi v. *Gauri Lal*(6), overruled *quoad hoc*.

Per COURTNEY TERRELL, C. J.—The transfer of a negotiable instrument is not, by section 48 of the Negotiable Instruments Act, restricted to the operation of endorsement.

Appeal by the plaintiff.

The facts of the case material to this report will appear from the following judgment of Rowland, J. referring the case to a Division Bench :—

ROWLAND, J.—This is an application by the plaintiff, the assignee of a promissory note by virtue of a registered instrument executed by the holder. He sued to recover from the executant the debt evidenced by the document making his assignor a party as defendant second party. He prayed in the alternative for a decree against the defendant, second party, for the amount of the debt on the ground of failure of consideration. The Subordinate Judge dismissed the suit considering himself to be bound by the decision in *Peary Pasi* v. *Gauri Lal*(6).

In revision it is pointed out that that decision was not given in a suit by an assignee from the holder of the document; and the cases referred to and relied on in that decision are also not cases of suits

(1) (1905) I. L. R. 28 Mad. 544.
(2) (1913) I. L. R. 38 Mad. 297, S. B.
(3) (1912) 16 Cal. W. N. 666.
(4) (1921) 66 Ind. Cas. 501.
(5) (1918) 51 Ind. Cas. 250.
(6) (1934) I. L. R. 13 Pat. 655.

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brought by an assignee from the holder. In *Pearay Pasi* v. *Gauri Lal*(1) the executant had obtained a release from the holder; the plaintiff had not obtained an assignment from the holder but from a lady who was alleged to be the beneficiary for whom the holder was a benamidar. The plaintiff set up an acknowledgment by the holder that he was a benamidar and the lady was the real beneficiary. In these circumstances the decisions which were cited, as I have said, are decisions directed to the question whether the plaintiff can maintain a suit on the allegation that the holder of a negotiable instrument is his benamidar. This question has been answered in the negative by a Full Bench of the Madras High Court in *Subba Narayana Vathiyar* v. *Ramaswami*(2), a decision which has been followed in numerous cases including *Harkishore Barna* v. *Gura Mia Chaudhuri*(3). In several cases of the Patna High Court the question has been considered whether the beneficial owner can sue either the drawer alone or the drawer as defendant, first party, making the ostensible holder a party as defendant, second party—*Ram Das Sahu* v. *Chhota Lal Mander*(4) and *Sarjug Singh* v. *Deosaran Singh*(5), which were decisions of single Judges; *Surajman Prasad Misra* v. *Sadanand Misra*(6) and *Ramnagina Prasad* v. *Bishwanath Prasad*(7). In all these cases the question was as between the holder and an undisclosed principal, that is to say, the question of beneficiary and benamidar. The position where the holder is the assignor and the plaintiff is the assignee of a negotiable instrument has never been before this Court for decision so far as I have been able to ascertain. Elsewhere it seems to be the general view that a debt evidenced by a negotiable instrument is a chose in action and transferable otherwise than by endorsements. It is not necessary perhaps to labour the position that a chose in action is ordinarily transferable. A negotiable instrument has been held to be transferable by the Madras High Court in *Muhammad Khumarali* v. *Ranga Rao*(8) following an earlier unreported case of the same Court. It was held that the assignee, though he may be unable to maintain an action as endorsee, could recover the amount due under the note as an assignee of the chose in action. This was followed in *Muthar Sahib Maraikar* v. *Kadir Suhib Maraikar*(9) where the Chief Justice held that endorsement was not the only mode by which negotiable instruments may be transferred. They may be otherwise assigned, and the assignee may sue in his own name. He will, however, have only the right, title and interest of the assignor while the endorsee of a negotiable instrument will have all the rights of a holder in due course. The decision in *Muhammad Khumarali* v. *Ranga Rao*(8) was again followed in the same Court in *Chandana Vencatadri* v. *Majati Lakshminarasimha*(10). This was a case of partition among members of a Hindu

(1) (1934) I. L. R. 13 Pat. 655.
(2) (1906) I. L. R. 30 Mad. 88.
(3) (1930) I. L. R. 58 Cal. 752.
(4) (1927) 9 Pat. L. T. 238.
(5) (1930) 11 Pat. L. T. 255.
(6) (1932) I. L. R. 11 Pat. 616.
(7) (1933) 15 Pat. L. T. 102.
(8) (1901) I. L. R. 24 Mad. 654.
(9) (1905) I. L. R. 28 Mad. 544.
(10) (1910) 8 Ind. Cas. 39.

coparcenary. The partition resulted in a handnote which stood in the name of one member being allotted on partition to another member. It was held that he could sue on it as assignee although there was no endorsement on it. That a promissory note can be transferred without endorsement was not doubted in *Raman Chetty* v. *Nagarathna Naicker*(1) where it was observed that as the transfer had not been made by a registered instrument, section 137 of the Transfer of Property Act did not operate to render oral assignments valid.

In another case of the Madras High Court [*Muthukrishnier* v. *Veeraraghava Iyer*(2)] White, C.J. and two other Judges held that a mortgage in writing of a promissory note creates an assignment of the promissory note even without an endorsement whereby the right to sue on the note becomes vested in the mortgagee.

The Madras view is followed in the Punjab, *Lacha Ram* v. *Hem Raja*(3) and *Panna Lal Lachman Das* v. *Hargopal Khubi Ram*(4) and in Burma, *Palawan* v. *Kanu*(5). In these areas the Transfer of Property Act not being in force a registered instrument was not considered necessary.

In *Benode Kishore Goswami* v. *Ashutosh Mukharji*(6) a transfer of a Government promissory note by a registered deed of gift was held to be a valid transfer of the document.

The case of *Peeray Pasi* v. *Gauri Lal*(7) is, as I have said, not on all fours with the facts of the present case; but having regard to the observations there made as to the position of the holder and assignee of a negotiable instrument, I think an important question of law arises for the determination of which this case should be placed before a Bench.

The case was placed before Khaja Mohamad Noor and Varma, JJ. who referred it to a Special Bench by the following judgment :—

This case has been referred to a Division Bench by Rowland, J. The question for determination is whether a handnote can be transferred by means of a registered instrument and if not, whether the transferee can sue independently of the handnote as an assignee of the debt. Rowland, J. seems to be of the opinion that the transfer is valid and that a suit can be maintained on its basis; but in view of the observations in the case of *Peary Pasi* v. *Gauri Lal*(7) he considered it expedient to refer the case to a Division Bench. The present case is distinguishable from the case just mentioned. In that case the handnote stood in the name of defendant no. 2 of the suit, who

(1) (1912) 15 Ind. Cas. 380.
(2) (1913) I. L. R. 38 Mad. 297, S. B.
(3) (1932) A. I. R. (Lah.) 30.
(4) (1918) 51 Ind. Cas. 250.
(5) (1921) 66 Ind. Cas. 501.
(6) (1912) 16 Cal. W. N. 666.
(7) (1934) I. L. R. 13 Pat. 655.

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was said to be the benamidar of a lady who had transferred it to the plaintiff. There were, therefore, two objections against the maintainability of the suit: first, that the transfer was not by an endorsement on the handnote itself; and, secondly, that the transferor was not the holder of the handnote but was alleged to be its beneficiary. The Division Bench held that the transferee from the alleged beneficiary was unable to maintain a suit. It also observed that the transfer of a handnote without endorsement does not give any right to the transferee. Though this observation may not have been necessary for the determination of the case, as the transfer was not by the holder but by a third person, nevertheless it is expressed in a decisive manner. There are, however, decisions of other High Courts which may lead to the conclusion that the endorsement is not the only mode of transferring a handnote though the position of the transferee without endorsement will be different from the transferee who holds a handnote under endorsement.

In our opinion the question is of general importance and requires further consideration. The records will be placed before the Hon'ble the Chief Justice so that the case may be heard by a specially constituted Bench.

On this reference:

S. S. Bose, for the petitioner: A promissory note can be transferred by a sale-deed. Section 48 of the Negotiable Instruments Act does not lay down that a negotiable instrument cannot be assigned otherwise than by endorsement and delivery. The section deals with the negotiation of an instrument; but the word "transfer or assignment" is wider than "negotiation".

[CHIEF JUSTICE.—"Negotiation" means any transfer other than by operation of law.]

The Act nowhere defines "holder" as including an assignee by endorsement alone.

Section 48 is an enabling provision affording an exception to the law laid down in the Transfer of Property Act. The section does not exclude the possibility of any other form of assignment.

(Sections 130 and 137 of the Transfer of Property Act referred to.)

Section 137 only says that nothing in Chapter VIII would apply to negotiable instruments. The result of this provision is that section 130, which requires a transfer to be made by a registered document, will not apply to the assignment of a negotiable

instrument. In other words, registration becomes unnecessary. The case of *Pearay Pasi* v. *Gauri Lal*(1) deals with the right of beneficial owner to maintain a suit. The observation as to the mode of assignment is obiter dictum, as the question did not really arise. In any case, I venture to submit that the decision is wrong.

Reliance was placed on *Muthur Sahib Moraikar* v. *Kadir Sahib Moraikar*(2) *Muthu Krishnier* v. *Veeraraghava Iyer*(3), *Benode Kishore Goswami* v. *Ashutosh Mukhopadhya*(4), *Palawan* v. *Babu Kanu*(5), *Panna Lal Lachhman Das* v. *Hargopal Khubi Ram*(6).

D. C. Verma, for the opposite party: The Negotiable Instruments Act is a self-contained Act and the Court should not go beyond the four corners of this Act. If a promissory note is transferred otherwise than by endorsement and delivery, it loses its character as a promissory note. The plaintiff in the present case is neither a " holder " nor a " holder in due course ". When the Act provides a particular mode by which a promissory note may be negotiated, it inferentially excludes all other modes.

[NOOR, J.—But section 48 does not say that a negotiable instrument *must* be negotiated by endorsement only and not by any other mode.]

The general law should not be applied where the special law does make a provision.

The decision in *Pearay Pasi* v. *Gauri Lal*(1) on this point is correct and should be followed.

S. S. Bose, not called upon in reply.

S. A. K.

Cur. adv. volt.

JAMES, J.—Ramadhin Sahu borrowed a sum of money from Sitaram Marwari for which he gave a

(1) (1934) I. L. R. 13 Pat. 655.
(2) (1905) I. L. R. 28 Mad. 544.
(3) (1913) I. L. R. 38 Mad. 297, S. B.
(4) (1912) 16 Cal. W. N. 666.
(5) (1921) 66 Ind. Cas. 501.
(6) (1918) 51 Ind. Cas. 250.

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handnote. Sitaram Marwari sold the handnote to Ghanshyam Das Marwari by a registered sale deed. Ghanshyam Das Marwari then sued the debtor for recovery of the value of the handnote, basing his suit on the handnote and also on the debt which had been transferred to him with the handnote by means of the registered instrument. A plea of partial payment was put forward at the trial by the defendant which the Small Cause Court Judge disbelieved; and he would have decreed the suit except for the fact that he regarded the decision of this Court in *Pearay Pasi* v. *Gauri Lal*(1) as prohibiting the transfer of a handnote or of the debt based on it by any other means than by endorsement and delivery as described in the Negotiable Instruments Act. The case originally came before a Single Judge who referred it to a Division Bench. The Division Bench, doubting the correctness of part of the decision in *Pearay Pasi* v. *Gauri Lal*(1), asked for a reference to a larger bench.

In *Pearay Pasi* v. *Gauri Lal*(1) the handnote was executed not in favour of the person who advanced the consideration but in the name of a benamidar. The assignment was made, not by the benamidar whose name appeared upon the note, but by the person who claimed to be the beneficial owner; and although it is to be noted that the benamidar expressly agreed to the assignment, it is also to be noted that in the case before the Bench, he alleged that the debt of which the note was evidence had been discharged. There is a current of decisions to the effect that where a handnote is executed in favour of a benamidar, it is not open to the denfendant to assert that the holder of the note is not the beneficial owner—[*Subba Narayana Vathiyar* v. *Ramaswami Aiyar*(2)]; and conversely that if a suit is to be based on the handnote, it must be instituted by the holder whose name appears on the note, not by another person who alleges that the original holder is his benamidar and that he

(1) (1934) I. L. R. 13 Pat. 655.
(2) (1906) I. L. R. 30 Mad. 88.

is the beneficial owner—[*Ram Das Sahu* v. *Chhote Lal Mander*(1) and *Harikishore Barna* v. *Gura Mia Chaudhuri*(2). In the case of *Pearay Pasi* v. *Gauri Lal*(3) if the benamidar had endorsed the handnote to the beneficial owner before transfer, or if the benamidar had himself executed a deed of transfer, the plaintiff's position would have been different. The transfer in that case was actually made, not by the person whose name appeared upon the note, but by the person who claimed to be the beneficial owner; but it appears that the rule regarding the manner in which negotiable instruments can be transferred was stated somewhat too broadly in the decision of that case, so that in the present case, the learned Small Cause Court Judge considered that he was incapable of acting upon the transfer by a registered instrument which was executed by the original holder. We have to determine whether such a transfer confers upon the transferee the right to sue.

In *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(4) the Acting Chief Justice of the Madras High Court held that an assignment of promissory notes by a registered instrument gave the assignee the right to sue upon them in his own name, though the assignee in such circumstances acquired only the right, title and interest of his assignor, whereas the endorsee would have all the rights of a holder in due course. In 1912 in *Muthukrishnier* v. *Veeraraghava Iyer*(5) Sir Arnold White, presiding over a Special Bench of the Madras High Court, held that where a promissory note had been mortgaged to the plaintiffs of that case without endorsement, the transferee was entitled to sue upon the note and was actually the only party entitled to sue. In *Benode Kishore Goswami* v. *Ashutosh Mukhopadhya*(6) where a promissory note had been transferred by a registered

(1) (1927) 9 Pat. L. T. 238.
(2) (1930) I. L. R. 58 Cal. 752.
(3) (1934) I. L. R. 13 Pat. 655.
(4) (1905) I. L. R. 28 Mad. 544.
(5) (1913) I. L. R. 38 Mad. 297, S. B.
(6) (1912) 16 Cal. W. N. 666.

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deed of gift, the transfer was held to be a valid assignment. It has been decided in Burma and in the Punjab that such an assignment could be made in more informal fashion and yet be effective. The Burma Chief Court in *Palawan* v. *B. Kanu*(1) held that a negotiable instrument could be transferred so as to enable the transferee to maintain a suit thereon even without endorsement or a written assignment. In the Punjab it had been held by the Chief Court in *Panna Lal Lachhman Das* v. *Hargopal Khubi Ram*(2) that endorsement was not the only mode by which a negotiable instrument could be transferred; it can be assigned otherwise and the assignee could sue in his own name, the only difference being that the assignee would have only the right, title and interest of the assignor, while the endorsee would have all the rights of a holder in due course, following the decision in *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(3) to which reference has been made.

I do not think that it can be held in view of these authorities that endorsement is the only means by which a negotiable instrument can be transferred. Chapter IV of the Negotiable Instruments Act deals with the manner of the negotiation of these instruments. In the ordinary way, under section 48 of the Act, a handnote, such as we have before us in the present case, would be negotiated by endorsement and delivery thereof; a promissory note endorsed in blank or a promissory note to the holder or bearer, is negotiated in simpler fashion. But the Negotiable Instruments Act itself does recognise that negotiable instruments may be transferred and for consideration otherwise than by negotiation, because section 118(*a*) of the Act provides that, until the contrary is proved, when a negotiable instrument has been negotiated or transferred, it shall be presumed that it was negotiated or transferred for consideration.

(1) (1921) 66 Ind. Cas. 501.
(2) (1918) 51 Ind. Cas. 250.
(3) (1905) I. L. R. 28 Mad. 544.

In the case now before us the promissory note was transferred by means of a registered instrument; and we have not to consider the question of whether the transfer by less formal means other than by endorsement would or would not be valid. Section 130 of the Transfer of Property Act provides that a transfer of an actionable claim shall be effected only by the execution of an instrument in writing; but section 137 of the Act provides that nothing in section 130 shall apply to negotiable instruments. Section 137 of the Act excludes negotiable instruments from the operation of the rule which requires that transfer shall be made by a written instrument, because they are ordinarily transferred by negotiation. Nothing in section 137 prohibits the transfer of negotiable instruments by means of separate written instruments; but the question of whether in the present instance the transferee was entitled to sue as the holder of the handnote and also as the assignee of the debt of which the handnote was evidence does not arise in this case, because he did in fact institute his suit in each of those capacities, and when his claim to recover the amount of the debt was proved, he was entitled to succeed.

The defendants pleaded part payment; but the finding of the court was that payment had not been made and that the debt claimed in the plaint was due. The Small Cause Court Judge would have decreed the suit if he had felt that he was able to hold that the mode of transfer employed entitled the plaintiff to sue; and in the circumstances, I would allow this application, set aside the decree of the Small Cause Court Judge and decree the plaintiff's suit with costs throughout: hearing fee three gold mohurs.

COURTNEY TERRELL, C. J.—I entirely agree. My statement of opinion in *Pearay Pasi* v. *Gauri Lal*(1) to the effect that a transfer of a handnote

(1) (1934) I. L. R. 13 Pat. 655.

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could not be made otherwise than by endorsement and delivery was not necessary for the decision of the case and moreover I am now convinced that it was erroneous. I was misled by the wording of section 48 of the Negotiable Instruments Act and did not notice that the transfer of a negotiable instrument is not by that section restricted to the operation of endorsement.

COURTNEY TERRELL, C. J.

KHAJA MOHAMAD NOOR, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

S. A. K. *Rule made absolute.*

APPELLATE CIVIL.

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September, 18.

Before Courtney Terrell, C.J. and James, J.

KRISHNA KUMAR CHATTERJI

v.

MUSAMMAT JAGPATI KUER.*

Stamp Act, 1899 (*Act II of* 1899), *sections* 12, 36, 61 *and* 63—*cancellation of adhesive stamp, if necessary at the time of execution of handnote—cancellation, meaning of—document not properly stamped once received in evidence, whether can be rejected at a later stage.*

A handnote bearing adhesive stamps was admitted in evidence but subsequently it transpired that only one of the stamps had been cancelled at the time of execution. The trial court held that the handnote was not properly stamped and hence inadmissible in evidence under section 36 of the Stamp Act.

Held (i) that the document having once been admitted in evidence it could not be called in question at any subsequent stage of the same suit.

*Appeal from Original Decree no. 155 of 1933, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Muzaffarpur, dated the 18th April, 1933.

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Nirode Basini Mitra v. *Sital Chandra Ghatak* (1), followed.

(*ii*) It is not necessary that an adhesive stamp should be cancelled at the time of execution of the handnote. It is sufficient compliance with the provision of sub-section 2 of section 12 that the stamp is cancelled before the court looks at it.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

A. K. Mitra, for the appellant.

S. K. Mitra and *R. Misra*, for the respondents.

COURTNEY TERRELL, C.J.—This is an appeal by the plaintiff from a judgment of the Subordinate Judge of Muzaffarpur. The case arose out of the following facts:—

There was a firm of partners who carried on business under the name of Damri Sahu Halkhori Sahu and the partners in that firm were Damri Sahu and Halkhori Sahu respectively. They carried on business at various places and on the occasion of the transaction in question they were negotiating through the plaintiff as their agent for a contract with a certain sugar mill for the purchase of molasses which is one of the by-products of sugar manufacture. They desired to purchase the outturn of molasses by that particular sugar mill. The plaintiff in November of 1926 secured a contract for the firm out of which, if the contract were carried through, he would be paid a remuneration by way of commission. The sugar mill was willing to sell their output of molasses provided that the firm would deposit Rs. 10,000 as earnest money for the molasses they would buy, within one week. The partner Halkhori Sahu came to Muzaffarpur where the sugar mill was, and was told the terms upon which the mill would be willing to conduct the business. He had not the

(1) (1930) 128 Ind. Cas. 187.

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necessary sum of Rs. 10,000 with him to make the required deposit and therefore he borrowed from the plaintiff a sum of Rs. 5,000 and with that money made the required deposit with the sugar mill. To secure the loan Halkhori Ram executed a handnote promising to repay the loan together with interest at a reasonable market rate. The loan not being repaid and the partners having since died, the plaintiff began this suit against the widow amongst other persons of the partner Damri Sahu and in his plaint he set forth the story of the loan and claimed to recover upon the handnote. He claimed the Rs. 5,000 principal lent and interest at the rate of 12 per cent. per annum which he said was the reasonable market rate according to the contract, for three years.

When the case came on for hearing before the lower court for some reason the defendants were not represented and judgment for the plaintiff went by default, the plaintiff producing the handnote in question. There was an appeal to the High Court from this decision on the ground that the learned Judge ought not to have given judgment by default but should have given the defendants an opportunity of being heard. The High Court agreed with the contention and remanded the case to be heard upon the merits.

The plaintiff went into the witness-box and towards the end of the cross-examination he was asked questions about the handnote in question, having proved the handnote on the previous day, (when the handnote was endorsed by the Judge with a statement that it was admitted to evidence). The further questions on the following day related to this handnote. He was asked about the cancellation of the stamps which the handnote bears. The handnote bears six adhesive stamps, two of them being one anna each and four others half anna and across the half anna stamp which is in the righthand bottom corner of the group of stamps the signature of the executant of the handnote appears. There also appear two lines

drawn across the stamps, one lying across each row from left to right. He was asked whether those lines came into existence at the time of the execution of the note: he said 'no'. the stamps were free at that time from the lines which they now bear and he stated that as a matter of fact that could be demonstrated by a photograph which he had taken after the note was executed for greater caution. An examination of the handnote bears out what he says with the result that it would appear that at the time of the execution of the handnote the righthand bottom corner half anna stamp alone of the six had been cancelled, the horizontal lines drawn across the rows of stamps having been added at some later time and before the note was tendered as evidence.

The learned Judge took a somewhat peculiar course. He held that the stamps had not been properly cancelled and that under the Act this was equivalent to the document not being properly stamped and therefore he refused to consider the suit as one brought on the handnote but on the merits of the question of whether the loan had in fact been granted or not he used the handnote as very good evidence of the loan and gave judgment for the plaintiff for the capital sum Rs. 5,000 of the loan. He held, however. that inasmuch as the contract to pay interest was evidenced by the handnote alone and that inasmuch as it was not properly stamped it could not be used by the plaintiff, and he declined to grant any decree for interest.

From that decision the plaintiff appealed and his appeal is before us. There is also a cross-objection by the defendants to which I will presently refer. The contention on behalf of the appellant is based upon section 36 of the Indian Stamp Act which provides—

> "Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

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In this case the learned Judge had on the first day of the trial admitted the handnote to evidence and had marked it as an exhibit. It was not until the second day when the defendant made the discovery by cross-examination of the fact that the cancellation of five out of the six stamps had not been effected at the date of execution that the point for consideration by the Judge arose. In my opinion, at the time that the Judge entered into this matter the instrument had already been admitted in evidence and that is proved by the endorsement on the note and further it is conclusively proved by the fact that the Judge in considering whether the plaintiff could recover upon a contract apart from the note definitely took the note into evidence as cogent evidence of the contract. It is therefore not open to objection from the point of time of admission. The section has been discussed in many cases but I do not think I can do better than quote from the judgment of Sir George Rankin in *Nirode Basini Mitra* v. *Sital Chandra Ghatak*(1):

"On the merits of the appeal, it appears to me that section 36 of the Stamp Act makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure-holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that, under section 36, it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. These stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made up by the trial court, there it might be rejected, if not, the matter stopped there."

(1) (1930) 128 Ind. Cas. 187.

In my opinion this point is conclusive against the respondent.

There is a further objection to the argument of the respondent. The section which deals with the cancellation of stamps is section 12. By the first paragraph of the first sub-section it is provided—

"Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again."

The second sub-section is the sub-section which really is used by the respondent in this case—

"Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

Now by section 63 of the Act any person required by section 12 to cancel an adhesive stamp and failing to cancel such stamp in the manner prescribed by that section shall be punishable with fine which may extend to Rs. 100. By this means a penalty is provided to enforce the provisions of the first sub-section to section 12. It is argued on behalf of the respondent that there is a further penalty on persons who do not cancel the stamp at the time of affixing, namely, that if it should turn out that the cancellation, however effective, was effected at some later time than the affixing of the stamp, the document is not receivable in evidence. In my opinion that construction is unsound. The wording of sub-section (2) makes it clear that a document is to be deemed unstamped if when the Court looks at the same it finds that it has not been cancelled so that it cannot be used again and the criterion of cancellation is the appearance of the stamp. If the stamp is in such a condition that it cannot be used again then it has been cancelled and the document cannot be treated as unstamped. The sub-section has nothing to do with the penalties for failing to cancel the stamp. That is provided by section 63 and I cannot find anything in this section which prevents the document from being used in evidence if, when it is presented to the Court, it is in

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fact cancelled within the meaning of sub-section (2) and that does not mean that it must have been cancelled at some particular time anterior to its presentment in evidence but merely refers to the condition of the stamp at the time it is so presented.

Mr. S. K. Mitra on behalf of the respondent would have us believe that the object of the legislature would by such a construction be defeated. That is not so. The object of the legislature is to protect the revenue. If when the Court comes to examine the document the stamps are intact the danger of a second use of the stamp has not yet occurred and if cancellation is, before it is presented in evidence, effected, no danger arises as to the second use of the stamps in the future. On these two grounds, therefore, the document should properly be considered as having been properly stamped and should have been received in evidence by the Judge and no other question as to the authenticity of the handnote has been presented to us.

The appeal of the plaintiff therefore should succeed.

We have now to consider the contentions of the defendant on her cross-objection. Defendant no. 1 is the widow of the deceased partner Damri Sahu. The debt was incurred on the 6th November, 1926, that is to say, the 16th Kartick, 1334. It is said that the partner of whom defendant no. 1 is the widow died on the 30th October, 1926, that is to say, the 9th of Kartick, 1334, and therefore his estate cannot be liable under his partnership contract for debts incurred by another partner after his death. If that fact had been pleaded and established by the respondent she would have been entitled clearly to succeed, but she did not plead it. An examination of her written statement, involved as it is, discloses no hint whatever of such a point being taken in her favour. Furthermore, in the depositions given before the Court there is no evidence whatever that her late

husband died after the debt was incurred. It is said that there were certain Land Registration proceedings in which the death of the husband was mentioned and the judgment in those proceedings has been put before us; but needless to say the judgment is no evidence of the facts therein stated, more particularly as the litigation was not between the same parties. The only witness who deals with the question of the date of death merely mentions that it took place in Kartick, 1334, which is consistent with the death either being after or before the date of the debt in question. Having failed to plead or indeed to argue the point in the lower court it is clear that it is too late at this stage of the matter to consider its merits and there is no evidence before us upon which it could be supported.

A further argument was addressed to us on behalf of the defendant that there are no materials upon which we could grant interest at other than some purely nominal rate. There was evidence, however, before the Subordinate Judge as to the rate at which the deceased partner, when he borrowed money, was able to borrow from his bank by way of overdraft and the rate was at 12 per cent. It must be remembered that this was an entirely unsecured loan and in the circumstances the rate of interest at 12 per cent. is by no means unreasonable and it certainly could not be obtained in the market for less than that rate.

I would allow the appeal and direct that the decree of the lower court be varied by adding to the decree for Rs. 5,000 interest at the rate of 12 per cent. per annum from the date of the handnote up to the date of the decree and thereafter at 6 per cent. until realisation. The defendant must pay the costs in this Court and in the Court below.

Appeal allowed.

JAMES, J.—I agree.

J. K.

REVISIONAL CRIMINAL.

1936.

September, 22.

Before Rowland, J.

SAKALDEO SINGH

v.

KING-EMPEROR.*

Sugar-cane Act, 1934 (Act XV of 1934), sections 3 clauses (2) and (3), and 7—Sugar-cane Rules 11, 13, 15, and 20—District Magistrate's order for prosecution for breach of Rules 9 to 11—conviction for breach of Rule 13, whether legal—Sugar-cane Rules 11 and 13, if ultra vires—*Penal Code, 1860 (Act XLV of 1860), sections 40, 64 and 67—General Clauses Act, 1897 (Act X of 1897), section 25—imprisonment in default of fine, if can be awarded for breach of Sugar-cane Rules—offence, meaning of.*

The District Magistrate ordered the prosecution of the petitioner, a licensed purchasing agent, under rule 15 of the Sugarcane Rules for breach of rules 9 to 11 of the said rules but the petitioner was convicted for breach of rule 13, i.e., purchasing sugar-cane without proper weighment.

Held (*i*) that the conviction was not illegal. When a prosecution has been instituted of a kind requiring the previous complaint, sanction or order of a particular authority, then once the proceedings are on foot they will take their course in respect of any offence which the facts disclose.

Jamuna Singh v. *Laldhari Singh*(1), referred to.

Section 7 of the Sugar-cane Act gives very wide powers to local Government to make rules for the regulation of the purchase and sale of sugar-cane by and to licensed purchasing agent and therefore rules 11 and 13 are not *ultra vires*.

The breach of Sugar-cane Rules is an offence within the meaning of section 40 of the Penal Code.

Section 25 of the General Clauses Act makes sections 64 and 67 of the Penal Code applicable to offences under the Sugar-cane Rules and therefore the order passing the sentence of imprisonment in default of fine was not illegal.

*Criminal Revision no. 485 of 1936, from an order of S. K. Das, Esq., I.C.S., Sessions Judge of Saran, dated the 22nd July, 1936, affirming an order of Maulavi S. N. Haider, Subdivisional Officer, Chapra, dated the 2nd June, 1936.

(1) (1934) 15 Pat. L. T. 694.

Ma Khwet Kyi v. *King-Emperor*(1), distinguished.

Application in revision.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Pandey Nawal Kishore Sahay, for the petitioner.

Mr. Gopal Prasad, for the Crown.

ROWLAND, J.—The petitioner is a licensed purchasing agent for a sugar-cane factory and has been prosecuted for an offence against the new Rules framed by the local Government under the Sugar-cane Act, 1934. The finding of the lower appellate court expressed in the concluding portion of his judgment is that the appellant purchased sugarcane both on 19th March, 1936, and 20th March, 1936, without proper weighment, thereby contravening Rules 13 and 11 of the Sugar-cane Rules. The learned Sessions Judge accordingly held that he had rightly been convicted under Rule 15. Now Rule 11 deals with the maintenance of clear and accurate records of all purchases and these records are to show among other particulars the weight of the sugar-cane including the weight of the cart, the weight of the cart itself and the net weight of the sugar-cane purchased. This Rule is obviously framed by some one who supposed as a matter of course that weighment would be made on a mechanical weigh-bridge. In fact unless weighment is made in that manner, it is difficult to see how any clear and accurate record of those particulars can possibly be made. Rule 13 requires the manager or purchasing agent to comply with conditions among which are these: that all dealings and contracts of purchase are to be made and had according to the standard maund and weighments shall be made to the nearest quarter maund; and the scales or weights used must permit of the easy reading of the recorded weight.

(1) (1928) I. L. R. 6 Rang. 791.

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ROWLAND, J.

It was first contended for the petitioner that the Rules nowhere provided that weighment must be made on a mechanical weigh-bridge. I think that Rule 13 contains requirements which a mechanical weigh-bridge satisfies and that no other method of weighing has been suggested which would equally satisfy those requirements. Rule 13 is, therefore, broken unless weighment is made either by a weigh-bridge or by some other method which equally satisfies the requirements of the Rule and no other practicable method has in fact been suggested; nor has any other practicable method been suggested of fulfilling the requirements of Rule 11. I am of opinion that the accused on the facts found by the learned Sessions Judge did not obey Rules 11 and 13.

It has, however, been contended that the proceedings are defective, because under Rule 20 no prosecution is to be instituted under these Rules except by order of or under authority from the District Magistrate. The District Magistrate did in fact direct the prosecution of the petitioner in the following terms:

> "Prosecute the two men under Rule 15 for infringement of Cane Rules 9—11."

The Sessions Judge has found that the petitioner committed a breach of Rule 13; and it is said that a breach of this Rule was not within the cognisance of the court before which a prosecution was instituted for breach of Rules 9—11. I do not find much substance in this argument. It has been held in several cases that when a prosecution has been instituted of a kind requiring the previous complaint, sanction or order of a particular authority, then once the proceedings are on foot they will take their course in respect of any offence which the facts disclose. There is ample authority for this. It is sufficient at present to refer to *Jamuna Singh* v. *Laldhari Singh*(1)—once the bar to the court taking cognisance of the case is

(1) (1934) 15 Pat. L. T. 694.

removed then if it appears that some other offence also has been committed, it is not necessary to have a fresh complaint.

Another point taken is that if the meaning of the Rules is as understood by the courts below and the Rules make it obligatory on the purchasing agent to buy in a particular manner by weight, then the Rules go beyond the scope of the Act and are *ultra vires*. For this contention reference is made to the provisions of the Act itself and the powers conferred on the local Government by it. Section 3(*2*) empowers the local Government to fix a minimum price for the purchase of sugar-cane in a controlled area; and section 3(*3*) authorises the local Government to prohibit in a controlled area the purchase of sugarcane for a factory otherwise than from the grower or a licensed purchasing agent. Then there is power in section 7 to make rules for the purpose of carrying into effect the objects of the Act and in particular to provide for

(*c*) the issue of licences to purchasing agents, the fees for such licences, and the regulation of the purchase and sale of sugarcane by and to such agents; and

(*f*) the records, registers and accounts to be maintained for ensuring compliance with the provisions of this Act.

Sub-clause (*3*) authorises the local Government to provide that a breach of sub-clause (*2*) (*c*) or (*f*) may be punished with fine not exceeding two thousand rupees. The power to make rules for the regulation of the purchase and sale of sugar-cane by and to licenced purchasing agents, seems to me to be a very wide power indeed; and I have no doubt at all that Rules 11 and 13 are within the powers conferred by section 7 of the Act.

These are all the points taken for the petitioner as against the conviction. One further point is raised with regard to the sentence imposed. The magistrate imposed a fine of Rs. 200 and directed that in default of payment the accused should suffer

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ROWLAND, J.

simple imprisonment for two months. It is said for the petitioner that the Act while authorising the imposition of a fine does not authorise the imposition of any sentence of imprisonment. The answer to this is in sections 64 to 67 of the Indian Penal Code read with sections 40 to 42. In sections 64-67 the word 'offence' is used in the meaning given in the second clause of section 40, that is to say,

> "a thing punishable under the Penal Code, or under any special or local law as hereinafter defined."

The definitions are in sections 41 and 42, 'special law' being a law applicable to a particular subject and a 'local law' being a law applicable only to a particular part of British India. Thus an offence under a local or special law is an offence for the purpose of sections 64 to 67. Under section 64 in every case of an offence punishable with fine only in which the offender is sentenced to a fine, it shall be competent to the court to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment; and under section 67 the amount of imprisonment is defined and limited. There is thus a power to impose a sentence of imprisonment in default of payment when an offender is convicted of an offence punishable under a special or local law although such law makes no specific provision for imprisonment in default. But it has been argued that though this principle may be applicable when an offence is created by any section of a special or local law, it does not apply when the offence is created by a rule made in exercise of a rule-making power. For this proposition reliance is placed on *Ma Khwet Kyi* v. *King-Emperor*(1), a case in which a single Judge of the Rangoon High Court held that the provisions of the Penal Code relating to abetment did not apply to an abetment of a breach of the bye-laws framed by a District Council under the authority of the Burma Rural Self-Government Act. The terms of that Act

(1) (1928) I. L. R. 6 Rang. 791.

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and of the rules and of the bye-laws are not before me; nor the provisions of the General Clauses Act, if any, in the light of which Acts of the Burma legislature are to be interpreted. But what we are dealing with here is an act made punishable by rules framed under the authority of an Act of the Governor-General in Council, the interpretation of which is controlled by the General Clauses Act, Act X of 1897. Section 25 of that Act makes applicable sections 63 to 70 of the Penal Code to all fines imposed under any Act, regulation, rule or bye-law, unless the Act, regulation, rule or bye-law contains an express provision to the contrary. I have no doubt therefore that the provisions of sections 64 and 67 of the Indian Penal Code are applicable to the fines imposed under rules framed under the Sugar-cane Act, and there is no want of power to impose a sentence of imprisonment in default of payment of the fine.

In the result the application fails and the rule is discharged.

Rule discharged.

J. K.

REVISIONAL CRIMINAL.

1936.

September, 25.

Before Rowland, J.

SUKHDEO PRASAD TIWARI

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 242 and 342—summons case—non-examination of accused under section 242, when vitiates the trial—non-examination of accused under section 342, effect of—prejudice.

*Criminal Revision no. 466 of 1936 from an order of Radha Charan Das, Esq., District Magistrate of Sambalpur, dated the 17th June, 1936, modifying an order of Rai Bahadur Madhukar Sahai, Honorary Magistrate, Jharsuguda, dated the 9th April, 1936.

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It is not a universal rule that omission to comply with an express provision of the Code of Criminal Procedure must always vitiate the trial.

Abdul Rahman v. *King-Emperor*(1), relied on.

Saiyid Mohiuddin v. *King-Emperor*(2), followed.

Subrahmania Ayyar v. *King-Emperor*(3), referred to.

When in a criminal trial the accused has been examined, the conviction will not be set aside because the examination ought to have been made at a different stage in the proceedings unless it is shown that the accused has been prejudiced.

Raghu Bhumij v. *King-Emperor*(4), *Fatu Santal* v. *King-Emperor*(5), *Gulam Rasul* v. *King-Emperor*(6), *Mitarjit Singh* v. *King-Emperor*(7), *Mir Tilawan* v. *King-Emperor*(8), *Bhagwat Singh* v. *King-Emperor*(9), *Varisai Rowther* v. *King-Emperor*(10), *Madura Muthu Vannian, In re*(11) and *Sheodutt Roy* v. *King-Emperor*(12), discussed.

Magistrates should take care that the record on the face of it establishes that the provisions of section 242 have been complied with. But the omission to explain the particulars of an offence and to ask the accused to show cause, if he is defended and pleads not guilty, does not vitiate the trial, provided no prejudice has been caused and he has been examined under section 342 of the Code.

Gopal Krishna Saha v. *Matilal Singh*(13), *Bhubaneshwar Prasad* v. *King-Emperor*(14), not followed.

Nakul Mandal v. *King-Emperor*(15), followed.

(1) (1926) L. R. 54 Ind. App. 96.
(2) (1925) I. L. R. 4 Pat. 488.
(3) (1901) I. L. R. 25 Mad. 61, P. C.
(4) (1920) 5 Pat. L. J. 430.
(5) (1921) 6 Pat. L. J. 147.
(6) (1921) 6 Pat. L. J. 174.
(7) (1921) 6 Pat. L. J. 644.
(8) (1921) I. L. R. 1 Pat. 31.
(9) (1924) I. L. R. 4 Pat. 231.
(10) (1922) I. L. R. 46 Mad. 449.
(11) (1922) I. L. R. 45 Mad. 820.
(12) (1929) A. I. R. (Pat.) 64.
(13) (1926) I. L. R. 54 Cal. 359.
(14) (1936) 17 Pat. L. T. 609.
(15) (1935) Cr. Rev. 675 of 1935 (Unreported).

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Application in revision by the accused.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Harinandan Singh, for the petitioners.

No one for the opposite party.

ROWLAND. J.—The petitioners have been convicted under section 352 of the Indian Penal Code and fined Rs. 15 on an allegation that they assaulted the complainant.

The facts are concluded by the findings of the Courts below; but two objections are taken to the regularity of the proceedings. It is said that the accused was not examined in accordance with the requirements of section 342 of the Code of Criminal Procedure. It is also said that the Magistrate at the outset failed to comply with the requirements of section 242 of the Code of Criminal Procedure under which in a summons case when the accused appears or is brought before the Magistrate the particulars of the offence of which he is accused are to be stated to him and he is to be asked if he has any cause to show why he should not be convicted. It is said that each of these provisions of law is what is called mandatory and that non-compliance vitiates the whole trial.

The objection as to non-compliance with the provisions of section 342 rests on a series of decisions of this Court beginning with *Raghu Bhumij* v. *The King-Emperor*(1) which was followed in *Fatu Santal* v. *The King-Emperor*(2) in which sessions trials were held to be bad if there had been no examination of the accused. The principle was held applicable to warrant and summons cases: *Gulam Rasul* v. *The King-Emperor*(3); and in *Mitarjit Singh* v. *The King-Emperor*(4) it was held in a warrant case that it was not enough that the accused should have been examined during the course of the trial. It was essential that

(1) (1920) 5 Pat. L. J. 480.
(2) (1921) 6 Pat. L. J. 147.
(3) (1921) 6 Pat. L. J. 174.
(4) (1921) 6 Pat. L. J. 344.

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the examination should take place at the point at which the Code directs it to be done, that is to say, after the examination of the prosecution witnesses and before he is called upon for his defence. In all these cases the trials were held to be bad irrespective of whether the accused had been prejudiced or not. But in *Mir Tilawan* v. *The King-Emperor*(1) where at the point where the accused should have been examined they filed written statements instead it was held that the accused had not been prejudiced, that there had been no miscarriage of justice and that there was no reason to interfere in revision. Consistently with this last decision in *Bhagwat Singh* v. *King-Emperor*(2), where it was contended that it was not enough to ask the accused whether they wished to make any statement, but they should have been questioned with regard to the several particulars appearing in the evidence against them, it was held that as the accused in answer to the first question put to them filed written statements and obviously did not intend to give oral answers to any questions the Magistrate was not bound to continue asking questions. To do so would be a useless formality. Meanwhile similar questions were considered elsewhere and a Full Bench of the Madras High Court in *Varisai Rowther* v. *The King-Emperor*(3), after examining the whole question in detail, held that while it was essential that the accused should be examined at some stage of the case the law was satisfied when the magistrate questioned the accused generally on the case before framing a charge. The trial was not vitiated by the omission to question the accused generally on the case after all the prosecution witnesses had been further cross-examined. Schwabe, C. J. dissented from the decision in *Mitarjit Singh* v. *The King-Emperor*(4) and overruled a similar

(1) (1921) I. L. R. 1 Pat. 31.
(2) (1924) I. L. R. 4 Pat. 231.
(3) (1922) I. L. R. 46 Mad. 449.
(4) (1921) 6 Pat. L. J. 644.

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decision in *Madura Muthu Vannian*(1). This Full Bench decision of the Madras High Court was approved and the decision in *Mitarjit Singh* v. *The King-Emperor*(2) was dissented from in *Saiyid Mohiuddin* v. *The King-Emperor*(3). Bucknill, J. puts the position briefly thus :—

ROWLAND, J.

" I do consider that, provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of section 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial wholly nugatory. Should such omission or failure be shown to have prejudiced the accused, the matter of course assumes a different aspect and can and should be remedied; but not, in my view, otherwise."

Mullick, J. examined the position in more detail. He held that in the case before him there had been no evasion of the provisions of section 342 and said :

" In any event the objection is based on the purest of technicalities and has neither principle nor experience to support it. Principle requires that the accused shall not be convicted without being given an opportunity of explaining the allegations against him; experience shows that judicial questioning must not become inquisitorial. If these essentials are secured, the trial cannot be impeached."

His Lordship then referred to the successive Criminal Procedure Codes in this country and to the principles of English as distinguished from continental European law, concluding that

" the object of the legislature is to give the prisoner every opportunity to lay his case before the

(1) (1922) I. L. R. 45 Mad. 820.
(2) (1921) 6 Pat. L. J. 644.
(3) (1925) I. L. R. 4 Pat. 488.

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Court and to protect him against anything in the nature of cross-examination by the Judge..... ..... what is necessary is that he should be given an opportunity before entering upon his defence as in England to state generally what are the real facts in reference to the complaint. If he is defended or if he files a written statement, judicial questioning will generally add but little to the Court's knowledge, nor will a violation of any rule as to the stage at which he is to be examined make much difference. If he has not been prejudiced the error ought not to vitiate the trial."

To the argument that an express violation of the terms of the statute must always vitiate the trial based on *Subrahmania Ayyar* v. *King-Emperor*(1) Mullick, J. replied that the observations of the Privy Council in that case must be read with reference to the particular facts before them. This decision has been generally followed in cases of the Patna High Court ever since.

In *Sheodutt Roy* v. *King-Emperor*(2) an objection was taken to a conviction in a summons case because it was said that the Code contemplated an examination of the accused on two occasions, that is to say, when he is first brought before the Magistrate as provided by section 242 and another examination after the closing of the evidence under section 342. Wort, J. said that assuming for the moment that no second examination was held no kind of prejudice was shown and the conviction could not be disturbed on this ground.

I have examined the legal position with reference to section 342 in some detail because these decisions have settled the principles to which a court should have regard in dealing with a technical objection of this nature. As a matter of fact, in this case

(1) (1901) I. L. R. 25 Mad. 61, P. C.
(2) (1929) A. I. R. (Pat.) 64.

reference to the record shows that in fact accused were examined after the prosecution witnesses had been heard, and that section 342 of the Code was obeyed.

But the principles which emerge from the above series of decisions are applicable also to the other objection which remains to be considered, namely, the contention that a trial is bad for want of explaining at the outset to the accused the particulars of the offence. The petitioner refers to *Gopal Krishna Saha* v. *Matilal Singh*(1) in which a conviction was set aside holding that the omission to comply with the provisions of section 242 was an illegality vitiating the trial. This case has been followed by Varma, J. in *Bhubaneshwar Prasad* v. *The King-Emperor*(2) but was not followed by James, J. in *Nakul Mandal* v. *King-Emperor*(3). The Calcutta decision deduces from *Subrahmania Ayyar* v. *The King-Emperor*(4) a universal rule that an omission to comply with an express provision of the Code as to the mode of trial vitiated the whole trial. The later Privy Council decision in *Abdur Rahman* v. *King-Emperor*(5) shows that the rule cannot be so broadly stated.

The judgments in *Subrahmania Ayyar's case*(4) and in *Rahman's case*(5) have this in common that their Lordships looked to the object intended to be served by the statutory provision whose breach was complained of and asked whether that object was in danger of being defeated.

This point of view agrees with that taken by this Court in *Saiyid Mohiuddin* v. *The King-Emperor*(6) and it is in this light that we should consider the

(1) (1926) I. L. R. 54 Cal. 359.

(2) (1936) 17 Pat. L. T. 609.

(3) (1936) Cr. Rev. 675 of 1935 (Unreported).

(4) (1901) I. L. R. 25 Mad. 61, P. C.

(5) (1926) L. R. 54 Ind. App. 96.

(6) (1925) I. L. R. 4 Pat. 488.

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provisions of chapter XX of the Code of Criminal Procedure dealing with the trial of summons cases. In a summons case under section 243 it is permissible to convict an accused without taking any evidence on his own admission if he shows no sufficient cause why he should not be convicted. Before this can be done it is required by section 242 that the particulars of the offence be stated to the accused and he shall be asked if he has any cause to show against the conviction. If, therefore, the Magistrate proceeded to convict under section 243 without first stating the particulars of the offence and hearing any cause which the accused had to show, there would be a manifest violation not only of what is ordered by the words of the statute but of the fundamental principle which, as explained in *Mohiuddin's case*(1), " requires that the accused shall not be convicted without being given an opportunity of explaining the allegations against him ". On the other hand, if the Magistrate proceeds to hear evidence it is difficult to see that the object of the statute can be imperilled provided that after hearing the complainant and his witnesses the Magistrate gives the accused the opportunity for which section 342 provides of putting forward his answer and explanation.

I am of opinion that in a summons case omission to explain the particulars of an offence to the accused under section 242 and to ask him to show cause at that stage is not (in cases in which the accused is defended and pleads not guilty) an illegality vitiating the trial provided of course that no prejudice can be shown to have been caused to the accused and that the accused has in due course been examined under section 342. I do not mean to say that it does not matter whether the provisions of section 242 are complied with or not, they ought to be complied with and Magistrates should take care that the record on its face establishes that there has been a full compliance with the law only because no Magistrate can tell what will be the opinion of a superior court as to whether the accused

(1) (1925) I. L. R. 4 Pat. 488.

has been prejudiced by the omission in the particular case.

In the proceedings before me the Magistrate reports that the particulars of the offence were explained to the accused, though this was not noted in the order-sheet. I accept this assurance and feel no doubt that in future the Magistrate will be careful to see that all proceedings are fully noted in the order-sheet so that no such question may arise.

The rule is discharged.

J. K.

Rule discharged.

APPELLATE CIVIL.

Before Khaja Mahamad Noor and Madan, JJ.

1936

October, 7.

SURPAT SINGH

v.

KUMAR BHUPENDRA NARAYAN SINGH.*

Record-of-Rights—presumption of correctness of entry in—Bihar Tenancy Act, 1885 (Act VIII of 1885), section 103-B—*entry as to rent-free, if rebutted by showing that land was within a permanently settled revenue paying estate—onus.*

The plaintiffs instituted suits for declaration of title and recovery of possession on the allegation that the suit lands were mal lands and not rent-free. The defendants relied on the entry in the record-of-rights finally published under section 103B of the Bihar Tenancy Act. In second appeal it was contended that the onus had been wrongly placed and the entry in the record-of-rights had been rebutted by the plaintiffs showing that the land was within their permanently settled estate.

*Appeal from Appellate Decree no. 821 of 1933, from a decision of Aghore Nath Banarji, Esq., District Judge of Purnea, dated the 31st March, 1933, confirming a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Purnea, dated the 16th July, 1931, and appeal from Appellate Decree no. 1116 of 1933, from a decision of Babu Nidheswar Chandra Chandra, Subordinate Judge of Purnea, dated the 11th May, 1933, affirming a decision of Babu Dwarika Das, Additional Munsif, Araria, dated the 27th January, 1932.

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SURPAT SINGH v. KUMAR BHUPENDRA NARAYAN SINGH.

Held (*i*) that the question of onus did not arise in the case as both parties had adduced evidence and the decision was based on balance of evidence.

(*ii*) it cannot be laid down as a general proposition of law that the presumption as to correctness of the entry in the record-of-rights of a particular land being rent-free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and is assessed to revenue.

Whether the presumption of the correctness of an entry had been proved to be rebutted was a question of fact and had to be decided on the facts of each particular case.

Jagdeo Narayan Singh v. *Baldeo Singh*(1), explained.

Lachman Lal Pathak v. *Kumar Kamakshya Narayan Singh*(2), *Sri Jagarnath Kishore Lal Singh Deo* v. *Prasanna Kumar Misra*(3), *J. A. Stonewig* v. *Kameshwar Narayan Singh*(4), *Nibaran Chandra Mukherji* v. *Harendra Lal Ray*(5), *Jodha Sahu* v. *Tirbena Sahu*(6) and *Raja Sri Sri Jyoti Prasad Singh Deo* v. *Bharat Shah Babu*(7), followed.

Maharajadhiraj Sir Kameshwar Singh Bahadur v. *Sheikh Sakhawat Ali*(8), dissented from.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Mohamad Noor, J.

S. N. Bose, for appellants in S. A. 821.

J. C. Sinha, for appellants in S. A. 1116.

Dr. K. P. Jayaswal (with him *S. C. Mazumdar* and *Bindeshwari Prasad*), for respondents in S. A. 821.

D. L. Nandkeolyar, for respondents in S. A. 1116.

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) (1931) A. I. R. (Pat.) 224.
(3) (1933) S. A. 1584 to 1590 of 1930 (Unreported).
(4) (1923) 11 Pat. L. T. 444.
(5) (1931) I. L. R. 59 Cal. 629.
(6) (1929) 11 Pat. L. T. 468.
(7) (1935) I. L. R. 15 Pat. 260.
(8) (1936) 17 Pat. L. T. 819.

KHAJA MOHAMAD NOOR, J.—These two appeals arise out of two suits instituted by the same plaintiffs against two sets of defendants for recovery of possession of certain lands on the ground that the defendants were in their wrongful possession and that their names were wrongly recorded in the Survey records-of-rights in respect of them.

The plaintiffs of the suits are the landlords of the villages where the suit lands are situated. The defendant of one of the suits, Kumar Bhupendra Narayan Singh (who is respondent in Second Appeal no. 821 of 1933) has been recorded in the settlement records as a rent-free tenureholder in respect of 125.08 acres of land in village Achra, situated in the area known as Kosi Diara in the district of Purnea. In the other case the defendants (who are respondents in Second Appeal no. 1116 of 1933) have been recorded as milikdar in respect of 14.03 acres of land in village Kusmaul also within Kosi Diara. The plaintiffs instituted these two suits for recovery of possession of these lands on the declaration of their title to them and on a finding that the defendants have not got the status given to them in the record-of-rights. The first suit was instituted before the Subordinate Judge and the second before the Munsif. Both of them were dismissed by the respective trial courts The appeal of the plaintiffs in the first suit has been dismissed by the learned District Judge of Purnea and that in the second suit by the learned Subordinate Judge of the same place. The plaintiffs have, therefore, preferred these two second appeals. As the appellants are the same and the points of law raised on their behalf are common to both the appeals they have been heard together.

Strictly speaking on the findings of the lower courts, no question of law arises in either of the two appeals. In Second Appeal no. 821 of 1933, the plaintiffs' case was that the suit lands were their mal lands and not rent-free. They further urged that,

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assuming that they were rent-free tenure of the defendant he lost it by the adverse possession of the plaintiffs. It was alleged by them that the lands submerged under the Kosi river and that since they came out of the river they had been in their possession through their own tenants. There is a clear finding of the lower appellate court which is in agreement with that of the trial court, that the lands are the rent-free tenure of the defendant and that the entry in the record-of-rights is correct. It has also been found that after their emersion from the river the lands were for a considerable time unfit for being taken possession of and therefore on the basis of his title the defendant must be held to have continued in possession. Both the courts have disbelieved that the plaintiffs were in possession of the lands after they came out of the Kosi. Similar is the case in respect of the lands involved in Second Appeal no. 1116 of 1933. The defendant of this suit claimed, as I have said, to be the milikdar of the suit land and was recorded as such in the record-of-rights. The lower appellate court has found that at least since 1909 he had been holding it as milikdar having in that year purchased it under a sale deed in which it was described as milik. It was also held that the entry in the record-of-rights was not proved to be incorrect by the plaintiffs. The learned Advocate for the appellant has contended that the statement in the deed that the land was milik was not admissible in evidence. It is true that the statement is not admissible to prove that the land is the milik of the defendant but it is admissible to prove that when the defendant came in possession of the land he did so with an assertion that he was holding it as a milikdar and since then he began to prescribe against the plaintiffs as milikdar. The suit having been instituted after 12 years of the commencement of that possession is obviously barred. The only other point urged in this case is that the entry in the record-of-rights is based upon no evidence. No material has been placed before us to support this contention.

The main contention of the learned Advocates for the appellants in both the appeals has been that the onus to rebut the presumption of the correctness of the entries in the record-of-rights was wrongly placed upon the plaintiffs. It was contended that the entries stood rebutted as soon as it was admitted that the lands were within the ambit of the permanently settled villages of the plantiffs and were assessed to revenue. After that it was incumbent on the defendants of the two suits to prove that they acquired from the zamindar either rent-free tenure or milik as the case may be.

Now, the question of onus does not really arise in these cases. As the learned District Judge in his judgment (appealed against in Second Appeal no. 821 of 1933) has pointed out, both the parties adduced evidence and the cases were decided on the balance of evidence. However, as the learned Advocates for the appellants have very elaborately argued the question of onus and placed a number of authorities before us, I think I should give my decision especially as I find myself with all respects in disagreement with the view taken in this connection by a Division Bench of this Court.

Now, the contention of the learned Advocates, as I have said, has been that the lower courts were wrong in relying upon the entries in the record-of-rights as they were proved to be incorrect by the fact that it was established that the lands were assessed to revenue and were within the permanently settled villages of the plaintiffs. In support of this contention reliance was placed upon the observations of their Lordships of the Judicial Committee in the well-known case of *Jugdeo Narain Singh* v. *Baldeo Singh*(1). It was contended that their Lordships have laid down that the presumption of the correctness of an entry in the record-of-rights about a certain land being rent-free is rebutted if the landlord proves

(1) (1922) I. L. R. 2 Pat. 38, P. C.

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that the land was included within the ambit of his village which was permanently settled with him. If the facts of the case which was before their Lordships are not kept in view, the argument of the learned Advocates at the first sight may appear to have some force and one may think that there is a conflict between the view taken in that case and the clear words of section 103B of the Bihar Tenancy Act. The observations relied upon are at page 48 of the report and are these :—

" Considerable stress has been laid on the presumption, (ie., the presumption under section 103B of the Tenancy Act). 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 for which they pay 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 that obligation either by some contract or by some old grant recognised by Government."

As I shall presently show this observation is in connection with the particular rent-free tenure which was before their Lordships, i.e., malikana, and cannot be applied to ordinary rent-free tenures or holdings which are before us.

The correctness of an entry in a record-of-rights can only be rebutted by proof of facts which are inconsistent with the entry. Assessment of land revenue on any land is not inconsistent with its having been made rent-free after the assessment of land revenue. It is certainly inconsistent with its being malikana which, as I shall show, originated at the time of the Permanent Settlement. I am absolutely certain that their Lordships have not laid down as a general proposition of law that the presumption of the

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correctness of the entries in the record-of-rights about a particular land being rent-free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and was assessed to revenue. Obviously, whether the presumption of the correctness of an entry has been proved to be rebutted is a question of fact and has to be decided on the facts of a particular case. Section 103b which was being considered by their Lordships run thus (see page 48 of the report):

"Every entry in a record-of-rights so published, (i.e., Chapter X of the Act) shall be presumed to be correct until the contrary is proved".

The sub-section now runs thus:—

"Every entry in a record-of-right so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect."

Though the amendment was made in 1907 it does not seem to have been brought to the notice of their Lordships. As was pointed out by Ross, J. in the case of *Lachman Lal Pathak* v. *Kumar Kamakshya Narayan Singh*(1), the presumption of the correctness of the record-of-rights cannot now be rebutted by another presumption under the general law in favour of the landlord as laid down by Sir James Colvile in *Raja Sahib Perhlad Sein* v. *Doorga Prasad Tewari*(2). In a large number of cases the very record which shows that a particular tenancy is rent-free shows that a particular person is the landlord of the village and that the tenancy is held under him and is not revenue-free, that is to say, it is assessed to revenue. Under the Bihar Tenancy Act the word ' landlord ' is defined as a man immediately under whom a tenant holds, and ' tenant ' is one who holds land from another person and is but for a special contract liable to pay rent for that land to that person. A rent-free holder is in most cases a tenant. Therefore if the contention of

(1) (1931) A. I. R. (Pat.) 224.
(2) (1869) 12 Moo. I. A. 286.

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the learned Advocates be accepted that their Lordships have held that the proof that a particular person is the landlord of a land holding it under the Permanent Settlement rebuts the presumption of the record-of-rights that the land is held rent-free by another person, then it will follow that in most cases we shall have to hold that the entry of rent-free tenancy is rebutted by another entry that it is under the landlord. This will lead us to a vicious circle and we shall have to hold that their Lordships' decision is in conflict with the clear provisions of section 103B of the Bihar Tenancy Act which says that every entry in the record-of-rights shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect. We will have to insert into this section an exception that an entry about the land being held rent-free shall not be presumed to be correct in cases where the land is held under a landlord of a village which has been assessed to revenue.

In the case of *Sri Jagarnath Kishore Lal Singh Deo* v. *Prasanna Kumar Misra*(1), decided by me singly, I explained that the observations of their Lordships have to be read as referring to the entry in the particular case where the claim of the defendants who were appellants before them was independently of the landlord. I quote the following passage from the judgment which I then delivered :—

" The defendants in that suit claimed to be malikanadars of certain lands in a village and they were recorded as such in the record-of-rights published under the Bengal Tenancy Act. I may note that the provision about the presumption of the correctness of the record-of-rights and the entry therein under the Bengal Tenancy Act is similar to the one under the Chota Nagpur Tenancy Act. Now, the plaintiff instituted that suit for a declaration that the defendants were not malikanadars and were liable to

(1) (1933) S. A. 1584—1590 of 1930 (Unreported).

pay rent. The two courts below upheld the plaintiff's contention and held that the defendants were not malikanadars of the lands. This Court in Second Appeal reversed those decisions and relying among other things upon the record-of-rights held in favour of the defendants. The matter went up to the Privy Council and their Lordships examined the evidence for themselves and held that there was no malikana in the village when it was assessed to revenue in 1839. Now according to the glossary of the terms given by the Settlement authorities in the Settlement Report of the Patna district from where that case came 'malikana' means the allowance of a dispossessed malik. In some cases the right to malikana has been compounded for a certain area of land thus known as malikana land. The word is also used in Behar to describe the land retained by the ex-proprietors for their subsistence when parting with the estate. When at the time of settlement of land revenue a proprietor refused to take settlement of an estate, or the Revenue authorities for some reason or other did not consider it proper to settle the estate with him and consequently settled with somebody else, the ex-proprietor was allowed some compensation. This compensation was either a perpetual annual payment of money known as the malikana money or some land in the village itself and was known as malikana land. The land was given by an arrangement between the Revenue authorities, the new proprietor and the old proprietor. Now their Lordships of the Judicial Committee, as I have said, examined the history of the settlement of the village which had taken place by the year 1839 and came to the conclusion that the entire village was included in this settlement with the then proprietress Musammat Umatul Zohra. The passage quoted above comes after the finding and should be read in the light of the finding and referring to it. It is clear to me that what their Lordships meant was that the plaintiff having proved that the land which was claimed by the defendants to be the

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malikana land was included in the land which was settled with the predecessor of the plaintiff and pro forma defendants and assessed with revenue, they sufficiently rebutted the presumption of the record-of-rights. I do not read the passage as meaning that once the plaintiff has proved that he is the landlord of the village the presumption about the record-of-rights in favour of the tenancy being rent-free is at once rebutted."

Further I said:

" The important words in the judgment of their Lordships of the Judicial Committee in the case of *Jagdeo Narayan*(1) are " the land which is sought to be rent-free lies within his regularly assessed estate or mahal ", " the land in dispute lies within the ambit of the estate ", and " for which they pay revenue assessed in the mauza ". These facts rebutted the presumption in favour of the malikana."

It is obvious that a malikanadar claims a title independent of the landlord, as the malikana had its origin at the time of the Permanent Settlement. Either he claims that the land was excluded from the Permanent Settlement or that by an arrangement between the Government and the man with whom the Permanent Settlement was made a certain land was set apart for the ex-proprietor as malikana. It is obvious that in such cases the production of evidence to show that the land was in fact included in the Permanent Settlement will obviously rebut the entry of malikana in the record-of-rights. But in other cases where the assessment of land revenue has no connection with a land being rent-free the facts found by the Settlement authorities to have existed at the time of the cadastral survey cannot possibly be rebutted by proof of facts which existed at the time of the Permanent Settlement and, if the facts of the case in which these observations were made were kept in view there is no conflict between the law and the observations of their Lordships. The case of *Jagdeo*

(1) (1922) I. L. R. 2 Pat. 88, P. C.

Narayan Singh(1) was considered in several cases. They are *J. A. Stonewigg* v. *Kameshwar Narayan Singh*(2), *Nibaran Chandra Mukherji* v. *Harendra Lal Ray*(3), *Jodha Sahu* v. *Tirbena Sahu*(4), *Lachman Pathak* v. *Kumar Kamakshya Narayan Singh*(5) already referred to, and *Raja Sri Sri Jyoti Prasad Singh Deo* v. *Bharat Shah Babu*(6). In none of these cases the observations of their Lordships of the Judicial Committee have been held to mean what the learned Advocate for the appellants has contended for.

The learned Advocate has referred us to an unreported decision of a Bench of this Court in *Maharajadhiraj Sir Kameshwar Singh Bahadur* v. *Sheikh Sakhawat Ali*(7). This case no doubt supports the contention of the learned Advocate. It seems, however, that the change in section 103B of the Bihar Tenancy Act was not brought to the notice of their Lordships. However, as in the present case, in view of the fact that it has been decided on the balance of evidence, the question does not arise, it is not necessary to refer it to a Full Bench.

I would dismiss the two appeals with costs in favour of those respondents who have appeared. There will be one set of costs in each case.

MADAN, J.—I agree.

J. K.

Appeals dismissed.

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) (1923) 11 Pat. L. T. 444.
(3) (1931) I. L. R. 59 Cal. 629.
(4) (1929) 11 Pat. L. T. 468.
(5) (1931) A. I. R. (Pat.) 224.
(6) (1935) I. L. R. 15 Pat. 260.
(7) (1936) 17 Pat. L. T. 819.

APPELLATE CRIMINAL.

1936.

October, 11.

Before Rowland and Madan, JJ.

KING EMPEROR

v.

BAHARUDDIN.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 512—*evidence recorded at the trial when admissible against absconding accused—separate proceeding, if necessary—procedure.*

When an accused person is tried and other accused persons are absconding proper steps ought to be taken at the time of the trial of the first accused in accordance with section 512 of the Code of Criminal Procedure to prevent necessary evidence from being lost by death of the witnesses or otherwise.

It is not necessary to start a separate proceeding under section 512 of the Code. It will suffice if at the commencement of the inquiry or trial the prosecutor proves that a certain person is absconding and gets an order from the court that the evidence about to be taken is being taken for the purpose of being used against the absconder.

Ghurbin v. *Queen Empress*(1) and *Sheoraj* v. *Emperor*(2), referred to.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Rowland, J.

S. A. Manzar, for the appellant.

Jafar Imam, Assistant Government Advocate, for the Crown.

ROWLAND, J.—This is a reference by the Sessions Judge of Santal Parganas for confirmation of the

*Death Reference no. 26 of 1936 and Criminal Appeal no. 241 of 1936. Reference made by S. Bashiruddin, Esq., Sessions Judge of Santal Parganas, Dumka, in his letter no. 28/D.B., dated the 22nd September, 1936.

(1) (1884) I. L. R. 10 Cal. 1097.
(2) (1926) I. L. R. 48 All. 375.

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sentence of death passed under section 302 of the Indian Penal Code on Baharuddin *alias* Bahardi Shaikh, convicted of the murder of Noor Muhammad. The prisoner has also appealed from his conviction.

The crime is said to have been committed on the evening of Monday, 23rd May, 1932, by the accused and two other persons Bara Raju and Chhota Raju. Of these Bara Raju was arrested not long after the crime and was tried and convicted. Chhota Raju has not yet been arrested. The prisoner was arrested on the 27th April, 1936.

The deceased was son of Samardi or Samaruddin Momin of village Gaganpahari, police-station Pakaur, and was living in his father's house. He was in the habit of going out in the evenings to music parties in company with Bara Raju, Chhota Raju and the prisoner with whom he was outwardly at least on good terms. It is the prosecution case that on the 23rd May at about candle-light time Chhota Raju called Noor Muhammad who went with him, a drinking party had been arranged consisting of the two Rajus, the prisoner and Noor Muhammad. Toddy was brought for them by the witnesses Jerat and Waris, and the party all drank together. Then a scuffle arose, Bara Raju, Chhota Raju and the prisoner attacking Noor Muhammad. The prisoner cut the throat of Noor Muhammad. Subsequently the body was thrown in the river Katasi about a mile away to the north. It is certain from the evidence of Samaruddin and other witnesses that Noor Muhammad was not seen alive after 23rd May. The family were apparently not particularly anxious on the Tuesday, but serious inquiries were made on Wednesday, May 25th, which did not lead to any clue. On Thursday, 26th May, Samaruddin accompanied by chaukidar Parbati went to the police-station and reported the absence of his son. He again went to the police-station the following day, the 27th May, and informed the Sub-Inspector of a clue that he had obtained from Mohar

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Shaikh. This Mohar was not available as a witness in the present proceedings, it being in evidence that he died about two years ago. The police took no action beyond making an entry in the station diary on Samaruddin's report of 27th. Thereafter Samaruddin obtained a further clue from Munshi Momin in consequence of which he went to the police-station again on Sunday, 29th May, and laid a first information of the murder against Turag, Chhota Raju, Bara Raju and Baharuddin. The Munshi who gave the clue referred to in this first information, died before the trial of the prisoner but had been examined in the Committing Magistrate's Court. His deposition has been taken in evidence under section 33 of the Indian Evidence Act. The substance of his deposition is that late at night on the Monday he saw Turab Biswas, Bara Raju, Chhota Raju, the prisoner and Sulaiman going towards the river Katasi and that Turab was carrying a heavy bundle on his head. There was no cross-examination in the commitment proceedings, and we have, therefore, no material on this record for testing the veracity of Shaikh Momin. It may, however, be significant that from the day that Munshi made that statement to Samaruddin the accused was missing from the village. The Sub-Inspector took up investigation and on the same day obtained the statement of Jerat, one of the witnesses put forward by the prosecution to prove the crime. It was on the 30th May that chaukidars found the body lying in the bed of the river Katasi, which suggests that it had in fact been taken in the direction previously indicated by Munshi. The discovery was reported to the Sub-Inspector who held inquest on the 31st. The dead body was tied up in a black striped chadar, cloth twisted twice round the neck, the throat was cut, and there were two marks of injury on the chest. These latter injuries are described by the Sub-Assistant Surgeon who held the post-mortem examination as contusion marks and lacerated wound, both superficial: but the injury to the neck was a wide gaping wound

right across the throat separating all the structures up to the vertebral column and was the cause of death. The other eye-witness Waris was not examined till the 10th June. He left the village on Saturday (28th May) and explains his absence by saying that he had gone to Pindatola in search of employment. The direct evidence of the crime is only that given by Jerat and Waris.

[His Lordship then referred to the evidence in the case.]

* * * * * * *

We have it from Leta Bibi (p.w. 2), mother of the deceased, that on the night of occurrence Chhota Raju called at her house for Noor Muhammad and they went away together. Similar evidence is given by Heytan Bibi, widow of deceased's brother Bahalin and by Kismat Bewa, sister of Samaruddin.

But it is suggested that Samaruddin was unable to tell the Sub-Inspector the name of the person with whom Noor Muhammad had gone out, till 27th May when he made his second report after getting a clue from Mohar Shaikh.

The reports of 26th and 27th May are not on the record of this case, having apparently by some mistake been destroyed: but they are summarised in the judgment of the earlier trial which has been exhibited, and in the interests of accused we have allowed Mr. Manzar to make use of what is there stated. Chhota Raju's name does not appear to have been mentioned on 26th May but there was a reference in the report of that date to music parties and Samaruddin appears to have been at the time of making that report under the impression that deceased had gone to such a party though it is not expressly stated.

The evidence of the women is therefore not altogether discredited by the absence of the name of Chhota Raju in the report of 26th May; and I believe they

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have deposed truthfully. It is unfortunate that we have not the evidence of Mohar Shaikh from whom Samaruddin got the clue which led to his second report on 27th May: Mohar was examined at the trial of Bara Raju in 1932, but his depositions cannot be used, the procedure laid down in section 512 of the Code of Criminal Procedure not having been taken; *see Ghurbin* v. *Queen Empress*(1) and *Sheoraj* v. *Emperor*(2). It is regrettable that so often in cases where an accused person is tried and other persons accused are absconding, it is subsequently found that no proper steps have been taken at the time of the former trial to prevent necessary evidence from being lost by death of the witnesses or otherwise. I do not understand it to be laid down by the Judges in *Sheoraj's* case(2), nor is it in my view the law that for the purpose of being used under section 512 the depositions of witnesses must be recorded over again in a separate proceeding. It will suffice if at the commencement of the hearing the prosecutor brings to the notice of the court the fact that such a person is absconding, examines a witness or witnesses to prove that fact and obtains a direction of the court that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under section 512 as well as against the person present and under trial.

[The rest of the judgment is not material for the purposes of this report.]

* * * * * * *

I would affirm the conviction, dismiss the appeal, accept the reference and confirm the sentence of death.

MADAN, J.—I agree.

Appeal dismissed.

Sentence confirmed.

J. K.

(1) (1884) I. L. R. 10 Cal. 1097.
(2) (1926) I. L. R. 48 All. 375.

SPECIAL BENCH.

1936.

December, 3.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and James, JJ.

RAI BABBAN LAL, MUKHTAR, In the matter of.*

Mukhtars, identification by, who have become professional identifiers should not be accepted.

It is not expedient in the public interest that the profession of professional identifiers should be allowed to continue. Identification by mukhtars who have made identification their profession should not be accepted by courts and officers as a matter of course.

Reference under section 14 of the Legal Practitioners' Act, 1879.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

Government Advocate, in support of the reference.

Jaleshwar Prasad and *Phulan Prasad Verma*, against the reference.

COURTNEY TERRELL, C.J.—We have before us the case of one Rai Babban Lal, a mokhtear practising at Chapra and aged about 70 years. The evidence very clearly discloses the fact that although he is certainly qualified to practise as mokhtear his practice in fact consists of identification. He does not take his seat in the mokhtar-khana of the court; he sits under a *bar* tree and does nothing else. The case which has led to the discovery of his real occupation was one in which he purported to identify the signature of one Ramnandan on three documents. One Basdeo Singh was placed on trial in the criminal court for complicity in the false identification of Ramnandan Singh and Rai Babban Lal mokhtear gave evidence in the course of that trial as to the particular incident in question. He explained it thus. He said that the

* Civil Reference no. 2 of 1936. In the matter of proceeding under section 13, clauses (*b*) and (*f*) of the Legal Practitioners' Act, 1879, against Rai Babban Lal, Mukhtar.

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RAI BAEHAN LAL, MUKHTAR, IN THE MATTER OF.

COURTNEY TERRELL, C. J.

accused man Basdeo Singh had come to him and asked him to identify the signature of Ramnandan. That as Ramnandan was a well-known person he thereupon signed the identification of what purported to be Ramnandan's signature on the documents presented to him. He stated that the accused person Basdeo Singh had informed him that Ramnandan was on his way to him (the mokhtear) and that he would come before him for the actual process of identification and while waiting for the appearance of Ramnandan he, the mokhtear, turned to other work and while his attention was distracted from the matter Basdeo Singh took up the papers which he had already signed purporting to identify Ramnandan and disappeared, that is to say, the mokhtear threw all the blame on the individual Basdeo Singh who was being tried. The criminal court acquitted Basdeo Singh of complicity in this false identification. The mokhtear was cross-examined in the course of his evidence and a number of cases were put to him in which he had purported to make identifications and in which it was very clear that the identification was falsely made. Indeed in one particular case—the case of the individual whom he had purported to identify on a former occasion and who was shown to him in court—he had to admit that he could not say whether that was the individual he had identified.

There is no doubt that in the course of time there has come into existence a class of mokhtears usually aged men who have no real practice as mokhtears but who earn a precarious living by making identifications which they are prepared to perform at a fee of a few annas as in the case of this particular man, and it is not expedient in the public interest that that profession of professional identifiers should be allowed to continue. It is of no avail to plead any excuse that the mokhtear is an aged person who could not otherwise maintain life, for that very excuse might be made for any aged person accused of some thoroughly wrongful act. The Courts and all officers who have

to receive documents on which signatures are identified should remember that they are not bound to accept the identification merely because the nature of the identifier's profession entitles him to perform identifications. It is very easy for any officer in that position to become acquainted with the fact that such and such mokhtear whose name he frequently sees on papers of identifications has really no other business, and in those circumstances the presumption is that he is merely a professional identifier whose identification should not be accepted. If the Courts and the officers engaged therein are careful to bear this principle in mind this undesirable type of practitioner will very soon disappear. There is no possible excuse for the individual whose case we are considering and his name must be removed from the roll of Mokhtears.

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RAI BABHAN LAL. MUKHTAR, IN THE MATTER OF.

COURTNEY TERRELL, C. J.

KHAJA MOHAMAD NOOR, J.—I agree.

JAMES, J.—I agree.

Reference accepted.

J. K.

SPECIAL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and James, JJ.

1936.

DEOBANSH SINGH, In the matter of.*

December, 8.

Legal Practitioner—Mukhtarnama or Vakalatnama to withdraw money—responsibility of Vakils and Mukhtars in accepting.

A mukhtar accepted a mukhtarnama, authorising him to withdraw money from court, offered to him by the Karta of a joint Hindu family who was known to him from before and who was accompanied by two other members of the family; but it subsequently transpired that the thumb impression of one other member and the signatures of two others were false.

Held that although the money had not been withdrawn and the conduct of the mukhtar was honest throughout, but

* Civil Reference no. 1 of 1936. In the matter of a proceeding under the Legal Practitioners' Act against Deobansh Singh, Mukhtar.

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DEOBANSH SINGH, IN THE MATTER OF.

he neglected the precaution which the court has laid down in the public interest as regards the acceptance of mukhtarnama and was warned.

The rules of the High Court in regard to the acceptance of vakalatnama or mukhtarnama are very strict and still more strict in the case of mukhtarnama and vakalatnama for the purpose of withdrawing money. The responsibility for the genuineness of the authorization of mokhtars or vakils are of a wholesome character and for the protection of the public.

Reference under section 14 of the Legal Practitioners' Act, 1879.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

Government Advocate, in support of the reference.

B. N. Rai and *Sarju Prasad*, against the reference.

COURTNEY TERRELL, C.J.—In this case we have to deal with the conduct of a Mokhtear Deobansh Singh practising at Gaya. There was a Chamar family whose holdings had been sold under a decree of the Court. After satisfying the decree-holder's claim there remained a sum of Rs. 2,000 odd which was in the normal course of affairs to be paid over to the judgment-debtors. Throughout the litigation the Chamar's family acted through its karta, one Bhitan, and had been represented by a pleader who has since retired from the profession. The Mokhtear Babu Deobansh Singh was acquainted with the pleader and in fact resided in the same house with him at all times material to this inquiry and seems to have had ample opportunity for acquainting himself with the circumstances of the family and the circumstances of the litigation which had given rise to the sale. On the 18th of January, 1935, the karta of the family, Bhitan, accompanied by two other members of the family, named respectively Chowthi and Pachan, went to the pleader and offered to him a mokhtearnama for the purpose of withdrawing the money which was

the surplus proceeds and remained in court. The mokhtearnama which was given to the mokhtear was signed by Bhitan and it was also signed by Ramautar and Tulshi by the pen of Tulshi and it bore the thumb impressions of Chowthi and Pachan who had accompanied Bhitan the karta to the mokhtear; it also bore the thumb impression of the sixth member of the family whose name is Munshi. As a matter of fact it has since transpired that the thumb impression of Munshi and the signatures of Ramautar and Tulshi by the pen of Tulshi were in fact false. The mokhtear accepted this vakalatnama. The falseness of one of the thumb impressions and the signatures of the three men who did not accompany Bhitan has since become manifest. The money has in fact not been withdrawn because by reason of circumstances which are not really necessary to detail the mokhtear was soon made aware of the defect in the mokhtarnama. The substance of the complaint against the mokhtear is the acceptance of this mokhtarnama without due inquiry. No damage has in fact been done to anybody because the defect in the mokhtarnama has since been discovered.

Now the rules of the High Court are very strict and they are the more strict in the case of mokhtarnamas and vakalatnamas for the purpose of withdrawing money. As has often been laid down by this Court the responsibility for the genuineness of the authorization of mokhtears or vakils as the case may be are of a wholesome character and for the protection of the public. There conceivably may be a certain temptation, present to the mind of a mokhtear, not to be too particular in the case of a mokhtarnama for the withdrawal of money because if he makes himself unpleasant to his clients by an acute inquiry his clients may possibly dispense with his services and engage somebody else and in any case the mokhtear runs the risk that he may not actually withdraw the money and may lose the standard remuneration for his services. It is by reason of this possibility—this possible temptation—that the rules are made particularly strict. It is perfectly clear that in this case,

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as has been pointed out by the learned Advocate on his behalf, the mokhtear had no fact before him and no circumstances which would normally have aroused any suspicion. He was acting undoubtedly on the instructions of the karta; he was supported by two members of the family and the earlier litigation had been carried out on behalf of the family through the karta. But the fact that there was nothing to arouse his suspicion does not absolve him from the duty in cases of this kind to make a thorough inquiry and that notwithstanding any possible disadvantage to himself. It is perfectly clear that the mokhtear has done nothing in respect of which this Court can make any reflection upon his character. His conduct has been honest throughout but he certainly has neglected the precaution which the Court has laid down in the public interest.

In the circumstances we see no reason to do more than to warn the mokhtear and the profession generally of the acute importance of making inquiries to see that their mokhtarnamas are in order even in circumstances where prima facie there are no facts to arouse their suspicion.

We do not see fit to make any further order in the matter.

KHAJA MOHAMAD NOOR, J.—I agree.

James, J.—I agree.

Reference accepted

J. K.

PRIVY COUNCIL.

HAZARIRAM MARWARI

v.

RAI BAHADUR BANSIDHAR DHANDHANIA.

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December, 16.

(On Appeal from the High Court at Patna.)

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, Rules 18 to 20—Set off—Decree for sale, when may be set off against decree for mesne profits—Decree in favour of a number of persons, whether it may be set off against decree against some of the number.

Where it is found that a person is entitled to a personal judgment and a charge on property and that neither of these rights are barred by limitation and the final decree directs a specific sum to be realized by the sale of the property charged, this decree may be set off against a decree for mesne profits.

Where a number of persons have a decree and their judgment-debtor has a decree against some of them, the holders of the former decree are entitled on a joint application to set off the latter decree against their decree.

Appeal (no. 18 of 1935) from an order of the High Court** (February 6, 1933) which reversed an order of the Subordinate Judge of Godda (April 11, 1931).

* PRESENT: Lord Roche, Sir Shadi Lal and Sir George Rankin.

**KHAJA MOHAMAD NOOR, J.—The simple question involved in this appeal is whether a mortgage decree for sale obtained by the appellants against Jai Krishna Barham and others hereinafter called the Barhams can be set off against a decree in favour of the latter against Kedar Nath, Musammat Teji Bibi and Nopechand Marwari, three out of sixteen appellants, which decree is now held by Hazariram Marwari and others, respondents, 1st party, as transferees from the Barhams. The learned Subordinate Judge has answered this in the negative and hence the appeal.

The facts are rather complicated and long and relate to a protracted and complicated litigation extending over a period of about thirty years. I shall however confine myself to only those of them which are relevant to the determination of the present appeal.

One Thakur Barham now represented by the Barhams was the owner of a fairly big estate called Patsanda in the district of Santhal Parganas. He seems to have borrowed money rather recklessly and by the year 1902 became hopelessly involved in debt. By that time 10 annas out

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The material facts are stated in the judgment of the Judicial Committee.

1936, *November* 24, 26 *and* 27. *DeGruyther, K. C.*, for the appellants: Unless the decrees are of

of 16 annas of the estate had already become mortgaged and besides this there were several simple money decrees against him. Two of these decrees—one for Rs. 21,702 and another for Rs. 4,522—were in favour of one Gobardhan Das a member of the family of Kedar Nath, one of the appellants. The decree-holder proceeded to execute them. Thakur Barham succeeded in obtaining a stay order from the Calcutta High Court pending the hearing of his appeals against the decrees— on giving security for carrying out the decrees of the High Court by hypothecating three annas out of the unencumbered six annas share of the estate. He gave two annas in security against the first decree and one anna as against the second decree. This was on 10th November, 1902. In the meantime several other persons holding money decrees against Thakur Barham, proceeded almost simultaneously to execute them against the six annas which was free from mortgage, except that 3 annas of it was subject to the two security bonds and it was sold in execution of one of these decrees which was in favour of one Jiban Ram. Unfortunately by some mistake the writ of attachment, issued in execution of this decree, instead of describing the six annas as unencumbered actually described it as encumbered. The Subordinate Judge, however, proceeded to sell and did sell the unencumbered six annas subject however to the two charges under two security bonds already referred to. He seems to have held that the word "encumbered" was a clerical mistake for "unencumbered". The sale took place on 27th July, 1904, and the property was purchased for Rs. 1,12,000 by three sets of persons (hereinafter called auction-purchasers) in the following shares:—

Sri Mohan, father of Kedar Nath ...	...	2 annas.
Gulabran, husband of Teji Bibi ...	...	3 annas.
Chaturi Ram and Nopechand ...	...	1 anna.
Total ...	...	6 annas.

The sale proceeds were rateably distributed among the various decree-holders. The auction-purchasers obtained delivery of possession on 25th December, 1904. By that time the security bonds subject to which the property was sold had become payable as Thakur Barham's appeal was dismissed by the Calcutta High Court; the auction-purchasers paid Rs. 34,000 to Gobardhan Das on the 21st of May, 1905, in discharge of the two security bonds.

Objections had, however, been raised by Thakur Barham at the time of the issue of the sale certificate in favour of the auction-purchasers to the effect that the share sold was not the unencumbered six annas, but the six annas out of ten annas which was encumbered. The objection was overruled by the Subordinate Judge and the Calcutta High

the same type there cannot be a set off. A decree for money may be set off against a decree for money and a mortgage decree against a mortgage decree. Rule 18 should be read with rule 20. In the absence of a

Court, but on appeal to the Privy Council their Lordships, on 25th November, 1913, set aside the entire sale [*Thakur Barmha* v. *Jiban Ram Marwari*(1)]. Thakur Barham had died in 1906 and was succeeded by the Barhams and in the meantime Qamaruddin and others (hereinafter called the Mandals) had obtained from them 3¼ annas out of six annas of the estate which was the subject-matter of the litigation. When the Privy Council set aside the sale, proceedings for restitution with mesne profits were started on behalf of the Barhams and the Mandals. It is unnecessary to describe in detail the course of a triangular fight which lasted for more than ten years. Not only was there litigation between Barhams and the auction-purchasers but also between Barhams and Mandals. The Mandals wanted restitution of 3¼ annas out of six annas of the estate to them on the basis of their being transferees of that share from the Barhams. This was disputed by the latter. The auction-purchasers objected to the restitution on grounds of which only three are relevant.

They wanted refund of the purchase money and of the Rs. 34,000 which they had paid to Gobardhan in satisfaction of the charge subject to which the property was sold and contended that as Chaturi, one of the auction-purchasers, had died before the order of the Privy Council, restitution to the extent of his share (6 pies) could not be granted. Without giving the detail of the course of this litigation it is sufficient to state that it ended in the following manner. It was held—

(*1*) That the decree-holders among whom the purchase money had been rateably distributed were not liable to refund it.

(*2*) That the auction-purchasers should bring a separate suit for the realisation of Rs. 34,000 which they had paid towards the discharge of the two security bonds in favour of Gobardhan Das.

(*3*) That 6 pies share of the auction-purchaser Chaturi Ram was not affected by the order of the Privy Council and the restitution could not be granted in respect of it.

(*4*) That the auction-purchasers were entitled to get a set off of their purchase money against the mesne profits of the period of their possession; see *Kedar Nath Marwari* v. *Jai Berhma*(2) for the judgment of the High Court and *Jai Berhma* v. *Kedar Nath Marwari*(3) for that of the Privy Council in appeal from this court.

After some further litigation with the consent of the parties decree for mesne profits was passed in M. A. 154 and 159 for Rs. 81,398 without interest against the auction-purchasers in favour of the Barhams on 15th January, 1924, after adjustment of the purchase money of

(1) (1913) I. L. R. 41 Cal. 590; L. R. 41 Ind. App. 38.
(2) (1916) 37 Ind. Cas. 863.
(3) (1922) 4 Pat. L. T. 61.

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personal liability there can be no set off. The value of the mortgage decree must be ascertained. A mortgage decree may be for Rs. 20,000 and the property on sale may not realise Rs. 5,000. Reference was made to Rule 53 and Order XXXIV, rule 6. To come within Rule 20 both decrees must be for sale.

KHAJA MOHAMAD NOOR, J.

Rs. 1,12,000 and the auction-purchasers were directed to give up possession at once. I shall call this decree the mesne profits decree and it is one of the two decrees with which we are concerned in this appeal.

By a similar compromise between the Barhams and the Mandals in this court the latter agreed to take 1 anna 7½ pies instead of 3 annas 3 pies and gave up their claim to the mesne profits for the period up to the date of the compromise, namely, 28th February, 1923.

It is necessary to state a few more facts about the mesne profits decree. It has been transferred to Hazari Ram and others, the principal respondents before us, on 12th November, 1925, for a consideration of Rs. 56,398 out of which Rs. 43,398 was set off towards the previous dues of Hazari Ram from the Barhams. Prior to its transfer the decree was attached by Lakhi Prasad Dhandhania and Sheodutt who held decree against the Barhams, and these two persons as attaching creditors sought to execute the mesne profits decree. This was objected to by, amongst others, Hazari Ram and others, the present respondents, as transferees of the decree and ultimately it was decided by this Court that as the transfer to Hazari Ram was subject to the attachment by Lakhi Prasad and Sheodutt, Hazari Ram must pay up these two decree-holders before he could get a complete title in the mesne profits decree. Accordingly Hazari Ram paid up the two decree-holders, Sheodutt and Lakhi Prasad, a total sum of about Rs. 12,000.

I have said that under the orders of this High Court [*Kedar Nath Marwari* v. *Jai Berhma*(1)] which was affirmed by the Privy Council [*Jai Berhma* v. *Kedar Nath Marwari*(2)] it was held that though the auction-purchasers were entitled to set off their purchase-money towards the mesne profits for which they were liable, they were not entitled to set off Rs. 34,000 which they had paid to discharge the two security bonds given by Thakur Barham to Gobardhan Das and for this they were referred to a separate suit. Consequently all the members of the auction-purchasers' family brought on the 6th February, 1917, a suit for this amount against the Barhams. The Mandals being interested in the property which was charged with this money were also impleaded as defendants. The suit was decreed on the 28th February, 1925, and a final decree for sale, for about Rs. 87,000 with future interest was passed on 18th December, 1932. This decree which I shall call the mortgage decree, is the decree which is sought by the appellants to be set off against the mesne profits decree. All the facts which I have stated are admitted and all are based upon court-records.

It will be useful at this stage to state the case of the appellants about the position of the auction-purchasers who are judgment-debtors

(1) (1916) 37 Ind. Cas. 863.
(2) (1922) 4 Pat. L. T. 61.

Before the Code of 1908 a mortgage decree could not be set off against a mortgage decree. *Nagar Mal* v. *Ramchand*(1) was wrongly decided.

in the mesne profits decree. It will be recalled that at the sale of 6 annas of the estate on 27th July, 1904, which was set aside by the Privy Council on 25th November, 1913, the auction-purchasers were Sri Mohan, father of the appellant Kedar Nath (2 annas), Gulab Ram, husband of appellant Teji Bibi (3 annas) and Chaturi Ram and appellant Nopechand (1 anna). Chaturi Ram as already stated having died before the Privy Council Order is not in this controversy. The appellants' case has been that these purchasers purchased the property not individually but as representing their respective families except of course Gulab Ram who was by himself and is now represented by his widow, Teji Bibi, appellant no. 12. It has been claimed that Sri Mohan represented the joint Mitakshara family of appellants nos. 1 to 11 and Nopechand Marwari represented the family of appellants nos. 13 to 16. It was for this reason that when the auction-purchasers instituted the suit for recovery of the money which during the period of their possession of 6 annas of the estate they had paid to discharge the two security bonds in favour of Gobardhan Das subject to which the property was sold, they did not bring the suit on behalf of the three nominal auction-purchasers only, but all the members of the two families along with Teji Bibi were plaintiffs; and it is for this reason that while in the mesne profits decree only three nominal auction-purchasers are the judgment-debtors, in the mortgage decree which was for the money spent by the auction-purchasers as such, all the members of the auction-purchasers' family are the decree-holders. That the purchase was on behalf of all the members of the three families was clearly mentioned in the plaint of the mortgage suit (*vide* paragraph 11, Exhibit 2). In fact it is maintained on behalf of the appellants that though the mesne profits decree is nominally against three judgment-debtors only all the appellants are judgment-debtors of that decree.

I have stated that the only issue in this case is whether the two decrees can be set off against one another. The learned Subordinate Judge has refused to do so, and the only ground of his refusal mentioned in his judgment is that according to him the two decrees are not cross-decrees on account of the parties being different. The same view has been pressed before us by Mr. Manohar Lal, who appeared on behalf of the respondents. He has further pressed several other grounds against the application of the rules of set off which I shall take up later.

In my opinion the view taken by the learned Subordinate Judge as to the parties being different cannot be accepted. In deciding whether the two decrees are cross-decrees we must look to the substance, and not to the form. In this case there is no difficulty in deciding that the judgment-debtors of the one are in substance exactly the decree-holders of the other and *vice versa*. The two decrees relate to the same transaction, and the rights and liabilities of the parties arise out of the same set of facts, namely, the possession of auction-purchasers under a sale which was subsequently set aside. The mesne profits decree

(1) (1910) I. L. R. 33 All. 240.

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Reference was made to *Sheo Shanker* v. *Ghunni Lal*(1), *Ram Chander* v. *Mahbir Singh*(2), *The Burma Oil Co., Ltd.*, v. *Ma Tin*(3) and *Venkata Reddi* v. *T. V. Doraisami*(4).

in favour of the Barhams against the auction-purchasers is for the latter's wrongful possession under a sale which was set aside by the Privy Council. The mortgage decree is for the money which these very auction-purchasers had spent in discharging the liability on that property of which they were in wrongful possession and for which they were specifically referred to a separate suit under the orders of this court and the Privy Council. It is obvious that the plaintiffs who brought the mortgage suit were those very persons who had paid the amount as auction-purchasers and as I have said were clearly mentioned in the plaint of the mortgage suit. The fact that in the mesne profits decree only three persons were made judgment-debtors as the sale was in their names only will not, in my opinion, affect the case. The difference in name is only in form and not in substance. It must therefore be held that all the appellants are judgment-debtors in the mesne profits decree. It has, however, been contended that the position becomes different on account of the fact that in the mortgage decree not only the Barhams but the Mandals as well are parties. That in my opinion should not affect the position. The Mandals were impleaded in the mortgage suit not because they were liable for the money but because they acquired interest in the equity of redemption after the creation of the charge and it was necessary that the order for sale should be passed in their presence in order to give them an opportunity to redeem. Under Order XXI, rule 20, the principle of set off is applicable to mortgage decrees, and in a mortgage decree generally persons other than the mortgagors are judgment-debtors. They are, however, not judgment-debtors in the sense in which the mortgagors are judgment-debtors. The question to be considered will be—who are liable to pay the money for which the decree for sale has been passed and in my opinion nobody else than the mortgagors, the Barhams, are so liable. Therefore the mesne profits decree is payable to the Barhams by the auction-purchasers in which term I will include all the appellants for the grounds stated above and the mortgage decree is payable by the Barhams to the auction-purchasers. I shall deal later with the question of the personal liability of the Barhams. The fact that the Mandals are also mentioned as judgment-debtors does not as I have said change the position and I, therefore, hold that these two decrees are cross-decrees. Apart from this the question that all the appellants were the auction-purchasers is concluded by *res judicata* between them and the Barhams whose representatives the respondents Hazariram and others are. The two security bonds were discharged by the auction-purchasers. All the appellants claiming to be auction-purchasers instituted the mortgage suit for that money against the Barhams and got a decree. The Barhams are bound by that decree and are precluded from challenging

(1) (1916) I. L. R. 38 All. 669.
(2) (1917) 15 All. L. J. 327; 39 Ind. Cas. 560.
(3) (1929) I. L. R. 7 Rang. 505.
(4) (1932) I. L. R. 56 Mad. 339.

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The parties here are different and the decrees cannot, therefore, be set off.

the fact that all the appellants were auction-purchasers. The respondents have taken a transfer of the mesne profits decree after the passing of the mortgage decree. They have taken the transfer subject to all the equities which the appellants had against the Barhams (section 49 of the Civil Procedure Code) and they cannot dispute the position taken up by the appellants.

I now take up the points raised by Mr. Manohar Lal against the application of the principle of set off in this case which were perhaps urged before the learned Subordinate Judge but do not seem to have been noticed by him in his judgment. It may be due to the fact that while the arguments were concluded on 14th September, 1929, on account of multifarious work which he has to do in the non-regulation district of Sonthal Parganas he could not deliver his judgment till 11th April, 1931. The points are these:—

(1) That Order XXI, rule 20, applies only when both the cross-decrees are mortgage decrees. It does not apply when one is a mortgage decree and the other is a simple money decree or at any rate it applies only when the mortgage decree for sale contains a personal order for payment of money.

(2) That the appellants are precluded from maintaining that they were all the auction-purchasers and are judgment-debtors in the mesne profits decree. Such a contention is barred by *res judicata*, or at any rate by estoppel.

(3) That set off should in this case be refused on equitable grounds because the property which is the subject of the charge of the appellants' decree for sale has been purchased subject to the charge by the appellants themselves in execution of simple money decrees or at any rate they brought about the sale of the mortgaged properties subject to their charge.

(4) That the personal remedy of the appellants against the Barhams is barred and therefore set off cannot be allowed as the mesne profits decree was the personal property of the Barhams and cannot be utilised for the satisfaction of the mortgage decree unless personal remedy is open to the appellants.

I shall take up these points in the order in which they have been stated.

As to the contention about the applicability of Order XXI, rule 20, there is nothing to indicate that the operation of the rule is confined only to cases where both the decrees are for enforcement of mortgage or charge. I am unable to read in rule 20 the qualifications which have been contended for by the respondents. In *Nagar Mal* v. *Ramchand*(1) a decree for sale was allowed to be set off against a simple money decree. Mr. Manohar Lal has, however, relied upon three cases in support of his contention, and I propose to examine each of them in detail.

(1) (1910) I. L. R. 33 All, 240.

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Sir Thomas Strangman, following: A money decree differs from a decree for sale. In the latter time is given within which to pay. Having regard

The first is the case of *Sheo Shanker* v. *Chunni Lal*(1). In this case the mortgagee decree-holders wanted to set off their decrees for sale against simple money decrees held against them not by the mortgagor but by subsequent transferees of the mortgaged property. This, if I may say so, was rightly refused. This case is rather an authority against the respondents and supports the view which I have taken in the earlier part of this judgment that in applying the principle of set off to a mortgage decree it will be necessary to examine whether a person, who is mentioned as a judgment-debtor in that decree is really so in the sense that he is liable for payment of the decree. I have held that the Mandals being parties as judgment-debtors to the mortgage decree before us does not affect the position inasmuch as they are judgment-debtors but are not personally liable for payment of the decree. They were impleaded as subsequent purchasers of the mortgaged properties.

The next case is *Ram Chander Upadhya* v. *Mahabir Singh*(2). In this case set off between two mortgage decrees was refused. This does not support the contention that rule 20 applies when both the cross-decrees are mortgage decrees. The position, of the parties in that case is not very clear from the judgment, but it appears that they were not identical. Mr. Manohar Lal has, however, relied upon the observation of their Lordships about the difficulties in administering rule 20 of Order XXI. The observations are these:

"This (rule 20) is a new rule which has been added to the present Code. It seems to us somewhat difficult to understand how the provisions of Order XXI, rules 18 and 19, will be administered as applying to mortgage decrees particularly in cases like the present when there is no personal liability. A mortgage decree merely directs the sale of mortgaged property in the event of the mortgage money not being deposited. We may point out that in many cases the value of a mortgage decree depends not on its face value, that is, the amount found due, but on the value of the property directed to be sold. It might so happen that a decree declaring that a lakh of rupees was due might be of less actual value than a decree declaring Rs. 5,000 due on other property; all depends on the value of the property ordered to be sold." * * * * * * *

* * * "We, however, have not to consider the case of setting off of two mortgage decrees between the same parties. It is quite clear that there cannot be a set off in the present case unless the decree can be said to be a decree "jointly" and "severally" against Ram Chander, his son and the other defendants. It seems to us that a mortgage decree can never be said to be a 'joint' and 'several' decree within the meaning of that expression in Order XXI, rule 18."

No doubt a mortgage decree so far as it orders the sale of a certain property is not joint and several, but so far as the liability of payment

(1) (1916) I. L. R. 38 All. 669.
(2) (1917) 39 Ind. Cas. 560.

to the very different character of the decrees, one would expect very clear language if it was intended to set off a decree for sale against a money decree.

of money is concerned it may be a joint and several decree against the mortgagors *inter se*. However the remarks of their Lordships as to the difficulties in the administration of rule 20 of Order XXI are *obiter dicta* and were not necessary for the decision of the case. In fact the *ratio decidendi* of that case was that the parties were not identical. While one decree was in favour of Ram Chander alone, the other as against Ram Chander, his son and six other persons and it is not clear from the judgment what was the character of persons other than Ram Chander in the decree passed against them.

The last case is *The Burma Oil Company, Limited* v. *Ma Tin*(1). This case has been relied upon by Mr. Manohar Lal as an authority for the proposition that Order XXI, rule 20 has no application unless there is a personal liability under the mortgage decree. The judgment of their Lordships no doubt supports this contention. In that case there was a money decree in favour of Ma Tin and Po Gon against the Burma Oil Company while the other decree—a mortgage one—was in favour of the latter but was not only against Ma Tin and Po Gon, but also against Po San, brother of the husband of Ma Tin who was not only a co-mortgagor with his deceased brother but had an interest in the mortgaged properties by virtue of an award. It is obvious that set off, if I may be permitted to say so, was rightly refused, but their Lordships did not decide the case on that ground. They decided it on the ground that for the application of Order XXI, rule 20 it was necessary that there should be a decree for payment of money. If their Lordships meant that rule 20 applied only in cases where personal remedy is legally available and not otherwise I respectfully agree: but if they meant that rule 20 only applies when the decree actually is for payment of money personally by the judgment-debtor, then with due deference I beg to differ, as this view is against the plain meaning of rule 20. Every preliminary decree for sale directs that a certain sum of money shall be paid by the judgment-debtors to the decree-holder within the time fixed by the Court (Form no. 5A in Appendix D of the Civil Procedure Code) and a final decree makes the conditional order for sale absolute. Such decrees are decrees for payment of money in the sense that that money is payable under them and default results in the sale of the mortgaged property. They are, however, not decrees for payment of money in the sense that there is no personal obligation to pay any money at that stage. That stage comes later. The decree making the mortgagor personally liable for payment of the money can only be passed after the mortgaged properties had been sold up and the sale proceeds are found to be insufficient for satisfaction of the decree. Order XXXIV, rule 6 provides that where the net proceeds of any sale held under the last preceding rule (rule 5) are found to be insufficient to pay the amount due to the plaintiff, the court on application by him may, if balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance. It cannot

(1) (1929) I. L. R. 7 Rang. 505.

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Dunne, K. C., and *Wallach* for the respondents: A reasonable construction must be put on the rules and, in construing them, one should not put a type of

be said that the decree referred to in rule 20 is the one contemplated in rule 6 of Order XXXIV or, in other words, that rule 20 applies only to personal decrees for the balance left after sale of the mortgaged property. This view will defeat the very object which the Legislature had in mind when they deliberately introduced rule 20 in Order XXI. Decrees passed under Order XXXIV, rule 6 are not decrees for enforcement of mortgage or sale but rule 20 specifically mentions a decree for enforcement of a mortgage and a charge. When a personal decree is passed under Order XXXIV, rule 6, there is no decree for enforcement of mortgage or charge. It appears from the judgment of Heald, J., that in his Lordship's view rule 20 applies when the preliminary decree for sale provides that in case the sale proceeds of the mortgaged property is insufficient to satisfy the decree, the decree-holder will be at liberty to apply for a personal decree. Form no. 4 in Appendix D of the Civil Procedure Code is referred to (perhaps forms nos. 5 and 5A are meant). Now this provision need not be mentioned in a preliminary decree. This is a right given to the decree-holder by law under Order XXXIV, rule 6. In my opinion it makes no difference whether such a provision is or is not made in the decree. If made it is nothing more than a quotation from Order XXXIV, rule 6. There are, however, passages in the judgment to show that in that case personal remedy was not available and his Lordship meant that in such a case rule 20 is not applicable. If so, as I have said, I respectfully agree with him. For instance, at pages 508 and 509 of the report his Lordship says:

"Nevertheless I find it difficult to hold that a mortgage decree for the sale of the mortgaged property, while there is no remedy except against the property and where there is no obligation on the part of the mortgagors personally to pay any sum of money, is a decree for the payment of a sum of money." Again at page 512 the following significant passage occurs:—

"If the balance is not so recoverable, the decree is not an ordinary decree for sale in enforcement of a mortgage, and since in my opinion it cannot be regarded as a decree for the payment of a sum of money I would hold that rule 18 cannot be applied to it."

It may however be argued that the view which I have taken may lead to anomalous results. For instance, it may be said that while in a decree for enforcement of a mortgage or charge the decree-holder, even if his personal remedy against the mortgagor is not barred by limitation, cannot proceed against him personally unless he exhausts his remedy against the mortgaged property. In other words, he is entitled to proceed against the mortgagor personally only for the balance of the money which remains unsatisfied and that also ordinarily after he obtains a decree under Order XXXIV, rule 6; but if we allow a decree-holder to set off his mortgage decree aganist a money decree which the mortgagor has against him, we practically allow the mortgagee decree-holder a personal remedy against the mortgagor before his remedy

case that is not likely to arise. Before the enactment of Rule 20, it was held under section 246 of the old Code that a decree for sale was a decree for the payment of money. There were differences of opinion on

against the mortgaged properties is exhausted. Allowing a set off is practically allowing the decree-holder of the mortgage decree to realise his decree from one particular kind of personal property of the mortgagor judgment-debtor, *e.g.*, the mortgagor's money decrees against the mortgagee. This may be so. But the Legislature has deliberately allowed this by introducing rule 20 in Order XXI and, in my opinion, its effect is that if the mortgagor has a decree against the mortgagee, such a decree can be set off against the mortgage decree even before the mortgaged property is exhausted and a personal decree under Order XXXIV, rule 6, is passed. It would have been rather unjust to a mortgagee, who holds a decree against the mortgagor for the enforcement of the mortgage to force him in some cases to wait for the expiry of the period of grace and then to proceed against the mortgaged properties which may hardly be sufficient for satisfaction of the decree, and then to apply under Order XXXIV, rule 6, for a personal decree, and in the meantime to allow the mortgagor in execution of his own decree against the mortgagee to put him into prison by enforcing his money decree against him. It was to avoid this contingency that the Legislature, in my opinion, has deliberately allowed the mortgage decree to be enforced against a particular kind of property of the mortgagor judgment-debtor, namely, against the decree of the mortgagor against the mortgagee. Then it is not universally true that a mortgage decree cannot be executed against the mortgagor unless the mortgaged property is exhausted. See *Hart* v. *Tara Prasann Mukherji*(1). It is, however, not necessary to discuss the matter further. Rule 20 is clear and unambiguous, and I would overrule the contention of the respondents.

The second point raised is that of *res judicata* and estoppel. In order to appreciate the arguments of Mr. Manohar Lal it is necessary to state a few more facts on which his contentions are based. In the beginning of the judgment I have stated that there were a number of simple money decrees against Thakur Barham now represented by the Barhams, and the decree-holders proceeded against the six annas share of Patsanda Estate which was sold in execution of the decree of one of them, Jibanram, and this sale was set aside by the Privy Council and litigation followed. In the meantime the sale proceeds, Rs. 1,12,000 had been ratably distributed among the various decree-holders, when the restitution proceedings were started the decree-holders between whom the sale proceeds were ratably distributed were necessarily made parties to the proceeding and they were also parties to the two Miscellaneous Appeals before this court: (Miscellaneous Appeal no. 154 of 1922 on behalf of the Barhams against the decree-holders and auction-purchasers and Miscellaneous Appeal no. 159 of 1922 by the three auction-purchasers against the Barhams and the decree-holders). By compromise a decree for Rs. 81,398 for mesne profits was passed against the auction-purchasers. Among the money decree-holders there

(1) (1885) I. L. R. 11 Cal. 718.

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the question and Rule 20 was enacted to remove the doubt. In a mortgage decree there must first be calculated the debt due which is to be enforced by

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were some members of one of the families of the auction-purchasers, and they were decree-holder respondents in Miscellaneous Appeal no. 154 of 1922 preferred by the Barhams. The decree of this court by mistake of the office, was so drawn up as to read that the mesne profits were decreed not only against the auction-purchasers but against the decree-holders as well. This was wrong. Two of the appellants, namely, Bansidhar and Jwala Prasad and Dwarka Prasad, the father of another appellant Moti Lal and some other decree-holders in their capacity as decree-holders filed an application for amendment of the decree and in Miscellaneous Judicial Case no. 9 of 1925 the decree was amended on the 20th of April, 1925, with an order that the mesne profits decree be confined against the three auction-purchasers only. On this fact Mr. Manohar Lal contended that some of the appellants having denied the liability to the mesne profits decree by applying for amendment of the decree cannot now come forward and say that they are the judgment-debtors in the mesne profits decree and thereby claim a set off by making the mesne profits decree and the mortgage decree cross-decrees. I do not find any force in this contention. We sent for the record of Miscellaneous Judicial Case no. 9 of 1925 and examined, in the presence of the parties, the application for the amendment of the decree, and informed them of this. There is nothing in that application to show that Dwarka Prasad and other appellants ever denied the liability to the mesne profits decree as auction-purchasers. They only wanted that the decree as drawn up which read as if the liability for payment of the mesne profits was not confined to the auction-purchasers but to the decree-holders also, be amended. The appellants were not only some of the appellants before us but several other decree-holders as well. In my opinion they rightly got the decree amended. Apart from this, I do not understand how estoppel can in any sense be applied to this case. Long before this application which was in 1925, all the appellants had already instituted a suit in 1917 for the realisation of money which they had paid to discharge the two security bonds and all the members of the family were plaintiffs in that suit, though the nominal purchasers were three persons only. They had also already obtained their decree on that basis on 28th February, 1925, several months before the order of amendment was passed by this court. There was no representation which in any way induced the Barhams to change their position. The Barhams knew full well that the case of the appellants in their mortgage suit was that all the appellants were in fact auction-purchasers and it was in that capacity that they were suing for the money. I do not find any merit in this contention.

The second set of facts on which the contentions of *res judicata* and estoppel are based are these. I have already stated that two persons Lakhi Prasad and Sheodutt who held simple money decrees against the Barhams in execution cases nos. 13 and 17 of 1924 attached this mesne profits decree and as the attaching creditors proceeded to execute it against the three auction-purchasers and attached a specific share of Kedar Nath and Nopechand in the joint family properties: (execution cases nos. 40 and 42 of 1925). There was an objection on behalf of some of the appellants which was disposed of on the 17th of January,

sale of the mortgaged property. It is impracticable to set off one mortgage decree against another. Upon a reasonable construction, if one party has a decree

1927 (see Exhibit K). The learned Subordinate Judge directed that only the share of the judgment-debtors named in the decree be proceeded with. These two execution cases were dismissed on full satisfaction as Hazariram and others transferees of the mesne profits decree paid up the creditors who had attached that decree prior to its transfer to them. On this it is contended on behalf of the respondents that as some of the appellants took up the attitude in those execution cases that the mesne profits decree was against three persons only, and it was so decided, this decision operates as *res judicata*, or at any rate the appellants are now estopped from raising the question that the mesne profits decree is against all the appellants, I shall take up *res judicata*. First of all there is no decision that the appellants are not liable for the mesne profits decree or that they are not its judgment-debtors. The only point decided was as to the extent of the share of the three judgment-debtors which was liable to attachment. Assume that there was a decision (if it was one) between some of the appellants on the one hand and Lakhi Prasad Dhandhania and Sheodutt, the two attaching creditors of the Barhams, on the other. The appellants are claiming a set off against the Barhams and their representatives the respondents. Neither the Barhams nor the respondents were parties to that decision, nor are they representatives of the attaching creditors. As the Barham and the respondents are bound by that decision, the appellants are not bound by it. For operation of *res judicata* there must be reciprocity. If in execution of a decree at the instance of an attaching creditor it is decided that the decree is barred by limitation, this decision is not binding upon the decree-holder and if it is decided otherwise, it cannot therefore be pleaded as *res judicata* by the decree-holder if the question arises directly between the decree-holder and the judgment-debtor.

I now take up the consideration of estoppel. There is nothing to show, not even an allegation that either the Barhams or the Mandals acted on any representation of any of the appellants. The respondents had already taken the transfer of the decree. Barhams knew the position of the appellants all along. So long ago as in 1917 the appellants had set up their case that all of them were auction-purchasers. It was on that basis that mortgage decree was passed in favour of all of them in 1925. The representation, if any, in the objection filed against the execution taken out by the two attaching creditors of the mesne profits decree was in 1927. What binds the Barhams binds the respondents. There is no estoppel when the true state of affairs is known. The only thing which the respondents did after the objection was that they paid about Rs. 12,000 to satisfy the decree of the attaching creditors. There is no allegation that they did so on the strength of any representation of the appellants. They did so to complete their own title to the mesne profits decree which was transferred to them while it was under attachment. I therefore hold that the claim of set off is not barred either by *res judicata* or estoppel.

The next point urged is the equitable consideration. In order to appreciate this, it will again be necessary to state a few more facts. I have already stated that after the sale of the six annas of the estate

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which is executable by sale, he is entitled to say, I have a decree which can be set off.

was set aside by the Privy Council the Barhams and the Mandals were allowed restitution of 5½ annas share only. The restitution of the remaining 6 pies was refused on the ground that one of the auction-purchasers Chaturi Ram, who was sharer in the sale to that extent, had died before the order of the Privy Council was passed. I have also stated that by a compromise between the Barhams and the Mandals 1 anna 7½ pies was allowed to the Mandals, thus leaving 3 annas 10½ pies only to the Barhams. It has also been stated that the several money decrees were being enforced against the Barhams and it was in execution of one of those decrees in favour of one Jiban Ram that 6 annas was sold and the sale proceeds Rs. 1,12,000 were ratably distributed among all the decree-holders.

When the sale was set aside and restitution proceedings were started, the execution proceedings were also revived and the decree-holders who held money decrees proceeded against 5½ annas which by now as I have shown was owned to the extent of 3 annas 10½ pies by the Barhams and 1 anna 7½ pies by the Mandals. It appears from the statement made in paragraph 13 of the objections filed by the respondents (page 3 of the paper-book, Parts I and II) that the Barhams sold 6 pies to one Ramrekha, 1 anna 1½ pies to Surajmal Marwari and gave the remaining 2 annas 3 pies in Satotra (an usufructuary mortgage in which the principal and the interest are satisfied within a certain fixed period of time and then the property automatically reverts to the mortgagor) to the same Surajmal Marwari; out of the proceeds of these transactions the Barhama partly satisfied the various money decrees. These facts have not been disputed before us. Thereafter the money decree-holder proceeded against the remaining 1 anna 7½ pies which apparently belonged to the Mandals. It is not clear from the record, but it seems that the attachment of 6 annas made in the year 1902 was taken to have been subsisting all these years, otherwise the share which had passed to the Mandals could not have been proceeded against. Be that as it may, the fact is that the decree-holders proceeded to sell the remaining 1 anna 7½ pies and the encumbrance of the mortgage decrees of the appellants was notified in the sale proclamation and the share was sold subject to this encumbrance in execution of the decree of one of the money decree-holders Baijnath Ram Marwari and was purchased by the aforesaid Surajmal Marwari and one Ramautar Lal Marwari for a sum of Rs. 38,100 and the sale proceeds were ratably distributed amongst all the decree-holders. The sale certificate is Exhibit 1 (page 66 of the paper-book, Part III) and the ratable distribution list will be found at page 67 of the same paper-book. Now prior to this execution against the 1 anna 7½ pies of the estate three out of five of these decrees mentioned at page 66 of the paper-book came to be held by some of the appellant: two of them by the family of the appellant Kedarnath and one by appellant Chamanram, and these three decrees were also executed and though the sale did not take place in execution of these decrees, the decree-holders participated in the ratable distribution and they had also taken steps to have the encumbrance of the mortgage decree notified in the sale proclamation. On these facts the respondents contend that

In the suit against the three persons their families were included. All the sixteen persons in the other suit were members of the three families.

Surajmal and Ramautar are the benamidars of the appellants and the 3 annas out of 5½ annas of the estate, on which there is a charge of the mortgage decree of the appellants, has come in their possession and they have purchased it subject to the encumbrance of their own decree. Therefore it will be inequitable to allow them to realise their decree by a set off.

The second contention is that even if the purchasers are not the benamidars of the appellants, even then as the family of the appellant Kedarnath and the appellant Chaman Ram brought the mortgaged properties to sale in execution of their own money decrees subject to the encumbrance, the appellants should not now be allowed to realise the decree by a set off, as it would amount to double payment, inasmuch as while the property was sold at lesser price on account of the encumbrance of the appellants and thus the Barhams, whose place has been taken by the respondents, were forced to part with their property on lesser price, they are now being called upon to surrender their mesne profits decree to satisfy that encumbrance, namely, the mortgage decree.

As to Surajmal and Ramautar being benamidars of the appellants, the respondents have not been able to substantiate this. There is absolutely no evidence on the record to show that either of them is a benamidar for any one of the appellants. No doubt, Surajmal is a partner in one of the cloth shops of one of the families of the appellants but that does not show that he is their benamidar in the property which he has purchased. The very fact that he is a partner shows that the interests of the two are different. Ramrekha is no doubt a relation of one of the appellants Nopechand, but that also does not show that he is his benamidar. Suggestions to this effect were made to the witnesses of appellants but have been denied by them. I therefore hold that it has not been proved that the mortgaged properties 3 annas out of 5½ annas of the estate have come into the possession of the appellants, the decree-holders of the mortgage decree.

Coming to the next question, Mr. Manohar Lal has relied upon Exhibits A, K(3), C, K(4), E and K(6) showing that it was at the instance of some of the appellants as money decree-holders that 1 anna 7½ pies, which was put up for sale, was so done after notifying the encumbrance of the mortgage decree. He contends that the judgment-debtors, the Barhams, fixed the upset price of 1 anna 7½ pies of the estate, which was going to be sold, at Rs. 75,000; it was at the instance of the decree-holders, who brought to the notice of the court that the property was subject to the encumbrance of Rs. 88,000, that the court fixed the value of the property at Rs. 35,000 and the property was sold at Rs. 38,100.

Now the question is whether by asking the court to notify their encumbrance of the decree the appellants have lost their rights of set off under Order XXI, rule 20. As was pointed out in the case of

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De Gruyther, K. C., in reply:—Referred to Woodroffe and Amir Ali's Code of Civil Procedure, 1st edition, page 375, and the difference of *Sheo Shanker* v. *Chuni Lal*(1), a case already referred to, the right of set off of decrees is a right created by law and must be enforced unless it is lost under the law. First of all, the property was not sold in execution of the decrees of any one of the appellants. It was sold in execution of a decree of another man altogether, namely, Baijnath Ram Marwari. They simply executed their money decrees to participate in the ratable distribution and participated in it. Notification of the encumbrance is compulsory under Order XXI, rule 66, and the decree-holders were legally bound to notify it. Again, the encumbrance was not on this specific 1 anna 7½ pies. It was on 3 annas out of the 5½ annas which was restored to the Barhams and the Mandals after the setting aside of the sale by the Privy Council. I do not find anything which can be said to have taken away the right of the appellants to have the decree set off.

Assuming, however, that we can apply equitable considerations in this case, there is no particular equity in favour of the respondents. The respondents have purchased the mesne profits decree after the mortgage decree was passed against the Barhams and they must be taken to have purchased it subject to all the equities which the appellants had against the Barhams. Those who have purchased 1 anna 7½ pies have done so far a sum of Rs. 38,100 of which the upset price as given by the judgment-debtors themselves was Rs. 75,000. They have also the equity in their favour to this extent that the burden on the property purchased by them should not be more than the difference between the actual value of the property and the price paid by them. Assuming that the properties fetched smaller price on account of their being subject to the encumbrances, the deficit was only Rs. 36,900 or say Rs. 40,000. The set off claimed by the appellants will not entirely satisfy the mortgage decree. It has swelled to about Rs. 1,12,000. The mesne profits decree, on the other hand, is only for Rs. 81,000 and as no interest was allowed on this amount the recoverable amount has not increased. The result will be that after the satisfaction of the mortgage decree by a set off against the mesne profits decree there will still be left about Rs. 40,000 to be realised before the mortgage decree can be satisfied and the purchasers of the property will still be liable for that amount. Therefore taking into consideration the equities in favour of the respondents and in favour of those who are subsequent transferees of the mortgaged properties, I do not think there is any reason to give the former preference over the latter and under the circumstances I think the legal right of the appellants must prevail. One more fact has weighed with me. It was purely a legal obstacle which prevented the appellants from getting the amount paid by them to discharge the security bonds adjusted in the mesne profits for which they were made liable and they were forced to have recourse to a separate suit. Now when the law allows them to claim a set off they should not be deprived of it.

(1) (1916) I. L. R. 38 All. 669.

opinion on the question of whether a decree for sale was a money decree. A decree for payment of money is distinct from a decree for sale in a mortgage suit. Execution cannot be applied for in the same way.

The three persons were auction purchasers and the decree was made against them. It is difficult to say they purchased for their families and they cannot be treated as representing their families.

The last contention raised by Mr. Manohar Lal was that the personal remedy of the appellants against the Barhams was barred. His contention amounts to this that this is a case in which after the sale of the mortgaged properties a personal decree under Order XXXIV, rule 6, cannot be passed. It must at once be conceded that if a personal remedy against the mortgagor is barred, the decree ceases to be a decree for payment of money and rules 18 and 19 of Order XXI will not apply, because there is no possibility of there ever being a decree enforceable against the person and other property of the mortgagor. Now, in this case, the cause of action of the appellant was not the maturity of the original security bond executed by the Barhams in favour of Gobardhan Das. After the purchase of 6 annas of the estate in 1904 the money became payable by the auction-purchasers, as they purchased it subject to the charge. Therefore, when the auction-purchasers discharged those two bonds they did what they were bound to do, and they had absolutely no right to sue the Barhams for that money. Their right to sue accrued when this court on 14th December, 1916 [*Kedar Nath Marwari* v. *Jai Berhma*(1)] refused to take this amount into consideration in adjusting the accounts between the Barhams and the auction-purchasers and the latter were specifically referred to a civil suit. Limitation for a suit for realisation of this money which was not based upon any registered contract, was only three years and the suit was instituted on 6th February, 1917, much before the time. I would therefore hold that the personal remedy of the appellants against the Barhams is not barred.

The result is that I would allow this appeal with costs, set aside the order of the learned Subordinate Judge and direct that the mesne profits decree be set off against the mortgage decree held by the appellants against the Barhams and that the appellants be permitted to proceed with the execution for the realisation of any amount which may be left due to them after part of their mortgage decree is satisfied by a set off.

COURTNEY TERRELL, C. J.—I agree.

(1) (1916) 37 Ind. Cas. 863.

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The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—The question in this appeal is whether under rules 18 and 20 of Order XXI in the First Schedule to the Civil Procedure Code, there can be a set-off in execution proceedings of two decrees hereunder mentioned. The High Court at Patna have allowed the set-off (6th February, 1933), after the Subordinate Judge of Godda had refused it (11th April, 1931).

The decrees in question are, first, a decree for mesne profits dated 15th January, 1924, of which the present appellants took an assignment on the 12th November, 1925: secondly, a final decree for sale dated 18th December, 1925. Both decrees were transferred to the Court of the Subordinate Judge at Godda for execution.

The history of the matter may be outlined as follows: One, Thakur Barham, was the proprietor of an estate in the Santal Perganas called Patsanda. He borrowed money from certain persons at whose instance in July, 1904, six annas interest in Patsanda was sold in execution of a decree and bought as to two annas by Srimoan, the father of the respondent Kedarnath, as to three annas by the husband of the respondent Teji Bibi, and as to one anna by the respondent Nopechand and his brother Chaturi Ram, since deceased. The first and third of these purchases were made on behalf of the joint Hindu family of the auction purchaser and not on his individual account. Respondents 1 to 16 in this appeal to His Majesty represent all the persons on whose account these purchases were made. Unfortunately there were two six-anna shares in Patsanda belonging to Thakur Barham, one heavily mortgaged and the other comparatively free. The former was the interest which had been attached, but the sale certificate was granted in respect of the other, and the

auction purchasers went into possession thereof. While so in possession they discharged two security bonds given on 10th November, 1902, by Thakur Barham, charging two annas and one anna respectively of Patsanda in favour of one Gobardhan Das. In 1913 the sale of July, 1904, was set aside as being invalid by reason that the interest sold was not the same as the interest attached [*Thakur Barmha* v. *Jiban Ram Marwari*(1)]. This gave rise to restitution proceedings under section 144 of the Code which were carried up to this Board [*Jai Berham* v. *Kedar Nath Marwari*(2)] where in June, 1922, the auction purchasers were held entitled to set-off the amount of their deposit against the mesne profits, but the High Court at Patna were held to have been right in refusing their claim to set-off the sums paid in discharge of the bonds to Gobardhan Das. After some further litigation the matter was settled by the first of the two decrees now in question—viz., the compromise decree of 15th January, 1924, of which the appellants are assignees. That decree, while binding upon the present respondents No. 1 to 16 so far as regards recovery of 5½ annas share of Patsanda, is nevertheless, so far as mesne profits are concerned, against three only—viz., Kedarnath, Teji Bibi and Nopechand, who are specially described in the cause title as the auction purchasers. The sums decreed amount to Rs. 81,398.

Against this decree for mesne profits the High Court have set-off a decree which has resulted from a suit [No. 2 of 1917] brought by members of the families interested in the auction purchase of July, 1904, to recover from the representatives of Thakur Barham and from the interest in Patsanda charged to Gobardhan Das, the sums expended in discharging the two bonds of 10th November, 1902. By his judgment dated 28th February, 1925, the learned Additional Subordinate Judge of Bhagalpur found for the

(1) (1913) L. R. 41 Ind. App. 38.
(2) (1922) L. R. 49 Ind. App. 351.

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plaintiffs, holding that they had both a right to reimbursement and a charge upon the property, neither right being barred by the Limitation Act. The formal decree of 28th February, 1925, is not before their Lordships, but the final decree dated 18th December, 1925, directs a sum exceeding Rs. 86,000 to be realised by sale of the property charged, and this is the decree which has been set off. Respondents 1 to 16 represent all the holders of this decree.

In the High Court of Patna the view taken by Noor J., who gave the judgment (the learned Chief Justice concurring), may be summarised by saying that the two decrees relate to the same transaction and that "the judgment-debtors of the one are in substance exactly the decree-holders of the other and *vice versa*" because all the present respondents No. 1 to 16 were in substance and as between themselves auction purchasers whose possession was ultimately set aside. He rejected the contention that rule 20 of Order XXI applies only when both decrees are mortgage decrees, but considered that a mortgage decree could only be set-off in cases where a personal obligation to repay existed and a remedy by personal decree was still available. He held on the facts that the remedy by personal decree was not in this case barred.

The contention that rule 20 only applies where both decrees are mortgage decrees was repeated before this Board, but their Lordships agree with the High Court in rejecting it. Rule 20 was new in 1908 and was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of "decree for the payment of money" or "money decree." There is nothing in the language of the rule and nothing in the reason of the matter to justify the interpretation contended for. In the absence of personal liability on each side, to set-off two mortgage decrees may be just as much or as little inequitable as to set-off a mortgage decree against a decree for money.

The words of rule 20—" decrees for sale in enforcement of a mortgage or charge "—cannot be restricted to personal judgments such as may be given under Order XXXIV, rule 6.

As it was held by the judgment in the suit in which the final decree for sale was passed that the right of the present respondents 1 to 16 to a personal judgment subsisted and was not barred, their Lordships do not find it necessary either to examine this question afresh in these execution proceedings, or to embark upon a discussion of the difficulties that may arise if a mortgage decree be set-off against a money decree in the absence of any personal liability on the part of the mortgagor who holds the money decree. Mr. Dunne for the respondents contested the view taken in the High Court as to personal liability being a condition of set-off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it. In so saying they do not intend to prejudice the view taken by the High Court. On the contrary they would be slow to give effect to a rule of set-off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. Whenever the matter arises for decision the observations of the learned Judge (Noor J.) and his discussion of the authorities [*Nagar Mal* v. *Ram Chand*(1); *Sheo Shankar* v. *Chunni Lal*(2); *Burma Oil Company* v. *Ma Tin*(3). Also cf. *Venkata Reddi* v. *T. V. Dorasami Pillai*(4)] will afford assistance to the Board and to the Courts in India.

The general character of the two decrees concerned does not in their Lordships' view preclude the set-off, but it is necessary to examine their exact form, having regard to the terms of rule 18 of Order

(1) (1910) I. L. R. 33 All. 240.
(2) (1916) I. L. R. 38 All. 669.
(3) (1929) I. L. R. 7 Rang. 505.
(4) (1932) I. L. R. 56 Mad. 339.

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XXI. The appellants' decree so far as money is concerned is against three only of the respondents—viz., Kedarnath, Teji Bibi, and Nopechand. The respondents' decree is in favour of some 18 members of the same family or families. Moreover the respondents' decree is against certain persons called Mandals, purchasers from the representatives of Thakur Barham, as well as against these representatives themselves.

The presence of the Mandals as judgment-debtors in the respondents' decree raises no obstacle to set-off and the contrary was not contended by learned counsel for the appellants. The respondents were entitled to execute the decree for the whole amount as against the Barham judgment-debtors, and clause 4 of rule 18 with its illustration (*d*) embodies what has always been the law on this matter [cf. *Hury Doyal* v. *Din Doyal*(1); *Ram Sukh Das* v. *Tota Ram*(2)].

The presence among the holders of the decree for sale in addition to Kedarnath, Teji Bibi, and Nopechand, of other members of their families, affords the only remaining objection to set-off. If *X* has a decree against *A* and *A* and *B* have a decree against *X*, it is clear from illustration (*b*) to rule 18, as well as on principle, that *X* cannot insist on a set-off. Their Lordships will assume without deciding, that the rights of *B* make it equally impossible for *A* alone to claim set-off against *X*. But if *B* and *A* both ask for the set-off must it necessarily be refused? And even if it appears that *A* incurred the debt to *X* on behalf of himself and *B*? Their Lordships think not. It is true that under rules 18 to 20 the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from,

(1) (1883) L. L. R. 9 Cal. 479.
(2) (1892) I. L. R. 14 All. 339.

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circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. But if an assignee can insist upon set-off as provided by clause 2 of rule 18, then to refuse the application of *A* and *B* to have the set-off allowed, would be the height of technicality. There is here no question of any other judgment debt which would obstruct the set-off. *B* at his own request can be treated as having released his right to *A* if he comes before the executing Court and asks for this. The circumstance that in so doing he does no more than his duty as between himself and *A* may under these rules be irrelevant, but it adds an element of reason to his request.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: *W. W. Box and Company.*

Solicitors for the respondents: *Hy. S. L. Polak and Company.*

PRIVY COUNCIL.

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v.

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J. C.* *December*, 16.

(On Appeal from the High Court at Patna.)

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order I, r.* 3, *Order II, r.* 3 *and Section* 99—*Misjoinder—Right to have parties or causes of action struck out—Effect of Misjoinder—Misjoinder as ground of appeal.*

Under the present rules the mere fact of misjoinder is not by itself sufficient to entitle a defendant to have proceedings set aside or an action dismissed.

Section 99 is in plain words. Joinder of parties and joinder of causes of action are discretionary in the Court and there is no absolute right to have them struck out.

*PRESENT: Lord Roche, Sir Shadi Lal and Sir George Rankin.

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Dictum of Pickford, L. J., in *Thomas* v. *Moore*(1), approved.

Smurthwaite v. *Hannay*(2), referred to.

Effect will not be given in appeal to the objection of misjoinder where the merits of the case have been satisfactorily disposed of in spite of the complication of the proceedings.

Appeal (no. 16 of 1935) from a decree of the High Court (December 16, 1932) which affirmed a decree of the Subordinate Judge of Patna (March 31, 1928).

The material facts are stated in the judgment of the Judicial Committee.

1936. *November* 23 *and* 24. *Eddy*, *K. C. and Rashid* for the appellants: On the question of misjoinder, the suit is bad for multifariousness. The misjoinder here is not merely technical. The appellants are affected by evidence tendered, not against them but against other parties Order I, r. 3, of the Code is based on the Rules of the Supreme Court, Order XVI, r. 1. *Smurthwaite* v. *Hannay*(2) led to the alteration of the previous rule. *Stroud* v. *Lawson* (3) was decided after the alteration. The alteration is discussed at page 50. Reference was also made to *Thomas* v. *Moore*(1).

When the matter comes before an Appellate Court, if the Court finds there is a misjoinder, it should dismiss the suit or remit the case for retrial after amendment. Section 99 of the Code was referred to.

Hyam, for the respondents, was not called on.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—The suit out of which this appeal arises was brought *in forma pauperis* on the

(1) (1918) 1 K. B. 555, 565.
(2) (1894) A. C. 494.
(3) (1898) 2 Q. B. 44.

18th September, 1922, by the three sons of one Kashinath against no fewer than 78 defendants. The plaint is a long and complicated document of 69 paragraphs and the general outline of its contents is that Kashinath, the father and karta of a Mitakshara family, had embarked upon a career of vice and extravagance, in the course of which he had parted with a number of the family properties and had lost other properties by sales in execution of decrees. The purpose of the plaint was to recover various properties from the persons to whom they had been thus alienated, upon the footing that the alienations were not made for family necessity and if made for Kashinath's antecedent debt, were not binding against his sons by reason that they were made for purposes which the Hindu law regards as immoral. In respect that all the transactions impugned were brought under the allegation as to Kashinath's bad character and habits, the various transactions raised what may be called a common question of fact, and in a very extended sense of the phrase it may be said that they constituted a series of transactions, but their Lordships have no doubt that this plaint challenged a greater number of transactions and impleaded a greater number of defendants than was either necessary, reasonable or convenient; in so saying their Lordships have not forgotten that in some cases different defendants by virtue of different transactions have come to have competing claims in respect of the same property.

The appellants before their Lordships are defendants 28, 33 and 35, their names being Mahant Ramdhan Puri, Bipat Ram and Adjodhya Prasad respectively. The two last mentioned had joined in one written statement. The first had filed another written statement jointly with defendant 36. The properties in which these defendants, or some of them, were interested included some property as to which the Courts in India dismissed the plaintiffs' claim, and this appeal concerns two items of property only, each item being a share of a village called Rupau.

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Property no. 1 is a third share, that is a 5 annas 4 pies share in this village. Property no. 2 is a share represented by a very small fraction and is called the 2 dams 19 kouris share. Property no. 1 was part of the ancestral family property of Kashinath. Property no. 2 was not. The first connection of the plaintiffs' family with property no. 2 was that on 18th February 1917, one Gopal Narain sold it to the plaintiffs' mother, Musammat Thakur Kuer.

The transactions which took place with reference to the two properties now in question were fully investigated by the learned Subordinate Judge of Patna in the course of a long trial. His decision was that the plaintiffs have established their right to a three-fourths interest in each of these two properties and his conclusions have been concurred in by the High Court of Patna on appeal by these defendants. On this appeal no complaint is made of the decree being limited to a three-fourths interest. The trial Court's judgment is dated 31st March, 1928, more than five years from the date of the plaint, and the decree of the High Court is dated 16th December, 1932.

To deal first with property no. 1—the 5 anna 4 pies share:

In 1913 Kashinath had executed in favour of his wife a mukarrari lease comprising this property and certain others. In 1915 this property was sold for arrears of road-cess and was purchased by Binat Ram, the second of the present appellants, who in 1917 re-conveyed it to Musammat Thakur Kuer. The Courts in India having without difficulty found that the lady in this transaction was acting as her husband's nominee and on behalf of the joint family of which he was karta rightly concluded that these transactions did not exclude or affect the interest of the plaintiffs in this property. On the 29th May, 1920, however, one Durga Prashad who had lent money to Kashinath on a bill of exchange upon which

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a pleader called Sital Prasad was acceptor, and had obtained a money decree (15th November, 1912) therefor against Kashinath, caused this property to be put up for sale in execution of the decree and purchased it himself. When he came to take possession of it, however, Kashinath's wife, Musammat Thakur Kuer, resisted him, claiming on the strength of her mukarrari lease; whereupon Durga Prasad brought a suit against Kashinath and his wife to have it declared that the mukarrari lease was a collusive document. In this suit Durga Prasad obtained an *ex parte* decree on 26th April, 1920, and again took out execution against property no. 1 and purchased it himself. This execution-sale having been confirmed and certain objections thereto taken by Kashinath and by his wife having been dismissed, each brought an appeal in the Court of the District Judge, challenging the execution-sale. While these appeals were pending Durga Prasad died and the disputes were compromised with his widow. On 1st April, 1921, an ijara deed was entered into by Kashinath and his wife with one Munshi Deonath Sahai comprising *inter alia* this property whereby Rs. 10,000 was raised to be given to Durga Prasad's widow as a term of the compromise. The lender, Munshi Deonath Sahai, was defendant no. 51 in the present suit and his rights under the ijara deed were challenged by the plaintiffs. On the same date the compromise with Durga Prasad's widow was completed by her executing what purports to be a deed of relinquishment, but which recites that both the appeals to the District Judge were withdrawn, that she had returned the sale certificate, that she had no longer any interest in or possession over the property, and that her rights had been acquired by Kashinath and his wife. This deed was stamped as a deed of relinquishment under the Indian Stamp Act and not at the higher rate payable in the case of a conveyance.

Now between the purchase by Durga Prasad on 29th May, 1920, and the deed of relinquishment (so

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called) of 1st April, 1921, namely, on the 26th July, 1920, this 5 annas 4 pies share in village Rupau had been purchased by Bipat Ram, appellant no. 2 before their Lordships, at another execution-sale. In 1913 one Mohanth Dalmir Puri a co-sharer malik of village Rupau, brought a partition suit (no. 23 of 1913) against his co-sharers, including Kashinath, in respect of his interest in property no. 1, and also including Gopal Narain, to whom this judgment will make further reference in connection with property no. 2. Kashinath having set up his wife's interest under the mukarrari lease before mentioned, she also was impleaded. The suit resulted in a decree for partition which contained certain orders for costs. In execution of this decree, at the instance of the plaintiff Mohanth Dalmir Puri, property no. 1 was put up for sale on 26th July, 1920, as being then the property of Kashinath, and it was sold to Adjodhya Prasad, appellant no. 3, who was acting for Bipat Ram, appellant no. 2. This sale was duly confirmed by order of the Court. The present plaintiffs having made an unsuccessful attempt to suggest that the partition decree was not binding upon them, set up against Bipat Ram who purchased on 26th July, 1920 the fact that on the 29th May of that year property no. 1 had been purchased by Durga Prasad. This by itself would not enable the plaintiffs to succeed in ejectment against the present appellants (as they could only succeed upon the strength of their own title) but the plaintiffs further rely upon the deed of 1st April, 1921, as being not merely a relinquishment of claim by Durga Prasad's widow but a conveyance by her to the plaintiffs' father and mother of the title to property no. 1 which Durga Prasad obtained by his purchase of 29th May, 1920, confirmed as it was by order of the executing Court and by the orders of the District Judge dismissing the two appeals therefrom. Their Lordships agree with the Courts in India in construing the deed of 1st April, 1921, as a conveyance, and on this view though the sale to Bipat Ram on 26th

July, 1920, was valid and regular, the judgment-debtor had no longer any interest which could pass by such sale, and the title relied upon by the present appellants in respect of property no. 1 has no validity. The plaintiffs' title therefore prevails as the Courts in India have held.

The dispute with reference to property no. 2, the smaller share in this village of Rupau, can be more shortly disposed of. When Gopal Narain, in 1917, sold this property to the plaintiffs' mother, she was acting, as the Courts in India have found, on behalf of the joint family. This property was put up for sale in execution of the partition decree in suit no. 23 of 1913 already mentioned, and on the 26th July, 1920, it was sold to appellant no. 3 on behalf of Bipat Ram, appellant no. 2, as being the property of Gopal Narain. That is to say, what passed to Bipat Ram by the sale was the right, title and interest of Gopal Narain. At this date, however, Gopal Narain had no interest left in him by reason of his transfer to the plaintiffs' mother in 1917. The Courts in India have rightly rejected the suggestion that Bipat Ram can claim to have taken good title by his purchase by reason that Kashinath is estopped from denying that the title was in Gopal Narain, by his failure to bring this fact to notice on the occasion of the execution-sale.

The reasons which induced the Courts in India to find in favour of the plaintiffs and against the title set up by the present appellants have now been explained. The complaint made by Mr. Eddy on behalf of the appellants is really two-fold. He complains first that so many parties and so many causes of action should never have been joined in one suit under the provisions of Order I, rule 3, and Order II, rule 3, and that the misjoinder is not merely a technical objection but one which, in the language of section 99 of the Code, affected the merits of the case.

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His second complaint is that the purchase by Durga Prasad on 29th May, 1920, of property no. 1 should not be relied upon in any way by the Courts as against the appellants, because in the plaint it was part of the plaintiffs' case that the loan taken by Kashinath from Durga Prasad was for immoral purposes; that his clients by their written statement had admitted this allegation and had, at the trial, treated this as common ground between the plaintiffs and themselves, not calling evidence to establish it, and not cross-examining witnesses called to establish the contrary.

Upon the first contention their Lordships are of opinion that the joinder of so many distinct causes of action against so many sets of defendants might well have led the trial Court to decline to entertain so many matters in one suit, even if they were within a sound construction of the rules. There is good reason to think that the inconvenience and expense avoided by the plaintiffs who sued *in forma pauperis* has been much exceeded by the inconvenience and expense caused to the defendants. The written statement of the present appellants (as is common in India) contained a plea that the suit was bad for misjoinder or multifariousness but their Lordships have not been satisfied that at any time before the commencement of the trial any appropriate and serious application was made to the Court upon the face of the pleadings for an order requiring the plaintiffs to amend by discarding portions of their claim. They are satisfied, however, that the heavy task which fell to the learned Trial Judge of dealing with so many matters in one trial was ably and fairly discharged and that he arrived at a correct view of the facts. It is desirable to point out that under the rules as they now stand the mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the proceedings set aside or action dismissed. Section 99 of the Code is in plain words but their Lordships may repeat what was said by Lord Justice Pickford in *Thomas* v.

Moore,(1) "Whatever the law may have been at the time when *Smurthwaite* v. *Hannay*(2) was decided joinder of parties, and joinder of causes of action are discretionary in this sense, that if they are joined there is no absolute right to have them struck out but it is discretionary in the Court to do so if it thinks right". Their Lordships are of opinion that in the present case no effect can be given to this objection of misjoinder, the merits of the case having been satisfactorily disposed of in spite of the complication of the proceedings.

The second ground of appeal was dealt with very carefully by the High Court. It is true that in paragraphs 9, 10 and 11 of the plaint an averment is made that the loan from Durga Prasad was taken without any legal necessity of the joint family, and that upon this basis it was suggested that Durga Prasad's decree and execution-sale and the compromise that ensued thereon had not the effect of binding the interest of the plaintiffs in the family property. The plaint, moreover, contained general allegations that Kashinath's indebtedness was tainted by an immoral origin. Of the two written statements filed by the present appellants paragraph 9 is to the effect that the answering defendants did not deny the allegations made in paragraphs 9 and 10 of the plaint, which means in effect that they did not challenge the attack made upon Durga Prasad's representatives, his widow, Musammat Bhawani Kuar being defendant no. 14. In one of the two written statements it is pleaded that

> "the plaintiffs' allegations in respect of drinking, debauchery, extravagance and adultery of defendant no. 1 are wrong, false and fictitious."

Whether or not the loan made by Durga Prasad was tainted with an immoral origin was a matter directly in issue between the plaintiffs and Munshi Deonath Sahai, defendant no. 51. An issue was taken upon

(1) (1918) 1 K. B. 555, 565.
(2) (1894) A. C. 494.

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the question. The plaintiffs having called Sital Prasad the pleader at Gaya to support their contention, this witness, as the High Court afterwards pointed out, was cross-examined on behalf of two of the present appellants as well as by the pleader of other defendants. The trial Judge took the view that he must ascertain and go by the facts as against the present appellants equally as against other defendants. He came to the conclusion that it was not proved that the loan made by Durga Prasad was tainted by immorality: indeed his view was that the plaintiffs' allegations of bad character on the part of their father were extravagant and unjustified. While the case was being argued on appeal before the High Court that Court took the view that the plaintiffs should be made to proceed regularly, and gave leave to amend the plaint. The present appellants were also given leave to file an additional written statement. This they did complaining that by reason of the allegations in the original plaint of 1922 they had made no attempt to obtain oral or documentary evidence in support of the allegation that Durga Prasad's loan had been obtained for immoral purposes; they complained also that the papers in connection with the execution cases had, in the meantime, been destroyed in the ordinary routine and were no longer to be found on the record of the executing Courts. They further pointed out that the pleader, Sital Prasad, had since died and could not be further cross-examined. The High Court having framed an additional issue upon the question whether the sale in favour of Durga Prasad was legal and valid, the appellants stated that they did not desire that the case should be remanded for the trial of this issue for the reasons set out in their written statements and asked the Court to decide the case on the materials on the record. The learned Judges of the High Court carefully considered the position before allowing the additional issue. Having pointed out that Sital Prasad had been examined in the trial Court and cross-examined not only on behalf of

defendants 50-53 but also on behalf of defendants 28 and 36; that the appellants had not mentioned any other witness by name who could have thrown any light upon the question; and that the order sheet of the execution proceedings started by Durga Prasad after he had obtained his money decree was still existent and available; the High Court held that the pleas taken in the written statement, by way of showing that the new issue should not be entertained, had no validity. Upon a review of the whole matter, their Lordships are in agreement with the opinion of the High Court and treating the question before them as a question whether leave to amend has been properly granted they are of opinion that an affirmative answer can safely be given. The amendment was within the competence of the High Court, having regard to the terms of Order VI, rule 17, and is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants: *Nehra and Co.*

Solicitors for the respondents: *Douglas, Grant and Dold.*

SPECIAL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and Varma, JJ.

1936.

September, 21, 22, 23, 24. *October*, 9.

KUCHWAR LIME & STONE COMPANY, LIMITED

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Contempt of Court—injunction, disobedience of—persons acting under authority derived from defendant, if bound.

* Miscellaneous Judicial Case no. 42 of 1936 arising out of First Appeal no. 68 of 1935.

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KUCHWAR LIME AND STONE COMPANY, LIMITED v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

although not parties to the suit—lease or contract under mutual mistake, effect of—party in doubt as to effect of Court's order, if can move the Court for directions—nature of possession of third party in execution under the Code of Civil Procedure.

The Government leased the mineral rights to the plaintiff Company for quarrying of lime stones in the Murli Hill in the district of Shahabad. Subsequently the Company went into liquidation and entered into an agreement with Bose for the sale of their rights to him which required the sanction of Government. Bose entered upon the property but was stopped by the order of the Government who authorised Kalyanpur Company to carry on quarrying operations. The plaintiff Company brought a suit against the Government and prayed for an injunction restraining them from granting a lease to Kalyanpur Company, or from authorising them to carry on operations and otherwise interfering with their rights and possession.

The plaintiff Company did not admit dispossession but complained against interference. The suit was dismissed and they appealed to the High Court and obtained an order for temporary injunction which was made permanent after the decision of the appeal in favour of the plaintiff Company.

The temporary injunction was served upon the Government who informed the Kalyanpur Company about it and also warned them that they could disobey it at their own risk.

After the decree of the High Court the plaintiff Company was obstructed by the Kalyanpur Company and representations to the Government and the Kalyanpur Company were of no avail. The plaintiff Company thereafter moved the High Court for an order of committal for contempt of Court.

Held, (i) that although the Government in granting and the Kalyanpur Company in accepting a lease or a contract for lease were under the impression that the Government had a title to grant such a lease or contract, the agreement had no binding effect for they were under a mutual mistake of fact as to the plaintiff's title and it was the duty of the Government after the judgment to repudiate the contract and withdraw any license or authority given by them to the Kalyanpur Company.

Cooper v. *Phibbs*(1) and *Ram Chandra Misra* v. *Ganesh Chandra Gangopadhaya*(2), relied on.

(*ii*) that if the Government had any doubt as to their position after the injunction in the matter of abiding by the contract with the Kalyanpur Company they should have asked for direction from the Court.

Eastern Trust Coy. v. *McKenzie Mann & Coy., Ltd.*(3), relied on.

(*iii*) that the injunction order was binding on the Kalyanpur Company for they were thoroughly aware of the injunction and were thoroughly aware that their presence upon the quarry with the permission of the Government was setting at naught the order of the Court.

Seaward v. *Patterson*(4), relied on.

(*iv*) that the possession of the Kalyanpur Company under the circumstances could not be treated as that of a third party under the Civil Procedure Code in execution proceedings.

Application by the plaintiff to the High Court to proceed against the defendant and certain other persons for contempt of Court.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

Baren Bose, of the Calcutta Bar (with him *Sushil Madhab Mullick*, *Mahabir Prasad* and *Tarkeshwar Nath*), for the petitioner: If the Secretary of State was under a mistaken notion about his title to grant a lease and if the Kalyanpur people were under a similar misapprehension about their accepting the lease, the agreement would be void as there was a mistake of fact. It was not binding on the Secretary of State and he could have repudiated it after the decree. [Reference was made to sections 20 and 56 of the Contract Act, and to *Ramchandra Misra* v.

(1) (1867) L. R. 2 H. L. 149.
(2) (1916) 21 Cal. W. N. 404.
(3) (1915) A. C. 750.
(4) (1897) 1 Ch. 545.

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KUCHWAR LIME AND STONE COMPANY, LIMITED v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Ganesh Chandra Gangopadhaya(1), *Secretary of State for India* v. *Seth Jeshingbhai Hathisan*(2) and *Cooper* v. *Phibbs*(3).]

The Kalyanpur people, either as licensees or agents, are equally bound by the order of injunction—Seton on Decrees, Vol. I, p. 509. The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it—*Seaward* v. *Patterson*(4). Similarly in *Wellesley* v. *The Earl of Mornington*(5) it was held that if a person, who knowingly aided and assisted the person enjoined by the injunction, might be proceeded against for a contempt. If any body though not a person actually named in the injunction chooses to step into the place of the man who was named and to do the act which he was restrained from doing, he commits a very gross contempt of Court—*Avery* v. *Andrews*(6).

In *Ray Chaudhuri* v. *Nalini Prokas Sen*(7) a Receiver had been appointed by the Court and a third party resisted the possession of the Receiver on the ground that the appointment had not affected his title. It was held that he was not entitled to do so as resistance to the possession of the Receiver meant resistance to the Court's order.

[CHIEF JUSTICE.—The proper course for an aggrieved person is to apply to the Court and seek redress.]

Yes. It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of

(1) (1916) 21 Cal. W. N. 404.
(2) (1892) I. L. R. 17 Bom. 407.
(3) (1867) L. R. 2 H. L. 149.
(4) (1897) 1 Ch. 545.
(5) (1848) 50 E. R. 785.
(6) (1892) 51 L. J. Ch. 414.
(7) (1913) 18 Cal. W. N. 289.

the Executive in cases of doubt to ascertain the law in order to obey it, not to disregard it—*Eastern Trust Company* v. *McKenzie Mann & Co.*(1).

Sir Sultan Ahmed, Government Advocate (with him *B. P. Sinha, Government Pleader*), for the Secretary of State:—I have to give an assurance that the attitude of the Secretary of State would be one of submission to the Court. It could not be one of defiance. The Secretary of State is prepared to abide by any order that may be passed by this court. [Referred to a series of correspondence and other documents.]

The papers will show that I have done nothing after the decree. I am in such a position that I cannot say "go" to my lessees.

[CHIEF JUSTICE.—You had only to raise your voice as the Kalyanpur people were only licensees.]

I respectfully submit that is not the position. They are not licensees or agents. They have been lawfully inducted on the land as lessees.

P. R. Das (with him *S. N. Bose*), for the Manager, Kalyanpur Lime Works:—The notice must give me the fullest information what the charges against me are. The notice issued by the High Court to which the plaintiff's petition is attached is not sufficient in law.

The notice itself must give the charges: the petitioner should not be left to gather them from the affidavit attached to the notice. [Reliance was placed on *Jayantilal Hiralal & Co.* v. *Waman Narayan Velinkar*(2).]

[CHIEF JUSTICE.—It was open to you to ask for particulars.]

It was for the prosecutor to say in what particular manner I have aided or abetted.

(1) (1915) A. C. 750.
(2) (1932) A. I. R. (Bom.) 638.

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The cases cited by Mr. Bose make a distinction between two classes of persons:—

(*1*) one who is not enjoined by the injunction and cannot, therefore, be guilty of disobedience;

(*2*) one, who is a party or not, has flouted the order of Court, that is to say, has treated it with contempt. I come within the first class.

If I was in possession on the 15th of April, 1934, I was entitled to maintain it and was entitled to say "the proper materials were not before the Court and I was not a party to the suit." If a litigant says that he was not a party to the suit, the court was not apprised of the true facts and therefore he was not bound by the decree and could not be ejected, that is a proper attitude to take up. Matters would be otherwise if it could be found that it was a mere pretence, that I was colluding with the Secretary of State to flout the order. If I am in possession bona fide and am not a party to the suit, I cannot be turned out except in a properly constituted suit. Possession of a person not a party to the suit has to be respected. [Reference was made to Order XXI, rule 97, Code of Civil Procedure.]

Rightly or wrongly the plaintiff's lease was forfeited and my possession in good faith will not be affected if later on it transpires that the forfeiture was not valid. A third party in possession and not bound by the decree is entitled to say that he cannot be evicted except by a suit—*Ezra* v. *Gubbay*(1). I am aware that this case has not been followed in later decisions of the Calcutta High Court [*Shaikh Yusuf* v. *Jyotish Chandra*(2)] and of the Bombay High Court, but I am only endeavouring to show that my attitude was bona fide.

[CHIEF JUSTICE.—There was collaboration between you and the Secretary of State; the litigation was for your benefit although the Secretary of State alone was party to the suit.]

(1) (1920) I. L. R. 47 Cal. 907.
(2) (1931) 35 Cal. W. N. 1132.

There is absolutely no material to show that there was any collaboration or agreement between the Secretary of State and myself. On the other hand, I was refused access to the authorities who were in charge of the conduct of the litigation.

[CHIEF JUSTICE.—You were substantially a party to the litigation.]

That cannot possibly be the position.

[CHIEF JUSTICE.—You could have intervened and applied to be made a party.]

I was under no obligation to apply when my interest was not going to be affected.

[NOOR, J.—But you stood by with full knowledge that your title was going to be jeopardized.]

There was nothing to preclude me from watching the proceedings. The suit was merely for a declaration and could not possibly affect my possession which had begun before the suit. It will appear from the plaint that it is the common ground that the Secretary of State had effected an ouster of the plaintiff.

Dr. P. K. Sen (with him *K. K. Banerjee*), for the Managing Director, Kalyanpur Lime Works, followed: There has been no attempt on my part to circumvent the Court's order. In all the cases cited by Mr. Bose there was a manoeuvre to set the order at naught. *Wellesley* v. *The Earl of Mornington*(1) is distinguishable: it cannot be said that I have "aided and abetted". In *Avery* v. *Andrews*(2) it was found that there was a conspiracy and combination to flout the Court's order. In the present case there is no such suggestion.

Baren Bose, in reply.

Cur. adv. vult.

S. A. K.

(1) (1840) 50 E. R. 785.
(2) (1882) 51 L. J. Ch. 414.

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COURTNEY TERRELL, C.J.—The Collector of Shahabad, through the Secretary of State for India in Council, one S. N. Ghose, described as the manager of the Kalyanpur Lime Works, Limited and one S. N. Banerjee, the Managing Director of the said Company have been called upon to shew cause why they should not be dealt with for alleged contempt of Court in respect of an injunction granted against the Secretary of State in a suit brought by the petitioners, the Kuchwar Lime and Stone Works, Limited, against the Secretary of State. It is necessary to narrate the circumstances of this litigation.

The Government were the owners of the mineral rights in two adjacent properties known, respectively, as the Upper and Lower Murli Hill. In respect of the Upper Murli Hill they also owned the surface rights. The surface rights in the Lower Murli Hill had been purchased by the plaintiff Company from the Zamindars. On the 1st April, 1928, the Government leased the mineral rights in the Lower Murli Hill and the surface and the mineral rights in the Upper Murli Hill to the plaintiffs for a period of twenty years. The mineral rights concerned are in respect of the quarrying of lime-stone and royalties were to be paid at a specified rate per ton on all lime-stone extracted. The plaintiff Company worked the quarries on both properties until January, 1933, when they went into voluntary liquidation. The lease is a peculiar one inasmuch as it does not provide for any minimum royalty, nor does there seem to be any clause imposing upon the lessees the obligation to work the quarries to any defined extent. On the 23rd March, 1933, the Government under a mistaken impression that there was a clause in the leases providing for minimum royalty, asked for payment thereof and on the 27th March the plaintiffs' Solicitors replied that there was no such obligation upon the plaintiff Company. The Government seems to have examined the lease and found that this was the fact. Clause 5 of one lease and clause 6 of the other run as follows :—

"That neither the lessee nor any person claiming through or under it shall assign the lease or transfer any right or interest thereunder or

underlet the hill or any portion of the premises comprised in such lease without the assent of the Board of Revenue first obtained. The penalty for the infraction of this condition shall be the forfeiture of the lease."

On the 30th September, 1933, the plaintiff Company through their liquidators entered into an agreement in writing with one S. G. Bose. It was agreed that, subject to the sanction of the Government (the Board of Revenue), the Company should sell their rights under the leases in question to Bose for a sum of Rs. 6,000. Until the attitude of the Government with regard to the prospective transfer should be ascertained, Bose was to be appointed local agent of the Company in respect of their leasehold rights and to continue so to act until either the transfer of the legal right should be effected or until the Government refused to sanction such transfer. Bose was to work the quarries for his own benefit and to pay to the plaintiff all royalties and other dues in respect of the leased property which might become due from the Company to the Government. On the 9th October, 1933, Bose entered on the property and began to work on the terms of the said agreement and on the same day the Company applied to the Collector for permission to assign the leases to him. Following the normal procedure, the Collector on the 25th October, 1933, enquired as to the financial position and status of Bose. On the 15th November, 1933, the Commissioner wrote to the Collector inquiring as to Bose's solvency and on the 16th the Deputy Collector reported to the Commissioner that he was a suitable transferee. On the 20th October Bose informed the Subdivisional Officer at Sasaram in whose jurisdiction the quarries lay that he had opened the quarry on the 9th October and had begun work and expected the despatch of lime-stone to begin on the 23rd October, but on the 26th October the Subdivisional Officer had written to the Collector a letter in which, referring to Bose's letter announcing the commencement of work, he called attention to the fact that the transfer of the leases could only be made with the permission of the

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Board of Revenue and that in his (the Subdivisional Officer's) opinion Bose, though styling himself the agent, appeared to be the proprietor of the quarries, and then went on to say that this was an opportunity to get rid of the disadvantages of the lease (i.e., the lack of provision for a minimum royalty). He wrote—

"this is the opportunity for us to get the previous mistake rectified. Since no permission has been taken from the Board the lease becomes null and avoid. So I am soliciting instructions whether despatch should be stopped at once or not."

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On the 21st November, 1933, the Commissioner wrote to the Collector of Shahabad to say that the working by Bose must be stopped at once. On the 6th December, the Subdivisional Officer ordered Bose to stop working. On the 9th December the Solicitors to the plaintiff Company wrote to the Collector complaining of the action of the Subdivisional Officer, stating that Bose was the agent of the Company and that the Government would be held liable to pay compensation to the Company. There was a long delay in replying to this letter; reminders were sent by the Solicitors on the 4th January, 1934, on the 12th January, on the 10th February and on the 14th March. On the 21st March, 1934, the Commissioner wrote to the Solicitors stating that the matter had been referred to the Government for orders. On the 12th April, the Solicitors again reminded the Commissioner and on the 20th April the Commissioner wrote to the Solicitors stating that the Government had forfeited the leases. It appears that the Government had "sanctioned" the forfeiture (whatever that may mean) on the 27th March. This fact was not communicated to the plaintiff until the 20th April, 1934, but the Government resolution to that effect was not passed until the 18th July, nor was the intimation of the resolution conveyed to the plaintiff Company until the 10th August, 1934.

On the 24th September, 1934, the plaintiff Company began a suit against the Government. In their plaint they set out a statement of the action of the

Subdivisional Officer in stopping the work of their agent Bose and further complained that the Government had wrongfully authorised a Company called the Kalyanpur Lime Works, Limited to carry on quarrying operations on the lands demised to the plaintiff Company with a view to granting a lease thereof to the said Kalyanpur Lime Works, Limited and to oust the plaintiff Company therefrom. They asked for an injunction restraining the grant of a lease to Kalyanpur Lime Works, Limited or any other person and to restrain the defendant from authorising such person or persons to carry on operations on the demised lands and from otherwise interfering with the rights and possession of the plaintiff Company. On the 15th November the Secretary of State filed a written statement alleging that the agreement with Bose of September, 1933, justified forfeiture of the lease and that the leases were forfeited under the order of the 18th July, 1934. Paragraphs 11 (*d*) and 11 (*e*) of the written statement are as follows :—

" 11(*d*) That the Government rightly re-entered, authorised and inducted the Kalyanpur Lime Works Company to quarry or to carry on quarrying operations in the lands previously leased out to the Kuchwar Lime Stone Company with a view to avoid loss to the Government and to grant subsequently a lease thereof to the said Company.

(*e*) That the Plaintiff Company was rightly ejected under the terms of the lease from the leased premises."

The plaintiff Company by their plaint had not in fact complained of ejectment but sought protection against interference with their rights, and based such claim upon threats of ejectment. This must be noted in view of a contention to be hereinafter considered that the plaintiffs admitted dispossession by the defendant, the Secretary of State, or by any one else. It may be noted in passing that the written statement also contended that the plaintiff Company had failed to work the quarry since it went into liquidation and by paragraph 17 a further grievance of the Secretary of State was also pleaded

" that the Company also claimed not to pay a minimum royalty as there was no such clause in the leases to pay the same."

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This last statement is a curious defence and needs no further comment. No suggestion was made that a lease had been in fact granted to any one by the Secretary of State. It is further to be noted that the Collector of Shahabad verified the written statement; paragraph 11 (*d*) was stated to be a matter of his "personal knowledge, information and record" which he believed to be true but paragraph 11 (*d*) was "verified" as a "matter of legal opinion".

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On the 12th January, 1935, the application for an interim injunction was heard but it was ordered to be adjourned until the trial of the suit and an order for expedition was made. The suit came on for hearing on the 1st March, 1935, and was dismissed by the Subordinate Judge on the 7th March. On the 10th April the plaintiffs appealed to the High Court (First Appeal no. 68 of 1935) and on the 23rd April they made an ex parte application to the High Court for an interim injunction. On the 25th April an interim injunction was ordered by the Court with a rule calling upon the defendant to shew cause. The Secretary of State applied for security for costs which was rejected on the ground that the plaintiffs had already put in security.

On the 25th July, 1935, the defendant was heard on the rule and the ex parte injunction which had been granted on the 25th April was continued until the trial of the suit. It is this injunction which on the final hearing of the appeal was made permanent. Therefore from the 25th April, 1935, the opposite party to this motion, the Secretary of State, has been under injunction restraining him from interfering with the plaintiff Company's leasehold.

It is necessary at this stage to interrupt the narration in order to trace the activity of the Kalyanpur Lime Works, Limited of which the respondent Banerjee is managing director and the respondent Ghose is the local manager. The earliest recorded appearance on the scene of this Company is in the

month of January, 1934, though whether the Kalyanpur Lime Works, Limited had opened up negotiations at an earlier date is not clear. On the 25th January they wrote a letter to the Collector through the Subdivisional Officer of Sasaram and they stated that they understood that the lease to the plaintiffs had been terminated since the firm went into liquidation and desired to apply for a lease. They set forth the extent of their business and offered to guarantee a minimum royalty of Rs. 10,000 per annum and pointed out that the interest of the Government had suffered by the arrangement (without such minimum royalty) with the plaintiffs. They also stated that the plaintiffs had improperly worked the quarries and had damaged them. On the 31st March, 1934, the Secretary to the Board of Revenue wrote to the Commissioner approving of the grant of a lease to the Kalyanpur Company on the terms and conditions set forth in Chapter V of the Bihar and Orissa Waste Lands and Mineral Concessions Manual " on the understanding that after the lease is executed the question of royalty would be re-examined by the Board provided it is well understood that any reduction, if made, would be a matter of grace ". An examination of the Manual referred to shows that leases might be arranged on varying terms both as to period and royalty. It is contended on behalf of the respondent that these documents constitute an agreement to grant a lease but the essential terms were not settled and no such agreement was in fact come to. The Government appear, however, to have given permission to the Kalyanpur Company to work the quarries and on the 15th April, 1934, the respondent Ghose, the local manager, wrote to the Collector referring to an interview between the managing director and the Collector three days before, and stated that he had received a copy of a letter, dated the 14th of April, 1934, from the Board of Revenue to the Subdivisional Officer at Sasaram sanctioning the beginning of work on the quarries. He asked that a draft lease might be sent to him without delay and stated that he was " arranging to start

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quarrying lime-stone and manufacturing lime ". On the 2nd of May Ghose wrote a letter to the Collector asking formal permission to start quarrying operations and on the 13th May the Collector replied

" having been granted a lease for lime-stone concession in the Upper and Lower Murli areas you are lawfully entitled to start work in them at once. The draft leases have been submitted to the Board of Revenue."

It is interesting to observe that at this time, although the matter of granting permission to the plaintiff Company to transfer the lease to Bose had been " under the consideration " of Government since December, 1935, the Government resolution to forfeit the lease was not passed until the 18th July, 1934, and the " sanctioning " of forfeiture (however that may have been effected) did not take place until the 27th March, 1934, and it was not until the 10th August, 1934, as hereinbefore narrated that the resolution was conveyed to the plaintiff Company. The respondent Banerjee in his affidavit says that the forfeiture was acquiesced in by the plaintiff Company but there appears to be no ground for this assertion.

There must also be narrated the effort on the part of Bose whom the plaintiff Company had, pending the decision on the matter of the transfer of the lease to him by Government, appointed as their agent to work the quarries, to obstruct the Kalyanpur Company from getting into possession of the quarries. At the beginning of this judgment it was stated that as to the Lower Murli Hill estate the Government possessed the mineral rights only; the surface was owned by the zamindars who on September 23rd, 1928, sold the surface rights to the plaintiff Company. They in their turn sold the surface rights to Bose who carried on business as the " Kuchwar Lime and Stone Company ". It would seem that Bose decided to obstruct the Kalyanpur Company's men from crossing the surface of the Lower Murli Hill on their journey to the quarries. No doubt this behaviour of Bose, relying upon his personal rights as

the owner of the surface, was with the approval of the plaintiff Company. On the 23rd April, 1934, on a report of the Sub-Inspector of Police, the Sub-divisional Officer issued notice to Bose (describing him as the manager of the Kuchwar Lime and Stone Company) under section 144 of the Code of Criminal Procedure. Bose, instead of shewing cause, moved the High Court to quash the proceedings or to transfer the same to some other Magistrate. This petition was rejected by the Court on the 7th June. It has been contended before us that in his petition to the High Court the *plaintiffs* admitted that the Kalyanpur Company had obtained possession on the 22nd April, 1934. The answer to this is that plaintiff Company were not parties to the proceedings and an examination of the petition makes it perfectly clear that the only question in dispute between the parties was as to whether Bose as the owner of the surface rights over the Lower Murli Hill had the right to obstruct the Kalyanpur workmen from proceeding to and from the quarry. The order under section 144 was made absolute by the Subdivisional Officer. Later on certain employees of Bose were prosecuted under sections 143 and 341 of the Indian Penal Code for obstructing the Kalyanpur men. The Magistrate acquitted them but stated that as the Kalyanpur men had to get to the Upper Murli Hill quarries and there was no other road other than over the Lower Murli land, they had a right to pass over such land. The circumstances of this litigation in the Magistrate's Court has nothing to do with the question of fact as to whether the plaintiffs had been ousted by the Kalyanpur Company from possession of the quarries: it is concerned solely with the surface rights of the Lower Murli Hill of which the plaintiff Company had no legal control.

On the 11th May, 1935, the civil suit Deputy Collector of Arrah wrote to the Subdivisional Officer of Sasaram, forwarding a copy of the injunction which had been granted by the High Court; and on

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the 14th May he wrote that the order of the High Court should be carried out at once and requesting him to report immediately. The Subdivisional Officer on the 17th May also forwarded a copy of the High Court's injunction to Ghose and on the 21st the civil suit Deputy Collector wrote to the Subdivisional Officer stating that he had been asked by the Collector to inform the Kalyanpur Company that they should be directed to stop work as ordered by the High Court. On the 4th June Banerjee wrote to the Subdivisional Officer of Sasaram stating that the Khasmahal Tahsildar had sent word to Ghose asking him to stop work, that Ghose had asked for a written order and that since writing, a copy of the Collector's letter of the 20th May forwarding the injunction had been received. Then follows this extraordinary passage :—

> " In compliance with your executive order communicated through the Khasmahal Tahsildar, we have stopped all quarrying operations from the 21st ultimo and we have been suffering daily losses and damages to a considerable extent. Would you kindly let us know as early as possible how long you direct us to stop work."

The reply of the Subdivisional Officer is dated the 7th June. He states that he is surprised at Banerjee's letter, that no executive order was passed, and that the work was stopped by the injunction of the High Court and not by an executive order. On the 13th Banerjee replies that his Company is suffering daily losses and damages and earnestly requests that instructions may be issued to the Government pleader to move the High Court to get the injunction set aside. On the 3rd July the managing director writes again to the Subdivisional Officer stating that the injunction order is not binding on his company as it was not a party to the suit, that the work had been stopped on account of the administrative order through the Khasmahal Officer and again requesting that the Government pleader might be instructed to get the High Court order set aside. A copy of this letter was sent by the Subdivisional Officer to the Collector, stating that the Kalyanpur Company

appear to persist in their determination to misunderstand the order to stop work as an executive order and saying

> "As it appears to me they have some ulterior motive in doing so, I have thought it better to bring to your notice before replying to them."

On the 12th July the Collector wrote to Banerjee stating that if he disobeyed the High Court order he would do so at his own risk.

The High Court appeal was duly heard at the end of December and beginning of January, 1936, and on the 7th February judgment was delivered, allowing the appeal of the plaintiffs and making the temporary injunction permanent. It was held that the plaintiffs had committed no breach of the conditions of their lease which would justify forfeiture under the terms thereof; that the lease had not been forfeited and that the plaintiffs were still the lessees of the Government.

At the hearing of this appeal there was a suggestion that the Government or their nominees the Kalyanpur Company had succeeded in ousting the plaintiffs from possession; but there was no suggestion that any lease had in fact been granted to the Kalyanpur Company, and as the point of dispossession had not been raised in the Court below the learned Judges rightly refused to entertain it.

As a matter of fact it was admitted on behalf of the opposite party on this motion that the plant and machinery of the plaintiffs is still on the quarries. They include a light railway track and tub cars for the conveyance of lime-stone from the immediate site of the quarry to the railway line. Such work as has been done by the Kalyanpur Company is quite trifling in extent and the total royalty paid to the Government in respect thereof amounts only to Rs. 2,344-6 annas and 9 pies. The first payment was of Rs 100-14 annas and 9 pies on January 4th, 1935. If this is in respect of the previous quarter then it was in

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respect of working after the institution of the suit. There is no evidence of any working before the institution of the suit on September 24th, 1934, and at the rate of 13 annas 6 pies per ton which is the rate quoted in the Manual the amount of lime-stone quarried comes to only a little more than 2,000 tons. We are told that the lime-stone has been carried down from the quarry in baskets on the heads of labourers and tipped into bullock carts which have been the sole means of removing it from the quarry. This degree of " working " of the quarry is insignificant and does not constitute an ouster of the plaintiffs from possession.

The Kalyanpur Company at any time might have intervened in the suit and asked to be joined as a party but they refrained from so doing. In the affidavit filed on behalf of the plaintiff Company on this motion it is stated that on the 19/20th December, 1935, and on the 2nd/3rd January, 1936, Ghose and Banerjee were both present throughout the hearing of the appeal, either instructing the Government pleader or watching the proceedings on behalf of the Kalyanpur Lime Works Limited.

On the 9th March, 1936, the plaintiffs' Solicitors wrote to the Collector complaining that Bose was not allowed to work and that the Kalyanpur Company had begun to work and asking that Bose might be put in undisturbed possession. On the 16th March the Collector replied stating that the matter was under consideration. This evidently crossed with a letter of the 18th March in which the Solicitors sent a reminder to the Collector and on the same date the Solicitors also wrote to the Commissioner. They again wrote on the 30th March and this letter crossed with a reply by the Collector to the Solicitors, dated the 28th March. It is a very important letter because it makes it quite clear that the Government had made up their minds to depart from the correct attitude of the Collector (who had warned the Kalyanpur Company of the risk of working in view of the injunction)

and had decided to come out into the open and support the cause of the Kalyanpur Company. The letter is as follows :—

"With reference to your letter number M/N-7463, dated the 18th March, 1936, I have the honour to say that on the authority of letter number 21-27-4, dated the 31st March, 1934, issued by the Board of Revenue of Bihar and Orissa possession of the quarries at the Murli Hill was delivered to Messrs. The Kalyanpur Lime Works, Limited on the 15th April, 1934. That company took possession of the quarry on that date and they have been working in it since the 15th May, 1934. Messrs. The Kalyanpur Lime Works, Limited were not parties to the suit which was brought against Government by the liquidators of the Kuchwar Lime and Stone Company, Limited, and the decree passed by the High Court does not give Government authority to eject their present lessees. You may take such legal action against Messrs. The Kalyanpur Lime Works, Limited as you are advised."

It would be interesting to know how this change of attitude was brought about. Up to a point the Collector and apparently the Commissioner had acted correctly in warning the Kalyanpur Company that any resumption of work by them would involve risk in view of the High Court order. They did not, as they should have done, inform the Company that the Government's authority could no longer be relied upon to support the claim of the Kalyanpur Company to work the quarry. The Government in view of the judgment of the High Court were not entitled to treat the Kalyanpur Company as their lessees, for it had been held that the lease to the plaintiff Company still subsisted and had not been forfeited. Having regard to the injunction they were not entitled to authorise licensees to work in the quarries. By the letter above reproduced the Government through the Collector made it quite clear that the Kalyanpur Company were treated by the Government as lessees and that the Government would support their supposed lessees in that attitude. On the 31st March the plaintiffs' Solicitors wrote to the Kalyanpur Company stating that although they were not parties to the suit they were aware of the injunction and should have obeyed it and on the 21st April, 1936, Ghose wrote to the plaintiffs' Solicitors in reply stating—

"I beg to point out that I have been in peaceful and continuous possession of the Murli lime-stone quarries in Upper and Lower Murli

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Hill areas since April, 1934, and have been working the same as lessees of the Government paying Royalties, etc., to them ever since. In spite of full knowledge and repeated intimation of these facts your clients did not choose to make us parties or to ask for recovery of possession. We had no knowledge of the Title Suit filed by your clients in the second Sub-Judge's Court, Arrah, until at a very late stage after the matter had gone up to the High Court in appeal and not having been made parties we have had no opportunity to put in our papers and evidence and present our case as *bona fide* lessees of Government in which capacity we had taken full and complete possession of the quarries, etc., long before your clients filed this suit, referred to."

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It is not attempted on behalf of either Banerjee or Ghose to support the truth of the statement by Ghose as to the lack of knowledge of the Kalyanpur Company as to the suit or the filing of the appeal. The statement is a manifest falsehood and it is sought to excuse Ghose on the ground that he was merely the local manager without knowledge of the litigation. We have been informed, though there is no evidence to that effect, that the assistance or intervention of Banerjee was positively declined by the Government pleader in the course of the suit and the appeal. It may well be that the Government pleader had been instructed not to allow any interference on behalf of the Kalyanpur Company. The Kalyanpur Company could, however, had they so chosen, have intervened and stated, if it were the fact, that they were in possession under a title from the lessor and that they had a right to be heard. There is little doubt that the real reason for the non-intervention of the Kalyanpur Company was with a view that they might be able at a later stage, in the event of the decision being against the Government, to offer a second line of defence in subsequent proceedings and it is difficult to believe that this was done without complete co-operation between the Kalyanpur Company and the Government though it may be that the Government pleader was not instructed to that effect. It is much to be regretted that an open and candid attitude was not adopted. Similarly after the disposal of the appeal there was a change of attitude, when the Kalyanpur Company restarted work which they had

stopped after the temporary injunction. On the 16th March, 1936, the Collector warned the Company of the danger of working the quarry in view of the High Court judgment. The later letter of the 28th March which I have quoted above cannot be explained on any other basis than that by some means the Kalyanpur Company had persuaded the higher authorities in the Government hierarchy to support their possession.

In June, during the vacation, an application was tentatively made to the Vacation Judge to issue notice to the Government to shew cause why they should not be dealt with for contempt. The Vacation Judge directed that the application might well wait until the beginning of term and on the 4th August, 1936, the present petition was lodged.

I now proceed to deal with the arguments in support of and against the application for an order of committal for contempt of Court.

As against the Government it is urged and rightly urged that they are in contempt by direct breach of the injunction by allowing Banerjee and Ghose to work the quarries and encouraging them by their support.

On behalf of the Government Sir Sultan Ahmad took the correct attitude that the Government were anxious to obey the orders of the Court and that if their action should be held by the Court to be in breach of the injunction, the Government would unreservedly apologise and refrain from such action as the Court might consider a breach. He nevertheless contended that the decision of the High Court against the Government did not compel the Government to eject the Kalyanpur Company from the works. He contended that the Government were bound to the Kalyanpur Company by an agreement to grant a lease and had let them into possession of the quarries. This argument has no substance. Until the judgment of the High Court be set aside the Government are

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precluded from denying the title of the petitioners from being considered as tenants of the Government in possession of the quarries. The supposed contract had no binding effect even if it be true that the Government in granting and the Kalyanpur Company in accepting a lease or a contract for a lease were under the impression that the Government had a title to grant such a lease or a contract, for they are under a mutual mistake of fact as to the plaintiffs' title and it was the duty of the Government after the judgment to repudiate the contract and to withdraw any license or authority given by them to the Kalyanpur Company. As was said in *Cooper* v. *Phibbs*(1), " Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake "—see also *Ram Chandra Misra* v. *Ganesh Chandra Gangopadhaya*(2). No shelter is afforded either to the Government or to the other respondents by such a contract even if it existed. Moreover the contract relied upon is not a contract at all, for the essential term of the contract of the proposed lease is omitted as also is the matter of royalty. If the Government had had any doubt as to their position after the injunction in the matter of abiding by the contract with the Kalyanpur Company they should have asked for directions from the Court. As was said by their Lordships of the Privy Council in the *Eastern Trust Company* v. *McKenzie Mann and Company, Limited*(3), " It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it ". It may well be as in the present case

(1) (1867) L. R. 2 H. L. 149.
(2) (1916) 21 Cal. W. N. 404.
(3) (1915) A. C. 159.

that the Government may have thought that the decision of the High Court in the suit by the present petitioners was erroneous and we are informed that they intend to appeal to His Majesty in Council; but until the decision of the High Court was reversed the executive should have adopted the course that they had no power to grant any lease inconsistent with the lease to the petitioners; that they had no power to let into possession any person other than the petitioners and if such other person had entered into possession or was attempting to enter into possession on the strength of any authority granted by the Government, they should have notified to that person that the authority was terminated. The letter cited above, dated the 28th March from the Collector to the Solicitors to the petitioners indicates that the Government were treating the Kalyanpur Lime Works Company, Limited as in possession granted by the Government and that the Government endorsed the action of the Kalyanpur Company.

The arguments presented on behalf of Banerjee by Mr. P. R. Das and adopted by Mr. P. K. Sen on behalf of Ghose may now be examined. They may very simply be summarised as follows:—

First, it is contended and rightly contended that these persons were not parties to the suit by the petitioners against the Government and are therefore not bound by the injunction granted against the Government and cannot be held guilty of a breach thereof. But if the Kalyanpur Lime Works and Banerjee and Ghose are considered as servants or agents of the Government they are undoubtedly liable for breach of the injunction if they knowingly acted as servants or agents of the Government. We are unable to say what the precise relationship between the Government and the Kalyanpur Company really was. The almost simultaneous adoption in March and April, 1935, of a common line of defence may indicate that the action of the Kalyanpur Company was at the instance of the Government or it may be that the Kalyanpur Company

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had been able by some means to persuade the higher authorities of Government to override the Collector and give their support to the Kalyanpur Company. But quite apart from the question of service or agency there can be no doubt whatever that from the beginning the opposite party Banerjee and Ghose were thoroughly aware of the injunction and were thoroughly aware that their presence upon the quarry with the permission of the Government was setting at naught the order of the Court, and in these circumstances the conduct of these respondents was a contempt of the authority of the Court whether or not they were themselves bound by the injunction. The distinction between the two kinds of contempt has long been well recognised and was clearly explained by the Court of Appeal in *Seaward* v. *Patterson*(1) where all the authorities were examined.

Secondly, Mr. P. R. Das, endeavoured to argue that the possession of his client was analogous to that of a third party who under the Civil Procedure Code in execution proceedings sets up a claim to possession of property of which delivery of possession had been granted to the plaintiffs as against the defendant. The analogy is quite fallacious. In the first place, as has been pointed out above, neither the Kalyanpur Company nor Banerjee nor Ghose is in possession of the quarry in question. Moreover even if the analogy be good, it is incumbent upon the opposite party to shew that he was *bona fide* in possession on his own behalf and such *bona fides* is in this case conspicuous by absence. From the very beginning the course of affairs was clearly known to these respondents. Had their possession been *bona fide* they could have and would have insisted on appearing as parties at the trial or in the appeal. They were well aware that the Government could have had no power to grant them a lease or enter into a contract or let them into possession until the lease to the plaintiffs had been validly forfeited and after the injunction the Government had no title to allow them to continue in possession.

(1) (1897) 1 Ch. 545.

It is contended further by Mr. Das that the Kalyanpur Company would, had they been parties to the suit, have been able to present further arguments which would have convinced the Court that the lease by the Government to the petitioners had been rightly forfeited. By way of illustration it is said that it had not been pointed out to the Court that the grant of the lease was governed by the Crown Grants Act, 1895, and that this Act renders inapplicable to such a grant the provisions of the Transfer of Property Act with regard to requirements of notice of forfeiture and that re-entry by the Crown was the only necessary condition to be fulfilled by their forfeiture. To this argument if it had been offered a simple reply might be made that the Court had held that, quite apart from the question of notice, no ground for forfeiture, either by re-entry or by notice, had been committed by the plaintiffs.

In conclusion it was said on behalf of both the Secretary of State and of the two other respondents that if the Court holds that they or any of them have been guilty of contempt they unreservedly apologise and plead in extenuation that they had committed a *bona fide* mistake as to their respective legal position. That each of the three opposite party has been guilty of contempt the Government by a breach of the injunction and the two other respondents by setting at defiance the authority of the Court—there is no doubt in our minds. In the circumstances we deem it sufficient to direct that the Secretary of State do forthwith pay to the petitioners one half of their costs and that the other respondents Banerjee and Ghose shall also pay to the petitioners one half of their costs and shall be jointly and severally liable therefor and we fix the hearing fee of this petition at two hundred and fifty gold mohurs.

In view of the correct attitude taken on behalf of the respondents that they had and have every intention of treating with respect the authority of the Court we do not make any further order.

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KUCHWAR LIME AND STONE COMPANY, LIMITED v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

We are much indebted to Mr. Baren Bose for his very able and lucid argument in support of the petition.

KHAJA MUHAMAD NOOR, J.—I agree.

VARMA, J.—I agree.

Order accordingly.

J. K.

APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

COURTNEY TERRELL, C. J.

MAHARAJA KUMAR RAM RANBIJIYA PRASAD SINGH.

v.

1936.

November, 23, 24.

RAI BAHADUR HARIHAR PRASAD SINGH.*

Rent—"rents and profits accruing", meaning of—rent received in advance, if can be said to be rent accruing—rent, when falls due—rent, if accrues from day to day—Bihar Tenancy Act, 1885 (*Act VIII of* 1885),*section* 53—*Transfer of Property Act,* 1882 (*Act IV of* 1882), *section* 36—*suit to recover rent received in advance by defendant—Limitation Act.* 1908 (*Act IX of* 1908), *articles* 62, 109 *and* 120—*proper article applicable.*

By a compromise the plaintiff was entitled to "all rents and profits accruing from 20th July, 1928," of certain properties. The defendant had as a matter of fact received the rent of September kist in advance from the tenants. The plaintiff sued to recover this amount from the defendant and it was contended that rent of September kist had accrued after the 20th July, 1928, and they were entitled to it.

Section 53 of the Bihar Tenancy Act, which applies to the case, provides that

"money rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year;"

*Appeal from Appellate Decree no. 16 of 1934, from a decision of Rai Bahadur Ram Chandra Chaudhuri, District Judge of Shahabad, dated the 22nd of August, 1933, confirming a decision of Babu Radha Krishna Prasad, Subordinate Judge of Shahabad, dated the 14th of September,

and therefore the words "accruing after the 20th of July, 1928" referred to the September kist, that is to say, the rent which accrued after that date. The payment of rent by the tenants was an advance to the landlord with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent.

De Nicholls v. *Saunders*(1), relied on.

That in India, apart from the provisions of section 36 of the Transfer of Property Act, which did not apply to the case, rent does not accrue from day to day.

Held, that the sums received by the defendant could not be said to have been wrongfully received and therefore Article 109 of the Limitation Act had no application. The case was governed by Article 62 or Article 120 of the Act; and in view of the meaning of the expression "accruing" the action was within time.

Gooroo Das Pyne v. *Ram Narain Sahoo*(2), referred to.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Wort, J.

Sushil Madhab Mullick (with him *Sunder Lal* and *B. P. Sinha*), for the appellant.

Khurshad Husnain (with him *Mahabir Prasad* and *Harians Kumar*), for the respondents.

WORT, J.—This appeal depends upon the construction of a compromise before their Lordships of the Judicial Committee of the Privy Council—a compromise dated the 20th of July, 1928. By that compromise certain property was to be transferred to the plaintiff—appellant (the appellant here being the appellant before the Privy Council), and it was provided that the appellant

"should be entitled to all rents and profits accruing in respect of those properties as from the twentieth day of July, 1928."

(1) (1870) 5 Com. Pl. 589.
(2) (1884) L. R. 11 Ind. App. 59.

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It is upon the words "all rents and profits accruing", after the date mentioned, that the appeal depends. It would apppear from the facts found in this case that the kist in question was that of the 29th of September, 1928, but it would appear that the respondents had collected that rent in advance from the tenants prior to the date of the compromise, i.e., the 20th of July, 1928. The learned Judge in the Court below for reasons which it is unnecessary to mention, dismissed the plaintiff's claim.

WORT, J.

Two questions arise: first, whether the plaintiff is entitled to the whole; and, secondly (a matter depending upon the question of apportionment), if not the whole whether the plaintiff is entitled to a part of the claim. I should have stated that the main claim together with interest was Rs. 4,264-14-6. It is contended by Mr. Sushil Madhab Mullick on behalf of the plaintiff-appellant (as I understand his argument) that the words "all rents and profits accruing in respect of those properties" which we have to construe, are descriptive and that therefore, he under the agreement being entitled to the rents in any event from the tenants, would be entitled to those sums which have been collected by the defendants in advance. The point is in a small compass, and, by the argument of the learned Advocate appearing on behalf of the appellant, depends very largely upon a question decided in *De Nicholls* v. *Saunders*(1). The facts there were somewhat different and the question arose in an action by a tenant against his immediate landlord for damages for wrongful distress. It would appear that after the assignment which was by way of mortgage, the assignor had collected rent in advance from the tenant. No notice was given to the tenant of the assignment by way of mortgage, and it was in those circumstances that the assignee put in a claim for the rent which the tenant had already paid to the assignor. The fact which distinguishes

(1) (1870) 5 Com. Pl. 589.

that case from the present was that the collection by the assignor was after the date of the assignment, and Willes, J., in delivering the judgment of the Court, stated that in the circumstances, apart from the question of notice, had the collection been made before the date of the assignment, it would have been a complete discharge of the tenant. But the relevance of the case depends upon certain observations of the learned Judge with regard to s. 10, 4 *Anne*, c. 16. The learned Judge made this observation: "These cases (referring to certain common law cases) depend upon a rule of general jurisprudence not confined to choses in action, though it seems to have been lost sight of in some recent cases—viz., that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 *Anne*, c. 16, s. 10. And then he made this observation with regard to the payment of money in advance. " That statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment: this provision of the statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here, for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact, an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent." Section 53 of the Bihar Tenancy Act which applies to this case provides that

> "money-rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year."

It is, therefore, argued by Mr. Sushil Madhab Mullick that when the words " accruing after the 20th of July, 1928 " were used, the parties were referring to the

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date of the kist, that is to say, that rent which accrued after that day should be paid by the tenant, and "accrued" in the sense used meant the date upon which the payment fell due; and relying upon the words of Willes, J., it is contended that in spite of the payment which might in certain circumstances have been a full discharge of the tenant, although in fact the payment had been made the rent still accrued due after the 20th of July, 1928, and that therefore the plaintiff was entitled to recover this sum from the defendants. The case has all the more strength in India by reason of the fact that, apart from section 36 of the Transfer of Property Act, in India it is seen that rent does not accrue from day to day. There are a number of authorities which have pointed out that section 36 of the Transfer of Property Act is the only statutory provision in India relating to the apportionment of rent and I think it is quite clear that by section 2 of that Act section 36 does not apply to this case.

We are, therefore, in the position of having to deal with rent which, although it had been paid, did accrue after the 20th of July, 1928. The only question that remains is whether, under the agreement, the plaintiff was entitled to recover it from the defendants. There are authorities in India, particularly the decision in *Gooroo Das Pyne* v. *Ram Narain Sahoo*(1), which speak of an action of this kind as an action in which the plaintiff attempts to follow sums which are in fact due to him in the hands of the defendants. The case is more particularly relevant on the question of limitation to which I shall in a moment refer. But in my judgment on a plain reading of this compromise, assuming as we must that the parties were contracting with the full knowledge of the law that there is an agreement and an undertaking by the defendants to pay those sums (if they had already collected them) to the plaintiff in so far as they are

(1) (1884) L. R. 11 Ind. App. 59.

rents which accrued due after the 20th of July, 1928. In my judgment the observations of Willes, J. in the case to which I have already referred do apply to this case, and the conclusion at which I arrive is that this rent accrued after the 20th of July, although in fact there had been (to use the words of Willes, J.) an advance to the defendants which might in certain circumstances have been a complete discharge as against the defendants.

So far as the question of the amount which the plaintiff is entitled to recover is concerned, I have already indicated the view I hold by stating that rent does not accrue from day to day in India and therefore it did not accrue until the date of the kist of September, 1928. Therefore there can be no question of any diminution of the amount which the plaintiff claims.

So far as the question of limitation is concerned, it was variously contended that Article 62 applied, or that Article 109 applied, or in the alternative, as Mr. Mullick contends, Article 120. I think it impossible to hold that Article 109 applies for the very simple reason that that Article refers to profits of moveable property which belonged to the plaintiff and which has been wrongfully received by the defendants, which this is not. It cannot be said that these sums received by the defendants prior to the 20th of July were wrongfully received: it cannot be that case. So far as Articles 62 and 120 are concerned, it seems to me on the facts of this case and for the consideration which I have stated that it matters not whether it is Article 62 or Article 120. Article 62 is for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs' use. On the view I take as to the expression "accruing" used in the compromise it did not accrue till the end of September, 1928, and, therefore, in any event the plaintiff's action is within time. If Article 120 applies the plaintiff's action is equally within time.

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WORT, J.

For those considerations I am of the opinion that the decision of the learned Judge in the Court below is erroneous and the action of the plaintiff should have succeeded. I would, therefore, set aside the decision of the Court below and decree this appeal with costs. The plaintiff is entitled to judgment for Rs. 2,941-7-3 with interest at the rate of 6 per cent. per annum throughout.

AGARWALA, J.—I agree.

Appeal decreed.

J. K.

APPELLATE CIVIL.

1936.

November, 24.

Before Wort, J.

RAMGHULAM KHATIK.

v.

RAMKHELAWAN RAM.*

Public Nuisance—obstructing villagers from taking water from a well, if amounts to—suit by some of the villagers without proof of special damage, if maintainable—Code of Civil Procedure, 1908 (Act V of 1908), section 91 and Order I, rule 8—suit if maintainable without recourse to proceedings.

Order I, rule 8, is an enabling section which entitles one party to represent many who have a common cause of action, but it does not force one to represent many if his action is maintainable without the joinder of other persons.

A single member of the public cannot maintain an action in respect of a public nuisance without establishing special damage or without the consent of the Advocate-General under section 91 of the Code of Civil Procedure. The law in this respect is the same in India as in England.

*Appeal from Appellate Decree no. 496 of 1934, from a decision of Babu Gopal Chandra Dey, 1st Subordinate Judge of Chapra, dated the 30th of April, 1934, reversing a decision of Babu Mahabir Prasad, 1st Munsif of Chapra, dated the 21st of March, 1933.

Satku v. *Ibrahim Aga*(1), *Kazi Sujauddin* v. *Madhavdas*(2), *Baslingappa Parappa* v. *Dharmappa Basappa*(3) and *Mohamed Abdul Hafiz* v. *Latif Hosein*(4), referred to.

Manzur Hasan v. *Muhammad Zaman*(5), distinguished.

Mandakinee Debee v. *Basantakumaree Debee*(6), dissented from.

But the right of the resident of a village to sue for removal of an obstruction to a village path or to a well does not amount to a public nuisance.

Where the plaintiff instituted a suit for a declaration that they had a right along with other members of the public to take water from a certain well and to remove certain obstructions and did not allege or prove any special damage or had recourse to the provisions of Order I, rule 8, of the Code of Civil Procedure, *held* that the action was maintainable.

Harrop v. *Hirst*(7), relied on.

Appeal by defendants 1 to 4.

The facts of the case material to this report are set out in the judgment of Wort, J.

Sushil Madhab Mullick and *G. S. Sinha*, for the appellants.

B. C. De and *S. N. Banerjee*, for the respondents.

WORT, J.—This is an appeal by defendants 1 to 4 in an action brought by the plaintiffs in which they claimed a declaration as regards the rights of the public to use a certain well, also that the public had a right of way over 7 dhurs of land appertaining to the well. They sought also recovery of possession after demolition of the wall erected by the defendants which the plaintiffs claimed to be an obstruction to

(1) (1877) I. L. R. 2 Bom. 457.
(2) (1893) I. L. R. 18 Bom. 693.
(3) (1910) I. L. R. 34 Bom. 571.
(4) (1897) I. L. R. 24 Cal. 524.
(5) (1924) I. L. R. 47 All. 151, P. C.
(6) (1933) I. L. R. 60 Cal. 1003.
(7) (1868) L. R. 4 Exch. 43.

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their right of user. The case in the Court below was held to be maintainable in spite of the fact that the provisions of Order I, rule 8, of the Code of Civil Procedure, had not been complied with, and also in spite of the fact that the plaintiffs failed either to allege or prove special damage.

WORT, J.

In my judgment the case is disposed of on the authority of the decision which has not been referred to at the Bar by either party. Before dealing with that authority I would like to make some observation regarding the decision in *Mandakinee Debee* v. *Basantakumaree Debee*(1) where two learned Judges of the Calcutta High Court are reported to have held that " any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage ". If the learned Judges intended to hold that a single member of the public might bring an action, without the consent of the Advocate-General and without proving special damage, in respect of a public nuisance, I most respectfully disagree with them. A very long line of decisions in India has established the proposition that the law with regard to this matter in India is the same as in England; and, indeed in my judgment, it would be quite impossible to hold a contrary view having regard to the provisions of section 91 of the Code of Civil Procedure which, by necessary implication, states that to be the position. Had the facts of that case been brought to the notice of the learned judges of the Calcutta High Court, they would have seen [specially in the case of *Muhammad Din Mian* v. *Mussammat Atrajo Kuer*(2)] that this Court has not laid down any proposition which is not in conformity with the law as laid down by a large number of decisions of the Indian High Courts, and it would have been observed that the decision of their Lordships of the Judicial

(1) (1933) I. L. R. 60 Cal. 1003.
(2) (1931) I. L. R. 10 Pat. 568.

Committee of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(1) did not (as it is suggested) reverse the decisions of the Indian High Courts to the effect that an action with regard to a public nuisance, to be maintained, must establish special damage, or be brought under the provisions of section 91 of the Code of Civil Procedure. There Lord Dunedin, delivering the judgment of their Lordships of the Privy Council, and referring to a number of cases, accepted the Madras view as against the Bombay view on a very limited question relating to the conduct of religious processions through the streets and over the public high way, and it is with regard to that matter and that matter alone that their Lordships' decision was directed in the case of *Manzur Hasan* v. *Muhammad Zaman*(1). If the matter ever comes up for decision before their Lordships of the Privy Council, I have no doubt that it will be pointed out that their decision was limited to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage. I would add that every one of the decisions to which their Lordships of the Privy Council referred, namely, the decisions in *Satku* v. *Ibrahim Aga*(2), *Kazi Sujauddin* v. *Madhavdas*(3), *Baslingappa Parappa* v. *Dharamappa Basappa*(4) and *Mohamed Abdul Hafiz* v. *Latif Hosein*(5) related expressly to religious processions and not to what I describe as the 'wider question'. In my judgment the law in India is precisely the same in this regard as it is in England and it does not depend on the technical question of whether in the circumstances of the case an indictment could be maintained. Technical objections of that kind do not obtain in India. But the main

(1) (1924) I. L. R. 47 All. 151, P. C.
(2) (1877) I. L. R. 2 Bom. 457.
(3) (1893) I. L. R. 18 Bom. 693.
(4) (1910) I. L. R. 34 Bom. 571.
(5) (1897) I. L. R. 24 Cal. 524.

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principle upon which this question is to be discussed and upon which the whole matter rests is that where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by section 91 of the Code of Civil Procedure. The law in England in this respect has never been altered, but with regard to the case in hand the principle laid down in the well-known case of *Harrop* v. *Hirst*(1) applies. There is no doubt with regard to the facts of this case in spite of the loose pleadings and it is quite clear that the plaintiff is one of the limited members who enjoys the use of a certain well. The user of that well has been obstructed by the action of the defendants, and the short question is whether an action in those circumstances would lie at the instance of the plaintiff alone. Order I, rule 8, of the Code of Civil Procedure has nothing to do with the matter at all. Order I, rule 8, as has been pointed out by a number of decisions, is an enabling section which entitles one party to represent many who have a common cause of action; but it does not force one to represent many if his action is maintainable without the joinder of other persons. In any event the test in this case is not whether Order I, rule 8, applies and for the reason which I have stated clearly it has nothing to do with the matter. The fact that he has not complied strictly with the Order and rule does not in any way prevent his action succeeding. The real test, as I have indicated, is whether this is a public nuisance or not.

Now, I do not think I can do better than referring to the decision of Kelly, C. B. in (*Harrop* v. *Hirst*(1). In that case a number of inhabitants of a village had a right by prescription to a continuous flow of water for domestic purposes from what was called a spout. This right had been obstructed by

(1) (1868) L. R. 4 Exch. 43.

the defendant and by which the quantity of water coming from the spout had been diminished. In an action brought by the plaintiff alone, in which he alleged that he in common with the other inhabitants enjoyed this customary right, the question arose whether his action was maintainable without the proof of special damage. Kelly, C. B. in his judgment (Martin and Bramwell, B. B. concurred and Channell, B. expressed an opinion in the same sense) made this observation: "I think it is clear on the authorities, and especially on the case of *Westbury* v. *Powel* cited in *Fineux* v. *Hovenden*(1) that such an action is maintainable. It was there determined that where the inhabitants of Southwark had a common watering place, and the defendant stopped it, the plaintiff being an inhabitant, might bring an action on the case, there being no other remedy but by action; and the action was accordingly held maintainable without actual and particular damage to the plaintiff". Later he observes: "It is conceded that any inhabitant who had suffered actual damage from want of water could maintain an action for the injury done him. But that actual damage is not in such a case a necessary ingredient, is established by the passage cited by my Brother Martin from 1 Wms. Saunders, 346(*a*), in the note to *Mellor* v. *Spateman*, where it is laid down that a commoner may have an action on the case without proving any specific injury to himself against a person wrongfully depasturing cattle on the common; and the author observes:—'The law considers that the *right* of the commoner is injured by such an act, and therefore allows him to bring an action for it to prevent a wrong doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury'". The learned Chief

(1) Cro. Eliz. 664.

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Baron later refers to *Bower* v. *Hill*(1) in which Tindal, C. J. made this observation "The erection of the tunnel is to be considered as a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he received no immediate damage thereby. The right of the plaintiff to this way is injured if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of an abandonment and renunciation of the right of way". It is needless to say that the observations which I have read from a case precisely similar to the one before me, clearly shows that an action would lie without proof of special damage. In my opinion the decision of the learned Judge in the Court below was right although perhaps for reasons somewhat different from the ones which he expressed.

That in my view concludes the matter and for the reasons which I have stated I think the appeal fails and must be dismissed with costs. In the circumstances the plaintiffs are entitled to the declaration they claimed and I would grant an injunction restraining the defendants from obstructing the user of the well by the plaintiffs and other individuals.

Leave to appeal is refused.

J. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Fazl Ali and Agarwala, JJ.

MAHARAJDHIRAJ KAMESHWAR SINGH BAHADUR

1936.

November, 20. December, 7.

v.

BANSIDHAR MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rules* 91, 92 *and* 93—*auction-purchaser, if can maintain action for damages on the ground of fraud.*

*Appeal from Appellate Decree no. 1362 of 1933, from a decision of Babu Suchindra Nath Ganguli, Subordinate Judge of Darbhanga, dated the 23rd August, 1933, confirming a decision of Babu Satyanarayan Chaudhuri, Munsif of Darbhanga, dated the 12th May, 1932.

(1) 1 Scott, 526.

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MAHARAJA-DHIRAJ KAMESHWAR SINGH BAHADUR v. BANSIDHAR MARWARI.

Plaintiff, a purchaser in execution of a rent decree having been dispossessed as a result of proceedings under Order XXI, rule 100, of the Code of Civil Procedure, brought an action for damages on the ground that the defendants' servants who acted for him had committed a deliberate fraud.

Held, that the action was maintainable and that Order XXI, rules 91 to 93 of the Code of Civil Procedure did not bar such an action. When the auction-purchaser has suffered loss through the fraud of the execution creditor or breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which he has thereby sustained.

Rishikesh Laha v. *Manik Molla*(1), *Balwant Raghunath* v. *Bala Valad Malu* (2), *Dayal Das* v. *Shankar* (3), *Mehr Chand* v. *Milkhi Ram* (4) and *Bahadur Singh v. Ramphal*(5), followed.

Nagendra Nath Ghosh v. *Sambhu Nath Pandey*(6), distinguished.

Order XXI, rule 92, in so far as it bars a suit to set aside a sale must be strictly construed and can have application only to those cases where the matter which is sought to be agitated by means of the suit could be agitated under Order XXI, rules 89 to 91.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Murari Prasad and *K. P. Upadhya*, for the appellant.

Pande Nawal Kishore Sahaya, for the respondent.

FAZL ALI, J.—This is an appeal from an appellate decree affirming the decree passed by the Munsif of Darbhanga in favour of the plaintiff. It appears that on the 6th April, 1925, the defendant's father

(1) (1926) I. L. R. 53 Cal. 758.
(2) (1922) I. L. R. 46 Bom. 833.
(3) (1931) A. I. R. (Nag.) 116.
(4) (1932) I. L. R. 13 Lah. 618, F. B.
(5) (1929) I. L. R. 5 Luck. 552, F.B.
(6) (1924) I. L. R. 3 Pat. 947.

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Hasan, J.

obtained a decree for rent in respect of a holding situated within his zamindari against one Dwarka Chaudhury and certain other persons and the holding being put up for sale in execution of the decree, was purchased by the plaintiff for a sum of Rs. 1,100 on the 20th March, 1928. The plaintiff deposited in due time the entire purchase money and a portion of it was withdrawn by the defendant and the balance by Dwarka Chaudhury and others. As a matter of fact at the time when the plaintiff instituted the suit, neither Dwarka Chaudhury nor any of the other defendants in the rent suit was in possession of the holding. It is now established beyond doubt that though the holding had been previously mortgaged by the recorded tenant named Ramdhani Kant, the mortgage had been redeemed long before the institution of the rent suit by the latter and he was in possession thereof since 1919. Accordingly when the plaintiff proceeded to take possession of the holding through court, Ramdhani Kant made an application under Order XXI, rule 100, of the Code of Civil Procedure complaining that he had been wrongfully dispossessed by the plaintiff. This application succeeded and the possession of the property was restored to him on the 5th August, 1929. The plaintiff then instituted the present suit for recovery of Rs. 1,397, as damages. His case in the plaint was that the defendant's servants who acted for him had committed a deliberate fraud on him and he was entitled to be compensated. The case of the plaintiff has been accepted by both the courts below and the facts which have been found by these courts may be summarised as follows:—(*1*) That Sri Kant having redeemed the mortgage from Dwarka Chaudhury was in possession of the holding in respect of which the rent suit had been brought by the defendants since 1919; (*2*) that though this fact was known to the servants of the defendants, they brought the suit not against Sri Kant but against Dwarka Chaudhury; (*3*) that the defendant's servants had in

bringing the suit acted in collusion with Dwarka Chaudhury and others and had thus defrauded the plaintiff. The courts below have also in their judgment strongly commented upon the conduct of the defendant's *amlas* in not producing the zamindari papers to substantiate the defence that at the time when the rent suit was instituted the name of Dwarka Chaudhury was still recorded in the landlords' papers. They held therefore that the plaintiff was entitled to recover the entire purchase money together with the interest claimed by him by way of damages.

The first point which is raised by the learned Advocate appearing on behalf of the defendant appellant in this second appeal is that in view of the provisions to be found in Order XXI, rules 91 to 93, the plaintiff's suit is not maintainable and in support of his contention he relies strongly upon the decision of this Court in *Nagendra Nath Ghosh* v. *Shambhu Nath Pandey*(1). In that case it was held that a purchaser at a sale held in execution of a decree is not entitled to bring a regular suit for realisation of the purchase money paid by him on the ground that the judgment-debtor has no saleable interest in the property and that where he has purchased a property in which the judgment-debtor has not a saleable interest, the proper procedure for him to adopt in order to recover the purchase money is to apply under Order XXI, rule 91, Civil Procedure Code, to set aside the sale and then if the sale is set aside he may apply under rule 93 for an order for refund of the purchase money. If he does not apply under rule 91 or his application is rejected the sale must be confirmed and clause (*3*) of rule 92 bars a suit to set aside the sale.

It appears that this is the view which prevails in all the High Courts except the High Court of Lahore and the Chief Court of Oudh and as at present advised

(1) (1924) I. L. R. 3 Pat. 947.

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I find no justification for holding a contrary view. It is, however, to be remembered that the present suit has not been brought either to set aside the sale or to recover the purchase money on the ground that the sale is not binding upon the plaintiff. The plaintiff's action is one for damages for fraud and as far as I can see there is nothing in Order XXI, rules 91 to 93, to bar such an action. It appears to me that there is now a consensus of opinion that where an auction-purchaser at a court sale has suffered loss through the fraud of the execution creditor or breach of any duty which the execution creditor owes to the auction-purchaser he is entitled to receive compensation for the loss which he has thereby sustained [see *Rishikesh Laha* v. *Manik Molla*(1); *Balvant Raghunath* v. *Bala Valad Malu*(2); *Dayal Das* v. *Shankar*(3); *Mehr Chand* v. *Milkhi Ram*(4) and *Bahadur Singh* v. *Ramphal*(5)]. That this view is correct appears to me to be beyond question. Order XXI, rule 92, in so far as it bars a suit to set aside a sale must be strictly construed and can have application only to those cases where the matters which are sought to be agitated by means of the suit could be agitated under Order XXI, rules 89 to 91. It is obvious that even if the plaintiff had become aware in time that the judgment-debtors in the rent suit had no saleable interest in the holding in question, he could not recover any damages for the fraud practised upon him by the decree-holder by instituting a proceeding under Order XXI, rule 93; and if he attempted to raise any question of fraud he would have been met with the answer that such a question was beyond the scope of the enquiry. Besides, the remedy provided under Order XXI, rule 91, is available to an auction-purchaser only if he makes his application within thirty days of the

(1) (1926) I. L. R. 53 Cal. 758.
(2) (1922) I. L. R. 46 Bom. 833.
(3) (1931) A. I. R. (Nag.) 116.
(4) (1932) I. L. R. 13 Lah. 618, F. B.
(5) (1929) I. L. R. 5 Luck. 552, F. B.

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sale. There may be cases however, (this case is one of that type) in which an auction-purchaser becomes aware of the judgment-debtor's want of title in the property sold to him after the thirty days have expired and it is inconceivable that in such cases he should be left without a remedy. That being so, it has been held in some cases that where property to which the judgment-debtor has no saleable interest has been purchased in execution of a decree and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom the purchase price has been paid should retain the purchase money as against the auction purchaser, *the auction purchaser is entitled to recover such money from the decree-holder as money had and received to his use.* It is, however, unnecessary to deal with this aspect of the matter because in my opinion it is clear that in the present case an action for damages can be maintained.

The next question which arises for consideration is whether the defendant should be called upon to refund the whole of the purchase money although he withdrew only a part of it, the belance being withdrawn by the defendant in the rent suit. It appears that the plaintiff for some reason or other did not implead Dwarka Chaudhury and others as defendants in the present suit, but that fact cannot in my opinion defeat this action because the defendant and Dwarka Chaudhury having on the finding of the courts below acted in collusion with each other their liability for damages was joint and several.

The last point which arises in the case is whether a decree can be passed against the present defendant when the tortious act for which damages are claimed appears to have been committed during the life-time of his father who is now dead. This point, however, was not raised in any of the courts below or

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in the grounds of appeal and it cannot be allowed to be raised for the first time in this Court. For aught we know, if this point had been raised in any of the courts below, it might have been possible for the plaintiff to prove facts which would make even the present defendant liable.

I would in these circumstances dismiss the appeal with costs.

FAZL ALI, J.

AGARWALA, J.—I agree.

J. K. *Appeal dismissed.*

SPECIAL BENCH.

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November, 19, 20. December, 10.

Before Courtney Terrell, C. J., Khaja Mohamad Noor, James, Dhavle and Varma, JJ.

RAI SAHEB BHAGWAT NARAIN SINGH

v.

SRINIVAS.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 89—*deposit of decretal amount and compensation —part-payment of decretal amount and agreement to pay the balance on a fixed date—time, if can be extended—order refusing to set aside sale, if appealable—reason.*

On the 13th of September 1935, certain properties were sold in execution of a decree and on the same date the judgment-debtors paid a portion of the decretal amount to the decree-holder and a joint petition was filed in court by the decree-holder auction-purchaser and the judgment-debtors to the effect that if the balance of the decretal amount was paid by the 10th of November the sale would be set aside and in case of default the sale would be confirmed. The court was closed on the 10th of November and re-opened on the 13th. On the 14th of November the judgment-debtors applied for a chalan to deposit the amount and the deposit was actually

*Appeal from Original Order no. 354 of 1935, from an order of Babu Nidheswar Chandra Chandra, Subordinate Judge of Patna, dated the 25th November 1935.

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made on the 20th of November and accepted at the risk of the judgment-debtors. The court after hearing the parties held that it had no power to extend the time of payment as agreed to between the parties and confirmed the sale. The judgment-debtors appealed.

Held, that the time fixed for payment was, under the circumstances, of the essence of a contract and on default the sale became automatically confirmed and time could not be extended.

Held, that the application filed on the date of sale jointly by the parties might be treated as an application under Order XXI, rule 89, of the Code and as such the order was appealable.

Banga Chandra Mozamdar v. *Nanda Kumar Mozamdar*(1), *Henry Peter Pisani* v. *Her Majesty's Attorney-General*(2) and *Sadasiva Pillai* v. *Ramalinga Pillai*(3), relied on.

Held also that if the order refusing to set aside the sale was held to be wrong, it would have been set aside on the ground of refusal to exercise jurisdiction or of material irregularity in the exercise of jurisdiction.

Appeal by the judgment-debtors.

The facts of the case material to this report will appear from the following judgment of Khaja Mohamad Noor and Saunders, JJ. referring the case to a Special Bench:

KHAJA MOHAMAD NOOR AND SAUNDERS, JJ.—The question involved in this appeal, though at first sight simple, appears to us to be beset with difficulties. The appeal purports to be against an order under Order XXI, rule 89, of the Code of Civil Procedure, refusing to set aside a sale held on the 13th September, 1935, in execution of a decree at which the decree-holder himself was the auction-purchaser. An application under Order XXI, rule 89 or rule 90, could have been made by the 13th October, but as there was the civil court vacation it could have been made on the 31st October, 1935, when the courts re-opened. But on the very day of the sale a petition was filed by the parties to the effect that the judgment-debtors had paid Rs. 500 to the decree-holder auction-purchaser towards the satisfaction of the decree and that it was agreed between the parties that if the

(1) (1936) 40 Cal. W. N. 1402.
(2) (1874) L. R. 5 P. C. 516.
(3) (1875) L. R. 2 Ind. App. 219.

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remaining decretal amount with interest, etc., be paid by the 10th of November following, the sale would be set aside and the decree-holder auction-purchaser would forego the five per cent. compensation which he was entitled to under the law. In case of default in the payment by the date fixed the sale would be confirmed. The court was closed on the 10th of November, 1935, and re-opened on the 13th November, 1935, and it is not disputed that the decretal amount could have been deposited on that day. Nothing, however, was done on that date, and the reason for the default was tried to be explained by the judgment-debtors but is not urged in appeal. On the 14th November the judgment-debtors applied for a chalan. There is a note showing that a chalan was issued on the 15th November. The first part of the chalan seems to have been filled up on that date. The second part, which is the authority for the treasury officer to receive the money, does not seem to have been filled up by the court till the 20th of November on which date the decretal amount was actually deposited. The money was accepted at the risk of the judgment-debtors and was later utilized towards the satisfaction of the decree in a subsequent execution case. There is an allegation by the judgment-debtors that they attempted to pay the money to the decree-holder, who is a resident of Benares, before the 10th of November but that he could not be found. This point has, however, not been pressed. On the face of the chalan it may be said that the judgment-debtors were not responsible for the delay in payment between the 15th and the 20th of November and there may be a ground for not making them responsible for the delay between the 14th and the 15th. We have not, however, gone into this matter, as the case was argued on the assumption that the default between the 14th and the 20th November could be ignored since it was conceded that there was default on the 13th, and the question is whether this default can be condoned.

The decree-holder auction-purchaser ignoring the deposit made on the 20th November, applied to the court to confirm the sale as the judgment-debtor defaulted in carrying out the terms of the agreement entered into between the parties on the 13th of September. The learned Subordinate Judge has allowed this petition and has confirmed the sale. It is against this order that the present appeal has been preferred.

The questions for consideration are—

(*1*) Whether the order is one under Order XXI, rule 89 and is appealable;

(*2*) whether the court has power to set aside the sale on a deposit made after the date fixed by the parties; and, if so,

(*3*) should this power be exercised in this case?

It was urged by Mr. Das that no appeal lay, as there was no application under Order XXI, rule 89. At one stage we were inclined to the view that the joint application of the 13th September, 1935, was in spirit, though not in form, an application under Order XXI, rule 89, and that the period for deposit of the decretal amount and compensation, which is thirty days under Order XXI, rule 92, was extended with the consent of the decree-holder auction-purchaser. There are

observations in a decision of this Court in the case of *Chaudhry Rameshwar Misser* v. *Chaudhry Sureshwar Misser*(1) which may support the proposition that the period of 30 days fixed in Order XXI, rule 92, can be extended with the consent of the parties, but it is argued out that the statutory period of limitation for filing the application under Order XXI, rule 89, and for making the deposit cannot be extended by the consent of any party. If this contention be accepted, it may be said that the proceeding before the learned Subordinate Judge cannot be treated as one under Order XXI, rule 89, and even if the judgment-debtors would have deposited the money in time, the setting aside of the sale would have been not under the provisions of the Code of Civil Procedure but perhaps under the inherent power of the Court to give effect to the agreement of the parties. Mr. Das has contended that under the statutory provision of Order XXI, rule 92, when there was no application either under rule 89, 90 or 91 the Court was bound to confirm the sale. As there was no application under any of the three sections in this case, the confirmation of the sale must be taken to have been under rule 92 and all the intermediate steps should be ignored: and if the judgment-debtors had any right under any contract with the decree-holder, their remedy was a suit. It is also contended by him that in any case the Court has no power to accept the deposit after the agreed date.

It has been contended by Sir Sultan Ahmed, who appears for the appellants, that the decree-holder auction-purchaser by filing the application of the 13th September gave up his right under the sale and substituted for it another right based upon contractual relations between him and the judgment-debtors, one of the considerations of the contract being that the judgment-debtors did not file any application under Order XXI, rule 90. If the decree-holder wanted to enforce that right, which he got by the contract, the Court is entitled to decide that the time fixed was not of the essence of the contract and can refuse to confirm the sale if the decree was satisfied within reasonable time of the date fixed. It is also contended that when the parties come to the domain of contract and give up their statutory rights the Court should give relief against penalty and forfeiture. It is a different matter whether any question of penalty or forfeiture arises in a case of this kind. There is no clear decision on this point. There are some cases in which it has been held that when the parties compromise in a proceeding under Order XXI, rule 90, time is of the essence of the contract [*see* among others the case referred to in *Kandarpa Nag* v. *Banwari Lal Nag*(2)]. These decisions may be taken to have laid down that in a compromise between the judgment-debtor and the auction-purchaser in the course of a proceeding to set aside a sale time is of the essence of the contract. It is contended that those decisions require reconsideration, and further that in the present case there was no proceeding to set aside the sale. In short, in our opinion the question for decision is whether the decree-holder is entitled to insist upon his statutory right under the sale and can say that no deposit made by him after the period fixed by law will affect the sale, or that if that period can be extended by consent, the court has no

(1) (1917) 2 Pat. L. J. 164.
(2) (1920) 33 Cal. L. J. 244, 248.

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power to accept any deposit beyond the agreed period; or whether the statutory right of confirmation of sale came to an end when the decree-holder auction-purchaser entered into an agreement not consistent with his legal rights and thenceforward the rights of the parties should be determined on the basis of the contract. In the latter case the question of time being of the essence of the contract and the question of forfeiture may arise.

The next question is whether, if the latter situation be accepted, the judgment-debtors can ask the Court after accepting the deposit though beyond time to set aside the sale, or whether the Court is to confirm the sale and leave the parties to their remedy by a civil suit. In other words, the question will be whether the controversy which has arisen between the decree-holder and the judgment-debtors on the agreement entered into between them after the sale can be investigated and determined in the course of the execution proceedings. This Court has held in the case of *Choudhury Jagdish Missir* v. *Choudhury Sureshwar Missir*(1) that a proceeding for setting aside a sale under Order XXI, rule 90, is not a proceeding in execution but is in the course of the suit. The correctness of this decision might perhaps be questioned.

Considering the importance of the issues involved in the case and there being no clear decision on them we direct that the record of the case be placed before the Hon'ble the Chief Justice so that he may direct that the case be heard by a specially constituted Bench which will be in a position to deal with the correctness or otherwise of some of the decisions of this Court.

On this reference—

Sir Sultan Ahmed (with him *Mahabir Prasad* and *Choudhury Mathura Prasad*), for the appellant: The Lower court has held that it cannot give any relief against forfeiture for breach of contract. This is not correct. In the case of an order passed by consent of parties, the contractual relations remain in spite of the order of the court superadded to the contract. The Court retains its power to extend the time if it finds that time was not of the essence of the contract. [Reliance was placed on *Sasadhar Ganguly* v. *Raghab Singh Pradhan*(2).]

The consent order cannot have a greater sanctity than the contract itself. The circumstance that a consent decree has been passed on the basis of a compromise, does not oust the jurisdiction of the court

(1) (1921) 6 Pat. L. J. 253.
(2) (1930) A. I. R. (Pat.) 234.

to grant relief against forfeiture; the court must determine whether, on equitable grounds, relief would have been granted against forfeiture, if it had been called upon to enforce the agreement itself—*Kandarpa Nag* v *Banwari Lal Nag*(1). I submit that in the present case time was not of the essence of the contract. The test is whether the terms agreed upon have been substantially complied with. In cases arising out of a proceeding under Order XXI, rule 90, Code of Civil Procedure, no reason has been given by the learned Judges for the refusal to grant relief.

[CHIEF JUSTICE.—If this contract is substantially complied with, and if the court has power to grant relief against forfeiture, then the question of diligence does not arise.]

Yes.

Baldeva Sahay (with him *C. P. Sinha*), for the respondent: In the present case no appeal lies under Order XLIII, rule 1(*j*), Code of Civil Procedure. An appeal lies from an order refusing to set aside a sale but the provision has relation to Order XXI, rule 90. The jurisdiction of the Court to set aside or confirm a sale is confined to the events contemplated by rule 92. Therefore, an order which does not come within rule 92 is not covered by Order XLIII, rule 1(*j*). Courts have to follow statute law and it is only when there is no statute that the court can act on the principles of equity, justice and good conscience. Therefore the court had no jurisdiction to set aside the sale on the basis of the compromise. The parties could not extend the time for confirmation by mutual consent. The contract may bind the parties, but it cannot compel the court to set aside the sale except in accordance with the rules of procedure laid down in the Code.

(1) (1920) 33 Cal. L. J. 244.

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[NOOR, J.—If all the parties concerned agree to have the sale set aside, it does not require any rule for the court to act on the compromise.]

P. R. Das, followed: In the present case the Court acted on analogy. The parties, rightly or wrongly, substituted a period of their own for the statutory period. This was done by agreement, and unless this agreement was modified by another agreement, there was no power in the court to alter it.

[CHIEF JUSTICE.—You mean to say that as the Court cannot extend the statutory period without the consent of parties, it cannot extend the time fixed by agreement without such consent.]

Yes. My next point is that the question of relief against forfeiture does not arise in the present case. The judgment-debtor lost title at the date of sale. A further period of 30 days is given by way of concession. But the title of the purchaser accrues from the date of sale. In the present case, forfeiture has already been incurred. Relief could only be given if the title had still subsisted in the judgment-debtor. There can be no relief when the property has already vested in me. [Reliance was placed on *Harakh Singh* v. *Saheb Singh*(1).]

Sir Sultan Ahmed, in reply.—When the Court has a general jurisdiction, parties to a proceeding may by agreement adopt a procedure different from the ordinary procedure and the Court is bound to give effect to such an agreement—*Banga Chandra Mozumdar* v. *Nanda Kumar Mozumdar*(2). Title did not pass to the purchaser on sale. It passed on confirmation although with retrospective effect. In *Harakh Singh* v. *Saheb Singh*(1) a vested title had passed. This is not the case here.

S. A. K.

Cur. adv. vult.

(1) (1907) 6 Cal. L. J. 176.
(2) (1936) 40 Cal. W. N. 1402.

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KHAJA MOHAMAD NOOR, J.—This appeal is against an order of the Subordinate Judge of Patna confirming a sale held in execution of a decree on the 13th of September, 1935, at which the decree-holder had himself purchased the property sold.

The facts are these. On the very day when the property was sold the decree-holder auction-purchaser and the judgment-debtors jointly filed an application to the effect that the latter had paid Rs. 500 to the former towards satisfaction of the decree and that the parties had agreed that if the remaining decretal amount be paid by the 10th of November next the sale would be set aside and the auction-purchaser would forego the five per cent. compensation which he was entitled to. In case of default in the payment as provided by the date fixed the sale would stand confirmed. The court was closed on the 10th of November and re-opened on the 13th. It may be conceded and in fact has not been disputed that a deposit of the decretal amount in court on the 13th of November would have been within the terms of the agreement. The money was not, however, deposited even on that date. Some explanations were offered on behalf of the judgment-debtors for this default but they were not pressed either before the lower court or before this Court. On the next day, that is, on the 14th of November the judgment-debtors applied to the court for a chalan to deposit the amount. There was for some reason or other, which is not necessary to investigate, some delay in passing the chalan by the court and it was not made over to the judgment-debtors till the 20th of November, 1935, on which date the money was deposited in court. The delay in depositing the money between the 14th of November when the chalan was applied for and the 20th of November when the money was actually deposited is immaterial, as on behalf of the judgment-debtors the case has been argued on the assumption that there was a default on their behalf at least on

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the 13th of November when the court re-opened and on which date the money could have been deposited. The deposit on the 20th of November was accepted at the risk of the judgment-debtors and when the matter was taken up by the court it held that the deposit was not within the terms of the agreement, and that it had no power to extend the time of payment as agreed to between the parties and accept the deposit beyond the time so fixed. It confirmed the sale. It is against this order that the present appeal has been preferred.

It was contended on behalf of the decree-holder auction-purchaser that no appeal lay as the proceedings before the learned Subordinate Judge were outside the scope of the Code of Civil Procedure and there is no appeal unless it has specifically been provided. At most it might be said that the court in allowing the parties to substitute an agreement in place of their legal rights was acting under its inherent powers. If this be the case, orders passed in such a proceeding are not open to appeal.

As to the merits of the appeal, Sir Sultan Ahmed has contended that the agreement between the parties, which was filed in court on the 13th of September 1935, immediately after the sale should be treated as a pure contract between the parties and should be dealt with as such. It was, therefore, for the court to decide whether the time fixed for payment was of the essence of the contract. He contended that under the circumstances of the case the court should have held that the payment though actually made on the 20th November was in effect on the 14th of November (the delay between the 14th and the 20th being due to the acts of the officers of the court) and the court should have also held that the time was not of the essence of the contract and that the payment made on the 14th of November was substantial compliance with the agreement between the parties and the decree-holder auction-purchaser could not avoid it and the

sale ought to have been set aside by virtue of that agreement.

The case was originally heard by a Division Bench of this Court, but considering the important issues raised it asked that the case should be heard by a larger Bench.

The first question to be considered is whether the order of the learned Subordinate Judge, dated the 25th November 1935, confirming the sale is appealable. Now the proceeding before him may be looked upon from two points of view. On the one hand, it may be said that it was outside the scope of the Code. Once a sale has been held it can be set aside only on applications made either under Order XXI, rule 89 or 90 or 91. There is no question of there being any application under rule 90 or 91, and strictly speaking there was no application under rule 89 also. That rule contemplates an application for setting aside a sale within thirty days of it as prescribed in Article 166 of the Limitation Act. If such an application be made within the time and the decretal amount and compensation be deposited in court within thirty days of the sale, the sale has to be set aside. In this case though there was an application within thirty days of the sale, the deposit was not made and was not to be made within the prescribed time but was to be made under the agreement of the parties on a later date fixed by them. Therefore, the proceeding was outside the scope of Order XXI, rule 89, and the court in allowing the parties to substitute a procedure in lieu of one prescribed by law was acting under its inherent power and the order passed in such a proceeding is not appealable. On the other hand, as was pointed out by Mitter, J. in *Banga Chandra Mozumdar* v. *Nanda Kumar Mozumdar*(1), where a court has general jurisdiction, the parties to a proceeding can by agreement

(1) (1936) 40 Cal. W. N. 1402.

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adopt a different procedure quite contrary to the ordinary *cursus curiae* and the court is bound to give effect to such an agreement. His Lordship referred to two decisions of the Privy Council in which this principle was laid down. They are *Henry Peter Pisani* v. *Her Majesty's Attorney-General*(1) and *Sadasiva Pillai* v. *Ramalinga Pillai*(2) In the former case it was held that the departure from an ordinary procedure is permissible unless there is an attempt to give the court jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision. Such a departure has never been held to deprive either of the parties of the right of appeal. In this case though it may be said that the parties agreed to substitute an agreed procedure for the procedure prescribed by law, the procedure nevertheless was in essence though not exactly in form under Order XXI. The setting aside of a sale under Order XXI, rule 89, requires (*1*) an application and (*2*) a deposit of the compensation and decretal amount. In this case the application filed on the date of the sale jointly by the parties may be treated as an application for setting aside the sale under Order XXI, rule 89, and the compensation instead of being deposited in court was to be foregone by the auction-purchaser and a portion of the decretal amount, namely, Rs. 500 was paid to the decree-holder out of court and the balance was to be deposited not within the time prescribed by law but some time later. Now in a case in which there is an application for setting aside a sale but its requirements are not complied within time it is clear that the sale cannot be set aside, but nevertheless the proceeding is under the Order and the rule and an order passed even on a barred application or on an application in which

(1) (1874) L. R. 5 P. C. 516.

(2) (1875) L. R. 2 Ind. App. 219.

the deposit is not made according to law is an order under Order XXI, rule 89. Take for instance a case in which there is an application under rule 89, but the judgment-debtor instead of depositing the compensation and the decretal amount in court pays them to the auction-purchaser and the decree-holder out of court and the sale is set aside. It is obvious that the order in essence is one under Order XXI, rule 89. In our opinion the order of the learned Subordinate Judge is appealable. In view, however, of our decision on the main issue it is not necessary to pursue this point further. Even if there be no appeal and if we would have come to the conclusion that the order of the learned Subordinate Judge was wrong, this was clearly a case of not exercising jurisdiction, namely, of setting aside the sale, or, at any rate, a case of exercising jurisdiction with material irregularity, and it would have been open to us to interfere.

The main contention of the appellant in this case is that the agreement between the parties as evidenced by the joint application filed on the date of the sale should be treated purely as a contract and the court should decide whether or not the time for payment fixed was of the essence of the contract. Mr. Das on behalf of the respondent has, however, contended that what the parties did was to substitute for thirty days (the time fixed by the statute) another period and as the time of payment fixed by the statute cannot be extended, so the date fixed by the parties, which takes the place of the period fixed by the statute, cannot be extended. We have come to the conclusion that it is not necessary for us to decide this wider question of the general power of the court under such circumstances, as assuming for the sake of argument that the court had power to examine whether or not the time fixed by the parties was of the essence of the contract the question remains whether in this particular case the time was or was not of the essence of

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the contract. Section 55 of the Indian Contract Act enacts:

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

In order to decide whether in this particular case time was of the essence of the contract we must look to the contract itself. The words are that in case the judgment-debtor fails to pay up the decretal amount within the time specified the sale would stand confirmed. No particular order was necessary. The wording of the contract, in our opinion, clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time; or, in other words, the time was of the essence of the contract. The effect of the contract was that on the expiry of the 10th of November, the last date fixed for the payment of the decretal amount, the sale automatically became confirmed. Even if it be conceded that on account of the court being closed on that and on two subsequent days the payment could have been made by the 13th of November, even then the sale stood confirmed on the expiry of that date, no order of the court being necessary. There was nothing left which could be set aside after that date. It is true that the court when the joint application was filed on the 13th of September, 1936, ordered the case to be put up for confirmation on the 15th of November, but this is immaterial as the court fixed this date for its own convenience in order to finally dispose of the case on a consideration of what happened on the date fixed by the parties.

In this view of the matter the appeal fails and is dismissed with costs.

COURTNEY TERRELL, C. J.—I entirely agree.

JAMES, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

J. K.

Appeal dismissed.

FULL BENCH.

Before Fazl Ali, Khaja Mohamad Noor, James, Dhavle and Varma, JJ.

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November, 23.
December, 18.

POKHAN DUSADH

v.

MUSAMMAT MANOA.*

Hindu Law of Inheritance (Amendment) Act, 1929 (Act II of 1929)—whether applies to succession opening after the Act came into force—"Hindu male dying intestate", meaning of—presumption of intention in case of person dying intestate.

Where a Hindu male dies intestate leaving his widow or other limited owner, who dies after the enforcement of the Hindu Law of Inheritance (Amendment) Act, the succession to his estate is governed by that Act.

The date of the death of the male owner is not material as the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female owner.

The words "Hindu male dying intestate" do not mean a Hindu male who will hereafter die intestate. The words "dying intestate" which qualify the preceding words "Hindu

*Appeal from Appellate Decree no. 1324 of 1933, from a decision of Babu Kshetra Nath Singh, Special Subordinate Judge of Ranchi, dated the 11th September 1933, confirming a decision of Mr. J. H. Price, Subdivisional Officer-Munsif of Chatra, dated the 26th July, 1932.

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male" are merely descriptive and limit the operation of the Act to those Hindu males who answer the description. It being impossible to predicate as to who would succeed to the estate until the succession opens, it is difficult to say that a person who dies intestate had contemplated at the time of his death that he would be succeeded by any particular person or persons. There will be still less justification for presuming that if he had known that a change was going to be effected in the existing law he would have disposed of his property by means of a Will.

Chulhan Barai v. *Musammat Akli Braini*(1), approved.

Lakshmi Ammal v. *Anantharama Ayyangar*(2), *Shrimati Shakuntala Devi* v. *Kaushalya Devi*(3), *Musammat Rajpali Kuer* v. *Surju Rai*(4), *Bandhan Singh* v. *Musammat Daulata Kuer*(5), *Musammat Sattan* v. *Janki*(6) and *Shib Das* v. *Nand Lal*(7), followed.

Krishnan Chettiar v. *Manikammal*(8) and *Musammat Janki* v. *Musammat Sattan*(9), dissented from.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Dr. K. P. Jayaswal (with him *Anand Prasad*), for the appellant: The Hindu Law of Inheritance (Amendment) Act of 1929 not being retrospective, it cannot affect the estate of a Hindu male who died before the Act came into operation. The Act cannot be construed to be retrospective in effect unless it is clearly indicated in the terms of the Act—Maxwell, pp. 186, 187.

[FAZL ALI, J.—How does the question of retrospection arise? All we have to see is whether a particular case fulfils the requirements of the Act.]

(1) (1934) 15 Pat. L. T. 707.
(2) (1936) Pat. W. N. cliv. (notes).
(3) (1936) I. L. R. 17 Lah. 356.
(4) (1936) A. I. R. (All.) 507.
(5) (1933) A. I. R. (All.) 152.
(6) (1936) A. I. R. (Lah.) 139.
(7) (1931) I. L. R. 13 Lah. 178.
(8) (1933) I. L. R. 57 Mad. 718.
(9) (1933) A. I. R. (Lah.) 777.

The matter of heirship was settled as soon as the male owner died. Possession only was deferred.

[NOOR, J.—The question as to who are the persons entitled to succeed is not necessarily decided at the time of the death of the male owner. Heirs who may not have been in existence then may eventually succeed.]

The owner knew the class of heirs under the general Hindu Law and in that view he may not have chosen to deal with his property as he liked. If he had then known that the sister would be an heir, he might have chosen to change the line of succession or otherwise deal with his property. By applying the Act to a case where the owner died intestate before the Act came into operation, we will be taking away a right of the deceased by forcing a particular kind of succession which he might have avoided if he had so liked.

[FAZL ALI J.—His personal wishes might have been thwarted by an act of God. Are we entitled to enter into such speculation?]

I submit that it is the proper test. The Act uses the expressions "dying intestate" and "shall be entitled" which clearly indicate that the event was to happen in future. In giving the Act a retrospective operation, you would be affecting the vested rights of the heirs. I adopt the reasoning of *Krishnan Chettiar* v. *Manikammal*(1), as a part of my argument.

My next point is that the Civil Court had no jurisdiction to entertain the suit. [Refers to section 139 (*5*) of the Chota Nagpur Tenancy Act, 1908.]

B. C. De (with him S. N. *Banerjee*), for the respondent: No question of retrospection arises. The principles enunciated in such cases as, for instance, *Bourke* v. *Nutt*(2), do not apply for the simple

(1) (1933) I. L. R. 57 Mad. 718.
(2) (1894) 1 Q. B. 725.

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reason that the Act does not purport to affect any vested interest at the date of the death of the last male owner.

Succession does not open until the death of the limited owner: *Moniram Kolita* v. *Keri Kolitani*(1). Till then reversionary right remains a mere possibility or spes successionis—*Janki Ammal* v. *Narayansami Aiyer*(2), *Amrit Narayan Singh* v. *Gaya Singh*(3).

The question of heirship cannot be determined until the death of the limited owner. A presumptive reversioner is entitled to bring a suit during the lifetime of the limited owner in a representative capacity only—*Venkatanarayana Pillai* v. *Subbammal*(4). If any succession opens after the Act has come into force, the new heirs will succeed in order of precedence. The preamble cannot be looked into when the enacting portion of the Act is clear enough.

The case of *Shrimati Shakuntala Devi* v. *Kaushalya Devi*(5) overrules *Musammat Janki* v. *Musammat Sattan*(6), and follows an earlier decision in *Shib Das* v. *Nand Lal*(7). Similarly *Lakshmi Ammal* v. *Anantharama Ayyangar*(8) overrules *Krishna Chettiar* v. *Manikammal*(9). [Reliance was placed on *Chulhan Barai* v. *Musammat Akli Braini*(10), *Musammat Rajpali Kuer* v. *Surju Rai*(11), *Musammat Sattan* v. *Janki*(12), *Bandhan Singh* v. *Musammat Daulata Kuer*(13).]

As to the second point my submission is that the jurisdiction of the Civil Court is barred only in relation to suits for possession—*Chaudhury Gursaran*

(1) (1880) I. L. R. 5 Cal. 776, P. C.
(2) (1916) I. L. R. 39 Mad. 634, P. C.
(3) (1917) I. L. R. 45 Cal. 590, P. C.
(4) (1915) I. L. R. 38 Mad. 406, P. C.
(5) (1936) I. L. R. 17 Lah. 356.
(6) (1933) A. I. R. (Lah.) 777.
(7) (1931) I. L. R. 13 Lah. 178.
(8) (1936) Pat. W. N. Civ. (Notes).
(9) (1933) I. L. R. 57 Mad. 718.
(10) (1934) 15 Pat. L. T. 707.
(11) (1936) A. I. R. (All.) 507.
(12) (1936) A. I. R. (Lah.) 139.
(13) (1933) A. I. R. (All.) 152.

Das v. *Akhauri Parmeshwari*(1); *Raja Shiva Prasad Singh* v. *Bhuban Mahato* (2).

Dr. K. P. Jayaswal, in reply.

S. A. K. *Cur. adv. vult.*

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FAZL ALI, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to recover possession of a holding which admittedly belonged to one Ghaman Teli of mauza Duari. Ghaman Teli died sometime before 1929 and was succeeded by his widow Musammat Runia who died in July, 1929. By this time the Hindu Law of Inheritance (Amendment) Act (II of 1929) which includes a sister in the category of reversioners to the estate of a Hindu male came into force and accordingly the plaintiff who is a sister of Ghaman Teli claiming to be an heir of her deceased brother applied to the landlord for mutation of her name. The landlord, however, refused to register her name and so she applied under section 23A of the Chota Nagpur Tenancy Act to the Subdivisional Officer of Chatra for mutation which was allowed sometime in July, 1930. Meanwhile the landlord had settled the land with defendant no. 1 and the plaintiff's case is that defendant no. 1 dispossessed her from the holding and she was therefore compelled to institute the present suit.

The plaintiff's suit was decreed by the trial court and the defendant no. 1 having unsuccessfully appealed to the Court to which the appeal lay in the first instance has now preferred this second appeal.

The main contention which has been put forward on behalf of defendant no. 1 the appellant in this case is that the Hindu Law of Inheritance (Amendment) Act has no application to this case as Ghaman Teli died before the passing of that Act. The question which thus arises for our consideration is whether the Act applies only to those cases where

(1) (1926) I. L. R. 6 Pat. 296.
(2) (1933) 14 Pat. L. T. 657.

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the Hindu owner dies after the passing of the Act or it also applies where such a person dies before the Act came into force, but owing to the estate being in the hands of a female heir (a limited owner under the law) the succession does not open until the death of the latter. In other words, what we have to decide is whether the material date for the application of the Act is the date of the death of the Hindu owner or the date when the succession opens. The point is not a new one and has been the subject-matter of much discussion in recent times. In 1933 a Division Bench of the Madras High Court held that Act II of 1929 does not apply to cases of Hindu males who died intestate before its coming into force and that in determining the order of succession to the estate of such a person the Hindu Law as it stood before the Act would apply [*See Krishnan Chettiar* v. *Manikammal*(1)]. The same view was taken by a single Judge of the Lahore High Court in *Musammat Janki* v. *Musammat Sattan*(2). This last decision was, however, reversed on appeal under Letters Patent and the decision of the Madras High Court to which I have referred has been recently overruled by a Full Bench in *Lakshmi Ammal* v. *Anantharama Ayyangar*(3). The High Courts of Madras, Lahore and Allahabad are now agreed that the Act in question applies even to the case of a person who dies before it came into force, if his widow or any other limited owner who inherited his estate is alive at the time of its enforcement [see *Shrimati Shakuntala Devi* v. *Kaushalya Devi*(4); *Musammat Rajpali Kuer* v. *Surju Rai*(5); *Bandhan Singh* v. *Musammat Daulata Kuer*(6); *Musammat Sattan* v. *Janki*(7) and *Shib Das* v. *Nand Lal*(8)]. This is also the view

(1) (1933) I. L. R. 57 Mad. 718.
(2) (1933) A. I. R. (Lah.) 777.
(3) (1936) Pat. W. N. Civ. (Notes).
(4) (1936) I. L. R. 17 Lah. 356.
(5) (1936) A. I. R. (All.) 507.
(6) (1933) A. I. R. (All.) 152.
(7) (1936) A. I. R. (Lah.) 139.
(8) (1931) I. L. R. 13 Lah. 178.

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which was expressed in this Court by Courtney Terrell, C. J. sitting singly after a very thorough examination of the question in all its aspects [see *Chulhan Barai* v. *Musammat Akli Baraini*(1)]. As however notwithstanding these decisions the question has been raised persistently in this Court it becomes necessary to examine it once more.

The object of the new Act was in the words of its preamble

"to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate."

Section 2 which was enacted to carry out this object provides that a son's daughter, daughter's daughter, sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother. The effect of this enacment is best understood if we look at the matter as follows: Let us suppose that before the Act came into force there was available to us a complete list of reversionary heirs to a Hindu male which was compiled according to the law as it then stood. The effect of the Act is simply to substitute a revised list with certain additions and alterations. As before the Act we would have had to refer to the list only when the question of succession had to be determined, so after the passing of the Act also it will not be necessary to refer to the revised list substituted by the Act until we are asked to decide who should succeed to the estate of the deceased owner. The Act itself makes no reference to the date of death of the Hindu male and I do not see why the operation of the Act should depend upon that date. The only date which is material is the date when the succession opens or when the question of succession to the estate arises. If such a question arose before the Act came into force the succession would be governed by the Hindu Law as it stood

(1) (1934) 15 Pat. L. T. 707.

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before the Act. If the question arises after the Act, it will apply. Therefore when the Hindu owner of an estate died before the Act came into force the question whether the Act would affect the succession to his estate or not would depend on whether he has left any female heir such as widow, daughter, etc., or he has died without leaving any such heir. In the former case it is only after the death of the limited owner that the succession opens, that is to say, the reversionary heir is entitled to enter into the possession of the estate. If, however, the owner has died without leaving any female heir, the succession opens immediately on his death and if he died before the passing of the Act, the Act will have no application.

The reason why the date of the death of the last male owner is not material in such a case is that the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female heir left by him whenever he dies leaving such an heir. At first by a fiction of law the husband's life was assumed to continue in the existence of his widow, but latterly the same rule has been extended to the case of the other female heirs with the result that it is only after the death of the limited owner that the succession opens and the estate goes to the next heir of the last male owner and not to the next heir of the limited owner. That being so during the life-time of a limited owner no one can say with certainty as to which of the persons who may be the heirs of the last male holder of an estate at the time of his death will be entitled to succeed to the estate when the succession opens. They may or may not be alive at the date when the succession opens or the whole situation may be altered by the coming into being of a new heir who was not in existence when the last owner died. It follows from this that the estate does not vest in any particular reversioner upon the death of the owner when he leaves behind a limited heir and the reversionary right remains a mere

possibility or spes successionis. This position has been made perfectly clear by their Lordships of the Privy Council in a number of decisions and for the purpose of this case it will be sufficient to quote the following passage only from their pronouncement in *Janaki Ammal* v. *Narayansami Aiyer*(1):

" The law as to the situation of the reversionary heirs is also in substance quite clear; there is, as stated, no vesting at the date of the husband's death (the case before their Lordships was one where the limited heir was the widow of the last holder) and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives..... . Even where the courts have proceeded, prior to the opening of the succession, to give any declaration, that has been done for special reasons only.....and—to use the language of Sir Arthur Wilson—it is made clear that ' whenever the succession opens by the death of the widow, the present decision will have settled nothing as to who should succeed '."

Therefore the only criterion to be applied in determining whether the Act is applicable to a particular case is to enquire when the succession opened and whether the conditions laid down in the Act for its application have been fulfilled. The preamble of the Act makes it clear that it applies where the person to be succeeded has died intestate and section 1, sub-section (2), expressly says that:

" it applies only to the person who but for the passing of the Act would have been subject to the law of Mitakshara in respect to the provisions enacted in the Act and that it applies to such persons in respect only of the property of the males not held in coparcenary and not disposed of by will."

A question may arise as to whether the Act applies to such property as *cannot be disposed of by will.*

(1) (1916) I. L. R. 39 Mad. 634, P. C.

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In my opinion the words " not disposed of by will " which occur at the end of the sub-section are comprehensive and enough to cover such a case. Thus as far as I can see there is nothing in the Act which makes the date of the death of the last male holder a condition precedent to its application and as I have already explained the question of the applicability of the Act will arise only when the succession opens and not before it.

There are four main grounds on which this view has been criticised in *Krishnan Chettiar* v. *Manikammal*(1) (in which the opposite view has been propounded with great clarity) and these may be summarised as follows :—

(*1*) That the words " dying intestate " used in the preamble connote a person whose death is to occur and not one who had already died.

(*2*) That the changes made by the Select Committee in the original Bill indicate that it was intended to affect only the estate of the person who has died since the passing of the Act.

(*3*) That the Act cannot have retrospective operation because it contains no express provision to this effect and because it will be contrary to principle to give it a retrospective effect.

(*4*) That to hold that the Act affects the estate of a person who died before the Act would be to frustrate his presumed intentions because if he had known that the law was to be changed, he might have preferred to dispose of his property by means of a Will.

The first objection admits of a simple answer. It implies that the words " Hindu male dying intestate " means a Hindu male who will hereafter die intestate. It appears to me, however, that the

(1) (1933) I. L. R. 57 Mad. 718.

words in question were never intended to convey this meaning. The words " dying intestate " which qualify the preceding words " Hindu male " are merely descriptive and limit the operation of the Act to the estate of those Hindu males only who answer the description. It is true that the participle in the expression " dying intestate " is in the present tense; but that is the present tense of logic and the expression connotes the intestacy of the deceased owner without any reference to whether the death occurs before or after the Act comes into force. " The Hindu male dying intestate " simply means the Hindu male who has died or may die intestate.

As to the changes made by the Select Committee they appear to me to be more or less irrelevant because we have to interpret the Act as it stands. But in point of fact the changes made by the Committee do not point to the conclusion which is sought to be drawn. In sub-clause (*2*) of clause (*1*) of the original Bill the latter portion reads as follows :—

" But it applies only in the case of the property of Hindus not being held in coparcenary and not having been disposed of by the will, to which the succession opens after the 31st July, 1928."

The Select Committee omitted the words which I have underlined and explained the omission by saying—

" We are also of opinion that it is unnecessary either to assign retrospective effect to the provisions of the Bill or to defer the coming into operation thereof, and we have therefore omitted reference to the date on which the succession opens."

Now, the Act received the assent of the Governor General in Council on the 21st February, 1929, and if the passage which has been omitted by the Select Committee had been retained, the effect would have been that the Act would have operated retrospectively so as to apply to cases in which succession opened between the 31st July, 1928, and the 21st February, 1929. The Select Committee, however, thought that it was not necessary to assign retrospective effect to the provisions of the Act only for such a short period

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and it decided to let the Act come into force on the day it would have come into operation in the ordinary course. The passage, however, which has been quoted above is significant because it shows that what the framers of the Bill as well as the Select Committee had in view was not the date of the death of the last male owner but the date when the succession opens.

The third objection appears to me to be based on a misconception. As Sir Courtney Terrell, C.J. has pointed out in *Chulhan Barai* v. *Musummat Akli Baraini*(1) on the language of the Statute as it stands no question of its retrospective operation arises. It has been said that the question of retrospective operation arises in the sense that the change of law introduced in this Act affects also the estates of persons who have died intestate before the Act. This fact standing by itself does not make the Act retrospective in its operation. As I have already stated, the critical date is the date when the succession opens and the Act would have had retrospective application only if it was applied to cases where succession opened before the passing of the Act. For instance, it would have had retrospective application if the original Bill (which proposed to make the Act applicable to cases in which succession opened after the 31st July, 1928) had not been amended by the Select Committee.

The question as to when an Act would have retrospective operation is dealt with elaborately in *Bourke* v. *Nutt*(2). In that case Lopes, L. J., observed :—

> " It is a well recognised principle in the construction of Statutes that they operate only on cases and facts which come into existence after the Statute was passed unless a retrospective effect is clearly intended and that this principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would

(1) (1934) 15 Pat. L. T. 707.
(2) (1894) 1 Q. B. 725.

prejudicially affect the vested rights or the legal character of past transaction."

Now, in the first place, there is no room for the application of these principles to the present case, because as I have already stated, the Act was never intended to operate retrospectively in the proper sense of the term; and secondly, to hold that the Act would affect the estate of persons who have died before the passing of the Act will not in any way prejudicially affect any vested rights. Learned Counsel for the appellant conceded that when a Hindu male dies leaving a female heir his estate does not vest at once in the next reversioner. He contends, however, that such a reversioner has at least the right to demand that the estate be kept free from waste and danger during its enjoyment by the widow or the owner for life. This right, however, has in some cases been conceded even to one who is not necessarily the nearest reversioner. Again as was pointed out by the Privy Council in *Janaki Ammal* v. *Narayansami Aiyer*(1) such a right is exercised by a reversioner only in a representative capacity. To hold, therefore, that the Act may in certain cases apply to the estates of persons who died before the passing of the Act cannot prejudicially affect any rights which the reversioner possesses only in a representative capacity.

The fourth objection is one on which learned Counsel for the appellant laid most stress in this Court and it may be set out once more in the words used by the Judges of the Madras High Court in *Krishnan Chettiar* v. *Manikammal*(2)—

"At page 186 of Maxwell's book, it is observed that a fundamental rule of English law is that no Statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. At page 187, the learned author

(1) (1916) I. L. R. 39 Mad. 634, P. C.
(2) (1933) I. L. R. 57 Mad. 718.

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observes that a testator is presumed to have in view the state of the law when he made his Will. If it be so, we can reasonably presume that a person competent to make a Will is satisfied with the state of the law regarding the order of succession to his estate among his heirs, if he prefers to die intestate without making a Will. If he wishes to prefer a remoter to a nearer heir he will certainly have recourse to the making of a Will. If he does not make a Will, it may be because he wishes that his property should devolve according to the existing law of succession. The policy of the Legislature is not to make a subsequent enactment operative against the estate of such a man and thus frustrate his presumed intentions, unless for special and weighty reasons such a retrospective operation is found to be necessary. If Act II of 1929 is given such a retrospective operation, it would be frustrating the intentions of the last male owner who preferred to die intestate before the passing of this Act. Such an anomaly will not arise if this Act should be held to apply only prospectively."

The point to be considered is whether we can legitimately draw any presumption as to the intention of a person who has died intestate. I venture to point out respectfully that if it is permissible to say that a man did not leave a Will, because he was satisfied with the state of the law regarding the order of succession to his estate, it is equally permissible to say that his intention might have been to let the law take its course and that he was not thinking of any particular heir at all. It being impossible to predicate as to who would succeed to the estate until the succession opens, it is difficult to say that a person who dies intestate had contemplated at the time of his death that he would be succeeded by any particular person or persons. There will be still less justification for presuming that if he had known that a change was going to be effected in the existing law he would have disposed of his property by means of a Will. That being so, there is no qusetion of frustrating the

presumed intention of a person to whose estate the Act applies and as already stated to hold that the Act applies only when succession opens is not to give it a retrospective effect and therefore the principles bearing upon the question as to when a statute shall be construed to have retrospective operation have no relevancy.

The conclusion therefore which I have unhesitatingly arrived at is that the view put forward by Courtney Terrell, C.J. in *Chulhan Barai* v. *Musammat Akli Baraini*(1) which now prevails in the other High Courts is the correct view and should prevail in this Court.

The only other question which is raised in this appeal is that section 139(*5*) of the Chota Nagpur Tenancy Act bars the jurisdiction of the civil court to try the suit. The question, however, has been fully considered by the Munsif and the decision of the Munsif does not appear to have been seriously questioned before the learned Subordinate Judge. Besides the question which has been raised here was raised in many cases in this Court and has been exhaustively dealt with recently by a Division Bench of this Court in *Raja Shiva Prasad Singh* v. *Bhuban Mahato*(2). It was held in that case "that section 139(*5*) only bars the civil court from entertaining a suit regarding a matter cognizable by the Deputy Commissioner by way of application and that so far as recovery of possession of a tenancy is concerned by no provision did it bar the civil court from entertaining a suit for a declaration of title to and consequent recovery of possession of a tenancy nor interfere with the period of limitation prescribed for such a suit". This represents the settled view of this Court and there is no doubt therefore that the civil court was competent to try the present suit. Indeed having regard to the pleadings of the parties no decree for recovery of possession could be passed

(1) (1934) 15 Pat. L. T. 707.
(2) (1933) 14 Pat. L. T. 657.

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POKHAN DUSADH v. MUSAMMAT MANOA.

without properly deciding the plaintiff's title. It is clear that the question as to whether the plaintiff is entitled to avail herself of the provisions of Act II of 1929 is one which could not be decided in a summary proceeding for possession in a revenue court.

FAZL ALI, J. In my opinion, therefore, the decree of the court below should be affirmed and the appeal dismissed with costs.

KHAJA MOHAMAD NOOR, J.—I agree.

JAMES, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

1936.

October, 9.

Before Courtney Terrell, C.J. and James, J.

RAI BAHADUR KHARAG NARAYAN

v.

JANKI RAI.*

Hindu Law—Joint family—mortgage by one member of undivided share, if void ab initio—mortgagor representing that he was separate—transferee for value without notice—Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 3, 43—*Transfer of Property* (*Amendment*) *Act*, 1929 (*Act XX of* 1929), *section* 4.

G, a member of a joint Hindu family, mortgaged his 1/6th share in certain properties alleging that he was separate from the other members of the family to *J* in 1918. In 1928 there was a formal partition and in 1929 *G* mortgaged a part

* Appeal from Original Decree no. 156 of 1933, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Monghyr, dated the 22nd December, 1932.

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of the property which had fallen to him on partition to *K* and also sold a portion to *L*. *J* instituted a suit on the basis of the mortgage aforesaid and impleaded the sons of *G* and *K* and *L* as defendants. The defendants pleaded *inter alia* that since *G* was a member of the joint family when the mortgage was executed nothing was conveyed by the transaction. The Subordinate Judge held that as the mortgagor represented to the mortgagee that he was separate the provisions of section 43 of the Transfer of Property Act applied, and the subsequent transferees although for value were not protected as they had failed to prove want of notice. *K* and *L* the subsequent transferees appealed.

Held that a mortgage by a member of a joint Hindu family is not void but voidable at the option of the other members of the family or any one of them.

Madan Lal v. *Chiddu*(1), relied on.

Section 43 of the Transfer of Property Act provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Therefore the mortgage lien was transferred on that portion of the property which the mortgagor had obtained on partition.

Bhup Singh v. *Chedda Singh*(2), followed.

Appeal by the defendants, the subsequent transferees.

The facts of this case material to this report are set out in the judgment of James, J.

Khurshed Husnain (with him *B. C. Mitra, B. B. Saran* and *J. M. Ghosh*), for the appellants.

B. C. De and *M. K. Mukharji*, for the respondents.

JAMES, J.—Gobardhan Lal and his brother Girwar were members of a joint family, with their father Banarsi Lal, and their two uncles Brij Lal

(1) (1930) I. L. R. 53 All. 21.
(2) (1920) 18 All. L. J. 807.

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JAMES, J.

and Dularchand. Gobardhan Lal at an early stage began to quarrel with his family and to do business on his own account with Janki Rai. On the 9th of February, 1918, he executed a bond whereby he purported to mortgage a share of 1/6th in the property specified, part of which was ancestral property of the family, while part had been bequeathed by Nandu Lal, the maternal grand-father of Banarsi Lal, to his three grandsons Banarsi Lal, Dularchand and Brij Lal. In the mortgage bond there was a recital to the effect that Gobardhan Lal had demanded partition of the family property; but the members of the family were unwilling to make it: so this mortgage was executed in part for payment of antecedent debt and in part to raise money for the purpose of instituting a suit for partition. The money was not utilised for the institution of the partition suit, but it was utilised for a separate business carried on by Gobardhan Lal. After 1918 the three brothers made further acquisitions of joint family property. They did not mention the name of Gobardhan Lal in any deed; but as there is no mention of any sons, this fact would not necessarily be of any significance. If Gobardhan Lal had actually separated in 1918, he would not prima facie have been entitled, when partition was ultimately made, to a share in this property, though he might possibly have been entitled if while he still remained a tenant in common, the property was acquired from the joint fund. On the 21st of May, 1927, after the death of Banarsi Lal, Gobardhan Lal's two uncles with his brother executed a mortgage, wherein they recited that Gobardhan Lal had cut himself off from his family in the lifetime of his father and had ceased to have any right to the family property. The mortgagee, doubtful on this point, obtained another mortgage bond in the following year in the execution of which Gobardhan Lal took part, wherein it was recited that the family was joint. On the 25th of September, 1928, a formal partition of the property was made, wherein a third share went to Gobardhan Lal and his

brother Girwar who immediately partitioned this share between themselves. On the 7th of December, 1929, Gobardhan Lal mortgaged part of the property which had fallen to him on partition to Rai Bahadur Kharag Narain. On the 12th of January, 1930, he sold a portion of that property to Musammat Lal Pari who redeemed to that extent the mortgage of Kharag Narain.

On the 11th of May, 1931, Janki Rai instituted a suit on the basis of his mortgage of 1918, claiming to proceed against the property which had fallen to Gobardhan Lal on partition. The suit was instituted almost twelve years after the date of payment fixed by the mortgage bond, but within time. It was contested on various grounds by the sons of Gobardhan Lal, and also by the mortgagee of the 7th of December, 1929, and the purchaser of the 12th of January, 1930, who asserted that the bond was a colourable transaction not executed for consideration; that there was no family necessity for the bond; and that since the mortgagor was a member of the joint family when the mortgage was made nothing was conveyed by the transaction. The Subordinate Judge found that the mortgage was for consideration and that so far as the sons of Gobardhan Lal were concerned, it was binding on them because it was executed on account of antecedent debt and for family necessity. He found that the mortgagor was not separate from his father and uncles at the time when the deed was executed, but that he represented to the mortgagee that he was separate. The learned Subordinate Judge accordingly applied the provisions of section 43 of the Transfer of Property Act holding that since the mortgagor by actual separation had placed himself in a position to carry out the alienation which in 1918 he had represented himself to be able to make, the mortgage deed must be enforced. The mortgagee of 1929 and the purchaser of 1930 were transferees for value; but the learned Subordinate Judge found that they had failed to prove that they had no notice of the option conferred

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by the mortgage of 1918, and it could therefore be enforced against them. Immediately after the institution of the present suit the mortgagee of 1918 instituted a suit on his own mortgage bond which was apparently disposed of more promptly than the suit with which we are here concerned, so that he was able to obtain a decree and purchase the property in dispute while this suit was pending. The mortgagee and the transferee of the 12th of January, 1930, have appealed from the decision of the Subordinate Judge.

Mr. Khurshed Husnain on behalf of the appellants attacks in the first place the finding of fact of the learned Subordinate Judge that at the time of the mortgage, the mortgagor represented to the mortgagee that he had made a definite announcement of his intention to separate such as would amount to separation in the eye of law. Mr. B. C. De supporting the decree on grounds decided against him in the trial court argues that the learned Subordinate Judge ought to have found that there was actual separation in 1918. Whatever representation might have been made, Mr. Khurshed Husnain argues that the mortgage should not be regarded as taking effect upon the share which ultimately fell to Gobardhan Lal on partition, because the mortgagor did not purport to transfer a share of an undivided estate but merely a share in specific property. He argues also that the mortgage of an undivided share is void ab initio and no equity can be created by it, such as would call for the application of the provisions of section 43 of the Transfer of Property Act or of any other equitable rule. Finally he argues that the appellants are transferees for value without notice of the option and that they are therefore protected from the operation of section 43.

Mr. Khurshed Husnain suggests that there is no averment in the plaint that Gobardhan Lal at the time of the mortgage represented that he was separate. In the translation of the plaint which has been prepared

for this Court, the expression "*apne khuahish zahir kiya*" has been translated "expressed desire" (for separation and partition); but "announced an intention" would be an equally good translation and it cannot be said that the representation has not been pleaded. Two witnesses Bihari Lal and Damri Sao state that Gobardhan Lal actually did make an announcement of the fact that he was separate before the execution of the mortgage; and since it appears to be clear that he was at that time and for a long time afterwards on bad terms with his family and he did actually separate from them, there is no reason why this evidence should not be accepted. The recitals in the bond of the 21st of May, 1927 (Exhibit 2), indicate what the rest of the family thought on this matter. This deed executed by the surviving members of the joint family Dularchand, Brij Lal and Girwar Lal, the brother of Gobardhan Lal, recites that Gobardhan Lal, the eldest son of Banarsi, separated during the lifetime of his father and went to his father-in-law's house in Benares on relinquishing his claim, leaving the executants in possession and occupation of all the property of the joint family. But later we find Gobardhan Lal joining with the other members of the family in executing a mortgage deed and at the time of the partition they described themselves as joint.

Mr. Khursed Husnain argues with some reason that we have not here anywhere a definite unequivocal and irrevocable announcement of intention to separate until the commencement of the actual proceeding for partition. There were attempts to obtain partition; Gobardhan Lal deserted the family home and went to Benares; and the impression which would be conveyed by this evidence is that either of the two parties represented themselves as joint or separate as it suited their convenience. The position of Gobardhan Lal appears to have been uncertain and equivocal and it cannot be said that there was any unequivocal announcement of separation actually effected. On the other hand it appears to be clear that

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Gobardhan did represent in 1918 that he had cut himself off from his family; although it does not appear from the subsequent conduct of the parties that the representation was regarded by them as irrevocable. I would accept both the findings of the Subordinate Judge: that the representation was made at the time of the mortgage and that the mortgagee believed it; and that there was no actual separation until 1928.

The objection that what was mortgaged was not a share in the undivided estate but was a share in specific property was not taken in the written statement and is now raised for the first time. The plaintiff asserted by his plaint that Gobardhan Lal's 1/6th share in the family property mortgaged to him represented the share which was allotted to Gobardhan at the partition. He distinctly stated in paragraph 8 of his plaint that the property detailed and specified below in schedule 2 had been allotted to Gobardhan Lal in lieu of the mortgaged 1/6th share. We do not know that at the time of the mortgage, the joint family possessed any property other than that specified in the mortgage bond; nor whether the subsequent acquisitions to the joint family were made from the common fund represented by this property. A new point of this kind must not be raised for the first time in appeal. If the point had been taken in the written statement parties would have entered into evidence on this question; and it would have been possible to ascertain whether what was mortgaged was part of Gobardhan's share or the whole of it. The learned Subordinate Judge has pointed out that at the time of the mortgage Gobardhan's share would not have been 1/6th but 1/9th; but he appears to have been under the impression that he would be entitled to 1/6th on partition, the share to which he would become entitled on the death of his father and which he actually obtained when the partition was made. I consider that the learned Subordinate Judge rightly treated the mortgage as a mortgage of the share of Gobardhan Lal in the joint family property, together with his

share in the property which descended to the family under the will of Nanu Lal.

Mr. Khurshed Husnain argues that since Gobardhan Lal was not separate at the time of the mortgage, his mortgage of an undivided share was void ab initio. This question was discussed by the High Court of Allahabad in *Madan Lal* v. *Chiddu*(1) where it was pointed out that an alienation made by member of a joint Hindu family is not void but voidable at the option of the other members of the family or of any one of them. It appears that misunderstanding is apt to be caused by declarations that particular alienations are void, which have been made after the alienations have been impeached by persons at whose option they were voidable, when the court finding that the alienation cannot be supported has declared it to be void. When a voidable contract is successfully impeached by a person entitled to challenge it, it becomes void; but this is not a contract of the kind which is in itself void ab initio. The learned Judges in the case quoted pointed out that the alienation cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest of the entire joint family. They made an exception of the position of an auction purchaser who may have purchased the interest of a co-parcener in execution of a decree. From that decision it would appear that neither of two appellants are entitled to impeach this mortgage of Gobardhan Lal on the ground that his interest in the joint family was not such as to entitle him to make it, since they both appeared in the appeal in their capacities of transferees from Gobardhan. For other property in which the appellant Rai Bahadur Kharag Narain had acquired the interests of the entire joint family, his claim has been allowed by the Subordinate Judge; to that extent the plaintiff has failed, and we are not concerned with that property in this appeal.

(1) (1930) I. L. R. 53 All. 21.

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JAMES, J.

Section 43 of the Transfer of Property Act provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. In 1918 Gobardhan Lal erroneously represented that he was entitled by reason of his declaration of separation to mortgage a share of 1/6th in the joint family property; and he mortgaged that share to the plaintiff. When he did in the partition proceedings finally and unequivocally separate from the rest of the family, he became entitled to dispose of the one-sixth share. I need only cite the decision in *Bhup Singh* v. *Chedda Singh*(1), wherein it is pointed out that it is an incident of the mortgage of an undivided share in joint property that the mortgagee cannot follow his security into the hands of a co-sharer who may have obtained part of the mortgaged property on partition; the mortgage lien is transferred to that portion of the joint property which the mortgagor had obtained at the partition. As soon as the partition was effected on the 25th of September, 1928, the mortgage lien was transferred to the property which fell to Gobardhan's share; and the subsequent transfers of the 7th of December, 1929, and the 12th of January, 1930, which were made by Gobardhan Lal were subject to that mortgage lien.

Neither of the appellants proved want of notice. The plaintiff said that he approached the appellant Rai Bahadur Kharag Narain when he was taking the mortgage from Gobardhan and he demanded his dues from him but the appellant declined to satisfy him. His karpardaz, Munshi Lal, stated in evidence that this appellant had no knowledge of the mortgage; but the Subordinate Judge did not believe him. If he was to avoid being charged with notice, it would have been necessary to demonstrate that there was some

(1) (1920) 18 All. L. J. 807.

irregularity in the registration of the bond of the 9th of February, 1918, in view of the provisions of section 3 of the Transfer of Property Act as amended by section 4 of Act XX of 1929; and in the absence of such evidence the appellants must be deemed to have had notice of the existence of a previous mortgage. Neither of the appellants can claim to be in the position of a transferee without notice.

The appeal accordingly fails and I would dismiss it with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeal dismissed.

J. K.

Rel. 29 Pat 1031.

APPELLATE CIVIL.

Before Fazl Ali and Madan, JJ.

1936.

December, 11.

HARGOURI PRASAD

v.

RAGHUNATH SINGH.*

Bihar Tenancy Act, 1885 (Act V of 1885), section 26(O) —whether applies to transfers of transferable occupancy holdings transferred before the commencement of the Act.

Held, on a construction of the various sections of the Bihar Tenancy Act, that section 26(*O*) applies only to those cases where the title of the transferee has not been perfected, or in other words to those transfers only which relate to non-transferable holdings.

Section 26(*B*) to 26(*M*) have no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer.

K. C. Mukherjee v. *Musammat Ram Ratan Kuer*(1), explained.

*Appeal from Appellate Decree no. 249 of 1934, from a decision of Rai Sahib Bhuneshwar Prasad Pande, Subordinate Judge of Monghyr, dated the 18th September, 1933, reversing a decision of Babu Ram Anugrah Narain, Munsif of Jamui, dated the 23rd May, 1932.

(1) (1935) I. L. R. 15 Pat. 268, P. C.

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HARGOURI PRASAD v. RAGHUNATH SINGH.

Appeal by the defendant no. 1.

The facts of the case material to this report are set out in judgment of Fazl Ali, J.

Nawal Kishore Prasad II, (with him *Mehdi Imam* and *Sarjoo Prasad*), for the appellant.

S. M. Mullick and *Ishwari Nandan Prasad*, for the respondents.

FAZL ALI, J.—This appeal arises out of a suit instituted by the plaintiff who is the transferee of a portion of a holding situated in village Matwalwa in the district of Monghyr, to recover possession of the lands sold to him from defendant no. 1 who is admittedly the landlord of the village. The lands in question were sold to the plaintiff by two sale deeds dated the 29th of February, 1928, and 19th of September, 1929. The plaintiff's allegation was that he got possession of the lands upon the execution of the sale deeds, but he was dispossessed by the landlord some time about the 30th of May, 1930. The suit was contested by the defendant no. 1 on the allegation that the holding was not transferable, that as a matter of fact the original tenants had made a gift of the entire holding in favour of his sons and the latter had surrendered it to the landlord and that the suit was barred by limitation. It was further pointed out on behalf of defendant no. 1 that at the date of the institution of the suit the entire holding had passed out of the possession of the original tenant, a portion of the holding having been sold to one Lakhi Singh on the 15th of October, 1928.

The principal point which appears to have been in dispute in the courts below was whether the holding was by custom transferable or not and on this point the courts below came to two different conclusions. The first court held that the holding was not transferable and accordingly dismissed the plaintiff's suit. The lower appellate court, on the other hand,

has held that the holding was transferable and passed a decree in favour of the plaintiff.

The first point which has been raised on behalf of the appellant (defendant no. 1) in this second appeal is that the finding of the lower appellate court that the holding is transferable is not conclusive because the court has, in coming to this conclusion, taken into consideration evidence which was not relevant to the point in issue. It appears that the learned Subordinate Judge in coming to the conclusion that the holding was transferable relied upon the village note which contained a definite entry to that effect and upon certain sale deeds coupled with the evidence of the fact that the sales had been recognised by the landlord without any salami having been paid to him. The point which has now been raised is that these sale deeds relate only to portions of holdings and therefore have no bearing on the question in issue. It has, however, been pointed out by the learned advocate appearing for the respondents that there is nothing in the judgments of either of the courts below to show that these sale deeds related only to portions of holdings and in fact no such contention was raised even in the memorandum of appeal filed in this Court. It is, therefore, clear that the finding of the learned Subordinate Judge cannot be challenged in second appeal.

The next contention put forward on behalf of the appellant is that this case is governed by section 26 (*O*) of the Bihar Tenancy Act of 1885 and that the title of the plaintiff is not perfected until he pays to the landlord, or deposits with the Collector, a certain percentage of the consideration paid for the transfer, as specified in that section. The learned advocate for the appellant tried to support this contention by relying on certain observations made by their Lordships of the Judicial Committee in *K. C. Mukherjee* v. *Ramratan Kuer*(1). That was a case in which a

(1) (1935) I. L. R. 15 Pat. 268, P. C.

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HARGOU RI PRASAD v. RAGHUNATH SINGH.

FAZL ALI, J.

question arose whether the transfer of an occupancy holding made before 1923 would be affected by the provisions of section 26(*N*) of the Act. Section 26(*N*) provides that every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion thereof by sale, exchange, gift or will, made before the 1st day of January, 1923. Accordingly it was held in that case that as the transfer in question had been made before 1923 the landlord must be deemed under this provision to have given his consent to it. Their Lordships also incidentally referred to section 26(*O*) and observed as follows:—

"Again, if section 26(*O*) is looked at, it will be seen that in the case of a transfer made after the 1st of January, 1923, but before 10th June, 1935, the provision is that the transferee may pay or deposit the landlord's transfer fee and thus perfect his title. There is no suggestion that a transferee shall be incompetent to make the payment or that the Collector shall refuse to receive the money in any case in which the transfer is impugned in a pending suit."

The inference which is sought to be drawn from this observation is that section 26(*O*) applies to every pending suit and whether the holding transferred is transferable by custom or not the title of the transferee is not perfected until the transfer fee prescribed in this section is paid. It appears to me, however, that the argument involves a confusion of thought. Section 26(*A*) clearly states that the provisions of sections 26(*B*) to 26(*M*) shall apply to all transfers of occupancy holdings or portions thereof made after the date of the Bihar Tenancy (Amendment) Act of 1934. For the present purpose it will be sufficient to refer to section 26(*B*) and section 26(*F*). Section 26(*B*) provides that an occupancy raiyat shall have power to transfer his occupancy holding or any portion thereof

but except in certain cases no such transfer shall be valid against the landlord unless he has given or is deemed under section 26(*F*) to have given his consent thereto. Secion 26(*F*) provides that if the landlord's transfer fee is paid in accordance with the provisions made in the Act, the landlord shall be deemed to have given his consent to the transfer. Now, as I have already stated, both these provisions apply to transfers made after the passing of the Bihar Tenancy (Amendment) Act. These sections have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer. If the title of the transferee is already perfect it is obvious that it will not be necessary to have recourse to the provisions made about the payment of transfer fee in section 26(*O*). These considerations make it clear that section 26(*O*) is intended to apply only to those cases where the title of the transferee has not been perfected, or in other words, to those transfers only which relate to non-transferable holdings.

The only other point which was raised in this appeal was that the suit was barred by limitation because it was not brought within two years of the date of the first sale deed executed in favour of the plaintiff. The answer to this contention is, however, provided in the written statement of the landlord who has stated that he entered into the possession of the disputed land on the 21st of June, 1929. The suit was brought within two years of this date and is clearly within time.

In these circumstances I would dismiss the appeal with costs.

MADAN, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CRIMINAL.

1936.

December, 14.

Before Agarwala and Varma, JJ.

KING-EMPEROR

v.

NEMU SINGH.*

Bihar and Orissa Opium Smoking Act, 1928 (*Bihar and Orissa Act II of* 1928), *section* 12—*Bihar and Orissa Opium Smoking Rules*, 1928, *rules* 10, 11—*rule* 11, *whether ultra vires—rule-making power, whether can create an offence—breach of the rules, whether an offence.*

The Act does not itself impose a penalty for a breach of the terms of a licence granted to a registered smoker nor does it expressly empower the rule-making authority to provide such a penalty.

Held, therefore, that rule 11 of the Bihar and Orissa Opium Smoking Rules is ultra vires.

Hall v. *Nixon*(1), *Young* v. *Edwards* (2), *Hattersley* v. *Burr*(3) and *Queen* v. *Sankey*(4), referred to.

Appeal against acquittal under section 417 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

Sir Sultan Ahmed, *Government Advocate*, for the appellant.

Rajkishore Prasad, for the respondent.

AGARWALA, J.—The respondent and three others were charged before the Subdivisional Magistrate of Barh with having committed offences against Bihar and Orissa Act II of 1928 which is entitled "the

*Government Appeal no. 4 of 1936, against an order of P. N. Tandon, Esq., I.C.S., Subdivisional Officer, Barh, dated the 16th July, 1936.

(1) (1875) 10 Q. B. 152.
(2) (1864) 33 L. J. (M. C.) 227.
(3) (1866) 14 L. T. (N. S.) 565: 14 W. R. 864.
(4) (1878) 3 Q. B. 379

Bihar and Orissa Opium Smoking Act of 1928 ". The charge against the respondent was that he was in possession of $1\frac{1}{4}$ tolas of prepared opium and of pipes for using prepared opium. He was also charged with having permitted his premises to be used by the three persons who were accused with him and who were unauthorised smokers. These two charges were stated to be under section 6 and section 7 of the Act, respectively. The three persons tried along with the respondent were charged under section 6 of the Act with smoking prepared opium on the premises of the respondent. The learned Magistrate acquitted all the accused of all the charges. The local Government has appealed against the order of acquittal passed in favour of the respondent only.

The object of the Act, as stated in the preamble, is to regulate the smoking of opium in the province of Bihar and Orissa. Section 3 requires the Local Government to cause a register to be prepared of all persons who are not under the age of twenty-five years and who are in the habit of smoking opium. Section 4 provides that any person may apply to be registered in the form and manner to be prescribed by the proper authority. By section 2 of the Act a person whose name has been entered in the register is designated a registered smoker and section 5 provides that a registered smoker shall

" subject to the prescribed conditions and restrictions, be entitled, notwithstanding anything to the contrary contained in any other enactment or in any rules made under such enactment, to manufacture, possess or smoke prepared opium ".

By section 6 of the Act it is provided that any person other than a registered smoker who smokes, uses, manufactures or has in his possession any prepared opium or any pipes, utensils or apparatus used in connection with the manufacture or smoking of prepared opium, shall, on conviction before a Magistrate, be punished for each such offence with

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AGARWALA, J.

imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees, or both. Section 7 provides that any person who, being the occupier of any premises, permits those premises to be used by any unauthorised persons for manufacturing or smoking prepared opium, or who is concerned in the management of any premises used for any such purpose or sells or otherwise deals in prepared opium shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both. It will be noticed, therefore, that by sections 6 and 7 of the Act the Legislature clearly creates two offences. It does not, however, purport to create any offence by section 5 of the Act. This difference between section 5 on the one hand and sections 6 and 7 on the other is still more clearly illustrated by the subsequent provisions of the Act. By section 8 it is provided that a Magistrate who imposes a fine under section 6 or section 7 may direct the offender to be imprisoned in default of the payment of the fine for a term which may extend to six months and that such imprisonment shall be in excess of any other imprisonment to which he may have been sentenced. Section 9 authorises the confiscation of prepared opium in the case of a conviction under section 6. Section 11, which relates to the trial of offences under the Act provides,

> "No offences punishable under sections 6 and 7 shall be tried by any court inferior to that of a Magistrate of the second class".

This section also, therefore, neither provides for nor contemplates a trial of anything that may be done or not done under section 5 of the Act. Section 12, however, authorises the local Government to make rules for the purpose of carrying into effect the provisions of the Act, and, without prejudice to the generality of this provision, it empowers the local

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AGARWALA, J.

Government to make rules to regulate or provide for the authority by whom and the manner in which the register of smokers has to be prepared, the form and contents of the register, the form of application and the manner in which such applications shall be submitted and, lastly, the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. It is noticeable that the Act does not provide for any penalty for the breach of the conditions and the restrictions referred to in the last mentioned provision of section 12, namely, the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium.

It is conceded by the learned Government Advocate before us that the respondent committed no offence under section 6 or 7 of the Act. Under section 12 the local Government have framed the Bihar and Orissa Opium Smoking Rules of 1928, which were published under notification no. 694, dated the 16th January, 1929. The rules provide for the form and manner in which applications for registration are to be made and the procedure to be followed on such applications and for the maintenance of the register. Rule 10 contains the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. Sub-rule (*1*) of rule 10 prohibits a registered smoker from manufacturing or possessing at one time for his personal use more than half a tola in weight of prepared opium. Sub-rule (*2*) provides that if a registered smoker intends to change his place of residence permanently he shall, before leaving the district in which he is registered, report such change to the Collector of that district. Sub-rule (*3*) provides that if a registered smoker has changed his place of residence permanently he shall within 30 days of such change produce a certified copy of his registration before the Collector of the district in which

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he has taken up his residence. Rule 11 is in the following terms:

"Any registered smoker who does not comply with any of the conditions prescribed in rule 10, shall, on conviction before a Magistrate, be punished—

(*a*) for the breach of sub-rule (*1*) of the said rule with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees, or with both;

(*b*) for the breach of sub-rule (*2*) or sub-rule (*3*) of the said rule for a term which may extend to six months or with fine which may extend to two hundred rupees:"

There is also a provision for the infliction of further imprisonment in default of payment of any fine that may be imposed for the breach of sub-rules (*a*) and (*b*).

The question for decision in this appeal is whether rule 11 of the rules is ultra vires. As has already been indicated, the Act does not itself impose a penalty for a breach of the terms of a licence granted to a registered smoker nor does it expressly empower the rule-making authority to provide for such penalty. The question, therefore, is whether an authority on whom the rule-making power has been conferred is authorised to create an offence and impose a penalty for a breach of the rules. We have not been able to find any reported cases exactly on the point in the decisions of the Courts in India, but we have been referred to two cases decided in England. The first of these is *Hall* v. *Nixon*(1). The facts which gave rise to that case were as follows: Local boards were empowered by 21 and 22 Victoria, capita 98, to make bye-laws with respect to levels and the construction of new streets, the structure of walls of new buildings, sufficiency of ventilation and with respect to the drainage of buildings, etc., and were further authorised to provide for the observance of the bye-laws by enacting therein such provisions

(1) (1875) 10 Q. B. 152.

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as they might think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings and as to inspection by the local board and as to the power of the local board to remove, alter or pull down any work begun, or done in contravention of the bye-laws. The 6th bye-law framed under the power thus conferred required that a person proposing to put up a new building should give notice to a surveyor of the board and it was further provided that the notice should be given 14 days before the work began. The 6th bye-law concluded with the following paragraph:

"Any person who shall erect any new building without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the local board, or in anywise contrary to plans and sections which have been approved of by the local board, shall be liable for each offence to a penalty of 40s".

A question arose whether the local board acted within its powers in providing for a penalty of a breach of the bye-laws. It was held that the bye-law was intra vires. In the course of his judgment in that case Mellor, J. referred to *Young* v. *Edwards*(1) and *Hattersley* v. *Burr*(2) in which cases it was held that an authority on whom had been conferred power to make rules had no power to create offences and impose penalties for those offences. The learned Judge, however, stated that he was unable to see the reasons for this decision and expressed his own view that a bye-law with a penalty for disobedience must necessarily be the mode of carrying out the Act and therefore, the bye-law was intra vires. Lush and Quain, JJ. also delivered judgments agreeing with Mellor, J. It is to be observed, however, that section 34 of 21 and 22 Victoria, capita 98, provided that that Act and 11 and 12 Victoria, capita 63, were to be read together as one Act, and section 115 of 11 and

(1) (1864) 33 L. J. (M. C.) 227.
(2) (1866) 14 L. T. (N. S.) 565; 14 W. R. 864.

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12 Victoria, capita 63, expressly gave power to impose reasonable penalties not exceedinig £5 for any breach of the bye-laws. The next case was *Queen* v. *Sankey*(1) which arose under the Elementary Education Acts (33 and 34 Victoria, capita 75, and 36 and 37 Victoria, capita 86). These Acts impose a penalty for the offence of personating any one entitled to vote at the election of a school board, but do not provide for the offence of personation at the voting for a resolution for application for a school board. An order in Council purporting to be made under these Acts, however, imposed a penalty upon any one guilty of the latter offence. It was held to be ultra vires by Mellor, J. and Lush, J. who had taken part in the decision in *Hall* v. *Nixon*(2). Mellor, J. said in the course of his judgment, "We should be proceeding against all the recognised principle of construction if, without express authority, we were to extend the power of the School Board Commissioners, so as to enable them to make personation an offence without a direct statutory authority so to do, and Lush, J. said, " I certainly cannot think we are justified in holding upon any principle of construction that such words convey by implication or give a legislative power to create an offence which the statutes have refrained from doing. They may have no meaning at all for aught I know, but certainly, we cannot construe words of an ambiguous meaning as conveying a power to create a new offence." In the first of these two cases, therefore, there was in existence a statutory provision authorising the rule-making authority to impose a penalty for breach of its bye-laws, and the second case is a direct decision that without statutory authority there is no power to create an offence and impose a penalty for it.

In my view, in the present instance, therefore, rule 11 of the Bihar and Orissa Opium Smoking Rules

(1) (1878) 3 Q. B. 379.
(2) (1875) 10 Q. B. 152.

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is ultra vires and the respondent has committed no offence for which he is liable to imprisonment or fine. The appeal is dismissed.

VARMA, J.—I agree.

Appeal dismissed.

J. K.

REVISIONAL CRIMINAL.

Before Agarwala and Varma, JJ.

1936.

December, 23.

RAM SARAN JHA

v.

KING-EMPEROR.*

Sugar-cane Act, 1934 (*Act XV of* 1934), *sections* 5 *and* 7—*Sugar-cane Rules*, 1934, *rule* 18—*whether confined to sugar-cane purchaser only.*

As is indicated by the preamble, the object of the Act is to secure to sugar-cane growers a fair price for their produce. Rule 18 was enacted to prevent the objects of the Act being frustrated. The opening words of the rule "Whoever" is not in any way restricted to the purchaser of sugar-cane and there is no reason why the generality of the expression should be so restricted.

Held, therefore, that the petitioner, whose duty it was to grant *purjis* to sgar-cane growers enabling them to get their sugar-cane weighed, having extracted money from them before granting the *purjis*, was rightly convicted under rule 18 of the Sugar-cane Rules.

Application in revision by the accused.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

S. N. Sahay and *K. K. Banarji*, for the petitioners.

*Criminal Revision no. 564 of 1936, against an order of T. G. N. Ayyar, Esq., I.C.S., Sessions Judge of Darbhanga, dated the 17th August, 1936, affirming the order of Mr. M. P. Sinha, Subdivisional Officer, Darbhanga, dated the 5th June, 1936.

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Assistant Government Advocate, for the opposite party.

AGARWALA, J.—The petitioner, who is employed as a jamadar by the Sakri Sugarcane Mill at their weighbridge station at Benipur, was charged with a breach of rule 18 of the Bihar and Orissa Sugar-cane Rules, 1934. He was convicted and sentenced to pay a fine of Rs. 300 or in default to undergo simple imprisonment for one month. The rule under which he has been convicted is one of the rules framed in pursuance of section 7 of the Sugar-cane Act of 1934. By its preamble that Act is declared to be an Act for regulating the price at which sugar-cane intended to be used in the manufacture of sugar may be purchased by and for factories for the purpose of assuring to sugar-cane growers a fair price for their produce. Section 3 empowers the local Government to declare any area to be a controlled area for the purpose of the Act and to fix a minimum price at which sugar-cane may be purchased in any controlled area when intended to be used in the manufacture of sugar. Section 5 of the Act is in the following terms:

> "Whoever, in any controlled area purchases any sugar-cane intended for use in a factory at a price less than the minimum price fixed herefor by notification under sub-section (2) of section 3 or in contravention of any prohibition made under sub-section (3) of section 3 shall be punishable with fine which may extend to two thousand rupees."

Section 7 empowers the local Government to make rules for the purpose of carrying into effect the objects of the Act. Sub-section (3) of section 7 empowers the local Government to provide for a fine not exceeding two thousand rupees to be imposed for breach of some of the rules. It was not suggested in this case that rule 18 is not one of the rules for breach of which the local Government is empowered to provide for the infliction of a fine. The local Government of Bihar and Orissa have framed rules under the provisions of section 7 of the Act and those rules are=

entitled the Bihar and Orissa Sugar-cane Rules, 1934. Rule 18 is in the following terms:

"Whoever, in circumstances where it would amount in effect to an attempt to evade the provisions of section 5 of the Act, accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification, consideration, bonus, set-off, luck money or any other such money whatever other than legal remuneration as a motive or reward for weighing or purchasing sugar-cane or for making payment therefor or for showing or forbearing to show in connection with the purchase and weighment of or payment for sugar-cane, favour or disfavour to any person shall, on conviction, be liable to a fine which may extend to one thousand rupees."

It is under this rule that the petitioner has been convicted.

It is necessary to state the procedure followed by the sugar-cane factory which employed the petitioner in order to understand what his position was vis a vis the sugar-cane growers. It appears that growers of sugar-cane desiring to sell their produce to this factory intimate their desire while the crop is still growing and the factory send one of their officers, called the cane assistant, to inspect the crop and form an estimate of the probable amount of the crop. This estimate, with the name and address of the grower, is entered in a list maintained by the factory. This list, in English and in two of the vernacular languages, is suspended at the factory's weighbridge. When the crop has been harvested the grower delivers it at the weighbridge where it is weighed and paid for. But before it is possible for the grower of the cane to have it weighed it is necessary for him to produce to the man in charge of the weighbridge what has been called a *purji*. This *purji* is in effect a copy of the entry relating to the particular grower in the list already referred to, that is to say, it is an authority to the weighman to receive from a particular person a certain amount of sugar-cane on behalf of the factory. It was the duty of the petitioner to make up these *purjis* and distribute them to the persons whose crops had been assessed by the cane assistant. He was, therefore, in a position to delay the weighing of the cane when brought to the factory or to prevent its

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delivery altogether by not delivering in time or not delivering at all a *purji* which would authorise the weighman to weigh and receive the cane. The charge against the petitioner is that taking advantage of this position he has been in the habit of demanding payments for himself before making out and delivering the *purjis* to the persons entitled to them. The charge in the case relates to three cultivators from whom he is said to have taken Re. 1, Rs. 10 and Rs. 4, respectively. It may be mentioned that the amounts thus levied by the petitioner for his own benefit resulted in the growers of sugar-cane receiving about 5 per cent. less than the minimum price fixed by the Government for the period and in the controlled area to which the charge relates. The three persons with whom we are concerned in the present case are Banarsi Purbey, Ramkishun Purbey and Jainarain Purbey. From Ex. 3/23 it appears that the minimum rate fixed by Government in the present instance for the period from the 16th of December, 1935, until the end of that year, was 5 annas 3 pies a maund. From the 1st of January the rate was reduced to 5 annas a maund. Between the 18th of January, 1936, and the 23rd of January of that year Banarsi Purbey delivered at the factory 126 maunds of cane, the minimum price of which was Rs. 39-6-0, and there is no dispute that this amount was actually paid to him by the factory. But before he delivered this amount he had had to obtain *purjis* from the petitioner and for these *purjis* he had had to pay the petitioner Rs. 10. For the sum thus illegally extorted the petitioner received five *purjis* each of which entitled the weighman to receive six carts of sugarcane from him. Banarsi Purbey deposed that it was in Aghan, that is to say, December, 1935, that he paid to the petitioner Rs. 10 for the *purjis*. In the month of December, 1935, between the 21st and 26th Banarsi Purbey also delivered at the weighbridge 133 maunds and 20 seers of sugar-cane and received payment at the then minimum price of 5 annas 3 pies a maund, that is to say, Rs. 43-12-9. This was the amount,

to which he was entitled and which he actually received. So that during the months of December and January Banarsi Purbey received from the factory Rs. 83-2-9 as the proper price of the sugar-cane which he delivered to the factory. But out of that price he had had to pay the petitioner Rs. 10. Banarsi Purbey, however, had not utilised all the five *purjis* which he obtained from the petitioner.

From the 21st to the 26th of December, 1935, Ramkishun Purbey delivered to the factory 120 maunds and 10 seers of cane at the minimum price of 5 annas 3 pies and received as payment the proper amount, namely, Rs. 39-7-3. He also, before being able to have his cane weighed at the weighbridge had had to pay to the petitioner Rs. 4 for two *purjis* entitling him to deliver six carts of cane. This payment, he said, had been made in Aghan, that is to say, December, 1935.

Between 21st of January, 1936, and 23rd of January, 1936, Jainarain delivered 59 maunds and 10 seers of cane at the weighbridge and received payment of Rs. 18-8-3 at the then minimum rate of 5 annas a maund. He states that he had, before having his sugar-cane weighed, to pay one rupee to the petitioner for a *purji* entitling him to deliver three carts of cane.

The question that arises is whether the petitioner is a person who is liable to the penalty mentioned in rule 18. It is contended that the petitioner is not a purchaser of cane and that rule 18 must be read with section 5 and, that, so read, its operation is restricted to purchasers of cane. As is indicated by the preamble to the Act the object of the Act is to secure to sugar-cane growers a fair price for their produce and the method adopted by the Legislature to achieve this end is to regulate the price at which sugar-cane intended to be used in the manufacture of sugar may be purchased by or for factories. Section 5 penalises a person who purchases sugar-cane in any controlled area for use in a factory at less than the price fixed

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by the proper authority. But it is obvious that the object of the legislature in securing the minimum price to the cane grower would be frustrated if some one, not the actual purchaser, but whose duty it was to perform some act enabling the grower to perform his contract with the purchaser, were in a position to extract from the cane grower any amount which would have the result of depriving him of the full minimum price for his cane. Bearing this in mind, it is not difficult to understand that the local Government, in exercise of the rule-making power conferred upon them by section 7 for the purpose of the carrying into effect of the Act, intended to prevent the objects of the Act being frustrated in the manner indicated above and that Rule 18 is designed for that purpose. The opening word of the Rule " Whoever " is not restricted in any way to the purchaser of cane and I see no reason why the generality of the expression should be restricted in the manner contended for by learned Counsel for the petitioner. What has to be seen is whether by demanding gratification or other payment the petitioner prevented the cane growers from receiving the full benefit of the minimum price fixed for their produce. As I have shown above the three cane growers with whom we are concerned, like all other cane growers dealing with the factory, were unable to receive the full minimum rate for their produce because the petitioner insisted on a payment to him before their cane was weighed. Provided the factory was buying cane from them at the minimum rate, and not at any rate in excess of the minimum rate, it follows that the cane growers were not receiving the benefit of the full minimum rate. It was contended by learned Counsel for the petitioner that there was no evidence that the factory was buying merely at the minimum rate, and he relied on a document on the record for the purpose of shewing that for at least one period, namely, in November, the factory was buying at the rate of $5\frac{1}{2}$ annas, and he contended that in the absence of proof by the prosecution that the factory paid the three persons with whom we are concerned,

at the bare minimum rate, it was not possible to hold that the payments to the petitioner had had the effect of depriving the growers of the full minimum rate. From the Suppliers' Accounts maintained by the factory, and produced by the defence, it is clear, however, that the rates actually paid to Banarsi, Jainarain and Ramkishun were at the minimum rates prescribed by the local Government in exercise of the powers conferred on them by section 3 of the Act. The fact that 5 annas 6 pies was paid in the month of November is explained by the fact that that was the minimum rate prescribed by the local Government in that month [*vide* notification no. 2119-D., dated the 11th November, 1935]. It is clear, therefore, that in the view we take of the scope of Rule 18 the petitioner is guilty and the conviction was rightly recorded against him.

Before leaving this application, however, it is, I think, desirable to comment on the gross carelessness with which the prosecution in this case was conducted in the lower court. The Government notifications fixing the minimum rate for the periods with which we are concerned were not filed by the Public Prosecutor until the close of the case for the defence. No attempt was made by the prosecution to prove that the rates paid to the three persons with whom we are concerned were the minimum rates permitted by the notifications. But for the fortuitous circumstances that the defence filed the factory's Suppliers' Accounts the prosecution must have failed for want of this proof. Since, however, those accounts are on the record and have been proved in due course by the defence the Court cannot ignore them. It is merely to this circumstance that the prosecution owes the fact that this charge does not fail, and not to the vigilance and assiduity of the Public Prosecutor.

I would dismiss this application maintaining the conviction and sentence.

VARMA, J.—I agree.

Rule discharged.

J. K.

PRIVY COUNCIL.

*J. C.** 1937.

February, 1.

On Appeal from the High Court at Patna.

MAHARAJA SIR KESHO PRASAD SINGH

v.

BAHURIA MUSAMMAT BHAGJOGNA KUER.

Bengal Tenancy Act, 1885 (*VIII of* 1885) *section* 149—*Public right and matters of public or general interest—Limits of Revenue mahal map—Evidence Act*, 1872 (*I of* 1872) *sections* 32 (4) *and* 83—*Judgments, relevancy of, as evidence of title against third parties—Code of Civil Procedure*, 1908 (*Act V of* 1908) *section* 100—*Second Appeal—Finding of fact—Map wrongly used in arriving at finding of fact—Jurisdiction in Second Appeal to enter into facts—United Provinces Land Revenue Act*, 1901 (*III of* 1901) *sections* 32 *and* 44.

A suit for recovery of rent deposited under section 149 of the Bengal Tenancy Act is in effect, as against a defendant in possession, a suit in ejectment and the plaintiff must prove his title.

The limits of a particular revenue mahal is not a matter of public right or public or general interest and a map made for the purpose of showing the limits in a previous suit is not admissible as evidence of the limits in a subsequent suit without proof of its accuracy.

In a suit for possession of land a judgment in a previous suit, though admissible as evidence of assertion of a right to the land, is not evidence of the right as against a stranger.

The Duchess of Kingston's Case(1), *Natal Land Company* v. *Good*(2), *Gujjee Lal* v. *Fatteh Lal*(3), *Dinomani* v. *Brojo*(4), and *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*(5) referred to.

Observations on the probative value of entries in registers under the United Provinces Land Revenue Act.

*Present: Lord Maugham, Sir Shadi Lal and Sir George Rankin.

(1) (1776) 2 Howell's State Trials, 528.
(2) (1868) L. R. 2 P. C. 121, 133
(3) (1880) I. L. R. 6 Cal. 171.
(4) (1901) I. L. R. 29 Cal. 187; L. R. 29 I. A. 24.
(5) (1894) I. L. R. 22 Cal. 533; L. R. 22 I. A. 60.

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MAHARAJA SIR KESHO PRASAD SINGH v. BAHURIA MUSAMMAT BHAGJOGNA KUER.

Where a Subordinate Judge in a First Appeal from the decree of a Munsif does not, in coming to his finding of facts as to possession of land, direct himself accurately as to the purposes for which a map put in evidence can be used as such against a party, the High Court can in Second Appeal entertain afresh the question of parcels.

Consolidated Appeal (no. 19 of 1933) from a judgment and 5 decrees of the High Court (August 5, 1930) which reversed the appellate judgment and decrees of the Subordinate Judge of Shahabad (March 8, 1926) and restored the judgment and decrees of the First Munsif at Buxar (August 30, 1924).

The suit was instituted by the appellant to recover rent deposited under section 149 of the Bengal Tenancy Act and raised the question of the boundaries of an estate known as Naubarar, purchased by the appellant in 1903. The defence was (*1*) that the lands claimed in the suit fell within the limits of the contiguous estate, Gangbarar, and were in pattis owned by the defendants as maliks of Gangbarar and (*2*) that the defendants had acquired title thereto by adverse possession for more than 12 years.

In 1911 the appellant had instituted a suit against some maliks of Gangbarar claiming a large tract as included in his estate of Naubarar. In that suit a map was prepared by a Commissioner, Parker, appointed for the purpose, showing the boundaries of Naubarar and this map was ultimately the basis of the decree in that suit. The respondents were not parties to that suit.

In the present suit the appellant, inter alia, relied on the final judgment in the suit of 1911 and Parker's map as evidence of his title.

The material facts and the findings of the lower Courts are stated in the judgment of the Judicial Committee.

Dunne, K. C. and *Pringle*, for the appellant:

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The High Court was not entitled to interfere with the Subordinate Judge's finding as regards adverse possession. In 1903, the property in suit was in the possession of the owners of Gangbarar. The appellant purchased it, but did not get possession. In 1911, he brought a suit for possession against 150 out of 160 persons. Assuming appellant's title to Naubarar established and that the land in dispute is within Naubarar, then the question is whether the defendants have established possession from 1903. The defendants claim to have had possession through tenants. The only way to prove that would be by producing receipts for rent. The fact that the tenants did not pay the plaintiff would be immaterial. The onus is on the defendants. No rent receipts were produced in this case. Receipts were produced in other cases relating to other lands. Under the Bengal Land Revenue Sales Act (XI of 1859) section 27, sales are final on the 60th day Section 28 provides for a certificate of sale and under section 29 the Collector should order delivery. The High Court is wrong in saying that possession continued as before. The occupancy ryot is not turned out.

There must be continuity to establish adverse possession. Reference was made to the definition of "defendant" in the Limitation Act. Possession of a trespasser cannot be tacked on to establish adverse possession. There is no evidence to show that tenants ever attorned to the defendants. The absence of rent receipts shows tenants were not paying rent to the defendants. Though the decree in the suit of 1911 does not bind the defendants who were not parties to it, it is evidence to show which lands were comprised in Naubarar. The Evidence Act, section 13, was referred to. On the High Court's jurisdiction in Second Appeal to interfere with findings of fact reference was made to *Musammat Durga Chaudhrain* v. *Jewahir Singh Choudhri*(1) and *Wali Mohammad* v. *Mohammad Baksh*(2).

(1) (1890) I. L. R. 18 Cal. 23; L. R. 17 I. A. 122.
(2) (1929) L. R. 57 I. A. 86.

In 1917 the time for the five-yearly revision of assessment arose. The Government then had before it the fact that under Parker's map, which was accepted, Naubarar then consisted of over 5,000 acres, a great increase. All parties interested were before the Government. Under the United Provinces Land Revenue Act (III of 1901) the record-of-rights had to be revised. Sections 32 and 33 were referred to. The Gangara people who had held Naubarar were before the Government. Naubarar was ascertained and the plaintiff was held liable for revenue based on that settlement. The tenants were included in the new Naubarar. The High Court held that this was not to be treated as evidence as no presumption of correctness arises. The High Court was wrong. Under section 44 there is a presumption in favour of the plaintiff which shifts the onus.

Godfrey, for the respondents: The suits are not suits for declaration of title. They were instituted in relation to rent. It is doubtful if the Munsif could have entertained suits for a declaration of title. The question of title is, however, involved. The plaintiff must show that the respondents' two pattis are included in the acreage of Naubarar which consisted of 570 bighas in 1862. The Commissioner in this case found that some pattis were in Gangbarar and some in Naubarar. It is admitted by the appellant here that patti Naunidh Singh belongs to Gangbarar. This is Ram Sarup's patti and on that admission the appeal fails as against him. Musammat Bhagjogna Kuer had a small share in patti Sheo Bux Singh. On the question of adverse possession reference was made to *Jobeda Khatun* v. *Tulshi Charan Das*(1) and on the question of tacking to *Ram Piari* v. *Budh Singh*(2). The decision in *Wali Mohammad* v. *Mohammad Baksh*(3) does not affect

(1) (1922) 36 Cal. L. J. 472.

(2) (1920) I. L. R. 43 All. 164.

(3) (1929) L. R. 57 I. A. 86.

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the principles laid down that inferences from documents and admission of evidence are questions of law. Reference was made to *Nafar Chandra Pal* v. *Shukur*(1), *Dhanna Mal* v *Moti Sagar*(2), *Maharaja Sir Luchmeswar Singh Bahadur* v. *Sheik Manowar Hussain*(3), *Rani Hemanta Kumari Debi* v. *Brojendra Kishore Roy Chowdhry*(4), *Harendra Lal Ray Chowdhuri* v. *Hari Dasi Debi*(5).

Dunne, K. C. in reply: In 1862 the defendants were recorded proprietors of Gangbarar. Gangbarar had accretions. The Government decided to make the accretions a new estate, Naubarar. Only cultivable lands would be assessed. 570 bighas would be the assessable area, but not necessarily the whole area.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—In this case five appeals remain to be decided, seven having been compromised. The plaintiff in suit no. 106 (appeal no. 35) was Bahuria Musammat Bhagjogna Kuer and the principal defendant was the then Maharaja of Dumraon. In the other four suits the Maharaja was plaintiff and the principal defendant was Babu Ramsarup Singh, Musammat Bhagjogna's husband. These original parties have all died and their place has been taken by representatives, but these changes in the record may be disregarded for the sake of brevity in expression. The suits arose out of proceedings taken by the tenants of certain agricultural lands near to the River Ganges and to the border line between the district of Shahabad in Bihar and Orissa and the district of Ballia in the United Provinces. By section 149 of the Bengal Tenancy Act a tenant, if sued for rent by a person whose title to the rent he does not admit, may pay the money into Court with a plea that the rent is due to a third person. The Court there-

(1) (1918) I. L. R. 46 Cal. 189; L. R. 45 I. A. 183.
(2) (1927) I. L. R. 8 Lah. 573; L. R. 54 I. A. 178.
(3) (1891) I. L. R. 19 Cal. 253; L. R. 19 I. A. 48.
(4) (1890) I. L. R. 17 Cal. 875; L. R. 17 I. A. 65.
(5) (1914) I. L. R. 41 Cal. 972; L. R. 41 I. A. 119.

upon gives notice to the third person with a view to his bringing a suit against the plaintiff and obtaining an "order restraining payment out of the money". In the case of the five tenancies with which the present case is now concerned, the suits so brought raised the question of title to the lands of the tenancies, and were not confined to the question of the right to a particular amount of rent deposited.

The controversy between the Maharaja on the one hand and Bhagjogna and Ramsarup on the other hand, arises out of the fact that in the district in question the River Ganges has altered its course from time to time. Originally, on the northern bank, and in what is now the United Provinces of Agra and Oudh, there was a revenue paying estate called Mahal Sheopur Diar. As land accreted to this estate by the recession of the river towards the south another estate was settled called Sheopur Diar Numberi. In 1825 a further accretion of a large quantity of land had taken place and this in turn was made into a separate estate, Sheopur Diar Gangbarar (hereinafter called Gangbarar). The river continued to alter its course to the south and by 1851 still further accretion had taken place. At some date between 1851 and 1862 it returned to the north, flowing through the middle of Gangbarar, as indeed it still does. More land having thus emerged to the south of Gangbarar, a separate estate, Sheopur Diar Naubarar ("Naubarar") was formed in 1862 and settled with the owner of estate Gangbarar to which it had accreted. The main question at issue is: What land was thus settled in 1862? And it arises from the fact that in 1903, the proprietors of Naubarar having defaulted in payment of land revenue, the estate Naubarar was sold for arrears of revenue under the provisions of the Bengal Land Revenue Sales Act (XI of 1859) to a purchaser acting on behalf of the then Maharani of Dumraon. The rubakari, dated 11th September, 1903, confirming the sale under section 27 of the Act has been put in evidence, and from this it appears that the subject

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matter of the sale was " number 1504 Shibpur Diar Naubarar, parganah Bhojpur ". By virtue of this purchase by his predecessor, the Maharaja of Dumraon claims to be entitled to the superior interest in the whole of Naubarar whatever its boundaries may be, and he claims that those boundaries include the lands of the tenancies which form the subject matter of the five suits now before the Board.

Ramsarup, on the other hand, on the 23rd March, 1920, and his wife Bhagjogna on the 8th December, 1915, purchased an interest in the estate Gangbarar. In this way each derives title as a co-sharer to a subdivision of Gangbarar Bhagjogna being co-sharer in patti Sheo Bux Singh and Ramsarup in patti Naunhid Singh. The lands of Gangbarar from long before 1903 have been distributed among some 17 pattis, and lands of each patti are also allocated to particular co-sharers in respect of their interest in the patti. Thus, for example, in Musammat Bhagjogna's suit she claims to have an interest of 1 anna 4 pies in patti Sheo Bux Singh, represented by a half interest in a Takhta of 2 annas 8 pies to which belong the lands comprised in her suit and held by the tenant defendants therein. She thus claims half the rent of these lands. The question of title is whether the land of the tenancies in suit belongs to Gangbarar or Naubarar, and if this question has to be answered in favour of the Maharaja a further question arises for decision under article 144 of the Limitation Act of 1908, namely, whether the title which the Maharaja obtained by his purchase in 1903 has not come to an end by reason of the adverse possession of Bhagjogna and Ramsarup or their predecessors in title.

At the hearing of the suits the Maharaja was not able to call any evidence of the receipt by him of rent from any of the lands in question at any time since the purchase in 1903.

On the question of title the Munsif appointed a commissioner to find out which of the lands in the 12

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suits then before him lay in Naubarar and which in Gangbarar, and by the writ of commission he directed the commissioner to decide this question by re-laying the map made by a Mr. Parker in 1912. The Maharaja in 1911 had brought a suit (no. 274 of 1911 afterwards numbered suit no. 4 of 1913), against a large number of co-sharer maliks of Gangbarar claiming a large tract of land as belonging to his estate of Naubarar. In that suit, however, the predecessors in title of Bhagjogna and Ramsarup were not impleaded. Mr. Parker, then District Engineer of Shahabad, having been appointed commissioner in that case, heard evidence and made enquiries as a result of which he drew a map showing the boundary between Gangbarar and Naubarar. This map was ultimately the basis of the decree in the suit, a decree made in 1916 and confirmed by the High Court at Patna in 1919. An appeal to His Majesty in Council (no. 91 of 1923) was dismissed in 1925 " on the ground of incompetency " as an appeal against concurrent findings of fact. The controversy in the 1911 suit upon the maps and other documents which came into existence in 1862 and prior thereto may be stated as follows: Gangbarar, settled in 1825, was 13,977 bighas, 15 kathas. Its most southern plot, according to a map of 1840, was plot 920. In 1861 the whole area was found to be 16,855 bighas, 5 kathas, an addition of 2,877 bighas, 10 kathas. From this additional area a deduction was made of 2,307 bighas, 18 kathas " on account of the river and bhagar," of which 1,923 bighas was for the river and 384 bighas, 18 kathas for uncultivated bhagar, etc., leaving 569 bighas, 12 kathas. This is charged as worth Rs. 4 per bigha (Rs. 2,278-6-0) less Rs. 70-14-0 as " rasum putwari " = Rs 2,207-8-0 of which one half is Rs. 1,103-12-0, say Rs. 1,104. Now the river had by change of course covered lands of Gangbarar and the maliks had a claim for reduction in respect that the whole of their original 13,977 bighas, 15 kathas no longer existed above water. The

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question in the suit of 1911 was whether Naubarar settled in 1862 was 940 bighas only (of which 569 bighas, 12 kathas were cultivated and 384 bighas, 18 kathas were not), Gangbarar land extending southwards far enough to make up the 13,977 bighas, 15 kathas, or whether Gangbarar stopped at plot 920 as before, the whole of the land to the south of that plot being given to Naubarar, though the revenue was assessed on 569 bighas, 12 kathas only, the maliks of Gangbarar and Naubarar being the same. The High Court, in 1916, held that Naubarar comprised 2,877 bighas south of plot 920, and that this was only assessed as 569 bighas by way of effecting a remission of the revenue payable on Gangbarar due to the maliks for diluvion. Of course, if this be right, any further accretions to the southward would belong to the maliks of Naubarar—i.e., after 1903 to the Dumraon raj, which as it happened owned the villages to the south. That the assessment of 1862 should have been made on the principle just stated is not perhaps very probable *a priori*. After 1903 it produced a remarkable result, and one cannot deny that there is room for dispute upon the matter. But on an elaborate review of the evidence and of the documents the Court arrived at that conclusion and there is no apparent force in the comment that the judgment gave the Raj 2,877 bighas and the map gave over 4,000. It does appear, however, from the High Court's judgment that the effect given by that Court to the settlement of 1862 was not the effect which certain revenue officials (Tehsildars) gave to it in 1867. In 1903 and afterwards, as more than one learned Judge has in the subsequent litigations observed, that there was "a good deal of confusion as to the exact location and extent of Naubarar" and their Lordships think it clear that by reason thereof the Raj was not put by the Collector in 1903 in possession of the lands of the 1911 suit or of the present suits.

In the present case the Munsif having directed that Parker's map should be taken as the basis for deciding whether the land in suit lay in Naubarar or not, and the commissioner having reported that the lands now in question in the five suits before their Lordships were within the limits of Naubarar, the Munsif held that the Maharaja had proved his title to such lands subject to the question of adverse possession. On the question of adverse possession, however, he found that Bhagjogna and Ramsarup and their predecessors in title had proved adverse possession for more than 12 years and that accordingly the title of the Maharaja under the purchase of 1903 had come to an end.

The cases went on appeal to the Subordinate Judge who agreed with the Munsif's finding in favour of the Maharaja's title but considered that the documents relied upon by Bhagjogna and Ramsarup were insufficient to establish adverse possession for the necessary period. On appeal to the High Court of Patna (Ross and Scroope, JJ.) it was held that the Maharaja had not proved that the lands in suit were within the boundaies of Naubarar and therefore failed on the question of title. The decision of the Subordinate Judge on the question of adverse possession was also reversed notwithstanding that the powers of the High Court were limited in the manner set forth by sections 100 and 101 of the Civil Procedure Code.

On behalf of the Maharaja it was argued that the decree of 1916 and Parker's map, though not binding upon the principal respondents in the present cases, were evidence against them of the boundary of Naubarar under sections 11 or 13 of the Indian Evidence Act, and that the symbolical possession given under the decree in the previous suit was given openly and was marked by boundary pillars set up in the neighbourhood to mark the boundary line. In addition it was said that in 1917, when the terms of the

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existing settlement of Government revenue were due to be revised, the Maharaja, as the result of proceedings of which the Gangbarar maliks including the principal respondents had notice, became liable for revenue to Government upon the basis of Parker's map and for the whole of the lands delineated therein as comprising Naubarar, and that at the same time the revenue assessed on Gangbarar was reduced.

Since the Maharaja obtained his decree in 1916, three apportionment cases have been decided, i.e., suits (or group of suits) brought by him claiming apportionment of rents due from tenants of lands lying partly in Gangbarar and partly in Naubarar as delineated by the decree. In two of these cases (no. 839 of 1918 and no. 340 of 1920) the claim failed as against Gangbarar maliks not parties to that decree, on the ground that it was not evidence against them and on the ground that adverse possession had in any case brought to an end the title of the Raj [cf. *Maharaja Bahadur Kesho Prasad Sinah* v. *Ramdeal Kuer*(1), *Kesho Prasad Sinah* v. *Kirtarath*(2)]. In one of these two cases both Ramsarup and Bhagjogna were parties, and the Munsif in his judgment stated that on their behalf revenue chalans had been filed besides a host of decrees and plaints showing that they and their predecessors brought rent suits and got decrees [cf. exh. E. (22)]. The third case (no. 88 of 1922) concerned a plot of 52 acres out of which the Maharaja claimed some 43 acres as situated in Naubarar. A commissioner was appointed to ascertain how much of the tenancy lands were within Naubarar and for this purpose he decided to accept the line of Mr. Parker marked by pillars. Musammat Bhagjogna was one of the defendants; Ramsarup was not. The learned District Judge on first appeal [cf. exh. A. (41)] considered that Parker's map was evidence in itself as the maker was dead and also because the

(1) (1924) 6 Pat. L. T. 214.
(2) (1926) A. I. R. (Pat.) 577.

revenue had been assessed in 1917 upon the basis of it; also that the judgments in the 1911 suit were admissible in evidence under section 13 of the Evidence Act. This judgment of 9th November, 1923, is in itself of no great importance for the present purpose since the High Court on second appeal proceeded on different grounds, but it influenced the Munsif in the suits now before the Board, who quoted it (30th August, 1924) as justifying him in proceeding upon the basis of Parker's map. The High Court [cf. *Musammat Dharichna Kuer* v. *Maharaja Bahadur Keshava Prasad Singh*(1)] which had to deal with this question of fact on the footing that the decision of the Ditrict Judge was final save for error in law, ultimately ruled that the commissioner's finding as to area should be upheld. Without decidng whether Parker's map was evidence against the defendants who had not been parties to the suit of 1911, the High Court proceeded on the ground that there was other evidence before the amin which could support his finding. The erection of boundary pillars without objection and the revenue documents of 1917 were the items of other evidence mentioned.

The decree of 1916 was also followed by a suit for mesne profits (no. 263 of 1916) in which an enquiry was held as to which lands within the boundaries defined by the decree were in the possession of proprietors who had been made parties to that suit and mesne profits were allowed in respect of such lands only. No profits were given for any lands of the present suit.

Before the Board as before the High Court the Maharaja relied upon certain registers kept under the United Provinces Land Revenue Act (III of 1901) as containing entries which are not only evidence in his favour but carry a statutory presumption of correctness upon the question whether the suit lands are within Naubarar. Certain sections of that enactment

(1) (1926) 8 Pat. L. T. 129.

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(including sections 33 and 40) are referred to in the judgment of Ross, J., and Scroope, J., has observed that there does not seem to be any presumption of correctness attached to khesras and khatiaunis under the Act. Clause A of section 32 refers to "a register of all the proprietors in the mahal including the proprietors of specific areas specifying the nature and extent of the interest of each." By section 33 (3) read with section 35 no change is to be made in respect of such entries save by order of the Collector or, in undisputed cases only, of the Tehsildar. By section 40 all disputes are to be decided on the basis of possession, and by section 41 boundary disputes are to be decided if possible on the basis of survey maps, if this be not possible then on the basis of actual possession. Under this section if it is not possible to decide as to possession the person "best entitled" may be recorded. Section 44 provides: "All entries in the annual registers made under sub-section (3) of section 33 shall be presumed to be true until the contrary is proved."

It was contended on behalf of the Maharaja that the respondents must have accepted the correctness of Parker's map at the time when the order was made in the present suits for the appointment of a commissioner. The application for the commission and the writ of commission, are absent from the printed record before their Lordships; but the order of the Munsif dated 13th May 1924, and the commissioner's report have been obtained and in view of these documents, the pleadings of the parties and the history of the dispute their Lordships find it impossible to hold that the respondents had given up the contention that Parker's map was wrong and was in no way binding upon them—a contention which was indeed their main plea. The Munsif discussed the law of the matter in his judgment and took the view that the decree of 1916 was admissible as evidence against the respondents in a passage which is inconsistent with the suggestion

that the respondents had submitted to be bound by it. It becomes necessary, therefore, to consider carefully whether there is proper proof as against the principal respondents that the lands now in suit lie within the Maharaja's estate of Naubarar.

It is convenient to consider first whether the Maharaja can succeed upon the basis that to all the lands comprised in his decree of 1916 he acquired a new, or independent, title in 1917 by reason of the proceedings to revise the revenue. This is faintly indicated at the end of paragraph 7 of his plaints, and the only evidence put forward in support of it seems to be the note inserted in the *D* Register (exh. *A* 38) of Naubarar. The contention has been dealt with more than once in the previous suits, and in their Lordships' view there can be no doubt that it is bad. There is no evidence of anything more than a revision of the amount assessed upon the mahal Naubarar as formed in 1862; and, if reference be made to the judgments in the suit of 1911 for the history of these estates, it will be seen that, according to the case of both sides and the documents put forward, the maliks of Gangbarar and the Maharaja as malik of Naubarar have permanent interest in their respective estates though by reason of special circumstances the revenue is not permanently fixed. The not made upon exh. *A* is not the record of, or primary evidence of anything decided by the revenue court of Ballia district but is a note made for the purposes of the Shahabad authorities in carrying out the new arrangement.

Before the Board the argument was put as a case of estoppel. It is said that the respondents stood by when in 1917, on the strength of his decree, the Maharaja's revenue was enhanced: indeed that at the same time the assessment on Gangbarar or certain parts of it was reduced. As the Maharaja had obtained possession of large tract of land from certain

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Gangbarar maliks it is not surprising that in due course his assessment was revised and increased: but that Ramsarup and his wife were responsible for this by action or inaction in any way is neither proved nor probable. It is difficult to discover any basis of evidence for the suggestion of estoppel, which appears to be rested mainly upon the fact that the revision of revenue is made "in the presence of all the proprietors" (*see* paragraph 9 of the Maharaja's written statement). In their Lordships' view the Munsif and the High Court have rightly rejected these contentions as to the effect of the proceedings of 1917. Whether in the course of such proceedings or as a consequence thereof any entry has been made in a register so as to be evidence in favour of the Raj or even to carry a presumption of correctness are separate questions.

The map made by Mr. Parker—if looked at simply as a map and apart from the decree of 1916 and from the physical existence of pillars erected on the land in accordance with it—is not evidence against the respondents. The question of the limits of a particular revenue mahal is not a matter of public right or public or general interest so as to be within section 32 (4) of the Evidence Act, nor is Parker's map a published map generally offered for public sale or a map made under the authority of Government within section 36. It is on the contrary within the provision of section 83 that maps made for the purposes of any cause must be proved to be accurate.

The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English law. Exceptions there are but the general rule is not in doubt. A well known statement of it was given by

Sir William de Grey (afterwards Lord Walsingham) in the *Duchess of Kingston's* case(1) and striking instance of its application by the Board may be seen in *Natal Land Co.* v. *Good*(2). That the same rule applies in India though it is not expressly formulated in these terms may be seen from a reference to section 43 of the Indian Evidence Act, 1872, and the illustrations given thereunder. On the other hand apart from all discussion whether a judgment is or is not a "transaction" within the meaning of section 13 of the Evidence Act [cf. *Gujju Lal* v. *Fatteh Lal*(3) *Dinomani* v. *Brojo* (4)] the judgment of 1916, together with the plaint which preceded it and the steps in execution which followed, are evidence of an assertion by the Raj of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right. There are undoubtedly cases in which a judgment is evidence of weight even against third parties. Thus in *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh*(5) a decree 80 years old dismissing a suit on the ground that the defendants had mokarari tenure, was cogent evidence of their ancient possession, of the rate of rent paid, and of their title having been long ago asserted successfully. And in *Dinomani* v. *Brojo*(4) magisterial orders under section 145 of the Criminal Procedure Code were held to be admissible for and against every one when the fact of possession at the date of the order has to be ascertained. But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903, is not by itself serious evidence of his right. There is and was no lack of assertion on the other side. It adds little or nothing that having got decree he took

(1) (1776) 2 Howell's State Trials, 538.

(2) (1868) L. R. 2 P. C. 121, 133.

(3) (1880) I. L. R. 6 Cal. 171.

(4) (1901) I. L. R. 29 Cal. 187; L. R. 29 I. A. 24.

(5) (1894) I. L. R. 22 Cal. 533; L. R. 22 I. A. 60.

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symbolical possession (*dakhaldahani*) or even that he set up boundary pillars well to the north of the land now in suit. The respondents could not prevent his doing these things and their rights are not in any way affected by them. Of course if it could be said that had the respondents the right they claim they would have at once challenged these acts by bringing a suit for a declaration of their title—some weight might be attached to the fact that they did not. But in the present case such an argument would be quite hollow. It is difficult to think that any Court would grant relief upon the sole basis of the plaintiff's assertion made against other parties and because the parties now impleaded waited to be sued. That on this basis alone possession should be disturbed would be indefensible especially in Ramsarup's cases seeing that he was recovering decrees for rent in 1919 and 1920. Their Lordships find themselves in agreement with the observation of Ross, J. :—

> "The judgment is not *inter partes*, nor is it a judgment *in rem*, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue, and if the existence of the judgment is relevant under some of the provisions of the Evidence Act it is difficult to see what inference can be drawn from its use under these sections."

Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival claimants, and much "indirect laying" might be expected to follow therefrom.

A very important feature of the case must here be borne in mind. The evidence before the Board does not enable their Lordships to see how near in each case the lands now in dispute lie to the boundary line drawn in 1916, but in three of the suits against Ramsarup the plaint lands were found by the commissioner to include some lands of Gangbarar, which would seem to involve that the lands now in question in these suits are at the very extremity. In the two

other suits also this may very well be the case. Accordingly it is anything but certain that any of the defendants in the previous suit had an interest even indirectly in the exact line drawn at these particular points. The lands now in suit are only small areas out of the large tracts then disputed and lie in all probability on the outside edge thereof.

So far as Ramsarup is concerned, whether or not he has proved possession for 12 years adverse to the Maharaja, their Lordships consider that he has proved that he was in possession of the maliki interest which he claims at the time when the Maharaja brought these four suits against him in August, 1923. Apart from any antecedent probabilities arising from the fact that the Maharaja had never had possession, or from the fact that the lands now in question were excluded from the decree for mesne profits as being held by a Gangbarar malik not party to the suit of 1911, he has proved in three of the suits that he had recently recovered rent decrees: and, though in suit no. 111 there was no such special evidence, he gave oral evidence before the Munsif (not included in the paper-book) produced his sale-deed of 1915 and a certified extract from khatiauni jamabandi for 1917 showing the tenant defendants of that suit (no. 111 recorded as holding under his share of the patti Naunidh Singh (Exhibit *E* 21). In these four suits the Maharaja is really a plaintiff suing in ejectment and must give proper proof of his title as against a defendant in possession. The position of Bhagjogna is different.

No doubt in 1917 there came into existence entries in public records consequent upon the decree of 1916. These entries are admissible under section 35 of the Evidence Act, but, as Ross, J. has pointed out, the entries to be made under the United Provinces Act III of 1901 are intended to be based upon the facts as to possession (section 40) and it is plain enough that the Raj was not in possession of the lands now in suit.

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On their merits as evidence these entries add nothing. Apart from the particular provisions of Act III entries in such Government records are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time they were made they carry little, if any, weight. This would be specially applicable to entries made by the Tehsildar as of routine and without notice to any parties interested to oppose their being made.

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In the argument before the Board it was suggested that the learned Judges of the High Court had altogether failed to notice section 44 of the United Provinces Act (III of 1901) but their Lordships do not so read either of the two judgments. The paper-book prepared for the purposes of this appeal contained no document, carrying a statutory presumption of correctness, to which the appellant could point as containing a statement to the effect that the lands now in suit are part of the mahal Naubarar. A main purpose of the opportunity given by their Lordships at the end of the hearing on 28th July, 1936, for the addition to the paper-book of further documents was that the appellant might lay before the Board any entry made under section 33, sub-section (*3*) of Act III to which he could point as containing that statement. Such entries alone attract the statutory presumption of correctness under section 44 of the Act.

No such entry appears among the further documents since obtained from India. Hence even if it be assumed that the presumption would remain when the facts as to possession were established the appellant can take no advantage from section 44.

Their Lordships have not merely to consider whether there is some evidence in support of the view that the suit lands lie within the Maharaja's mahal of Naubarar. The learned Subordinate Judge, in coming to his finding of fact upon this point in agreement with the Munsif, does not appear to have observed that the commissioner was directed to accept

Parker's map as correct, and did not in their Lordships' view direct himself accurately as to the purposes for which the map could be used as evidence against the respondents. The High Court in their Lordships' view was entitled to entertain afresh this question of parcels notwithstanding that they were exercising jurisdiction in second appeal. The question now is whether the High Court are shown to have been wrong in their finding. Their Lordships are of opinion that they arrived at a correct conclusion upon this part of the case. Indeed in the circumstances of the case it was hardly reasonable on the part of the Raj as plaintiff in the four suits against Ramsarup to expect to succeed without proving afresh as against him the particulars of the settlement of 1862 when Naubarar was formed into a separate estate.

As already noticed the position of Bhagjogna is different from her husband's. In suit 106 she is plaintiff and it is for her to prove her title to the lands of that suit. She claims a half interest in a plot of some 5 bighas let out to tenants at a rental of about Rs. 42 per annum. The khewat for 1921 (*D.* 10) is produced and item no. 6 shows her purchase in 1920 of a share (1 anna, 4 pies) in patti Sheo Buksh Singh the rental being given as Rs. 45-1-10. This very same interest was excluded in 1919 from the mesne profits suit as appears from section B to the commissioner's report therein (exhibit *3*). The Munsif relied on exhibits *D.* 1, *D.* 2 and *D.* 4 which are khesras and a "Jild Bandobust" (*D.* 3) which are either not included or are not identifiable in the paper-book; he appears to have considered that one Jaigeshri Lal was a vendor to Bhagjogna in respect of the lands of suit 106, and he referred to two decrees obtained by him for rent in 1890 and 1895; also a plaint in 1890 in a rent suit. Their Lordships have, however, been unable to discover any proof that Jaigeshri Lal was a predecessor in title of Bhagjogna or that the plaint and decrees have any reference to the lands of this suit, these somewhat ancient matters being all strenuously denied

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on behalf of the Maharaja. From her plaint it appears that Bhagjogna herself cannot have collected any rent from these lands because in answer to the Maharaja's rent suit in 1922 the tenant defendants deposited the rent from 1919-22. In her title deed of 8th December, 1920 (exhibit *D*) her vendors explain that the lands sold were sandy and unprofitable. It is fair to add that her husband appears from the Munsif's judgment to have given oral evidence on her behalf, and might and should have been cross-examined on the objections now taken to her title. His evidence, however, has not been included in the paper-book. The Munsif and Ross, J. gave some weight to the fact that in a previous suit about apportionment of the rent of other lands, she put in evidence chalans, plaints and decrees showing possession by her vendors; but it is difficult to assume that they would be found to have reference to the lands of the present suit (no. 106) or to see that she has any valid excuse for not producing them once more.

In this state of the evidence their Lordships think it impossible to hold that Bhagjogna as plaintiff has proved her title as against the Maharaja. Whether the interest which, in 1920, she purchased in patti Sheo Buksh Singh or the interest which, in 1903, the Maharaja purchased in mahal no. 1504 gives title to the land in suit depends entirely upon the question whether the land lies within the one mahal or the other. She as plaintiff must produce proof upon this point unless she is to succeed entirely on the ground of adverse possession. It may be—their Lordships do not decide—that, so far as regards the mere claim to the deposited rents for 1921-22, she could succeed by giving proof of possession of the maliki interest in the particular lands of her suit and relying upon the Maharaja's failure to prove his title [cf. *Jadub* v. *Sm. Khemankari*(1)]. But her evidence of her predecessors receipt of rent from the lands of suit 106

(1) (1903) 8 Cal. W. N. 248.

is of the most tenuous and dubious character and quite insufficient for this purpose.

Upon the question of adverse possession their Lordships being concerned only with five suits have a more limited enquiry than that which was necessary before the Courts in India. Having found that prior to the sale in 1903 the respondents' predecessors, maliks of Gangbarar, were in possession of the lands now in question, Ross, J. expressed his view thus:—

"The Raj not having taken delivery of possession after the revenue sale, the presumption is that possession continued as before, and this presumption is borne out by the fact that a suit for possession was brought in 1911 and also by the pleading, in paragraphs 5 and 6 of the written statement (of the Maharaja), that he got into possession of the property in dispute by bringing a suit in Court."

Their Lordships cannot agree that this approach to the present question is accurate. If it be once shown that the lands in dispute passed by the revenue sale of 1903 there can in law be no presumption that, contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants. Any possession which the old proprietors may have exercised after the sale would no doubt be adverse to the purchaser, but they must prove that they continued in possession and it does not appear that it is possible for them to prove possession save by proving that they received rents from the tenants notwithstanding the sale. No doubt, if at some date rent was received by them in respect of a previous period subsequent to the sale, a question may arise whether this receipt does not evidence possession by the tenants on behalf of the old proprietors since the date of the sale; but proof of receipt of rent would seem to be necessary if the old proprietors are to make out a case that the purchaser's title has come to an end by reason of their adverse possession. It is important, however, to notice that proof of receipt of rent may be indirect, for example, public records showing that A.B. was in possession of the maliki interest may or may not be sufficient in any particular

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case. So far as regards the five tenancies now before their Lordships, it is difficult to impugn the accuracy of the view taken by the learned Subordinate Judge that the evidence given is neither satisfactory nor sufficient to prove 12 years' adverse possession. In Bhagjogna's suit the only decrees proved have reference to a period prior to 1903. In Ramsarup's cases proof of adverse possession no longer matters but it may be noted that in suit 110, he proved one rent decree obtained in 1920 in respect of the years 1916-19. In suit 111 there seems to be no proof of any rent decrees. In suit 112 there were two rent decrees, one in 1911 and one in 1919. In suit 113 there was one rent decree in 1920. Ramsarup's case is but slightly strengthened by khatiaunis or khasras. No doubt in the circumstances of the present case (referred to in the passage which their Lordships have just quoted from the judgment of Ross, J.) the mere fact that many years after the sale the Gangbarar maliks or persons deriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to diluvion by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in possession or in receipt of rent is, it need hardly be said, insufficient under article 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors in title. Their Lordships are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity and exclusiveness" [*per* Lord Shaw in *Krishnan* v. *Peringati*(1)] necessary to displace the title of the Maharaja, and they think that

(1) (1921) 26 Cal. W. N. 666, 673, P. C.

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no reason in law exists why his finding of fact in this respect should not be final.

Their Lordships will humbly advise His Majesty that the appeal should be allowed in respect of Bahuria Musammat Bhagjogna's suit (suit no. 106), that the decree of the High Court therein be set aside and the decree of the Subordinate Judge restored: that in respect of the other suits this appeal should be dismissed. The appellant will get from Musammat Bhagjogna his cost of the appeal to the High Court in suit no. 106. The appellant will pay to the respondents who appeared three-fifths of their costs of this consolidated appeal.

Solicitors for the appellant: *Watkins and Hunter.*

Solicitors for the respondents: *Douglas Grant and Dold.*

LETTERS PATENT.

Before Courtney Terrell, C.J. and James, J.

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February, 3.

RASHIK LAL SAHU

v.

SIRPAT SINGH.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 103*B—record-of-rights—entry as to rent-free, if can be rebutted by showing that land was within plaintiff's zamindari.*

The plaintiff brought an action for a declaration that the entry in the record-of-rights that the land held by the defendant was rent-free was erroneous and for assessment of fair rent, and it was contended that the land being within the ambit of his zamindari the presumption of the correctness of entry in the record-of-rights was rebutted.

Held that such a broad proposition could not be accepted as it would be in contravention of the express terms of the Bengal Tenancy Act, section 103B.

* Letters Patent Appeal no. 12 of 1936, from a decision of the Hon'ble Mr. Justice Wort, dated the 24th February, 1936.

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Jagdeo Narain Singh v. *Baldeo Singh*(1), explained.

J. A. Stonewigg v. *Kameshwar Narayan Singh*(2), *Jodha Sahu* v. *Tirbena Sahu*(3) and *Surpat Singh* v. *Bhupendra Narain Singh*(4), followed.

Maharajadhiraj Sir Kameshwar Singh Bahadur v. *Sheikh Sakhawat*(5), not followed.

Appeal under the Letters Patent, by the defendant, from the following judgment of Wort, J.:—

"These two appeals by the plaintiffs arise out of actions for assessment of fair rent. The defence was that the lands were granted rent-free and in each case reliance was placed by the defendants upon the record-of-rights together with other evidence. So far as second appeal no. 1120 of 1933 is concerned, it is admitted by the learned Advocate appearing on behalf of the plaintiff-appellants that 7½ bighas out of 9 bighas are governed by a recent judgment of mine in this Court and the appeal is pressed only as regards 1½ bighas which is the difference between 9 bighas the area of the holding and 7½ bighas. The appeal is not pressed with respect to 7½ bighas as the learned Judge has identified the land in suit with certain sanad granted to the defendants' ancestors, and, the contract being established between the landlords and the original tenants, the learned Judge is justified in giving judgment to the effect that the land was rent-free. The contention on behalf of the plaintiff-appellants now is that they are entitled to assessment of fair rent so far as 1½ bighas are concerned. The learned Judge in the Court below has dealt with the matter in this way. He has identified the whole of the 9 bighas with the original sanad and has come to the conclusion that the difference between the 9 and 7½ bighas was merely by reason of a different standard of measurement. In my judgment the learned Judge was entitled to come to that conclusion if he was so minded. The decision of the learned Judge in the Court below that, the whole of the land in dispute and the land which was the subject-matter of the original grant being the same the plaintiffs' claim failed, being a decision on fact is binding on me in second appeal. Appeal no. 1120 of 1933 is therefore concluded by the finding of fact aforesaid and fails.

As regards second appeal no. 634 of 1933, different considerations arise. The area of the land in this case was much larger, but I am not much concerned with that particular matter. I am concerned with the evidence upon which the learned Judge in the Court below relied for the purpose of coming to the conclusion favourable to the defendants. First the record-of-rights was relied upon and the learned Judge found that the plaintiffs failed to rebut the entry thereof which was in favour

(1) (1922) I. L. R. 2 Pat. 38, P. C.
(2) (1923) 11 Pat. L. T. 444.
(3) (1929) 11 Pat. L. T. 468.
(4) (1936) I. L. R. 16 Pat. 105.
(5) (1936) 17 Pat. L. T. 819.

of the defendants. The learned Judge also relied upon documents of title and documents between persons not parties to the action for the purpose of identifying the land in suit, and very little need be said with regard to that matter. But the learned Judge in the Court below has relied upon certain kabalas for the purpose of deciding that this land was rent-free. A recital to that effect is contained in Exhibits A and A-1 which are documents of title and in Exhibit 4 which is a document between persons not parties to the suit.

Now it is urged on behalf of the defendant-respondents that the decision of the learned Judge in the Court below is supported by section 32(7) of the Evidence Act which provides:

"When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a) (3), is made by a person who is dead, or who cannot be found or who has become incapable of giving evidence ..... it is by itself a relevant fact".

It is contended by Mr. Nandkeolyar in the first instance that the Judge was entitled to look at the documents because the persons were dead, and, as the recitals came under section 13, they were relevant. But the fact is that there was no evidence whatever which fell to be considered under section 32. The kabalas were simply introduced in the case without any evidence entitling them to be admitted under section 32 of the Evidence Act. Had there been such evidence I should have held very reluctantly that it came under clause (7) of section 32 read together with section 17 of the Act. But I need not express my own view in the matter, as their Lordships of the Privy Council have decided that the application of the section is to be extended to corporal rights as well as incorporal rights. I am quite clearly of the opinion that the learned Judge was not entitled to look at either of these documents (and certainly Exhibit 4) for the purpose of establishing the rent-free nature of the defendants' grant. At this point I should state that in this case there was no sanad or document of title or contract of any kind proved by the defendants and therefore they were forced to rely upon those kabalas plus the entry in the record-of-rights. Now the learned Judge has stated that apart from the kabalas the record-of-rights could be relied upon as the plaintiffs did not rebut the entry thereof. In the view that I take of the case, the only evidence the defendants could rely upon was the record-of-rights. Mere non-payment of rent for a period of twelve years or more is not sufficient as has been laid down by their Lordships of the Privy Council in a number of cases, and, if I may be allowed to say so, the proposition itself is evident. The defendants were therefore forced to rely upon the record-of-rights. In this connection the well-known decision in *Jagdeo Narain Singh* v. *Baldeo Singh*(1), a decision of the Privy Council is relied upon. The proposition stated by Mr. Ameer Ali is that the record-of-rights, in the circumstances such as existed in this case, that is to say where a rent-free grant is claimed, is rebutted the moment the plaintiff establishes that he is the zamindar or the proprietor. This proposition is no doubt based on the well-known decision in *Rajah Sahib Perhlad Sein* v. *Doorga Pershad Tewarree*(2) which is to the effect that "the zamindar has a prima facie title to

(1) (1922) I. L. R. 2 Pat. 38, P. C.

(2) (1869) 12 Moo. I. A. 286 at 331.

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the gross collection from all the mouzahs within his zemindary ". This is clearly based on the fundamental principles that if a person claims any right over any portion of the proprietor's land, he must establish that right by proving some sort of agreement between him and the landlord. The decision to which I referred to in the first instance has been explained, as I pointed out in a recent judgment, in *Stonewigg* v. *Kameshwar Narain Singh*(1). Not only is there that explanation, but I think there is a further explanation. The record-of-rights is not a document of title, it is simply an evidence of fact. When it is once shown, as it was in this case, upon fundamental principles, that the landlord is entitled to rent unless the defendant showed some contract or settlement which allows him to hold the land rent-free, the defendant is bound to prove that. Now, can the defendants prove it by producing the record-of-rights? It is impossible to hold that the proposition laid down in *Jagdeo Narain Singh's* case(2) is in any way limited, although it is true that in that case there was an elaborate discussion on an examination of evidence upon which the defendants relied in order to establish their rent-free grant. In my judgment the authority in *Jagdeo Narain's* case(2) governs this case and that the learned Judge in the Court below was wrong in holding that the defendants' right to rent-free grant was established by an entry in the record-of-rights. The defendants being no longer entitled to rely upon that entry, and the defendants also not being entitled to rely upon the three kabalas to which I have made more particular reference, the plaintiffs should have been allowed to succeed. For these reasons the plaintiffs' appeal no. 634 of 1933 succeeds and is allowed with costs.

Leave to appeal under the Letters Patent in respect of appeal no. 634 of 1933 is granted.

Second Appeal no. 1120 of 1933 is, as I have already said, dismissed with costs."

On this appeal.

D. L. Nandkeolyar, for the appellants.

J. C. Sinha, for the respondents.

COURTNEY TERRELL, C.J.— This Letters Patent appeal is brought by the defendant appellant against a decision of Wort, J. sitting singly and arises out of a suit by the landlord for a declaration that an entry in the record-of-rights to the effect that the land held by the defendant is held rent-free is erroneous and for assessment of a fair rent.

The suit was dismissed by the trial court and by the first appellate court, but these decisions were reversed by Wort, J. who held that the landlord plaintiff was entitled to succeed.

(1) (1923) 11 Pat. L. T. 444.
(2) (1922) I. L. R. 2 Pat. 38, P. C.

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The substantial point for our consideration is the effect to be given to the entry in the record-of-rights that the land is held rent-free. Some difficulty has been felt by the courts by reason of a decision of their Lordships of the Privy Council in *Jagdeo Narain Singh* v. *Baldeo Singh*(1) and that decision has been interpreted and discussed in subsequent decisions of this Court. The first decision of importance was given in the case of *Stonewigg* v. *Kameshwar Narayan Singh*(2). The decision of the Privy Council had given rise to the belief that it laid down the proposition that the presumption of the correctness of the entry in the record-of-rights was rebutted if the landlord could shew that the land in respect of which the suit was brought fell within the ambit of his ' zamindari '. Now the word ' zamindari ' has been somewhat loosely used. It may be used in the strict sense to denote the land in respect of which the landlord has a proprietary right and in respect of which he is assessed to revenue. It may also be used in a wider and looser sense to mean the land over which he has proprietary rights as to part of which he is assessed to revenue and as to the remainder of which he is not assessed to revenue but may have the duty of collecting the cess and in this wider sense it may be that the ' zamindari ' includes both land in respect of which the landlord receives rent and which is assessed to revenue and land in respect of which no rent is paid or in respect of which the tenant is not liable to pay rent. I think that some of the subsequent confusion has been due to the fact that the term has been used, sometimes in the one sense and sometimes in the other.

In the Privy Council decision, as was pointed out by Das, J. in *Stonewigg* v. *Kameshwar Narayan Singh*(2), their Lordships, when the decision is examined, were dealing with a case in which it was shown by evidence that there was no rent-free land

(1) (1922) I. L. R. 2 Pat. 38, P. C.

(2) (1923) 11 Pat, L. T. 444,

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within the landlord's zamindari and that the land in suit was within the zamindari; and as a matter of evidence in that case their Lordships took the view that as a matter of fact the presumption was rebutted. It is entirely a mistake to imagine that the decision laid down the broad proposition that if it could be shown that the land in suit was part of the landlord's proprietary right, the presumption which the Courts are bound under the Bengal Tenancy Act to attach to the entry in the record has been rebutted. Indeed if such a broad proposition had been intended by their Lordships of the Privy Council it would have been in contravention of the express terms of the Bengal Tenancy Act. By section 102, paragraph (*j*) it is the duty of the officer to make an entry in the record as to whether the land is claimed to be held rent-free and whether or not rent is actually paid and if not paid whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled, under what authority. The entries including entries of such matters as are prescribed by paragraph (*j*) are given presumptive force by the Act itself and the proposition in the wider and erroneous sense which was attempted (had their Lordships laid down any such proposition) would have meant that as between a landlord and tenant the entries in the record-of-rights relating to these matters have no presumptive force whatever.

The view of Das and Kulwant Sahay, JJ. in the case of *Stonewigg* v. *Kameshwar Narain Singh*(1) was followed and assented to by the judgment of a Bench of which I was a member together with Chatterji, J. [*Jodha Sahu* v. *Tirbena Sahu*(2)]. The same view of the judgment of the Privy Council was taken by Mohamad Noor and Madan, JJ. in so recent a case as *Surpat Singh* v. *Kumar Bhupendra Narayan Singh*(3) which was decided subsequently to the

(1) (1923) 11 Pat. L. T. 444.
(2) (1929) 11 Pat. L. T. 468.
(3) (1936) I. L. R. 16 Pat. 105.

decision of Wort, J. from which this appeal is now presented. The learned Judge of this Court has made reference to the decision of a Bench consisting of himself and Agarwala, J. in *Maharajadhiraj Sir Kameshwar Singh Bahadur* v. *Shaikh Sakhawat Ali*(1) and in that case the Court did not follow the decisions of this Court in *Stonewigg* v. *Kameshwar Narayan Singh*(2) and *Jodha Sahu* v. *Tirbena Sahu*(3) notwithstanding that those decisions were cited to the Court.

Now in the decision given by the learned Judge to which I have just referred it would seem that a point of principle in the matter of judicial decisions was not given its proper weight. The decision of the Privy Council had been interpreted in the two cases of *Stonewigg* v. *Kameshwar Narayan Singh*(2) and *Jodha Sahu* v. *Tirbena Sahu*(3) and it was in the circumstances therefore desirable that the interpretation placed by the Court upon that Privy Council decision should be followed unless a larger Bench should dissent from that interpretation. The learned Judges there (like Wort, J. in the particular case before us) seem to have reverted to and followed the contention that the decision of the Privy Council was to be given a wider interpretation and was to be deemed to have laid down the principle that when once the landlord had succeeded in showing that the land in question fell within his proprietary rights the presumption given by the record-of-rights to the entry that the land was held rent-free should be taken as rebutted. In view of the decisions in *Stonewigg* v. *Kameshwar Narayan Singh*(2) and *Jodha Sahu* v. *Tirbena Sahu*(3) that opinion as to the meaning of the decision of the Privy Council was not open to a Bench of two Judges sitting in this Court. The plaintiffs in this case did attempt to prove by the evidence of a patwari that the land in respect of which the suit was brought was in fact assessed to rent, but this evidence was not

(1) (1936) 17 Pat. L. T. 819.
(2) (1923) 11 Pat. L. T. 444.
(3) (1929) 11 Pat. L. T. 468.

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believed and in the circumstances, therefore the entry in the record-of-rights should have prevailed and the defendant should have been held to have held his land rent-free and the plaintiffs suit should accordingly have failed.

COURTNEY TERRELL, C. J.

For these reasons I would allow the appeal, set aside the judgment of the learned Judge of this Court and restore the judgment of the trial court and the first appellate court with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

J. K.

1937.

February, 8.

29 Pat 686

LETTERS PATENT.

Before Courtney Terrell, C.J. and James, J.

BHAGWAT SAHAY

v.

RAM SUKRIT RAM.*

Limitation Act, 1908 (*Act IX of* 1908), *Article* 182(5)—*step-in-aid of execution—order for transfer of decree, whether is.*

An order for the transfer of a decree for execution is a step-in-aid of execution within the meaning of Article 182, clause (5) of the Limitation Act.

Ramchandra Marwari v. *Krishna Lal Marwari*(1), followed.

Gopal Tewari v. *Ramdhari Pandey*(2), not followed.

Banku Behari Chatterji v. *Narainlas Dutt*(3), distinguished.

Appeal by the judgment-debtor.

* Letters Patent Appeal no. 7 of 1936, from a decision of the Hon'ble Mr. Justice Wort, dated the 24th January, 1936.

(1) (1922) I. L. R. 1 Pat. 328.
(2) (1934) A. I. R. (Pat.) 662.
(3) (1927) 54 I. A. 129.

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BHAGWAT SAHAY v. RAM SUKRIT RAM.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

D. N. Verma, for the appellant.

No one for the respondent.

COURTNEY TERRELL, C.J.—In this case the decree-holder obtained his decree on the 12th June, 1931. On the 8th July, 1932, on the application of the decree-holder, an order was made for transfer of the decree from the court in which it was granted to the court of the District Judge of Shahabad for execution. On the 5th July, 1935, the decree-holder took the next step by filing an application for the execution of the decree in the court of the District Judge of Shahabad.

The question for our decision is whether the order for the transfer made on the 8th July, 1932, was a step-in-aid of execution. The Munsif before whom this matter first came decided that it was a step-in-aid of execution and, therefore, the application by the decree-holder filed on the 5th July, 1935, was within time under Article 182, clause (*5*). From this decision the judgment-debtor appealed to the District Judge contending that the application for execution on the 5th July, 1935, was out of time. The appeal was summarily dismissed and the judgment-debtor appealed to the High Court. The learned Judge before whom the matter came held that he was bound by the decision of this Court in *Ramchandra Marwari* v. *Krishna Lal Marwari*(1) to the effect that the order for transfer was properly termed a step-in-aid of execution within the meaning of Article 182, clause (*5*) but he gave leave to appeal in Letters Patent because he was of opinion that a decision of their Lordships of the Privy Council in *Banku Behari Chatterji* v. *Naraindas Dutt*(2) had in effect overruled that decision and the learned Judge had himself

(1) (1922) I. L. R. 1 Pat. 328.
(2) (1927) L. R. 54 I. A. 129.

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expressed this view in an earlier decision of his own in *Gopal Tewari* v. *Ramdhari Pandey*(1). It seems, however, quite clear that the distinction has been recognised by many of the other High Courts that the decision of their Lordships of the Privy Council dealt only with Article 183. Moreover the fact that the order for transfer is in the nature of a ministerial act has nothing whatever to do with the material question for our decision as to whether that order was a step-in-aid of execution. In my opinion the decision of this Court in *Ramchandra Marwari* v. *Krishna Lal Marwari*(2) was not affected in the least by the decision of the Privy Council and the order for transfer was a step-in-aid of execution and the subsequent proceedings by the decree-holder were consequently within time under Article 182, clause (*5*).

For this reason I would dismiss this appeal. As there has been no appearance on behalf of the respondent the appeal will be dismissed without costs.

JAMES, J.—I agree.

J. K. *Appeal dismissed.*

APPELLATE CIVIL.

1936.

November, 30.

Before Wort, J.

MAGAN LAL MARWARI

v.

SITARAM PANNA LAL.*

Limitation Act (Act IX of 1908), Article 182—amendment made after the decree was dead—limitation runs from date of amendment—executing court, if can go behind the order of amendment—res judicata.

* Appeal from Appellate Order no. 130 of 1936, from an order of R. B. Beevor, Esq., I.C.S., District Judge of Bhagalpur, dated the 24th of February, 1936, confirming an order of Babu D. Prasad, Munsif, dated the 11th of January, 1936.

(1) (1934) A. I. R. (Pat.) 662.

(2) (1922) I. L. R. 1 Pat. 328.

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Where a decree was amended more than three years after it was passed and the judgment-debtor objected to the execution of the amended decree on the ground that the order of amendment was bad in law,

Held, that it was not open to the executing court to go behind the order of amendment and to enquire if the decree was really barred on the date of amendment or not. The question was res judicata.

Nagendra Nath Dey v. *Suresh Chandra Dey*(1), *Allada Lakshmikanta Rao* v. *Naddella Ramayya*(2), *Durga Prasad Das* v. *Kedarnath Nayek*(3) and *Musammat Bhagwati Kuer* v. *Narsingh Narayan Singh*(4), followed.

Raja Kalanand Singh v. *Rajkumar Singh*(5), not followed.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Wort, J.

K. P. Sukul, for the appellant.

Bindeshwari Prasad, for the respondent.

WORT, J.—The point for decision in this case is an attractive one and at first appeared to be one of some difficulty. But in my judgment it is concluded both by principle and authority.

The judgment-debtor is the appellant before this Court and objected under section 47 of the Code of Civil Procedure against the execution of a decree which was made in the first instance on the 21st of August, 1930. More than three years after the date of the decree an application for amendment was made on the 5th of January, 1935, and then the application for execution on the 13th of May, 1935, out of which this appeal arises. Mr. Beevor, the learned District Judge, relying upon the observations made by me in

(1) (1932) L. R. 59 Ind. Ap. 283.
(2) (1934) 67 Mad. L. J. 904.
(3) (1929) A. I. R. (Cal.) 650.
(4) (1930) 11 Pat. L. T. 181.
(5) (1917) 2 Pat. L. J. 286.

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WORT, J.

a judgment reported as *Musammat Bhagwati Kuer* v. *Narsingh Narayan Singh*(1) has come to the conclusion that the application was not barred by limitation. It is true that my observations are in a sense mere obiter as the facts of the case upon which reliance was placed were that the application for amendment was made before the decree had become barred by limitation. But in the view I now take the observations in the former case were warranted both on principle and authority as I have already stated.

Article 182 of the Limitation Act provides for various starting points of limitation for the execution of decree, and under clause (4) of the third column it is provided that where a decree has been amended, the starting point is the date of amendment. Now, the words of the Article are quite unqualified—it does not speak of any particular form of amendment, whether the amendment is necessary or otherwise, whether the decree is capable of execution without the amendment; it does not qualify, as I have said, the matter of amendment in any way. There is a decision of this Court which was not relied upon at the Bar in *Raja Kalanand Singh* v. *Rajkumar Singh*(2) where this point has been discussed. There Chapman, J. and Roe, J. decided that an action was barred by limitation as the nature of the amendment was such as not to give a fresh point for limitation. The learned Judges in that case, as I have indicated, discussed the nature of the amendment and decided the case accordingly. Two learned Judges of the Calcutta High Court have held a contrary view in the decision in *Durga Prosad Das* v. *Kedarnath Nayek*(3) and the observations which the learned Judges in that case made were that an executing court does not sit as a Court of appeal over the Court which has made the decree or which has made the amendment, but only to see whether the decree has been amended in order

(1) (1930) 11 Pat. L. T. 181.
(2) (1917) 2 Pat. L. J. 286.
(3) (1929) A. I. R. (Cal.) 650.

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to decide whether the application for execution is barred by limitation. The Madras High Court in the case of *Allada Lakshmikanta Rao* v. *Naddella Ramayya*(1) have come to the same conclusion relying upon a decision of their Lordships of the Judicial Committee of the Privy Council reported as *Nagendra Nath Dey* v. *Suresh Chandra Dey*(2). The same Article of limitation was in question in that case. But the matter to be decided was whether execution was barred by limitation and whether the date from which limitation ran was from the date of an appeal which had been preferred in the case. Their Lordships of the Judicial Committee in the opinion expressed by Sir Dinshah Mulla made this observation on the argument addressed that the nature of the appeal altered the question—"There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide." Likewise, the learned Judges of the Madras High Court, relying upon the decision to which I have just referred, have held that it was immaterial what was the nature of the amendment—whether the Court had jurisdiction to make it or not: in other words, the question is in a sense determined on the principle of res judicata. When the application for amendment was made, it would have been a complete answer by the judgment-debtor to the application that the decree was already dead in the sense of its being barred by limitation, and the amendment having been made it must be presumed that that question had no substance. As held by the learned

(1) (1934) 67 Mad. L. J. 904.
(2) (1932) L. R. 59 Ind. App. 283.

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MAGAN LAL MARWARI v. SITARAM PANNA LAL.

WORT, J.

Judges of the Madras High Court, it was not competent for the Court below in this case to sit in appeal on the decision of the Court amending the decree. In so far as the decision of this Court reported as *Raja Kalanand Singh* v. *Rajkumar Singh*(1) appears to hold that the Court may look into the nature of the amendment, I have no hesitation in saying that it was overruled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*(2). On a parity of reasoning, that is to say, if it is impossible to look into the nature of the appeal under Article 182, it is equally irrelevant to look into the nature of an amendment. In the case before the Privy Council the appeal was apparently irregular and incompetent and the persons affected by it were not parties and the appeal did not imperil the whole decree. In spite of that their Lordships gave full weight to the plain meaning of the word 'appeal' contained in Article 182.

In my judgment the decision of the learned Judge in the Court below was right, his judgment must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

J. K.

1936.

December 9.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

BANKANIDHI TANTRA

v.

GODIPATNA CO-OPERATIVE SOCIETY.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 20—*Limitation (Amendment) Act*, 1927 (*Act I of* 1927),—*payment made after* 1928—"*as such*", *whether redundant.*

* Circuit Court, Cuttack. Appeal from Appellate Order no. 7 of 1936, from an order of A. N. Bannerji, Esq., District Judge of Cuttack, dated the 31st December, 1935, reversing an order of Babu Badrinarayan Ray, Munsif, 1st Court of Cuttack, dated the 4th June, 1935.

(1) (1917) 2 Pat. L. J. 286.

(2) (1932) L. R. 59 Ind. App. 283.

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Held, that as to payment made before the first day of January, 1928, the words " as such " have some significance because they make it clear that in the case of a payment towards interest which is not required to be evidenced by writing it should be clear that the payment was in fact towards interest and not left as a matter of doubt. But as to payment made after the first day of January, 1928, the words " as such " have no significance.

Udeypal Singh v. *Lakshmi Chand*(1), dissented from.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

S. K. De, for the appellant.

S. N. Sen Gupta, for the respondent.

COURTNEY TERRELL, C.J.—This is a miscellaneous second appeal against an order of the District Judge of Cuttack dealing with an appeal from the first Munsif at Cuttack who had dismissed an application for execution. The main point which we have to consider is a simple one of limitation. The judgment-debtor who is the appellant was the defendant in a suit by the Godipatna Co-operative Society to recover the principal and interest of a loan made by the Society to the appellant. A decree was passed against the appellant for a sum which represented the principal and the bond rate of interest and interest was to run upon the decretal amount at a court rate of interest from the date of judgment until the date of payment. The successful plaintiff, the respondent in the matter before us, took out execution which was finally disposed of on the 7th August, 1931. There was a further application, the one with which we are now dealing, on the 27th August, 1934, more than three years after the disposal of the earlier execution case and prima facie the decree under execution was barred by limitation but the decree holder relies upon

(1) (1935) I. L. R. 58 All. 261, F. B.

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BANKANIDHI TANTRA v. GODIPATNA CO-OPERATIVE SOCIETY.

COURTNEY TERRELL, C. J.

a payment of 2 annas. The payment was made to the Society and the books of the Society recorded the payment and recorded also in connection therewith the signature of the judgment-debtor.

It is contended on behalf of the judgment-debtor that whereas there is an entry in the minutes of the Society to the effect that the two annas was received by the Society and appropriated to the payment of interest, that the claim to the principal decretal amount is barred by limitation though the limitation may be saved in so far as the amount of interest is concerned and the argument is based upon section 20 of the Indian Limitation Act. The Act was amended by the Amendment Act of 1927. Prior to the amendment payments to save limitation in respect of interest or in respect of principal differed. In the case of payments to commence a fresh period of limitation in respect of interest no writing was required on the part of the person liable to pay the debt whereas in the case of payments in respect of principal the requirement for writing was fixed. The Act made it clear that as to any given payment if it was contended that the payment was towards interest it must be clear that it was so intended and that the payment was not towards principal. Accordingly sub-section (*1*) of the section reads as follows:—

"Where interest on a debt or legacy is, before the expiration of the prescribed period, paid *as such* by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made:"

This was in the old Act followed by the following proviso:—

"Provided that in the case of part payment of the *principal* of a debt the fact of payment appears in the handwriting of the person making the same."

It was thought desirable by the Legislature to amend the proviso so as to strike out the difference between payments towards interest and payments towards principal in the matter of the required writing. Accordingly the new proviso effected by the Amendment Act of 1927 is as follows :—

" Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

The effect of the amendment was to remove the distinction between the two kinds of payment as to all payments made after the first day of January, 1928. Therefore as to payments made before that date the words " as such " have some significance because they serve to make it clear that in the case of a payment towards interest which is not required to be evidenced by writing it should be clear that the payment was in fact towards interest and not left as a matter of doubt. As to payments made after the 1st January, 1928, they are now placed on an equality. Therefore, the words " as such " are material when the Court has to consider a payment made before the 1st January, 1928, but they have no significance after the date mentioned. This view of the section was taken by two of the Judges in the Full Bench case of the Allahabad High Court in *B. Udeypal Singh* v. *Lakshmi Chand*(1) and there although the other three Judges took the view that the words " as such " had significance even with respect to payments made after the 1st January, 1928, the two Judges in minority took the view that as regards such payments after the 1st January, 1928, the words had no significance at all. With the view of the minority I respectfully agree and that view has recently been taken by a Bench of this Court. Further the debt which is owing by the judgment-debtor does not consist of two debts but of one. It is subject to a decree that a certain sum shall be paid together with interest on

(1) (1935) I. L. R. 58 All. 261, F. B.

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that sum until the date of payment. It is not possible to separate the two and to say that it consists of principal and interest and that limitation might be saved as to one part of the debt, that is to say, the interest, and yet be effective as against the other part of the debt, namely, the principal sum. The payment of the two annas in this case was towards the total debt. Any appropriation by the person to whom it was paid is immaterial. The payment was of a character which was clearly intended and was made for the purpose of saving the limitation and keeping the debt running. In my opinion the entire debt is saved from limitation and continues to run less the amount paid. The learned Judge was, in my opinion, correct in this matter.

There remains another point of quite a different character which has arisen owing to a slip either on the part of the parties at the time of the hearing before the learned Judge or possibly by a mistake of the learned Judge. One of the objections taken before the Munsif in the execution case was that a certain part of the property to be seized in execution, namely, lot no. 7 mentioned in the execution petition, was exempt from the sale by reason of the fact that it was the homestead land of an agriculturist. The learned Munsif found that this was the case and did not allow the sale to proceed in respect to that lot. When the case went before the District Judge he set aside the entire order. It is conceded that this was a slip and that the execution can only proceed with respect to the property other than this lot. The order of the learned District Judge will accordingly be amended to this extent. The appeal fails and is dismissed with costs.

JAMES, J.—I agree.

J. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and James, J.

1936.

December, 18.

KRUSHNA CHANDRA DHAR

v.

BEPIN BEHARI PADHI.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 73—*Transfer of Property* (*Amendment*) *Act*, 1929 (*Act* XX *of* 1929—*right of mortgagee to surplus sale proceeds—revenue sale, subject to incumbrance, whether entitles mortgagee to proceed under section* 73.

Where a residuary share which included the mortgaged properties was sold for arrears of revenue, *held*, that section 73 of the Transfer of Property Act had no application as the mortgagee had not been deprived of his security and the security had not been diminished.

Section 73 of the Transfer of Property Act creates no new law, but merely gives effect to the old law of substitution. The amendment of the Act, however, extended the section, so that it dealt not only with the sale of the mortgaged property at a revenue sale but also to the sale of any part thereof or any interest therein.

Kapuri Sahu v. *Mathura Das*(1), explained.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

B. Mahapatra, for the appellant.

B. N. Das and *A. S. Khan*, for the respondent.

COURTNEY TERRELL, C.J.—This is an appeal from an order of the Subordinate Judge in an execution case. There was a certain tauzi no. 924 in the Balasore collectorate in which separate accounts had been opened and there was a residuary share of 4 as. 7 p. and odd and within this residuary share certain judgment-debtors had a 5 p. 12½ kr. share.

* Appeal from Original Order no. 14 of 1934, from an order of Babu Sadhu Charan Mahanti, Subordinate Judge of Cuttack, dated the 7th May, 1934.

(1) (1933) 15 Pat. L. T. 95.

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COURTNEY TERRELL, C. J.

This share had been mortgaged to one Bipin Behari Padhi and Bipin Behari Padhi got a mortgage decree against this share for sale. Subsequent to the mortgage the judgment-debtor no. 5 in the mortgage suit—Krishna Chandra Dhar had purchased the 5 p. 12½ kr. share and he was accordingly made a defendant with defendants nos. 1 to 4 and the decree was against him also. The decree only affected him in so far as it was a decree for the sale of the mortgaged property. The 4 as. 7 p. residuary share in the estate which had included the mortgaged property was sold for arrears of revenue and in the circumstances by reason of section 54 of the Revenue Sale Law the sale was subject to the mortgagee's right in respect of the 5 p. 12½ kr. share out of the property sold in the revenue sale. The property sold at the revenue sale was bought by Biswanath Paida on the 14th of September, 1932, and the sale realized more than the amount of the revenue debt with the result that the surplus sale proceeds amounted to Rs. 22,662. The share of the judgment-debtor no. 5 out of this sum amounted to Rs. 2,307-3-10. Now Bipin Behari Padhi before executing his mortgage decree by putting up the mortgaged property to sale made an application for the attachment of the sum of Rs. 2,307-3-10, the share of the surplus sale proceeds attributable to this particular part of the property and withdrew that amount and then proceeded in execution to sell the mortgaged property and that sale has since been carried through.

Now certain facts are clear and beyond dispute. First of all it is clear that the revenue sale was in circumstances such as the mortgagee was not deprived of his security his mortgage was not affected by the revenue sale at all and, therefore, his security remained undiminished. Bipin Behari, however, justifies his attachment of the surplus sale proceeds amounting to Rs. 2,307-3-10 by virtue of section 73 of the Transfer of Property Act and the learned Subordinate Judge was of opinion that he had the right by reason of that section not merely to realize his security by means of his mortgage decree for sale, but also that he had the

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right to proceed against the surplus sale proceeds. Now section 73 of the Transfer of Property Act creates no new law, but merely gives effect to the old law of substitution. The amendment of the Act which was effected by Act XX of 1929 however extended the section, so that it dealt not only with the sale of the mortgaged property at a revenue sale but also to the sale of any part thereof or any interest therein. The learned Subordinate Judge has, I fear, been misled by a judgment of this Court in *Kapuri Sahu* v. *Mathura Das Marwari*(1). In that case a portion of the estate only which was subject to the encumbrance was sold for arrears of revenue and the result of the revenue sale was to diminish the security to a certain extent but without extinguishing it altogether; and in those circumstances this Court applied the principle involved in the amendment and stated that to that extent the mortgage security was not diminished by the effect of the sale. The mortgagee had the right to proceed against the mortgaged property in addition to the right which he had to proceed against the sale proceeds in respect of the portion by which the security had been diminished. That is the only effect of the decision in *Kapuri Sahu* v. *Mathura Das*(1). In this case, however, the mortgagee's rights were not diminished by the sale at all and he had his full right to put the mortgaged property up to sale and to accede to the proposition that he can also proceed against the sale proceeds would mean that by reason of the revenue sale the security held by the mortgagee was increased. This was clearly not the intention of the Legislature. The only reason for section 73 was to protect a mortgagee whose security has in fact been diminished. The mortgagee has put the property up for sale and to that extent he has been satisfied. The Rs. 2,307-3-10 is no part of the property of judgment-debtors nos. 1 to 4 but is the property of judgment-debtor no. 5 and that money which has been withdrawn by Bipin Behari Padhi must be replaced by him. If

(1) (1933) 15 Pat. L. T. 95.

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he has any further remedy for the balance of the mortgage debt against judgment-debtors nos. 1—4 or indeed against judgment-debtor no. 5 by reason of the decree, then he must take such appropriate steps as he may be advised for recovery of that balance as may be available to him. In the meantime, however, he must repay the money which he has withdrawn and the appellant (defendant no. 5) will be able to levy execution for this sum.

In my opinion the appeal succeeds and I would allow it with costs. The respondent will repay the said sum of Rs. 2,307-3-10 with interest at the rate of six per cent. from the date of its withdrawal to the date of its restoration.

JAMES, J.—I agree.

Appeal allowed.

J. K.

REVISIONAL CIVIL.

Before Fazl Ali and Madan, JJ.

CHAIRMAN AND COMMISSIONERS OF THE CHAIBASSA MUNICIPALITY

1937.

January, 25.

v.

GOBIND SAO.*

Limitation Act, 1908 (*Act IX of* 1908), *Articles* 115 *and* 120—*suit by Municipality against person authorised to collect tolls, if governed by Article* 115 *or* 120.

A suit by the Municipality to recover the balance of a sum agreed to be paid by the farmer, with whom the right to collect tolls in a market is settled at a specified sum, is governed by Article 115 of the Limitation Act.

* Civil Revision no. 295 of 1936, from an order of Maulavi Syed Ahmad, Small Cause Court Judge of Chaibassa, dated the 6th February, 1936.

Dip Narain Choudhury v. *The Additional District Magistrate*(1), *Venkata Gurunath Rama Seshayya* v. *Sri Tripurasundari Cotton Press*(2), *Lalji Singh* v. *Ramrup Singh*(3) and *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(4), referred to.

Application in revision by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

G. C. Mukherjee, for the petitioner.

R. S. Chatterji, for the opposite party.

FAZL ALI, J.—This is an application by the Chairman and the Commissioners of the Chaibassa Municipality whose suit for the recovery of Rs. 233-4-0 has been dismissed by the Small Cause Court Judge of Chaibassa.

It appears that in exercise of the powers conferred by the Bihar and Orissa Municipal Act, the Municipality established a market in Chaibassa and the right to collect the tolls in that market was settled with the defendant for the years 1931 and 1932 for a sum of Rs. 560. The defendant paid Rs. 326-12-0 out of this sum and so the Municipality brought the present suit to recover the balance, that is to say, Rs. 233-4-0. The suit was admittedly brought more than three years after the sum sought to be recovered had become due and thus a question arose in the court below whether Article 115 or Article 120 of the Limitation Act was the proper Article to be applied to the present case. It is clear that if the suit came under Article 115 which provides as the period of limitation a period of three years from the date when the cause of action in the suit covered by the Article arose, the suit was barred by limitation. On the other hand the limitation would be saved if the suit is held to fall under Article 120 of the Limitation Act which provides a

(1) (1933) A. I. R. (Pat.) 65.
(2) (1925) I. L. R. 49 Mad. 468, F. B.
(3) (1934) A. I. R. (Pat.) 148.
(4) (1916) I. L. R. 44 Cal. 750, P. C

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FAZL ALI, J.

period of six years from the date when the right to sue accrues. The learned Small Cause Court Judge being of the opinion that the suit was governed by Article 115 held that it was barred by limitation and dismissed the suit. The present application is directed against this decree of the learned Small Cause Court Judge.

Now, the learned Advocate for the appellant in pressing his contention that the view taken by the learned Small Cause Court Judge is not correct relied upon the following cases: (1) *Dip Narain Choudhry* v. *The Additional District Magistrate*(1); (2) *A. Venkata Gurunatha Rama Seshayya* v. *Sri Tripurasundari Cotton Press*(2); (3) *Lalji Singh* v. *Ramrup Singh*(3). In *Dip Narain Choudhry's* case(1) the suit had been instituted to recover certain taxes due to the Municipality and upon a discussion of the various provisions of the Municipal Act it was held that to a suit for the recovery of dues under section 130 of the Municipal Act, there being no other limitation provided for in the other Articles of the Schedule, Article 120 of the Limitation Act applied and the suit in question having been brought within six years of the date when the taxes became due, ought to be decreed. The learned Advocate for the appellant has referred us to sections 268, 275, 368 and 130 of the Municipal Act for the purpose of showing that the dues which are sought to be recovered in the present suit are covered by section 130 of the Municipal Act. It appears to me, however, that as no special period of limitation is provided in the Municipal Act for the recovery of dues under that Act, we have to fall back upon the Limitation Act and the question to be decided, therefore, is whether the present suit falls under any of the special Articles of the Limitation Act. If it does not fall under any of the special Articles it must be held to be governed by the residuary Article 120. Now, I have no doubt in my mind that

(1) (1933) A. I. R. (Pat.) 65.
(2) (1925) I. L. R. 49 Mad. 468, F. B.
(3) (1934) A. I. R. (Pat.) 148.

the Article which is applicable to the present suit is Article 115 of the Limitation Act. In *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(1) it was made clear by the Judicial Committee that the word " compensation " as used in the Indian Contract Act has been used in a very wide sense and Article 115 in that case was applied to a suit to recover royalty under a lease of certain land with the right to the coal therein. If the dues which are sought to be recovered from the defendant could have been described as rent, the appropriate Article would have been Article 110 but there is some authority for the view that such a due cannot be properly described as rent and therefore we have to fall back upon Article 115. There can be no doubt that the sum sought to be recovered was due to the plaintiff under a contract by which the defendant had bound himself to pay a certain amount annually and the present suit had to be brought by the plaintiff, because there had been a breach of this contract by the defendant. Article 115 has been made applicable to similar suits and I have no doubt that it is the appropriate Article to be applied to the present case also. The last two cases relied upon by the learned Advocate for the appellant do not appear to be of much assistance to us. In *A. Venkata Gurunatha's* case(2) a suit was brought by a shareholder against a company for recovery of the dividend and in *Lalji Singh's* case(3) the suit was brought to recover nazarana from a lessor who had failed to grant a lease. Whatever view may be taken with regard to these particular dues, it appears to me that the present case is covered by Article 115. I think, therefore, that the suit was rightly dismissed and this application must also be dismissed with costs. Hearing fee one gold mohur.

MADAN, J.—I agree.

Rule discharged.

J. K.

(1) (1916) I. L. R. 44 Cal. 759, P. C.
(2) (1925) I. L. R. 49 Mad. 468.
(3) (1934) A. I. R. (Pat.) 148.

Ov. Rul. 29 Pat. 1042.

LETTERS PATENT.

Before Courtney Terrell, C. J. and James, J.

1937.

February, 17.

FIRM DEDHRAJ LACHMINARAYAN

v.

BHAGWAN DAS.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182, *clauses* (2) *and* (3)—*" when there has been an appeal", meaning of—appeal from order made on an application for restoration under Order XLI, rule* 21, *Code of Civil Procedure, whether covered by Article* 182(2)—*application for restoration, whether is an application for review within the meaning of Article* 182(3).

Article 182 of the Limitation Act, 1908, provides a period of three years for the execution of a decree, the starting point being.....

" (2) where there has been an appeal, the date of the final decree or order of the appellate Court, or (3) where there has been a review of judgment, the date of the decision passed on the review."

Held, (*i*) that the words " where there has been an appeal " in clause (2) do not mean, in their strict grammatical construction, that the appeal must be against the decree in the suit; they include an appeal against an order made on an application for re-hearing under Order XLI, rule 21, Code of Civil Procedure, 1908;

(*ii*) that all cases in which the Court reconsiders its own judgment are cases of review within the meaning of clause (3) of Article 182, and, therefore, that an order made on an application for restoration under Order XLI, rule 21, Code of Civil Procedure, is an order passed on review within clause (3).

A suit for money was dismissed by the trial court on the 8th January, 1931. The plaintiff appealed and on the 7th of August, 1931, the appeal was allowed and the suit decreed ex parte. The defendant made an application for restoration under Order XLI, rule 21, Code of Civil Procedure, but this was dismissed by the Subordinate Judge on the 19th November, 1931. Thereupon the defendant appealed from the order of dismissal to the High Court but the appeal was

* Letters Patent Appeal no. 15 of 1936, from a decision of the Hon'ble Mr. Justice Dhavle, dated the 8th April, 1936.

dismissed on the 1st September, 1933. The application for execution was made on the 15th November, 1934.

Held, (*i*) that the application for execution was within time;

(*ii*) that if no appeal had been preferred from the order on the application for restoration, the date of the order of the Subordinate Judge (19th November, 1931) would have been the starting point for limitation under clause (*3*) of Article 182, but as an appeal from this order had been preferred the case came within clause (*2*) and the starting point for limitation was the date of the final order of the High Court dismissing the appeal.

Nagendra Nath Dey v. *Suresh Chandra Dey*(1) and *Nagappa Bandappa Kadadi* v. *Gurushantappa Shankrappa Umbargi*(2), followed.

Rai Brijraj v. *Nauratan Lal*(3), not followed.

Somar Singh v. *Deonandan Prasad Singh*(4), distinguished.

Appeal by the decree-holders, under clause 10 of the Letters Patent, from the following judgment of Dhavle, J.—

DHAVLE, J.—This is an appeal by the decree-holders, and it arises out of execution proceedings. The judgment-debtors contended that the execution case was barred by limitation; and this contention was rejected by the Munsif but allowed by the District Judge on appeal. The suit was tried in 1931 and was dismissed by the trial court on the 8th of January of that year. On the 7th of August following an appeal was allowed and the suit decreed *ex parte* by the lower appellate court. Upon this the defendants made an application under Order XLI, rule 21, on the 27th of August. On the 19th of November the application was rejected by the lower appellate court. Against this rejection there was an appeal to the High Court, which was dismissed on the 1st of September, 1933. The application of the decree-holders for execution was filed on the 15th of November, 1934, which is more than three years from the 7th of August, 1931, the date when the appeal was allowed and the suit itself decreed, and the question raised is whether the appeal against the rejection of the application under Order XLI, rule 21, which appeal was dismissed on the 1st of September, 1933, will provide the starting point for limitation for the execution. Article 182 of the Limitation Act provides a period of three years for the execution of such decrees, the starting point being (*1*) the date

(1) (1932) L. R. 59 Ind. App. 283.
(2) (1932) I. L. R. 57 Bom. 388.
(3) (1917) 3 Pat. L. J. 119.
(4) (1927) I. L. R. 6 Pat. 780.

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DHAVLE, J.

of the decree, or (?) " (where there has been an appeal) the date of the final decree or order of the Appellate Court." So far as the decree under execution is concerned there was no appeal. The proceedings under Order XLI, rule 21, which were brought up to this Court in appeal, are analogous to proceedings under Order IX, rule 13, in the case of decrees passed *ex parte* by the trial court; and there are several express decisions where it has been held that proceedings of that kind do not postpone the starting of limitation. In *Rai Brijraj* v. *Nauratan Lal*(1) it was held by Chamier, C.J. and Sharfuddin, J. that the words " where there has been an appeal " in article 182 of the Limitation Act mean ' where there has been an appeal against a decree in the suit ', and cannot be held to include an appeal against an order made on an application to set aside that decree. This decision is binding on me sitting singly. Not only is it in accordance with earlier decisions from Bombay and Madras as well as Calcutta, but it has been followed in the Calcutta High Court in such cases as *Fakir Chand Mandal* v. *Daiba Charan*(2) and *Profulla Kumar Basu* v. *Srimati Sorojbala Basu*(3). I do not think that anything said in *Somar Singh* v. *Deonandan Prasad Singh*(4) regarding the case of *Rai Brijraj* v. *Nauratan Lal*(1) has the effect of shaking the authority of that decision. The learned Advocate for the appellants has, however, relied on two Privy Council decisions in support of the contention that the view taken in this Court must be taken to be overruled. One of these decisions is *Nagendra Nath Dey* v. *Suresh Chandra Dey*(5). Sir Dinshaw Mulla, who delivered the opinion of the Judicial Committee in this case, pointed out that there is no definition of appeal in the Code of Civil Procedure, and added that " their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent." It is contended on behalf of the appellants that this observation covers the facts of the present case. I am unable to accept this. What their Lordships were dealing with at the time was an appeal which was irregular in form as not being an appeal against the decree of the Subordinate Judge but one against his judgment; and what they decided was to overrule the view taken in such cases as *Christiana Sens Law* v. *Benarashi Prosad Chowdhury*(6) that the appeal contemplated in article 182 of the Limitation Act must be an appeal in which the parties to the execution proceedings are directly interested and must be such as to imperil the integrity of the decree. Considerations of that kind do not arise here. What the appeal to the High Court imperilled was the order of the lower appellate court rejecting the application under Order XLI, rule 21, after it had allowed the appeal in the suit and decreed the suit *ex parte*, but it is not the rejection of that application or the appeal from that rejection that is under execution. The appeal to the High Court was not intended to set aside any decision of the subordinate court except

(1) (1917) 3 Pat. L. J. 119.
(2) (1927) I. L. R. 54 Cal. 1052.
(3) (1930) 35 Cal. W. N. 155.
(4) (1927) I. L. R. 6 Pat. 780.
(5) (1932) L. R. 59 Ind. App. 283.
(6) (1914) 19 Cal. W. N. 287.

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the rejection of the application under Order XLI, rule 21. The learned Advocate for the appellants has also relied on another observation in *Nagendra Nath's case*(1) that " It is at least an intelligible rule that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage." But the only question that could be considered to be *sub judice* between the parties while their appeal in the High Court was pending was not the decree under execution, but whether the appellants to the High Court had been duly served with notice of the appeal, in the lower court or had been prevented by sufficient cause from appearing when that appeal was called on for hearing. The observation of their Lordships of the Judicial Committee must, I think, be taken with the facts of the case before them, and does not seem to cast any doubt on the uniform current of decisions not only in this High Court but in all the other High Courts of the country as far as I am aware with the sole exception of *Lutful Huq* v. *Sumbhudin Pattuck*(2), a case which has been repeatedly dissented from. The other case referred to by the learned Advocate for the appellants in *Hussain Asghar Ali* v. *Ramditta Mal*(3). The facts of that case and the point for decision in that case are entirely different from anything we have before us. But the learned Advocate has relied on Sir George Lowndes's observation that " Their Lordships think that, when an order is judicially made by an appellate court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Article 182(2) of the Act of 1908." This was said with reference to an order of abatement, the question for decision being whether such an order was a judicial order so as to come within the Article. The order of the High Court dismissing the appeal on the 1st of September, 1933, was unquestionably a final order in the miscellaneous case which was based on the defendants' application under Order XLI, rule 21, but I am unable to see anything in the case of *Hussain Asghar Ali* v. *Ramditta Mal*(3) which has any bearing on the question whether the appellate order in the proceeding under Order XLI, rule 21, will operate to postpone the starting of limitation for the execution of the decree of the lower appellate court which was passed on the 7th of August, 1931, and which is now under execution. It is impossible to read the decision of the Privy Council as shaking the authority of *Rai Brijraj* v. *Nauratan Lal*(4) which, as already said, is binding on me sitting singly, and which, if I may say so with all respect, expresses the law correctly.

In my opinion the view of the lower appellate court that the execution case is barred by limitation is correct. The appeal fails and is dismissed with costs.

Leave to appeal is given.

On this appeal.

S. N. Bose, for the appellant.

S. N. Ray, for the respondents.

(1) (1932) L. R. 59 Ind. Ap. 283.
(2) (1881) I. L. R. 8 Cal. 248.
(3) (1932) I. L. R. 60 Cal. 662, P. C.
(4) (1917) 3 Pat. L. J. 119.

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COURTNEY TERRELL, C. J.—The suit out of which this Letters Patent Appeal arises was a money claim which was dismissed by the trial court on the 8th January, 1931. The plaintiff appealed and on the 7th August, 1931, the appeal was allowed and the suit decreed ex parte against the defendant. The defendant made an application for restoration under Order XLI, rule 21, but this was dismissed on the 19th November, 1931. The defendant appealed from the order of dismissal to the High Court but the appeal was dismissed on the 1st September, 1933. The present application for execution was made on the 15th November, 1934. The judgment-debtors contended that the execution case was barred by limitation. This contention was rejected by the Munsif but allowed by the District Judge on appeal. A second appeal by the decree-holder was allowed by the learned Judge of this Court and the question to be decided by us is whether the execution proceedings are or are not barred by limitation, having been begun more than three years from the decree of the 7th August, 1931. The matter depends upon the construction of Article 182, clauses (*2*) and (*3*) of the Limitation Act; and it is contended on behalf of the decree-holder appellant that the case comes either under clause (*2*) or under clause (*3*). These clauses are as follows:—

"2. Where there has been an appeal, the date of the final decree or order of the Appellate Court, or withdrawal of the appeal, or

3. Where there has been a review of judgment, the date of the decision passed on the review."

In support of this contention it is urged on the one hand that the dismissal on the 1st September, 1933, of the Miscellaneous appeal to the High Court is within the meaning of clause (*2*), and even if this argument be not justified that the dismissal on the 19th November, 1931, of the application by the judgment-debtor for restoration of the appeal comes within the meaning of clause (*3*); in either event the application for execution is within time.

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As to the first argument it is contended on behalf of the judgment-debtor that the word 'appeal' in clause (2) refers to an appeal from the decree in the suit and to nothing else; and the decision in *Rai Brij Raj* v. *Nawratan Lal*(1) has been relied upon. The learned Judge of this Court held that this decision was binding upon him. The argument of the appellant before the learned Judge and before us was that the decision must be taken to have been impliedly overruled by their Lordships of the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*(2). In that case one Madan Mohan sued in the court of the Subordinate Judge to enforce a mortgage. The plaintiff claimed that the appellants (before the Privy Council) who were defendants 11 and 12 in the suit had assigned their interest in the mortgage to him. The Subordinate Judge upheld this claim and declared the liability of these defendants to pay a sum of Rs. 4,000 which they brought into court. On appeal to the High Court a compromise was effected between the parties and a new preliminary decree was passed in terms of the compromise. Madan Mohan's claim against the appellant was disregarded and the appellants were shown as mortgagee creditors for Rs. 14,000, whereupon they applied to the Subordinate Judge for the withdrawal of the Rs. 4,000 they had brought into court. This was allowed. Madan Mohan opposed this application but his contention was overruled. He appealed to the High Court but the appeal was dismissed. The decree by consent in the High Court divided the parties into one of decree-holders and the other of judgment-debtors. Two of the judgment-debtors paid the amount due from them under the decree. Madan Mohan who belonged to the group of decree-holders applied to the Subordinate Judge for a final mortgage decree, claiming again that defendants 11 and 12, who were grouped with him as decree-holders had assigned their interest to him.

(1) (1917) 3 Pat. L. J. 119.
(2) (1932) L. R. 59 Ind. App. 283.

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This was disallowed by the Subordinate Judge and a final decree was passed on the 24th June, 1920, and declared that in conformity with the judgment defendants 11 and 12 were entitled to payment of the said sum of Rs. 14,000. On August 27, 1920, Madan Mohan appealed to the High Court and joined as parties to the appeal only the other decree-holders and not the judgment-debtors and his appeal was insufficiently stamped. It was nevertheless heard by the High Court and was dismissed upon the merits and also on the ground of irregularity on account of the insufficient stamp. The judgment of the High Court to this effect was dated August 24th, 1922, and the question before their Lordships was as to the effect of this judgment. The application for execution by sale of the mortgaged properties was dated October 3rd, 1923. The respondents before the Privy Council contended that the date of the decree of the Subordinate Judge, that is to say, June 24th, 1920, was the proper starting time and that the application for execution was out of time. The appellant contended that the critical date was the decree of the High Court of August 24th, 1922, dismissing the appeal on the ground of irregularity and upon the merits. It was urged that the appeal by reason of its irregularity was not an appeal at all and also that to come within clause (*2*) of Article 182 the appeal must be one in which the whole decree was imperilled. Their Lordships referred to the difference of opinion in India and said that nothing would be gained by discussing them in detail. They said that the question must be decided upon the plain words of the Article "where there has been an appeal" and stated—

> "There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently

result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub-judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

In applying that principle to the case before us we find that there was in fact an appeal to the High Court in the matter of the judgment-debtor's application for restoration. Had the judgment-debtor been able to shew that he had good grounds for not being present when the suit was decreed ex parte, the Subordinate Judge would have set aside the original ex parte decree and would have heard the case on its merits after hearing the judgment-debtor. That is to say, the original decree was by the application for restoration put in peril. Similarly until the appeal of the judgment-debtor to the High Court from the Subordinate Judge's decision was decided, the suit was still in peril. Clause (*2*) of Article 182 does not state, in its strict grammatical construction, that the appeal must be against the decree in the suit. These are words which we are asked to read into the Article by implication and I see no ground in principle for so reading them. In conformity with the Privy Council decision that the matter must be decided on the plain words of the Article and applying the principle of the rule stated by the Privy Council so as to make it intelligible, the order of the appellate court of the 1st September, 1933, should be held the proper date from which the period of limitation should start. In my opinion the contention of the appellants is correct and the case reported as *Rai Brijraj* v. *Nauratan*[1] must be considered as overruled. This view of the matter was followed in

(1) (1917) 3 Pat. L. J. 119.

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Nagappa Bandappa Kadadi v. *Gurushantappa Shankrappa Umbargi*(1) the facts of which may be simply related.

Under a decree dated December 14th, 1925, Revanshidappa and Sidramappa become entitled to recover a sum of money from Gurushantappa. On April 6th, 1926, Sidramappa preferred an appeal against the decree. Meanwhile on March 6th, 1926, Gurushantappa had applied for a review of the decree. This was allowed on July 15th, 1926, and as a result of the rehearing on the same date and by the same judgment the amount under the decree was reduced. Revanshidappa and Sidramappa then preferred an appeal against the order granting the review but they presented no appeal against the decree of July 15th, 1926. On October 29th both the appeals were dismissed as incompetent. Revanshidappa and Sidramappa assigned their rights to Nagappa who applied on September 2nd, 1929, for transfer of the decree to another court for execution. It was contended by Gurushantappa that the application was barred, not having been filed within three years from July 15th, 1926. It was held that the application for execution was in time as time began to run from October 29th, 1928, the date of the dismissal of the appellate decree from the order granting the review; and in view of the Privy Council decision the Court refused to accept the contention that the appeal mentioned in Article 182, clause (2) must be an appeal from the original decree.

I agree with the learned Judge of this Court in his opinion that the case of *Somar Singh* v. *Deonandan Prasad Singh*(2) does not really cover the point. In that case an appeal to the High Court had been lodged from a preliminary decree in a mortgage suit but not from the final decree which was sought to be executed. In that case, however, the preliminary decree determined the rights of the parties in the suit and the

(1) (1932) I. L. R. 57 Bom. 388.
(2) (1927) I. L. R. 6 Pat. 780.

appeal from that decree would in any case be properly regarded as within clause (*2*) of Article 182. The real distinction between clauses (*2*) and (*3*) of Article 182 is, in my opinion, really one of the particular tribunal which passes the order by which the original decree is imperilled. If the order is made by the appellate court, then the period of limitation under Article 182, clause (*2*) runs from the date of the appellate order. If on the other hand the order imperilling the decree is made by the original court which passed it then the date from which the limitation runs is the order of the original court.

Now there is no essential difference between orders for restoration and orders for review. Notwithstanding the heading in Order XLVII, the matters dealt with in that Order are reviews for which applications are made on certain specified grounds and it is true that in common parlance the term ' review ' is used for applications based upon the grounds specified in that Order. No court, having once passed a judgment, can alter the terms of that judgment save upon certain specified grounds and one of those grounds is dealt with under the term ' restoration '. In both cases, however, the court has first to decide whether on the ground specified it is justified in law in reconsidering its own decision and it either allows or refuses the application for reconsideration. In some cases after the decision to reconsider it may be necessary at a subsequent and separate hearing to deal with the fresh case on its merits. In some cases the matter is dealt with at the same hearing and in one judgment the court decides, first, whether the case should be reconsidered and, secondly, the result of its reconsideration. But all cases in which the court reconsiders its own judgment are cases of review within the meaning of clause (*3*) of Article 182 of the Limitation Act. Applications for restoration and applications for review (using the word in the narrower sense) are it is true separately dealt with in the Orders appended to the Civil Procedure Code. These are mere

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questions of procedure and may be altered by any particular High Court; but the entire jurisdiction of any court to interfere with its own decision once given is derived from section 114 of the Code itself where the single word " review " is used. Therefore, in my opinion, if no appeal had been preferred from the order on the application for restoration by the Subordinate Judge the date of his order would have been the starting point for limitation under clause (*3*) of Article 182, but as an appeal from this order was preferred, the start of limitation is the date of the order of the appellate court.

With great respect, therefore, for the careful judgment of the learned Judge of this Court I am of opinion that it was erroneous and the appeal under the Letters Patent should be allowed with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

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February, 18.

Before Agarwala and Madan, JJ.

GHASIRAM MARWARI

v.

RAJA SHIBA PRASAD SINGH.*

Execution—minor judgment-debtor described as major in execution petition—guardian ad litem appointed after expiry of limitation—execution, whether barred—Order-in-Council passed against a dead person, whether is a nullity—order for execution after issue of notice—execution proceeded against all the judgment-debtors—no separate order against

*Appeals from Original Orders nos. 359 of 1935 and 10 of 1936, from the orders of Babu Kishun Prasad, Subordinate Judge of Manbhum, dated the 13th November, 1935.

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minor judgment-debtor—decree, whether revives against all—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 183 *—homestead land not forming part of agricultural holding, whether exempt from sale—Chota Nagpur Tenancy Act*, 1908 (*Beng. Act VI of* 1908), *section* 47.

An Order-in-Council does not become a nullity merely because it is passed against a dead person.

Sri Chandra Chur Deo v. *Musammat Shyam Kumari*(1), followed.

An execution is not necessarily barred merely because one of the judgment-debtors is not described as a minor in the execution petition and the guardian ad litem is not appointed till after the period of limitation. The subsequent appointment of a guardian ad litem does not amount to the addition of a new party to the suit or proceeding which must be deemed to have been instituted against the minor on the date on which it was filed.

Khem Karan v. *Har Dayal*(2), *Rup Chand* v. *Dasodha*(3), *Talib Ali Shah* v. *Piarey Lal*(4) and *Peary Mohan Mukherjee* v. *Narendra Nath Mukherjee*(5), followed.

Where there was an order for execution after the issue of notice under Order XXI, rule 22, Code of Civil Procedure, 1908, and the execution did in fact proceed against all the judgment-debtors named in the execution petition and a portion of the decretal amount was realised, *held*, that there was a revivor of the decree against all the judgment-debtors named in the petition, within the meaning of Article 183 of the Limitation Act, 1908, although the court had not passed a separate order dealing with the case of the minor judgment-debtor.

James Russel McLaren v. *Veeriah Naidu*(6) and *V. Krishnaiyah* v. *C. Gajendra Naidu*(7), distinguished.

Parcels of land which do not form part of an agricultural holding but are either homestead land or form part of the

(1) (1931) I. L. R. 11 Pat. 445.
(2) (1881) I. L. R. 4 All. 37.
(3) (1907) I. L. R. 30 All. 55.
(4) (1930) I. L. R. 52 All. 924.
(5) (1915) I. L. R. 32 Cal. 582.
(6) (1915) I. L. R. 38 Mad. 1102.
(7) (1917) I. L. R. 40 Mad. 1127.

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compound of a house do not come within the purview of section 47 of the Chota Nagpur Tenancy Act, 1908.

Bama Charan Gorain v. *Gobindaram Marwari*(1), followed.

Appeals by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Madan, J.

B. C. De and *M. K. Mukharjee*, for the appellants.

S. N. Bose and *N. N. Roy*, for the respondent.

MADAN, J.—These two appeals by Bhagirath Marwari and his minor brother Ghasiram Marwari relate to the execution of a Privy Council decree for costs passed against Sheochand Marwari and others on the 24th February, 1919. The appellants who belong to a Hindu Mitakshara family are the sons of Sheochand who died on the 1st January, 1919. The decree-holder took out execution of the decree on the 7th February, 1931, within the statutory period of twelve years, and realised part of the decretal amount. The present execution was taken out for the balance of the decree in the year 1934, and objections filed by both the appellants were disallowed by the lower court and have again been urged before us. Mr. De for the appellants contended that the Privy Council decree was a nullity against Sheochand as he died during the pendency of the appeal and there was no substitution of his heirs. According to Bentwich's Privy Council Practice, second edition, page 234, a Privy Council appeal abates on the death of one of the parties and revives on his heir being substituted according to the law of the country from which the appeal comes. We were also referred to the case of *Jai Berhma* v. *Kedar Nath Marwari*(2) where their Lordships, having been informed before judgment that one of the respondents had died and his heirs had

(1) (1935) A. I. R. (Pat.) 105.
(2) (1922) I. L. R. 2 Pat. 10, P. C.

not been substituted, directed that the order passed should be without prejudice to the rights of that respondent or of his heirs. The case, however, is different where a Privy Council decree has actually been passed against a dead person. Such cases are governed by section 23 of Acts III and IV of *William IV* which runs as follows:—

"And be it enacted that in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein: but that in all cases where any such appeal may have been withdrawn or discontinued or any compromise made in respect of the matter in dispute, before the hearing thereof, then the determination of His Majesty in Council in respect of such appeal shall have no effect."

The decree against Sheochand was, therefore, not a nullity and under section 53 of the Civil Procedure Code it can be realised from the property of the deceased which came into the hands of his sons [*Sri Chandra Chur Deo v. Musammat Shyam Kumari*(1)]. This objection must, therefore, fail.

Mr. De next argued that the executions of both the years 1931 and 1934 were barred against the minor appellant. The execution of 1931 was taken out against both appellants, but Ghasiram was not described as a minor in the execution petition. On objection by Bhagirath filed on the 27th June, 1931, Ghasiram was described as a minor, and a guardian ad litem was appointed on the 22nd July, 1931, which was beyond twelve years from the date of the decree. It is therefore contended that the execution against the minor appellant had become barred. A similar point arose in *Khem Karan* v. *Har Dayal*(2) where a plaint was presented against two persons in ignorance of the fact that they were minors. It was held that a suit might be brought against a minor before a guardian was appointed, and that limitation counted from the date of the plaint and not from the appointment of the guardian. In *Rup Chand* v. *Dasodha*(3)

(1) (1931) I. L. R. 11 Pat. 445.
(2) (1881) I. L. R. 4 All. 37.
(3) (1907) I. L. R. 30 All. 55.

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it was held that failure to make a guardian ad litem a party to an appeal within the period of limitation was immaterial. It was pointed out that the guardian ad litem was not really a party to the appeal, but that he was merely named on the record as the person responsible for looking after the affairs of the minor. *Talib Ali Shah* v. *Piarey Lal*(1) is a case where a suit was restored after it had been discovered in execution that an ex parte decree had been passed against a minor described as a major. It was held that the subsequent appointment of a guardian ad litem did not amount to the addition of a new party to the suit which must be deemed to have been instituted against the minor on the date on which it was filed. The same principle was approved by the Calcutta High Court in *Peary Mohan Mukherjee* v. *Narendra Nath Mukherjee*(2). Under the Civil Procedure Code procedure in execution is intended to be less rather than more formal than in a suit, and it is clear that the execution was not barred merely because Ghasiram was not described as a minor in the execution petition and the guardian ad litem was not appointed till after the expiry of the period of limitation. This objection must also fail.

As regards the present execution the argument is that it is barred against the minor appellant as the former execution did not have the effect of reviving the decree against the minor within the meaning of Article 183. A revivor of a decree is effected by an order for execution after issue of notice under Order XXI, rule 22, and the ordersheet in this case shows that on the same day when the guardian was appointed the court ordered him to be served with a notice which must according to the normal procedure have been a notice under Order XXI, rule 22. There is nothing to show that any objection was filed by the guardian on receipt of the notice, nor has any reason been suggested why the decree should not have been revived

(1) (1930) I. L. R. 52 All. 924.
(2) (1915) I. L. R. 32 Cal. 582.

against the minor. The execution did in fact proceed against the judgment-debtors named in the execution petition and a sum of more than Rs. 5,000 was realised. In the circumstances it was not necessary for the court, as was contended by Mr. De before us, to pass a separate order dealing with the case of the minor judgment-debtor, and the decree must have been held to have revived against all the judgment-debtors against whom execution was taken out. Mr. De referred us to *James Russel McLaren* v. *Veeriah Naidu*(1) and *V. Krishnaiyah* v. *C. Gajendra Naidu*(2) where it was held that a decree does not revive against a judgment-debtor against whom the execution was not taken out. These cases are clearly different from the present case. This objection regarding the present execution was not raised before the lower court, and it also must fail.

The next argument was that the appeal to the Privy Council having been based on a wrong view of the law was in the nature of a gamble in litigation, and that the decree for costs was therefore not binding on the appellants even under their pious obligation to pay the debts of their father not contracted for illegal and immoral purposes. In *Ram Chandra Singh* v. *Jang Bahadur Singh*(3) it was held by this Court that it is not within the power of a karta to bind the joint family by entering into speculative transactions. In that case the suit was dismissed against all the defendants including the sons of the karta, but the question of the sons' separate obligation to pay off their father's debts was not dealt with in the judgment and does not appear to have been specifically raised. And apart from this, this whole argument of the appellants must fail if only because the appeal to the Privy Council did in part succeed, the case being remanded for hearing against some of the defendants.

(1) (1915) I. L. R. 38 Mad. 1102.
(2) (1917) I. L. R. 40 Mad. 1127.
(3) (1925) I. L. R. 5 Pat. 198.

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Lastly it was contended that the properties scheduled in the execution petition are exempted from sale under the provisions of section 47 of the Chota Nagpur Tenancy Act. The schedule comprises five pieces of land situated in the village in which the appellants reside. Four of these pieces of land are small areas containing pucka houses belonging to the appellants, and the fifth is a *bari* or homestead land surrounded by a wall and valued at Rs. 150. Section 47 provides that no order shall be passed by any court for the sale of the right of a raiyat in his holding, and a raiyat is defined in the Act as primarily a person who has acquired a right to hold land for the purpose of cultivating it. In this case it is admitted that the land was purchased by the appellants' ancestors who built the houses and had come to the village for doing business in cloth and grocery. There is no evidence worth considering to show that the appellants' family also acquired agricultural lands or that they depend for any appreciable portion of their livelihood on agriculture. In the survey khatian one of the plots containing a pucka house is described as raiyati, and as has already been stated one of the plots described in the schedule is a *bari*, but there is no evidence that these plots form part of an agricultural holding. In *Bama Charan Gorain* v. *Gobindaram Marwari*(1) one out of three plots was described as raiyati in the execution petition, but was held to be liable to be sold on the ground that land which is merely part of the compound of a house and shop does not come within the purview of the provisions of the Chota Nagpur Tenancy Act. This ruling is applicable to the present case, and it follows that this objection also cannot be sustained, and in fact it was given up in the lower court. These appeals must, therefore, fail and are dismissed with costs.

AGARWALA, J.—I agree.

S. A. K. *Appeal dismissed.*

(1) (1935) A. I. R. (Pat.) 105.

REVISIONAL CRIMINAL.

Before Agarwala and Varma, JJ.

MANI RAM

1937.

February, 21.

v.

KING-EMPEROR.*

Bihar and Orissa Mica Act, 1930 (*Bihar and Orissa Act* 1 *of* 1930), *sections* 17(2)(*a*) *and* 24—*conviction under section* 17(2) (*a*)—*excess amount of mica, whether can be confiscated* —*section* 24—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 517, *whether applicable—mica, whether is property* " *regarding which any offence appears to have been committed* ".

Section 17(2) (*a*) of the Bihar and Orissa Mica Act, 1930, provides :—

" Any licensee or registered proprietor who fails to keep any account required to be kept by section 10 or keeps an account which does not contain the particulars required by the said section or which is false in any material particular shall on conviction by a Magistrate of the first class be punishable with fine which may extend to five hundred rupees."

Held, that where the conviction of the accused is under section 17 (2) (*a*) of the Act for not keeping proper accounts and possessing crude mica not entered in the stock book, the excess mica cannot be confiscated under the provisions of section 24 of the Act which do not relate to an offence punishable under section 17(2) (*a*).

Held, *further*, that the excess mica could not be confiscated under section 517, Code of Criminal Procedure, 1898, as it was not a property " regarding which any offence appears to have been committed " within the meaning of the section.

Lakshmi Narayan Dutt v. *Inspector Ureagan*(1), *Abinash Chandra Bhattacharjee* v. *Emperor*(2), *Govindaraja Padayachi* v. *Emperor* (3) and *Emperor* v. *Elahi Bux*(4), followed.

*Criminal Revision no. 619 of 1936, from an order of N. N. Ray, Esq., Deputy Commissioner of Hazaribagh, dated the 19th August, 1936, reversing an order of P. N. Mazumdar, Esq., Subdivisional Officer of Giridih, dated the 7th May, 1936.

(1) (1905) 9 Cal. W. N. 597.
(2) (1907) I. L. R. 34 Cal. 986.
(3) (1915) 31 Ind. Cas. 827.
(4) (1903) 1 Cr. L. J. 38.

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Philip Spratt v. *Emperor*(1), not followed.

Shaik Dawood v. *Velayuda Semmanotti*(2), distinguished.

The facts of the case material to this report are set out in the judgment of Varma, J.

Baldeo Sahay, for the petitioners.

Assistant Government Advocate, for the Crown.

VARMA, J.—This is a petition against an order of confiscation of a certain amount of mica under section 517 of the Criminal Procedure Code. The petitioners Mani Ram and Babulall Ram of village Chandowari, police-station Ganwan, district Hazaribagh are holders of mica miner's license no. 45(G) on Jharnapahari mine. On the 14th of November, 1935, the Inspector of Mica Accounts visited their godown and on verification of the stock of mica kept therein found that 2 maunds and 6 seers of crude mica had not been entered in the stock book but had been kept in a separate room not ordinarily used for storing mica. He seized the 2 maunds and 6 seers of mica and on the basis of his report the licensees were prosecuted under section 17(*2*)(*a*) of the Bihar and Orissa Mica Act. They pleaded guilty and were sentenced to pay a fine of Rs. 90 each or in default to suffer one month's simple imprisonment by the Subdivisional Officer of Giridih. After the disposal of the case the licensees asked for the return of the mica which had been taken into custody but there was opposition by the Inspector of Mica Accounts who asked for its confiscation. The learned Subdivisional Officer ordered the mica to be returned holding that he had no right to confiscate it under any provision of the Mica Act. The Inspector of Mica Accounts then asked for a review of the said order. The learned Subdivisional Officer sent the matter to the Deputy Commissioner of Hazaribagh as he felt he could not review his own order. The learned Deputy Commissioner then passed the order against which the petitioners have moved this Court.

(1) (1933) 151 Ind. Cas. 735.
(2) (1927) I. L. R. 51 Mad. 606.

The petition of complaint filed by the Inspector of Mica Accounts, dated the 3rd of February, 1936, requested the Subdivisional Officer of Giridih to summon the petitioners under section 17(2)(a) of the Mica Act to take their trial according to law. Along with the petition of complaint a copy of the inspection note of the Inspector of Mica Accounts was also attached.

The learned Deputy Commissioner while dealing with the question whether the mica in question could be dealt with under section 517 of the Criminal Procedure Code says—

"In my opinion the learned Subdivisional Magistrate was wrong in holding that the mica seized by the Inspector of Mica Accounts could be dealt with only under the Bihar and Orissa Mica Act. Section 517, Criminal Procedure Code, refers to the disposal of property regarding which any offence has been committed and certainly applies to the present case which is covered by the phrase "regarding which any offence appears to have been committed" occurring in section 517, Criminal Procedure Code. One of the methods of disposal in section 517, Criminal Procedure Code is confiscation. The mica in question can therefore be confiscated under that section."

The questions that we have to consider in this case are, first, whether the mica confiscated was a property regarding which any offence appears to have been committed when the complaint was under section 17(2)(a) and the conviction was also under that section, and secondly, whether it was a fit case in which confiscation should be ordered. Section 17(2)(a) of the Mica Act runs as follows:—

"Any licensee or registered proprietor who fails to keep any account required to be kept by section 10 or keeps an account which does not contain the particulars required by the said section or which is false in any material particular shall on conviction by a Magistrate of the first class be punishable with fine which may extend to five hundred rupees."

In order to understand the nature of the complaint made one will have to refer to the report of the Inspector of Mica Accounts who incorporated his report as a part of his complaint. From the examination of the accused it appears that a reference to this report was made because the learned Magistrate who examined the accused put the following question.

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The question was " Do you accept the statement contained in the report of the Inspector ". It also appears that his chief complaint was that the accounts were not properly kept and he gives various instances in which sometimes the stock in the godown was less than what was shown in the accounts and sometimes it was in excess. The report is dated the 14th of November, 1935. On that date he found—

	Quantity as per Stock book.	Quantity actually found in the godown.
	M. S. Ch.	M. S. Ch.
Crude Mica	14 34 12	17 0 12
Cut mica (slabs) ...	3 35 12	3 36 0

On the 29th of September, 1935, according to the report of the Inspector, the closing balance of crude mica should have come to 29 mds. 4 seers instead of 27 mds. 4 seers as had been noted in the stock book.

On the 1st October, 1935, the closing balance of crude mica should have come to 33 mds. 21 seers and 8 chs. instead of 33 mds. 31 seers and 8 chs. as noted in the stock book.

On the 15th October, 1935, the closing balance should have come to 13 mds. 13 seers instead of 19 mds. 33 seers noted in the stock book.

On the 2nd November, 1935, the closing balance should have been 36 mds. 28 seers only instead of 36 mds. 38 seers as shown in the accounts.

In the case of cut mica again, the balance on the 24th October, 1935, was noted at 9 mds. 36 seers and 14 chs. The balance should have come to 9 mds. 26 seers and 14 chs.

The Inspector of Mica Accounts giving these examples along with the example which is the subject matter of the present case, found on the date of inspection an excess of 2 mds. 6 seers of crude mica.

From this it is clear that the complaint of the Inspector of Mica Accounts was chiefly under section 17(2)(a) of the Mica Act with regard to the wrong entry of accounts.

Sections 23 and 24 of the Mica Act are the relevant sections which deal with the seizure, detention and search of mica by any officer authorised in this behalf by the local Government. They are as follows:—

Section 23—

"(1) Any officer authorized in this behalf by the Local Government may seize any mica which is removed from any place mentioned in sub-section (1) of section 14 by a person who does not carry a pass as required by that sub-section or who does not produce such pass when required to do so, and may detain such mica at the nearest police-station until the ownership thereof is established to the satisfaction of any Magistrate authorised in this behalf by the District Magistrate.

(2) If the ownership of such mica is disputed or if the ownership thereof is not established to the satisfaction of the Magistrate, he shall refer the matter to the District Magistrate. If any claim made to the ownership of such mica is rejected by the District Magistrate or if no claim is made within one month from the date of detention, the mica shall be forfeited to Government:

Provided that when any such claim is rejected, the claimant may, within three months of the order rejecting the claim, apply to the Civil Court to set aside such order and the Court, if satisfied that such claimant is the owner of the mica, shall make an order for the delivery thereof to him."

Section 24—

"(1) Whenever any officer authorized in this behalf by the Local Government has reason to believe that an offence punishable under clause (a), (b), (c) or (d) of section (1), or clause (b) of sub-section (4), of section 17, or sub-section (1) of section 18 has been or is being committed in respect of any mica and that such mica is to be found in any building or place, and that a search warrant cannot be obtained without affording the offender an opportunity of concealing or removing such mica, he may, after recording the grounds of his belief, at any time by day or night, enter and search such building or place and seize any mica found therein, in respect of which he has reason to believe that any offence referred to in this sub-section has been or is being committed:

Provided that no police officer whose rank is lower than that of an Inspector of Police shall be authorized to exercise the powers conferred by this section.

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(2) Every officer seizing any mica under this section shall—

(a) prepare a list of the mica so seized and deliver a copy thereof signed by him to the person found in possession of such mica,

(b) enclose the mica seized in a package and place on such package a mark indicating that the mica therein contained has been seized, and

(c) as soon as may be after such seizure, make a report thereof to the Magistrate having jurisdiction to try the offence on account of which such seizure has been made.

(3) Upon receipt of any such report the Magistrate shall with all convenient despatch take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

The power of seizure and search referred to in section 24 of the Mica Act relates to offences punishable under clauses (*a*), (*b*), (*c*) or (*d*) of sub-section (*1*), or clause (*b*) of sub-section (*4*), of section 17, or sub-section (*1*) of section 18. Neither of these two sections refer to section 17(*2*)(*a*). From a perusal of section 17(*1*) and the relevant sub-sections it appears that section 17(*1*) deals with cases in which persons are held liable for being in possession of mica or for selling mica without proper authority. It is also clear that these sub-sections do not apply to an offence committed under section 17(*2*)(*a*). Now the question is whether section 520 read with section 517 of the Criminal Procedure Code can be utilised for the purpose of confiscating the mica found in the possession of a person holding a proprietor's license in excess of the amount shown in his account book.

Mr. Baldeo Sahay appearing on behalf of the petitioners urges that section 517 of the Criminal Procedure Code does not apply inasmuch as the origin of possession in this case was not unlawful, and secondly, that even if it did, it was not a case in which confiscation should have been ordered. Section 517 of the Criminal Procedure Code refers to any property or document produced before a court or in its custody or regarding which any offence appears to have been committed or which has been used for

the commission of any offence. An offence has been defined in the Criminal Procedure Code as any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871 (Section 4, clause (*o*), of the Criminal Procedure Code). Therefore, if the other conditions are satisfied, I see no objection to steps being taken under section 517 of the Criminal Procedure Code. Mr. Baldeo Sahay then refers to various instances in which orders under section 517 were held to be invalid. In the case of *Lakshmi Narayan Dutt* v. *Inspector Ureagan*(1) the accused was convicted under section 182 of the Indian Penal Code for having given false information charging one *B* with the theft of some ornaments. The ornaments had been found upon search in the accused's own premises. Whilst convicting the accused the Magistrate passed an order confiscating the ornaments. This order was set aside by the High Court and in course of their judgment their Lordships observed that the object of the section is to enable the Magistrate to direct property to be given to some person to whom it appears to belong or to allow it to continue in the possession of the person in whose possession it was found or to make some order of that character. In the case of *Abinash Chandra Bhattacharjee* v. *Emperor*(2) it was held that a printing press could not be said to have been used for the commission of the offence of sedition inasmuch as the offence was in the publication and not printing, the press being a remote instrument. In this case the prosecution alleged that the press was used for the publication of seditious matters. In the case of *Govindaraja Padayachi* v. *Emperor*(3) a habitual

(1) (1905) 9 Cal. W. N. 597.

(2) (1907) I. L. R. 34 Cal. 986.

(3) (1915) 31 Ind. Cas. 827.

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thief was found to be in possession of some property which he claimed to be his own and the Magistrate ordered the confiscation of the property. Their Lordships of the Madras High Court held that as there was no finding that an offence had been committed or that it appeared from the record that an offence had been committed with respect to the property, the order of the Magistrate was wrong.

The learned Assistant Government Advocate appearing on behalf of the Crown urges that under section 17, clause (*4*), of the Mica Act the Inspector of Mica Accounts has authority to seize the mica and after seizure, if it was produced before the court or was in the custody of the court, the court could pass any order it thought fit. On that point, I am afraid, the materials on record are inconclusive. The mica was no doubt seized by the Inspector of Mica Accounts but the order-sheet does not show that it was made a material exhibit in the case and it could not have been so because no evidence was led in the case. The only material upon which the learned Assistant Government Advocate relies is an application on behalf of Mani Ram and Babulal Ram, dated the 15th of April, 1936, where they alleged that 2 maunds and 6 seers of crude mica was seized and " is in custody ". This expression may mean that it was in the custody of the Inspector of Accounts, but the more important argument advanced by the Assistant Government Advocate is that the 2 maunds and 6 seers of mica was a property in regard to which an offence under section 17(*2*)(*a*) of the Mica Act was committed because, he says, if this excess quantity was not there the account could not have been found to be false or wrong. But from the wording of section 17(*2*)(*a*) it is clear that the offence it deals with is the offence of keeping wrong accounts and from the report of the Inspector of Mica Accounts it also appears that sometimes the account showed the mica to be in excess of the amount entered and sometimes to be less than the amount entered

So it is clear that an offence under section 17(2)(a) when committed is in respect to the account book and not in respect to the excess of mica found. He has referred to two or three cases. In *Shaik Dawood* v. *Velayuda Semmanotti*(1) their Lordships of the Madras High Court held that property regarding which an offence had been committed included within its meaning movable property regarding the possession of which a quarrel or a fight is begun whatever may be the offence that might ultimately be committed in the course of the quarrel or the fight. Here the quarrel was with regard to some boats and nets and it was with regard to this property that the offence had been committed. There is no difficulty in understanding that case. In *Philip Spratt* v. *Emperor*(2) certain books belonging to the accused, who were convicted under section 121-A of the Indian Penal Code, were seized from their possession as they supplied materials for writing articles which came under the purview of section 121-A of the Indian Penal Code. In the course of the judgment it was observed, " It is obvious that these works would be works which would supply the material on which the accused could write the articles on Russia which are among the activities of which he had been found guilty." It appears to me that this decision has gone a little beyond what is contemplated in section 517 of the Criminal Procedure Code. Instances may be cited in which the courts have held that certain property was a property with regard to which an offence was committed and there were such with regard to which an offence was not committed. Just to have one more example I refer to the case of *Emperor* v. *Elahi Bux*(3) where the pony, harness and cart of the accused who was convicted under section 279 of the Indian Penal Code were held to be property which could not be dealt with under section 517 of the Criminal Procedure Code.

(1) (1927) I. L. R. 51 Mad. 606.
(2) (1933) 151 Ind. Cas. 735.
(3) (1903) 1 Cr. L. J. 38.

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In dealing with the question whether the discretionary power of confiscation vested in the court should be exercised in the present case or not, the learned Deputy Commissioner came to the conclusion that he should exercise this power after making the following observation :

> " The circumstances of the present case leave no manner of doubt that the mica in question was obtained by illicit means, and this appears to be a fit case in which the discretionary power given by the section should be exercised."

There is no evidence on the point as no evidence was led in the case, and secondly, from the nature of the complaint and the question put to the accused it is clear that they were not asked to meet a charge of having obtained mica by illicit means.

Considering the circumstances of the present case, the offence of which the accused were convicted and the finding of the Deputy Commissioner that the mica was a property with regard to which an offence was committed, I am of opinion, in view of the reasons given above, that on the particular facts of this case the order of confiscation was not proper. I would, therefore, set aside the order of the learned Deputy Commissioner and restore the order of the Magistrate who ordered the mica to be returned to the accused.

AGARWALA, J.—I agree.

Rule made absolute.

S. A. K.

APPELLATE CRIMINAL.

Before Khaja Mohamad Noor and Rowland, JJ.

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February, 24.

GEDKA GOALA.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 84—*unsoundness of mind, nature of—accused, when exempted from Criminal responsibility—test—presumption of criminality arising out of consciousness of the nature of act done.*

It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility within section 84, Penal Code, 1860, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.

A person is not entitled to exemption from criminal liability in cases in which it is only shown that he is subject to insane impulses while the cognitive faculties remain, so far as can be judged from his acts and words, unimpaired.

Where the Judge drew an inference of " derangement of the brain " from the very nature of the act done by the accused, *held*, that the test applied by the Judge was inadequate; one must look outside the act itself for the evidence as to how much the accused knew about it.

A person is presumed to be responsible for his action unless the kind of insanity referred to in section 84 is affirmatively proved; likewise, if he is conscious of the nature of his act, he is presumed to have been conscious of its criminality.

Where it was proved that the accused had committed multiple murders while suffering from mental derangement of some sort and it was found that there was (*i*) absence of any motive, (*ii*) absence of secrecy, (*iii*) want of prearrangement and (*iv*) want of accomplices, *held*, that the circumstances were insufficient to support the inference that the accused

*Government Appeal no. 7 of 1936, from a decision of A. Mukherji, Esq., I.C.S., Sessions Judge of Purnea, dated the 8th October 1936.

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suffered from unsoundness of mind of the kind referred to in section 84.

Queen-Empress v. *Kader Nasyer Shah*(1), *Queen-Empress* v. *Lakshman Dagdu*(2), *Mani Ram* v. *The Crown*(3) followed. *Regina* v. *Michael Stokes*(4), *Regina* v. *Haynes*(5), referred to.

Appeal under section 417 of the Code of Criminal Procedure.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Government Advocate, for the appellant.

L. K. Chaudhuri, for the respondent.

ROWLAND, J.—Gedka Goala was put on his trial before the Sessions Judge of Purnea and four assessors charged with murder of his wife Musammat Reshmi, his daughters Budhsar and Dilsar and his son Sudhu, with causing grievous hurt to his son Budhu and with causing hurt to his mother Musammat Neno.

The accused was living in Patharghatti and on Friday, 19th June, 1936, he was in his own house with his wife Reshmi, his daughters Budhsar and Dilsar and his sons Budhu and Sudhu. He attacked all these persons with a heavy cutting knife *dao*. He was interrupted by the return to his house of his mother Neno whom also he attacked and wounded with the *dao*. The next to come was his brother-in-law Nunu Lal, seeing whom he said he had killed others and would kill him (Nunu Lal) too. Nunu Lal saved himself by flight. Gedka then picked up the boy Budhu and went out carrying him to the house of Ahmad Ali. He asked Ahmad Ali for water

(1) (1896) I. L. R. 23 Cal. 604.
(2) (1886) I. L. R. 10 Bom. 512.
(3) (1926) I. L. R. 8 Lah. 114.
(4) (1848) 175 E. R. 514.
(5) (1859) 175 E. R. 898.

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and poison " to kill himself as he had finished everybody " but went away to Murhi Bechi to the house of his brother Ledka announcing his intention of killing the latter and his wife. They, however, concealed themselves. At about 3 P.M. he came to Bibiganj where he met an excise peon Mir Ekbal who had the presence of mind to disarm and arrest the accused and made him over to Kharkhara Manjhi, dafadar along with the blood-stained knife.

The occurrence was proved by the boy Budhu Gop who survived his injuries and accused's mother Neno who was not seriously wounded and accused's father Hathia, and the subsequent movements of the accused by Ahmad Ali, Mir Ekbal and Kharkhara Manjhi.

The medical evidence proved that the death of the wife, two daughters and son was due to incised injuries inflicted with a sharp weapon such as the *dao* produced (Exh. II) and the injuries on Neno and Budhu could be inflicted by the same weapon.

The accused made a confession before a magistrate on 22nd June, 1936, but at the trial his statement is that he was not in his senses and does not know what he did and what he did not do and cannot remember whether he made a confession.

The Sessions Judge and all four assessors were of opinion that the facts were proved and no other view of the case is possible and the only defence that could be taken at the trial was that by reason of unsoundness of mind the accused was not responsible for his actions. This defence was accepted by the Sessions Judge in agreement with all the assessors, and the learned Judge on finding that the accused committed the acts charged but is not guilty in view of the provisions of section 84 of the Indian Penal Code, acquitted the accused but directed that he be detained in custody pending orders from the local Government under section 471 of the Code of Criminal Procedure.

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The local Government have preferred this appeal, and it is contended that the learned Sessions Judge has proceeded on a wrong view of the law regarding criminal responsibility, that it should have been held that the accused at the time of doing the acts knew what he was about and was liable to be convicted.

For the respondent it has not been contended that accused did not do the acts charged and the evidence abundantly establishes those facts. Therefore, the only question that remains is whether the Court below was right in the view taken regarding the absence of criminal responsibility by reason of unsoundess of mind. The law is in section 84 of the Indian Penal Code.

> "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

This provision was examined in *Queen-Empress* v. *Kader Nasyer Shah*(1), a leading case which has been repeatedly followed. The learned Judges point out that the rule is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in McNaghten's case. It is pointed out that

> "insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed."

And they say that

> "It is only unsoundess of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.

(1) (1896) I. L. R. 23 Cal. 604.

Instances of unsoundess of mind of this description would be such as these: A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life; in which case by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."

Apart from such delusions the Judges were not prepared to accept the view that a person is entitled to exemption from criminal liability in cases in which it is only shown that he is subject to insane impulses while the cognitive faculties remain, so far as can be judged from his acts and words, unimpaired. In the case before them, the learned Judges, though finding that the circumstances indicated that the accused must at the time of the acts charged, have been suffering from mental derangement of some sort, upheld the conviction on the ground that the circumstances did not show him to have been devoid of knowledge of the nature of his act or that he was doing what was wrong and contrary to law. In that case there had been evidence of mental derangement both before and after the occurrence. The murder was committed without any sane motive, and at the time when the case came up for preliminary inquiry the accused was found to be not in a fit state of mind to be able to make his defence and a delay of a year intervened before the inquiry was resumed.

Two English cases have been referred to at the hearing before us as illustrative of the manner in which a court should address itself to the question of criminal responsibility: one is *Regina* v. *Michael Stokes*(1). The prisoner Stokes was charged with

(1) (1848) 175 E. R. 514.

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murder for which no rational motive was apparent. It was argued in his defence that there was a class of lunatics " who are driven to commit homicide by a sudden and merely blind and instinctive impulse, without consciousness of the nature of the act ". Baron Rolfe impressed upon the jury that every man is held responsible for his acts if he can discern right from wrong. He said :—

" It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds?.....it is true that there is no motive apparent, but a very inadequate one; but it is dangerous ground to take to say that a man must be insane because men fail to discern the motive for his act. It has also been said by the prisoner's counsel that the conduct of the prisoner was that of a mad man in committing the offence at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, or the certainty of future punishment before him, he was therefore insane—as if the perpetration of crimes was to be excused by their very atrocity."

A similar case was *Regina* v. *Haynes*(1) Baron Bramwell told the jury :—

" It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, that the circumstance of an act being apparently motiveless is not a ground from which you

(1) (1859) 175 E. R. 898.

can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must therefore return to the simple question you have to determine—did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong."

Now the Sessions Judge has said that there was mental derangement beyond doubt and that

> "the very nature of the act goes to show that the derangement was such that the accused could not have known the nature of the act he was doing."

And he says:

> "I cannot believe that a man in his senses can commit a murder like this. The very act itself shows that there was a serious derangement of the brain of the accused at the time he committed the act."

The test which the learned Sessions Judge applied is plainly in view of the pronouncements above cited inadequate. A crime is not excused by its own atrocity. One must look outside the act itself for the evidence as to how much the accused knew about it.

The central point for examination is whether the accused knew that he was killing human beings, or was under a disorder which made him unaware that he was doing so.

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The sole eye-witness of the first assault is Budhu. His evidence does not disclose that the accused said anything at the time of the assault in his own house but he shut the door before beginning it, and this agrees with what the prisoner himself said in his confession on 22nd June. It has the look of a preparation for the deed. The accused does not appear to have said anything to his mother Musammat Neno whom he struck on her coming into the house, but he threatened the life of his brother-in-law Nunu Lal saying he had killed others and would kill him too. Then, when he met Ahmad Ali he first asked for water and poison " to kill himself as he had finished everybody "; but as Ahmad Ali said he should hand over the *dao* first the accused did not take the water or the poison saying that he would go on to Murhi Bechi and kill his brother and sister-in-law. He did go to Murhi Bechi, but his proposed victims escaped and hid. On this evidence I see no room to doubt that accused knew what killing was and meant to do it, knew what he had done already, knew who was his brother and his sister-in-law and where they lived and the way to that place. Therefore, so far as the nature of the act is concerned, the accused not only was capable of knowing it but did know it as well as any sane man.

The confession of 22nd June is to be considered in this connection. The confession shows that the accused had a clear recollection of what he had done. He says: " After feeding my children I began to cut them "; and " after shutting the window of the house I began to inflict cuts ". With this clear statement of what he had himself done, the accused joins a curious explanation of why he did it. He says the neighbours used to call his wife a witch and himself an Ojha, that they wanted to kill him and his wife and used to catch them and bring them back when they tried to escape, that his wife used to say " If you will die, I shall be free ", that Dhan Lal Barhi's brother said to accused's brother-in-law " He has

become mad. Bring pigeons and make him eat (them) and he will be cured". The accused says "We ate pigeons". Unfortunately the evidence gives little assistance in determining whether these are true statements of fact or are the outcome of a delusion from which the accused was suffering or are invented or imagined by him to excuse acts which he knew to be wrong. He says: "Then what did God do to me, whether some evil spirit possessed me, or what happened (I do not know)".

From this we can learn that at the time of the confession he knew the act to be evil, but was unable to account for the impulse which drove him to it, except by imagining some external interference with his will. The accused's brother-in-law Nunu Lal was not asked whether Dhan Lal Barhi's brother proposed to feed accused on pigeons to cure him. Accused's father Hathia says that Reshmi was not believed to be a witch nor was the accused an Ojha; that it is not a fact that the villagers wanted to take the life of the accused and his wife or chased them, and he never heard Reshmi saying to the accused that it were better if he were dead. There is evidence that at the time of occurrence the alarm was raised and people spoke of accused as a madman. That was an opinion—not an expert diagnosis. Assuming it to be a natural inference from his acts, it does not assist us in drawing the line which has to be drawn between insane impluses and delusions affecting the cognitive faculties. There is evidence as to condition of accused during the four or five days immediately preceding the occurrence. Prior to that no sign of madness had been observed, but for four or five days before the occurrence we have it from the accused's mother Neno that he did no work and used to sit still and behave as if he was dumb. Shaikh Chistu says that during these days accused used to look vacantly and would only speak to himself. Hathia, the father, says that the accused would sit at one

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place and would speak to no one. The Assistant Surgeon in the course of his evidence says :—

"I cannot say what the state of the mind of the accused was before I kept him under observation. It is possible the accused committed the occurrence in a temporary fit of insanity. Such a fit may come all on a sudden and disappear after a short while."

ROWLAND, J.

This does not help us very much. If it is an open question, a mere possibility that accused may have been insane, the presumption is that he was responsible for his action unless the kind of insanity referred to in section 84 is affirmatively proved. Neither the Assistant Surgeon nor the Civil Surgeon Dr. C. C. Bhaduri was asked what inference he would draw regarding the state of mind of the accused from such symptoms as sitting down at one place, behaving as if he was dumb, not stirring or speaking, or speaking only to himself, and wearing a vacant expression. These are symptoms from which the local witnesses inferred that accused's state of mind was not normal; and some disturbance of the melancholia type may be a reasonable inference. But for the reasons given above, it is clear that the accused was conscious of the nature of his act and, as stated in *Queen-Empress* v. *Lakshman Dagdu*(1),

"If he was conscious of its nature he must be presumed to have been conscious of its criminality."

The distinction is drawn in *Mani Ram* v. *The Crown*(2) between paralysis of the will by insane impulses and paralysis of the mind in the sense of being incapable of knowing the nature of the act or that it was wrong or contrary to law. In that case the Judges found (*1*) the absence of any motive, (*2*) the absence of secrecy, (*3*) multiple murders, (*4*) want of pre-arrangement and (*5*) want of accomplices. These circumstances were in that case held insufficient to support the inference that the accused suffered from unsoundness of mind of the kind referred to in section 84. The position in the present case is similar.

(1) (1886) I. L. R. 10 Bom. 512.
(2) (1926) I. L. R. 8 Lah. 114.

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I have dealt with the evidence of accused's mental condition before and on the day of the occurrence. After that date nothing abnormal was observed. He was clear headed at the time of his confession.

He was kept under medical observation by the Assistant Surgeon, Dr. R. K. Bose, who found no signs of insanity. The accused was behaving throughout the period of observation like a normal person. Later on, he was also under special observation of the Civil Surgeon from the 23rd September onwards. The Civil Surgeon found nothing abnormal about the state of the mind of the accused.

ROWLAND, J.

I would allow the appeal and convict the respondent Gedka Goala of the charges under sections 302, 326 and 324 of the Indian Penal Code. I would sentence him under section 302 of the Indian Penal Code to transportation for life, and would pass no separate sentence for the other offences. I would at the same time follow the course taken in *Queen-Empress* v. *Lakshman Dagdu*(1) and in *Queen-Empress v. Kader Nasyer Shah*(2) and direct that the case be reported to the local Government with a recommendation that it may be dealt with under section 401 of the Code of Criminal Procedure in such manner as may be judged fit, the accused having committed the murder without any apparent sane motive and while suffering from mental derangement of some sort.

MOHAMAD NOOR, J.—I agree.

Appeal allowed.

S. A. K.

(1) (1886) I. L. R. 10 Bom. 512.
(2) (1896) I. L. R. 23 Cal. 604.

PRIVY COUNCIL.

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v.

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February, 26.

On Appeal from the High Court at Patna.

Muhammadan Law—Shias—Wakf—Conditions necessary to effect Wakf—Proof.

Under Shiah law actual delivery of possession by or by direction of the wakif is a condition precedent to the wakf having validity and effect.

Where the wakif by the wakfnama appointed himself the first mutawalli and by the deed itself indicated that by mutation he would fulfil the condition requiring transfer of possession and where in fact mutation was effected in respect of the great bulk of the settled property by registering the properties, formerly in the settlor's name, in the names of himself and another as mutawallis and an account was begun in the name of the wakf and there was no suggestion or suspicion that he had any motive or desire to withhold any item of property.

Held, that the settlor had done what was necessary to change the character of his possession, to give possession to the mutawallis and to discontinue his own possession as proprietor.

Bakar Ali Khan v. *Anjuman Ara Begam*(1), *Agha Ali Khan* v. *Altaf Hasan Khan*(2) and *Abadi Begum* v. *Kaniz Zainab*(3), referred to.

Appeal (no. 68 of 1930) from a decree of the High Court (January 16, 1928) which modified in certain respects, but affirmed in the main, a decree of the Subordinate Judge of Patna (July 31, 1922).

The material facts of the case and provisions of the wakfnama are stated in the judgment of the Judicial Committee.

*Present: Lord Thankerton, Sir Shadi Lal and Sir George Rankin.

(1) (1903) I. L. R. 25 All. 236; L. R. 30 I. A. 94, 112.
(2) (1892) I. L. R. 14 All. 429.
(3) (1926) I. L. R. 6 Pat. 259; L. R. 54 I. A. 33, 37.

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1937, January 18, 19, 21 and 25. *Sir Herbert Cunliffe, K. C., Majid* and *Mrs. Clark*, for the appellant: The High Court, having found that the deed itself did not purport to retain any proprietary rights in the settlor, erred in inferring from the appropriation to himself for his personal use the income of the property and not spending it on the objects of the wakf or accounting for it, that he had not completely divested himself of the property as required by Shiah law. The fact that a breach of trust was committed by a trustee cannot be a ground for holding the trust invalid. Acknowledgment is evidence of a change of character of possession. Wakf is defined in Amir Ali's Muhammadan Law (4th edition), Volume I, pages 497 and 499. Transfer of possession may be actual, constructive or symbolical. Mutation in respect of a part is symbolical of mutation of the whole. Reference was made to *Ghazanfar Husain* v. *Ahmadi Bibi*(1), *Kali Das Mullick* v. *Kanhya Lal Pundit*(2), *Mahomad Buksh Khan* v. *Husseini Bibi*(3), *Mohammad Abdul Ghani* v. *Fakir Jahan Begam*(4).

The settlor here, by what he has done, must be held to be in constructive possession as mutawalli. There was mutation of part of the property. He has done all he could do Reference was made to *Abadi Begum* v. *Kaniz Zainab*(5), Muhammadan Jurisprudence by Abdur Rahim, page 275, *Jagannath Prashad Singh* v. *Syed Abdullah*(6), *Agha Ali Khan* v. *Altaf Hassan Khan*(7) and *Baker Ali Khan* v. *Anjuman Ara Begam*(8) and Wilson's Anglo-Muhammadan Law (4th edition), page 373, paragraph 327. [The rest of the argument was on the facts.] *Majid*, following: *Agha Ali Khan's* case(7) in so far as it holds that

(1) (1929) I. L. R. 52 All. 368, 372.
(2) (1884) I. L. R. 11 Cal. 121; L. R. 11 I. A. 218.
(3) (1888) I. L. R. 15 Cal. 684; L. R. 15 I. A. 81, 95.
(4) (1922) L. R. 49 I. A. 195.
(5) (1926) I. L. R. 6 Pat. 259; L. R. 54 I. A. 33.
(6) (1918) 22 Cal. W. N. 891.
(7) (1892) I. L. R. 14 All. 429.
(8) 1902) I. L. R. 25 All. 236; L. R. 30 I. A. 94.

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wakf is a bilateral act is wrong. 'Akf' means act and is wrongly translated as contract. The Shiah Law in this matter does not differ essentially from the Sunni Law. Amir Ali in his book is dealing with the law before *Abdul Ghani's* case(1). The Registration Act, 1876, sections 16 and 88 and Rule 80, was referred to. *Baillee*, Volume I, page 403. Acknowledgment is an integral part of Muhammadan Law. Abdur Rahim's Muhammadan Jurisprudence, page 319.

De Gruyther, *K. C.* and *Wallach*, for the respondents: On the facts, the deed was illusory. It was executed on the 25th May, 1917. There was no attempt at mutation till April, 1918. Up to that time the document was ineffective. The settlor had not made up his mind. Both courts have held that he was practically an imbecile at the time of the execution of the supplementary deed, February, 1919. The only account produced for this period is the seahas, the private accounts of the settlor, showing the receipts. No accounts of expenditure were produced. The settlor did not act on the deed. He did not draw pay of Rs. 250 a month as mutawalli. He paid Rs. 150 to his wife and Rs. 50 a month to Zamin.

It is submitted that the accounts produced are not the settlor's accounts. If they are, they show expenditure inconsistent with the wakfnama. The deed was not acted on. Reference was made to the accounts.

There is no reason why the settlor should not have applied for mutation the day after the execution of the deed. The excuse given cannot be accepted. The evidence shows that up to 1919 there was no intention to give effect to the deed.

On the law, reference was made to Wilson's Anglo-Muhammadan Law, page 484, *Kali Das Mallick's* case(2), *Abadi Begam's* case(3), and *Maham-*

(1) (1922) L. R. 49 I. A. 195.
(2) (1884) I. L. R. 11 Cal. 121; L. R. 11 I. A. 218.
(3) (1926) I. L. R. 6 Pat. 259; L. R. 54 I. A. 33.

mad Abdul Ghani's case(1). The whole of the settlor's conduct as mutawalli must be taken into account to determine whether he intended to divest himself of the property. Mutation was not necessarily the act of the settlor. The settlor in truth did nothing to divest himself.

Sir Herbert Cunliffe, K. C. replied.

The judgment of the Judicial Committee was delivered by—

SIR GEORGE RANKIN.—The sole question in this appeal is whether a wakfnama, dated 25th May, 1917, is valid and operative according to Shia law. The settlor was the late Nawab Haji Syed Nawab Mehdi Husain Khan, commonly known as Badshah Nawab. The suit was brought on the 9th January, 1920, in the Court of the Subordinate Judge at Patna by the respondent, Syed Akbar Ali Khan *alias* Syed Chhotey Nawab, one of the two surviving brothers of the settlor. The main though not the sole purpose of the suit was to obtain a declaration that the deed of 25th May, 1917, was invalid, and did not in law operate as a dedication of the properties comprised therein, and that, notwithstanding the deed, the plaintiff was entitled to possession of a third share of the properties by inheritance from his brother the settlor, who had died on 19th March, 1919. The appellant before their Lordships is Syed Ali Zamin who was the first defendant in the suit; by the terms of the deed he was appointed to be sole mutawalli on the death of the settlor. The other causes of action, and the other defendants need not now be detailed. The Subordinate Judge on 31st July, 1922, decreed the suit declaring the deed to be inoperative and the properties therein mentioned to be part and parcel of the estate which Badshah Nawab left at his death. On appeal this decree was, in certain respects, modified

(1) (1922) L. R. 49 I. A. 195.

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by the decree of the High Court at Patna, dated 16th January, 1928. But on the main question, namely the invalidity of the deed, the learned Judges of the High Court, Dawson Miller, C. J. and Adami, J. concurred in the conclusion reached by the Subordinate Judge though not in all his reasons.

In 1917 Badshah Nawab was about 60 years of age; he had a wife living (the second defendant in this suit), but he had no sons or daughters. His family had for long enjoyed the advantages of wealth and position, and his father had created a verbal wakf of three villages in Patna yielding an income of between Rs. 2,000 and Rs. 3,000 of which Badshah Nawab, after his father's death, was the mutawalli. This had provided for certain religious ceremonies in a mosque and imambara and Badshah Nawab had before 1917 been in the habit of adding money of his own to the income of his father's endowment for conducting the ceremonies. Since 1911 Badshah Nawab had suffered from paralysis, his second attack (in 1914) having impaired his ability to transact business of any difficulty: the third and last attack was in December, 1918, two or three months before his death. In 1915 he found it necessary to sell property in order to meet his debts. A banking business in which he was a partner had failed, involving him in heavy liability. With the help of the appellant, Ali Zamin, whom he called in to help him in managing his affairs, by borrowing money on mortgage and by the sale of properties he had dealt with the position and at the date of his death though he owed about Rs. 74,000, he was not insolvent even if the dedicated properties be disregarded.

The wakfnama now in dispute is an elaborate document and the schedules thereof specify a large number of properties, moveable and immoveable, with full details of the latter. The description of the objects upon which the settlor's bounty is to be expended and of the sums of money to be appropriated to each, is careful and lengthy. The net income from the

dedicated properties is stated in the deed to be just under Rs. 20,000 per annum; according to the High Court the properties comprised in the deed are substantially speaking, the whole of the unincumbered property which the settlor at that time possessed. The learned Chief Justice has given a short description of the nature and effect of the deed as follows:—

"The properties dedicated by the settlor are situated in the districts of Shahabad, Patna, Monghyr and Purnea and included his two houses known as Badshah Manzil and Badshah Mahal together with the effects and jewellery therein which were valuable. The former was to be the residence of the mutwalli and the latter the residence of his wife who was also to receive during her lifetime Rs. 3,600 per annum out of the income of the endowed properties. The mutwalli was to receive Rs. 3,000 per annum and two other annuitants Rs. 1,200 and Rs. 360 respectively. The municipal taxes and repairs of the houses are estimated at Rs. 1,872 and the auditors' fee at Rs. 312 Rs. 2,288 were to be spent in celebrating religious ceremonies (majlises and mahafils), Rs. 624 were to be spent on an orphanage, Rs. 468 on the burial of the dead, Rs. 312 in connection with a mausoleum, Rs. 104 for breakfasts in Ramzan and Rs. 728 on the upkeep of horses and camels for religious processions. About Rs. 1,600 were to be spent on leaders of the prayers and servants of the mosque and imambara and the balance, about one-seventh of the whole, was to go to reserve fund, to be dealt with as provided in the deed in buying further property. The settlor was to be the first mutwalli and was to be succeeded on his death by Ali Zamin. A managing committee was to be appointed to come into existence after his death with certain powers of control and the right of appointing and dismissing future mutwallis. The wife's annuity after her death was to be spent on the maintenance and education of orphans and widows and any large accumulations in the reserve fund were to go in acquiring immoveable properties to be treated as part of the wakf."

The appellant Ali Zamin was during the settlor's life to be co-mutwalli with him, but only nominally as the right of management was to be in the settlor. Clauses 1, 7 and 8 of the regulations laid down by the settlor for the management of the wakf are as follows:—

"1. During my lifetime, the Taulint of the entire wakf properties, noted in schedules nos. 1 and 2, shall have concern with me personally. During my lifetime, I shall keep the entire wakf properties in my possession and under my management as mutawalli and carry out the Tauliat work. During my lifetime, no one shall have absolutely any power to interfere with and raise an objection regarding the right of

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Tauliat or the management of the properties. I, the mutwalli too shall spend (money) in whatever manner I would like.

"7. In order to bring this wakfnama into force it will be incumbent upon me to get my name removed as a proprietor and to get it registered in the Government office as a mutwalli of the wakf properties specified in schedule no. I. Similarly the future mutwallis also shall do the same.

"8. Should any mutwalli, besides myself, give up the Isna-Ashuri sects of the Shia school or prove dishonest, the committee shall have power to remove him and to select another mutwalli, according to the terms of this wakfnama."

The first respondent by his plaint did not sue as a creditor of the settlor making a case that the wakfnama was a transfer executed with the intention to defeat and delay creditors and thus voidable under section 53 of the Transfer of Property Act or the well known principles therein embodied. In fact no creditor appears at any time to have sought to impeach the deed. The plaint attacked the deed upon a number of grounds: that the settlor was not of sound disposing mind; that he executed the deed under undue influence by the appellant Ali Zamin who desired the office of mutwalli; that no valid wakf could be made of moveables; and that the dedication was illusory in the sense that the settlor intended to use the income of the properties as he pleased and to continue throughout his life to spend the income as he had done in the past. Most of these contentions were accepted by the Subordinate Judge, who held in particular, that the wakf was illusory, never having been intended to operate; that it was executed under undue influence and was a cloak to secure benefits for the appellant and the settlor's widow. The High Court disagreed with the Subordinate Judge upon the question of undue influence and before them the case that the settlor was not of sound disposing mind was abandoned. They disagreed also with the contention that by the deed in the clauses which have been already quoted, the settlor was given power to do whatever he liked with the dedicated property, so that he really retained, during his life time, his original proprietary interest. They held, as their Lordships think

rightly, that on a true construction of these clauses the powers given to the settlor are the powers of a mutwalli and nothing more. But the High Court held the deed to be invalid by reason that the manner in which Badshah Nawab in fact dealt with the property after the dedication was proof that he never had any real intention of completely divesting himself of the proprietary rights during his life time. In the view of the High Court the settlor continued to retain possession as proprietor and to appropriate the bulk of the net profits to his own use; they held, accordingly, that the dedication did not comply with the requirements of the Shia law.

In Baillie's Digest of Mohommedan Law, 1869, Part II, page 218, the Shia law as laid down in the Suraya (Shuraya-ool-Islam) " the most authoritative work of that school " [per Sir Arthur Wilson in *Baker Ali Khan's* clase(1),] is given as follows :—

> " Conditions that relate to the *wakf* itself which are four in number. First it must be perpetual; second absolute and unconditional: third possession must be given of the *mowkoof* or thing appropriated, and fourth it must be entirely taken out of the wakif or appropriator himself."

In *Agha Ali Khan* v. *Altaf Hasan Khan*(2) and in *Abadi Begum* v. *Kaniz Zainab*(3), this has been quoted and applied. In the former case the third of these conditions was expounded by Mahmood, J. (page 455) as flowing from the fact that the Shia law recognises wakf, not as an unilateral disposition of property as does the Sunni law, but as partaking of the character of a contract, at least in so far as to involve acceptance as well as offer. The most immediate application of this principle is the necessity of delivery of actual possession by the wakif himself of the appropriated property to the mutwalli or the person appointed as superintendent of the wakf property (page 457). In other words the wakf does

(1) (1903) I. L. R. 25 All. 236; L. R. 30 I. A. 94, 112.
(2) (1892) I. L. R. 14 All. 429.
(3) (1926) I. L. R. 6 Pat. 259; L. R. 54 I. A. 33.

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not become perfect or obligatory by a mere declaration of the settlor. Mahmood, J. cited ample authority for these propositions and their Lordships are clearly of opinion that under Shia law actual delivery of possession by or by direction of the wakif is a condition precedent to the wakf having validity and effect. But the same judgment contains high authority from the texts for the proposition that " an appropriator could appoint himself as the mutwalli of a wakf, and that in such a case change in the character of the possession amounts to transfer of the possession which would be required when the mutwalli appointed by the wakif is a person other than the wakif himself " (page 479). A case is instanced as being one " in which the wakif Ali had appointed himself as mutwalli of the wakf and administered it as such thus fulfilling the requisite change in the character of possession which takes the place of actual transfer of possession when the wakif appoints another person as mutwalli ". No doubt is cast upon any of these propositions by the judgment of the Board in *Baker Ali Khan's* case(1) though on the question of the validity under Shia law of a wakf made by Will the decision was reversed.

Their Lordships, therefore, in applying the Shia law to the present case have two questions to consider, both of which have been contested at the hearing. The first is whether Badshah Nawab completely divested himself of all interest in the property which he dedicated. This, in their Lordships' judgment, is a question of construction of the terms of the wakfnama, as may indeed be seen from the illustrations given in the Suraya, as explaining the fourth condition, e.g., the case of a person making a settlement on himself, or making a settlement on another with a condition to pay the settlor's debts or expenses. The matter was so regarded in *'Abadi's* case(2), the question being deemed to arise on the face of the

(1) (1902) I. L. R. 25 All. 236; L. R. 30 I. A. 94, 112.
(2) (1926) I. L. R. 6 Pat. 253; L. R. 54 I. A. 33.

documents themselves. Agreeing as their Lordships do with the High Court that the powers given to the settlor by the wide language of the first clause, already quoted from the deed, are not more than the powers of a mutwalli to be exercised free from control by a committee of management or other such body, they are of opinion that there is nothing contrary to Shia law in the terms of the deed and that the wakf cannot be held to be invalid by reason of any failure to comply with the requirement that the settlor must divest himself of his proprietary right.

The next question for consideration is whether or not the settlor gave possession of the thing appropriated. As the settlor was to be himself the first mutwalli, this requirement will be satisfied, as has been already shown, if it be held proved that the settlor changed the character of his possession, continuing to hold the property not as malik of the property but as mutwalli of the wakf. The evidence in their Lordships' view establishes that this condition also was fulfilled. By the deed itself (clause 7 above quoted) the settlor had indicated that by mutation of names (kharij) in Register D kept under the Land Registration Act of 1876 he would fulfil this requirement which was present to his mind; and though the steps taken by him or on his behalf may be criticised as dilatory the fact is that in the course of 1918 Badshah Nawab and Ali Zamin were registered as holding the great bulk of the zemindary properties as mutwallis under the wakfnama of 25th May, 1917. The exact dates of the various applications, and in many cases of the new entries on the Register, are not shown by the certified extracts on the record in this suit, but it is sufficiently clear that beween April and August, 1918, if not from an earlier date, the settlor by his agents was engaged in effecting mutation in Patna, Shahabad and Monghyr districts. Certain properties in the district of Purnea (including Dinajpur) had been included at the end of the scheduled list of dedicated properties

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in the wakfnama. They had been lumped together in a summary manner for purposes of description and the name Taluqa Surjapur with the names that followed it gave an ambiguous indication of the property intended to pass under the deed. The learned Chief Justice has carefully explained the difficulty and in their Lordships' view has rightly held that the property referred to included the whole of the settlor's interest in the pargana of that name and not merely his interest in twenty-nine villages. That the settlor was advised to have this ambiguity cleared up before seeking mutation in respect of the Purnea properties is in their Lordships' view established, and in fact he executed a supplemental deed on 19th February, 1919, very shortly before his death, to effect this purpose. It contains full particulars of the patni tenures which had been originally intended but imperfectly detailed as well as a correction of the tauzi number of mauza Khajura in Monghyr. While it is true that suits for rent were in general brought in the name of Badshah Nawab as before, rent receipts given to tenants on the same printed forms as were before in use, and challans for payment of revenue, etc., made out as before, it is true on the other hand that on 4th November, 1917, (" on the tauzi day the 5th Kartik, 1325, Fasli ") an account was begun in the name of the wakf headed " annual jama karach in respect of the mahals recently given in wakf.....by Badshah Nawab and Ali Zamin mutwallis " and into this account were brought the receipts from the wakf properties including properties as to which there had been no mutation of names whether in Register D or (for patnis) in the zemindar's sherista. Certain comments on this account will be considered later in this judgment. Some of the dedicated property was situated in the area of a municipality and in the strict sense no system of mutation applied to it though it was possible to get an entry made in the books kept by the municipality for purposes of tax, etc. In a partition suit brought in September, 1918, against

Badshah Nawab and Ali Zamin as mutwallis in respect of a property in Patna municipality called Nawab Chak it was alleged by the plaint that they were so recorded, but their Lordships will take it that for municipal property no such steps were taken. It is on the other hand proved that in November, 1917, a receipt given to Mohammad Aqil for Rs. 5,100 being his collection of rents in Surjapur was given in the names of the mutwallis. Without entering further into detail their Lordships think that the broad effect of the evidence is that the settlor had done what was necessary to change the character of his possession, to give possession to the mutwallis and to discontinue his own possession as proprietor. In their Lordships' opinion mutation of names is not for the present purpose the only method by which possession can be given or altered. The observations made by Sir John Edge delivering the judgment of the Board in *Mohammad Abdul Gani* v. *Fakhr Jahan Begam*(1), are clearly against any such rule and the decision in *Abadi Begum* v. *Kaniz Zainab*(2) does not conflict with them, though in that case the importance of mutation and the significance of its absence were emphasised. In the present case the number and value of the properties as to which this most formal act of transfer of possession was carried out and the opening of a separate account in the name of the wakf are sufficient evidence that the properties comprised in the deed had been put into the possession of the mutwallis especially as there is no basis for a suggestion or suspicion that the settlor had a particular motive or desire to withhold any special item of the property. It would be to mistake the character and scope of the third condition in the passage above quoted from the Suraya, and to misinterpret it, to hold that the wakf was bad because one or two properties had not been recorded formally in the new names or because the utmost technicality had not been observed in granting rent receipts or framing plaints in rent suits.

(1) (1922) L. R. 49 I. A. 195.
(2) (1926) I. L. R. 6 Pat. 259; L. R. 54 I. A. 33.

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The real basis of the decision of the High Court is to be found in the fact that an examination of the wakf jama karach discloses that, while keeping an account of the wakf receipts and of the monies taken by himself or spent on his behalf, the settlor was nevertheless using the income much as he might have done before the date of the deed. One striking instance may be mentioned, viz., that of Rs. 5,100 received from Mohammad Aqil as rents collected by him from Surjapur. He had been given a receipt therefor in the names of the mutwallis and the money was credited to the wakf account (19th November, 1917), but the account shows that it had been handed out at once to the settlor who had spent it at or in connection with the Sonepur fair. The account does not show that all such monies had been refunded: something had been refunded but very little. It does not show that the settlor's wife or that he himself as mutwalli was being paid the salary provided by the wakfnama. It shows expenditure on religious ceremonies but of this part, not covered by the settlor's father's wakf, was of a kind which the settlor was quite probably meeting out of his own monies prior to May, 1917. Examining this unaudited, incomplete and badly kept account for the twenty-two months which separated the wakfnama from the settlor's death the High Court made out the result as follows:—

"The total income for the full period is Rs. 38,392. This is accounted for as follows:—

	Rs.	a.	p.
Government revenue and cesses	9,358	0	0
Law expenses and other miscellaneous charges	3,909	0	0
Municipal taxes	1,112	0	0
Spent on the objects of the wakf deed ...	6,934	0	0
Taken by Badshah Nawab for his personal use (including Rs. 6,868 shown in the seahas from the 25th May, 1917, to the 3rd November, 1917)	17,000	0	0
Balance in hand on the 19th March 1919 ...	79	0	0
Total ...	38,392	0	0

"These figures do not take account of a sum of Rs. 1,780 repaid to the wakf account from the tahvil of Badshah Nawab five days after his death. Why this amount was repaid, or by whose authority, has not been explained. In the total of Rs. 17,000 stated above to have been taken by Badshah Nawab for his personal use are included Rs. 1,540 repayment of a loan due from him to mahajans under a liandnote, Rs. 50 per month paid to Ali Zamin amounting in all to Rs. 750 representing an allowance which Badshah Nawab had been in the habit of making him before the deed was executed, Rs. 133 subscription to a hospital, Rs. 173 for income-tax and various small loans to different people, but the bulk of the amount including the sum of Rs. 5,100 taken for his expenses at Sonepur is unaccounted for. It appears that Bibi Zainia was paid at the rate of Rs. 150 per month instead of Rs. 300 as provided in the deed and, as far as the accounts show, the other two annuitants were not paid anything. It may be presumed in the absence of the personal accounts that Bibi Zainia had some sort of allowance from her husband before the deed was executed. Although the sum of Rs. 6,934 was spent on the declared objects of the trust during the period covered by the accounts, it is admitted that Badshah Nawab had previously been performing the same kind of religious ceremonies as mutwalli of his father's endowment and had supplemented the income thereof from his own resources, and it seems probable that after the new wakf deed was executed his expenditure in this respect did not appreciably increase. The accounts of the old wakf are not before us and there is no means of showing how the income derived therefrom was expended after May, 1917. It would appear therefore that the settlor to all intents and purposes continued to treat the income of the endowed properties as at his own disposal and spent the money as the deed says 'in whatever manner I would like' but whereas under the deed, as I interpret it, his choice of the mode of expenditure would be confined to the objects of the trust, in fact he spent the bulk of the available assets after payment of revenue and taxes upon his own personal needs. I am constrained to hold, agreeing with the learned Subordinate Judge, upon this part of the case, that there was never such complete divestment of interest or transfer of possession as the Shia law requires."

To this conclusion it is doubtless no sufficient answer to say that if the settlor committed breaches of trust, the trust is not thereby rendered invalid, and the settlor can be called upon to account. The settlor's intromissions with the income of the properties are part of the evidence upon which as a whole must be answered the question whether the character of his possession of the properties had been changed. Had the other evidence been less decisive this evidence might have had great importance upon the question of transfer of possession. Moreover by the

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contention that the wakfnama was " illusory ", is meant, it would seem, that while the settlor intended it to take effect after his death, intended to transfer the possession to the mutwallis in 1918, and to come under the obligations of a mutwalli in his lifetime, yet he never intended in fact to expend the wakf income during his life upon wakf purposes but fully intended throughout to commit unlimited breaches of trust. This, of course, is an extreme interpretation to put upon the conduct of a settlor but it seems to be required for the contention that he " never had any real intention of divesting himself of the proprietary right during his lifetime ". A consideration of the wakf account and of the settlor's conduct and circumstances does not, however, lead their Lordships to think that there is anything more exceptional or extraordinary in the present case than can be accounted for by attributing to the settlor loose ideas as to the duty of a mutwalli and laxity of practice at the stage which followed upon the execution of the wakfnama. The settlor was a Muslim of position who had for a long time contemplated founding a wakf and who was childless. He had given the utmost publicity to his wakfnama, taking pains to have it witnessed by a large number of persons both Hindus and Muslims. He may not have felt secure from all trouble with creditors but his finances were in no such state as to impel him to make a wakf to defeat or delay creditors. Still less reasonable is it to suppose that for this purpose he contemplated becoming mutwalli and then omitting altogether to carry out the terms of his own deed. The circumstance that he did not proceed to obtain mutation as if it were a matter of urgency but left this lengthy and troublesome business to be carried out in 1918 is not in any way surprising. He was in bad health and in no condition to exercise much driving power over his agents in the different districts. The purposes of his wakf included a good deal that he had been in the habit of carrying out in previous years

but this does not entitle a court of law to find that his expenditure thereon after May, 1917, was not expenditure made under the wakfnama or that he never acted upon the wakfnama. For the appellant before their Lordships it has been pointed out that against the Rs. 17,000 taken by the settlor from the wakf income a number of items may be credited to him. He was, or may at least have thought that he was, entitled to Rs. 5,500 for his own remuneration and his wife to Rs. 6,600 for the same period. He had spent Rs. 2,015 for stamp duty on the wakfnama and Rs. 452 for expenses of registration. Part of the Rs. 17,000 moreover consists of rents apportionable to a period prior to the deed. It is not in strictness true that of the expenditure upon religious objects none can be attributed unequivocably to the provisions of the deed as distinct from his previous practice. In these circumstances the wakfnama passes the tests (*1*) that the settlor retained no interest to himself upon a true construction of the deed, and (*2*) that he had before his death transferred the possession from himself as malik to himself and Ali Zamin as mutwallis, and their Lordships think that the wakf is valid at Shia law. They express no opinion as to the supplemental deed of 22nd June, 1917, but as to the mauza Kalimabad which is not comprised in the wakfnama of 25th May, 1917, the moveables numbered 6, 7 and 11 and the Hupmobile car numbered 8 in schedule IV to the plaint, they think the decision of the Subordinate Judge should stand.

The plaintiff is not upon the view taken by their Lordships entitled to any substantial relief in the suit, the contention that it is not lawful to make wakf of moveables having been abandoned by his learned counsel and his claim for possession having extended only to properties now held to have been dedicated by the deed of 25th May, 1917.

In their Lordships' opinion this appeal should be allowed and the decrees of the Courts in India set

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aside save as regards the declaration made by the Subordinate Judge that the moveables numbered 6, 7 and 11 in schedule IV of the plaint belong to the plaintiff and the declaration made by the High Court that the house no. 68, Dharamtala Street, Calcutta, belongs to defendant no. 2. There should be a further declaration that mauza Kalimabad and the Hupmobile car (item 8 of schedule IV to the plaint) are part of the assets belonging to Badshah Nawab at his death. Subject thereto the suit should be dismissed as against defendant no. 2 with costs of both Courts in India and as against the appellant with five-sixths of the costs of each Court in India and with the costs of this appeal. An application by the appellant to the Board to admit new evidence on this appeal must be dismissed with costs to the first respondent. The appellant to have leave to reimburse himself out of the wakf estate for any costs not recovered from the plaintiff. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant:—*Douglas Grant and Dold.*

Solicitors for the respondents:—*Hy. S. L. Polak & Co.*

APPELLATE CIVIL.

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November, 24, 25, 27.

Before Dhavle and Varma, JJ.

SITAL PRASAD SUKUL

v.

RAMSARAN MISSIR.*

Pre-emption—pre-emptor depositing entire price in favour of vendee—vendee not paying mortgagee—pre-emptor, if can recover from vendee—vendee, whether becomes a trustee for the pre-emptor.

*Appeal from Appellate Decree no. 29 of 1934, from a decision of A. Mukharji, Esq., I.C.S., Additional District Judge of Saran, dated the 8th May, 1933, modifying a decision of Babu Surjyamani Das, Subordinate Judge of Saran, dated the 17th February, 1932.

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A pre-emption decree directed the pre-emptor to deposit the entire purchase price in favour of the vendee. The purchase price included a certain sum which was to be paid to a zarpeshgidar of the vendor and which had not been paid by the vendee. The pre-emptor deposited the entire sum and the vendee withdrew the same.

Held, (*i*) that the vendee was under no obligation to pay to the pre-emptor the amount which he had not paid to the zarpeshgidar. Cases of trust, quasi contract or near relationship where, in certain circumstances, agreement may be enforced by strangers, stand on a different footing.

Ram Richha Prasad Tewari v. *Raghunath Prasad Tewari*(1), *Debnarayan Dutt* v. *Chunilal Ghose*(2), *Dwarkanath Ash* v. *Priyanath Malki*(3), *Khwaja Muhammad Khan* v. *Husaini Begam*(4) and *Tweddle* v. *Atkinson*(5), referred to.

(*ii*) that the plaintiff could and should have obtained relief in respect of the zarpeshgi money in the pre-emption suit, if necessary, by amending the plaint.

Sheikh Golam Ayhya v. *Joy Mungal Singh*(6), distinguished.

(*iii*) that the vendee could not be regarded as a trustee for the pre-emptor.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

A. B. Mukharji (with him *Harnarain Prasad* and *H. R. Kazimi*), for the appellant.

S. N. Bose (with him *Jadubans Sahay*, *Jaleshwar Prasad* and *K. P. Upadhya*), for the respondents.

DHAVLE, J.—This is an appeal by the plaintiff. Ramyad Gosain had a milkiat share in mauza Sawsara which he gave in zarpeshgi to defendants

(1) (1918) 46 Ind. Cas. 83.
(2) (1913) I. L. R. 41 Cal. 137.
(3) (1916) 22 Cal. W. N. 279.
(4) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(5) (1861) 1 B. & S. 393.
(6) (1870) 13 W. R. 435.

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6 and 7 for Rs. 1,600. He afterwards sold it to defendants 1 to 3 and one Parmanand, a predecessor of defendants 4, 5 and 8, for Rs. 2,750, out of which Rs. 1,600 was kept with the vendees for paying off the zarpeshgidars. In 1922 the plaintiff brought a pre-emption suit against the vendees, and this suit was decreed in his favour in September, 1923. Six weeks afterwards he moved the court for being permitted to deposit Rs. 1,150 only, so as to have Rs. 1,600 in hand for paying off the zarpeshgidars. This prayer was not allowed, and the plaintiff thereupon deposited the entire amount, viz., Rs. 2,750, in accordance with his pre-emption decree. About two months afterwards the zarpeshgidars moved the court for permission to withdraw their Rs. 1,600 out of the deposit made by the pre-emptor, and stated that they had already given up possession. This application of the zarpeshgidars was disallowed. A year afterwards, in February, 1925, the vendee defendants withdrew the entire amount deposited by the plaintiff. As the zarpeshgidars had given up possession, plaintiff had come into possession of the property and his possession continued for three years, when it came to an end because the zarpeshgidars, who had not been paid off in fact, brought suits for rent against the tenants in actual possession of the lands, and the tenants' defence that they had attorned to the plaintiff was overruled. Plaintiff therefore brought the present suit in March, 1930, for recovery of possession with mesne profits. He also made alternative prayers that he may be given a decree for Rs. 1,600 against the vendees, or that they may be ordered to pay off the zarpeshgidars and the zarpeshgidars ordered (upon such payment) to give up possession in favour of the plaintiff. The trial court gave the plaintiff a decree for Rs. 1,600 against defendants 1 to 3, holding that defendants 4, 5 and 8 were not liable for the act of their relative who had joined defendants 1 to 3 in withdrawing the deposit made by the plaintiff. Defendants 1 to 3 appealed,

and the Additional District Judge, who heard the appeal, came to the conclusion that as against defendants 1 to 3, or defendants 1 to 5 and 8, the plaintiff was not entitled to succeed unless the judgment in the pre-emption suit was vacated, but that as against defendants 6 and 7 he was entitled to a decree for redemption on payment of Rs. 1,600. I may say at once that such redemption was no part of the reliefs specifically sought by the plaintiff, and it is easy to see why he does not altogether appreciate the privilege of redeeming the zarpeshgidars by paying Rs. 1,600: for he has already deposited the entire sale-price in pursuance of the pre-emption decree.

Mr. Mukharji, who has strenuously argued this appeal on behalf of the plaintiff, has urged that the lower court erred in holding on the authority of *Ram Richha Prasad Tewari* v. *Raghunath Prasad Tewari*(1) that the plaintiff was not entitled to recover the Rs. 1,600 from those defendants who had withdrawn his entire deposit under the pre-emption decree. His argument is that though the plaintiff was not a party to the arrangement between Ramyad Gosain and his vendees, under which the latter kept Rs. 1,600 out of the consideration money in hand to pay off the zarpeshgidars, he is entitled, by reason of their withdrawal of the deposit made by him in their favour in accordance with the pre-emption decree, to hold them to their obligation of paying off the zarpeshgidars. In support of this contention Mr. Mukharji relied on *Debnarayan Dutt* v. *Chunilal Ghose*(2) and *Drawkanath Ash* v. *Priyanath Malki*(3) in the latter of which cases, following the decision of their Lordships of the Judicial Committee in *Khwaja Muhammad Khan* v. *Husaini Begam*(4), the contention was accepted " that the rule enunciated in *Tweddle* v. *Atkinson*(5) is not

(1) (1918) 46 Ind. Cas. 83.
(2) (1913) I. L. R. 41 Cal. 137.
(3) (1916) 22 Cal. W. N. 279.
(4) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(5) (1861) 1 B. & S. 393.

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applicable in this country and that an agreement may in certain circumstances be enforced by a stranger thereto, that is, in what may be briefly described as cases of trust, quasi-contract, or near relationship ". That principle is well established, but it does not, in my opinion, help the plaintiff in this case, nor could it have been overlooked by Richards, C.J. and Banerji, J. in the Allahabad case of *Ram Richha Prasad Tewari*(1) already referred to. In the two Calcutta cases cited by Mr. Mukherji there was no decree affecting the rights *inter se* of the parties and nothing to prevent them from being dealt with according to the rule of justice, equity and good conscience. In the present case, however, as in the Allahabad case, there is the decree which declared the plaintiff to be entitled to pre-emption, for which he was required to deposit in court the Rs. 2,750 in favour of defendants 1 to 3 and Parmanand. The decree further entitled these defendants to withdraw the entire amount without any reference to the Rs. 1,600 that they had agreed with the original owner to pay (out of the sale-price) in redemption of the zarpeshgi of defendants 6 and 7. Nor can it be said that the plaintiff was not aware, before he obtained such a pre-emption decree, that the zarpeshgi had not been paid off; the trial court refers to the evidence given by defendant no. 1 in the pre-emption suit that he had not yet paid off the zarpeshgidars. Notwithstanding this, the plaintiff took no steps to amend the frame of his suit and the relief claimed in it, but obtained a decree, which (as I have already said) required him to deposit Rs. 2,750 and entitled the defendants to withdraw that amount without any reference to the zarpeshgi. In this respect the case very much resembles the Allahabad case, where the learned Judges reluctantly came to the conclusion that after a decree of this kind it was not open to them to enforce repayment of the money so held by the vendee to the pre-emptor. It is true

(1) (1918) 46 Ind. Cas. 83.

that in that case the pre-emptor had after the pre-emption decree had to pay off the mortgagee and thereupon brought a suit to recover the amount from the vendee who had withdrawn the entire deposit made by the pre-emptor in accordance with the pre-emption decree; but this obviously does not affect the principle to be applied to cases where a plaintiff has deposited the entire sale price in favour of the vendee in accordance with his pre-emption decree, without troubling to secure his own rights in respect of an outstanding mortgage which the vendee was to pay off out of the sale price. The learned Judges said that they would have been very glad to have seen their way to uphold the decree for the money passed by the lower appellate court against the vendee but that they could not discover any basis upon which the plaintiff could succeed. After referring to the circumstance that the vendee had never entered into any contract with the pre-emptor to pay the money to the mortgagee and that the obligation of the vendee was one based on his contract with the original vendor, they pointed out that the whole trouble arose from the plaintiff not taking care to see that the pre-emption decree was drawn up in proper form directing that they should only pay the amount which the vendee had paid to his vendor.

This being so, Mr. Mukharji has raised two other points. In the first place, he has referred to the application which the plaintiff made after the pre-emption decree to be allowed to deposit that part of the sale price only which was to go to the owner and not also the part that was intended for the zarpeshgidars. He has also referred to the application of the zarpeshgidars asking to be allowed to withdraw the zarpeshgi money and stating that they had already given up possession. Both the applications were dismissed by the court, and Mr. Mukharji has contended that the orders of the court on those occasions were wrong and that the plaintiff is entitled to

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protection from injury from the failure of the court to pass the right orders. There are two answers to this. It is by no means certain that the orders of the court on that occasion were wrong. On the contrary they certainly seem to have been in strict accordance with the pre-emption decree that had been obtained by the plaintiff himself. Secondly, assuming that the orders were wrong, the plaintiff (if aggrieved by them) could and should have appealed against them, and got them corrected. They have now become final, and it is no longer open to the plaintiff to ask the court to correct them as in an appeal against them. Nor can he ask the court to ignore them, unless the bar of res judicata is shown on some ground or other to be inapplicable.

Mr. Mukharji's second point was that it was not open to the plaintiff in his pre-emption suit to raise any question as regards the zarpeshgi; and in support of this contention he relied on *Sheikh Golam Ayhya* v. *Joy Mungul Singh*(1). That, however, was a case in which it seems to have been argued in special appeal that the plaintiff was entitled to a pre-emption decree on depositing not the entire sale price but that price *minus* the amount of a certain mortgage debt. This contention was rejected by Couch, C.J. in the following words:

"That was an arrangement which the parties might well come to, but we think that it does not at all follow that the plaintiff who has a right of pre-emption is entitled to have the same thing done for him. And here it may well be that in reality the mortgage has been already discharged, and there is no ground for the plaintiff having this sum of money deducted from the price of the property that he may himself pay it off. Had this question been raised at an earlier period, a proper issue would have been framed and it might have been shown whether there

(1) (1870) 13 W. R. 435.

was or not any necessity for such an arrangement, as the plaintiff now contends for. If it had appeared that the mortgage was still existing, it would have been necessary for the defendant to come to some arrangement for its discharge.....".

These observations clearly show how before he obtained the pre-emption decree as it stands and after he became aware of the fact that the zarpeshgidars had not yet been paid off, the plaintiff could and should have obtained suitable relief in respect of the zarpeshgi by amending his plaint and raising an additional issue about the money required for the redemption.

It has also been contended that the effect of a pre-emption decree is to substitute the pre-emptor for the private purchaser as a vendee from the original owner and this, in respect of the rights and obligations arising from the sale under which the private purchaser had derived his title. This contention is perfectly correct so far as the right to redeem the mortgagees is concerned. But if it is meant to imply that as the private purchasers were to have the property clear of all encumbrance on payment of Rs. 1,150 to the original owner and of Rs. 1,600 to the zarpeshgidars, the pre-emptor is entitled to do the same, it is plain that the plaintiff is placed in a different position by his own pre-emption decree which entitled the private purchasers to the entire sum of Rs. 2,750 without any reference to the zarpeshgi.

Mr. Mukharji has also referred to *Raghubir Singh* v. *Jodha Singh*(1) in support of the contention that where the vendee defendant in the pre-emption suit has withdrawn the entire consideration money deposited by the plaintiff in that suit in his favour, the former becomes a trustee of the latter. No such broad proposition, however, was laid down in that case, which was decided on its own peculiar facts.

(1) (1923) I. L. R. 45 All. 482.

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In that case, as in the present, the property was actually in the posession of a mortgagee, and it would therefore have been useless for the holder of the pre-emption decree to take out delivery of possession against the vendee. More than 13 years after the pre-emption decree the vendee redeemed the mortgagee. The contention on his behalf was that as the pre-emptor (or his successor in title) had failed to put his pre-emption decree into execution by taking out delivery of possession, his right in the property absolutely ceased at the conclusion of 12 years from the date of the pre-emption decree. This contention was negatived by the learned Judges acting, among other things, on the analogy of section 82 of the Indian Trusts Act. The question was one of the competing titles of the pre-emptor and the vendee who had actually redeemed the mortgagee years after the pre-emption decree. The learned Judges held that as at the time of the pre-emption decree the property was not in the possession of the vendee defendant, the failure of the decree-holder pre-emptor to take out a formal delivery of possession against him did not affect the pre-emptor's title and that when he complied with the terms of the decree, that is to say, in the matter of depositing the sale price, his title was complete. They were of opinion that that title could not in equity be resisted by such title as the private purchaser had been able to acquire with the use of the pre-emptor's money. The decision of the question of the two competing titles in that case did not directly clash with the terms of the pre-emption decree and, as I have already said, there was also the analogy of section 82 of the Indian Trusts Act which, however, has no application to the facts of the present case.

Mr. Mukharji has also urged that the plaintiff is entitled to relief on the principle of section 69 of the Indian Contract Act, and he has cited *Soma-shastri* v. *Swamirao*(1) in support. The terms of the

(1) (1917) I. L. R. 42 Bom. 93.

section obviously do not help the appellant, and the case cited by Mr. Mukharji was not complicated, as is the present case, by a pre-emption decree which has to be taken to govern the monetary relations between the plaintiff and the vendees.

The first relief prayed for in the plaint was that the plaintiff may be declared to be entitled to khas possession without the zarpeshgi encumbrance, because defendants 6 and 7 had given up their claim to the peshgi money and their possession of the lands. This relief cannot be given to the plaintiff because it is clear that they never gave up their claim to the peshgi money. It is true that when they applied to the court for being allowed to withdraw the zarpeshgi money, they stated that they had given up possession. But they obviously did so because they expected to get the money from the deposit made by the plaintiff in accordance with the pre-emption decree. It is nobody's case that they actually got the money from that deposit, nor is it anybody's case that they have since received payment from the vendees or the pre-emptor or anybody else. Under the terms of the zarpeshgi deed they are entitled to retain possession until they are paid off, and as they were admittedly in possession at the date of the present suit, the appellant cannot recover possession from them without paying them off, for his title is subject to the zarpeshgi encumbrance. The first prayer of the appellant, therefore, fails. The second prayer, which was made as an alternative to the first prayer, was that a decree may be passed in favour of the plaintiff for Rs. 1,600 against defendants 1 to 5, and this prayer must be disallowed for the reasons indicated in *Ram Richha's* case(1). The third prayer was that defendants 1 to 5 be ordered to redeem defendants 6 and 7 and that the latter be ordered to give up possession. This prayer must also fail because in view of the terms of

(1) (1918) 46 Ind. Cas. 83.

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his pre-emption decree the plaintiff has no right to call upon the defendants to pay any money to the zarpeshgidars. All the prayers made by them, therefore, fail; and the appeal to this court must be dismissed with costs.

This, however, is not an end of the matter. The judgment of the lower appellate court as originally delivered entitled the plaintiff to recover possession on depositing Rs. 1,600 in court within two months for redeeming defendants 6 and 7; and it gave him this relief with "costs proportionate to his success with future interest at 6 per cent per annum and pleader's fee at 5 per cent." This last portion has been naturally objected to by defendants 6 and 7 before us. They have never disputed the plaintiff's right to redeem them and their action in going to the pre-emption court and seeking to be allowed to withdraw Rs. 1,600 from plaintiff's deposit is no reason for saddling them with any costs merely because on that occasion they gave up possession in anticipation of and as a preliminary to the court allowing them to withdraw the money that was admittedly due to them. That money is still due to them and, as I have already stated, the plaint did not seek their redemption by the plaintiff at all.

While this part of the judgment was being delivered this morning, it was brought to our notice by the learned Advocate who appears for defendants 1 to 3, that the lower appellate court had amended its judgment and decree and omitted the portion about redemption with costs. It appears that the amendments were made after hearing the parties including the plaintiff, and it is surprising that the plaintiff who appealed to this Court against the original unamended decree and judgment refrained from bringing the amendments to notice at once.

In the result I would dismiss this appeal and the suit with costs in all the courts to be paid by the

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plaintiff to defendants 6 and 7. As regards defendants 1 to 3, who also appeared in this Court, I would make no order of costs.

VARMA, J.—I agree.

J. K.

DHAVLE, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and James, J.

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February, 26.

DURGA TEWARY

v.

RAMRATI KUER.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 27—*additional evidence, appellate court's power to receive—discretion—additional evidence taken, whether can be left out of account in deciding the case on the merits—principles governing reception of additional evidence.*

Held, that paragraph (*b*) of rule 27 of Order XLI of the Code of Civil Procedure does not lay down that additional evidence should not be received by the appellate court, except on the definite requirement of the court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. There is nothing in the said paragraph which suggests that unless the appellate court finds some good reason for filling up some lacuna in the evidence, the parties have no right to produce such further evidence.

The word " requires " means that it is necessary.

A party is entitled to adduce additional evidence at the appellate stage if the evidence proposed to be offered was not available to him at the trial and has since become available to him.

*Appeal from Appellate Decree no. 79 of 1933, from a decision of Babu Ananta Nath Banerji, Subordinate Judge of Saran, dated the 28th September, 1932, reversing a decision of Maulavi Nasim-ud-din Ahmad, Munsif of Chapra, dated the 18th May, 1931.

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If additional evidence has been admitted and is admissible as relevant the additional evidence must be considered upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds.

Parsotim v. *Lal Mohar*(1), explained.

Per James, J.—The grounds which would justify the original court, if no appeal has been preferred, to review its judgment should always be regarded as substantial cause justifying the admission of additional evidence by the appellate court.

Appeal by the defendant.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

The case was first heard by Wort, J. who referred it to a Division Bench. It was then heard by Terrell, C.J. and James, J. who referred it to a Special Bench. As the points of law involved in the appeal were not pressed at the hearing, the case was referred back to the Division Bench.

Harnarayan Prasad, for the appellant.

Janak Kishore, for the respondent.

COURTNEY TERRELL, C.J.—This second appeal is by defendant no. 1 against a decree of the Subordinate Judge of Saran reversing a decision of the Munsif of Chapra. The plaintiff claimed as the sister of a lady named Kalika who had died, and one of the important issues in the case was as to when Kalika in fact died. The matter was heard by the trial court, and it was held that the lady died as alleged by the defendant in the year 1928. The matter went on appeal to the lower appellate court, and the lower appellate court had brought to its notice a certain document purporting to be an admission by the defendant of the date when the lady died and

(1) (1931) I. L. R. 10 Pat. 654; L. R. 58 Ind. App. 254.

putting that date not at the date alleged by the defendant but at a subsequent date, the 8th of May, 1929. The learned Judge decided to admit this document into evidence and having considered it together with the rest of the evidence allowed the appeal, deciding that the lady in fact died on the 8th of May, 1929. The matter was taken on second appeal to a learned Judge of this Court sitting singly, and the appellant took the ground that the lower appellate court should not have admitted this additional evidence. There was another point in dispute which was a matter of law only. The learned Judge heard the second appeal and decided to refer the matter of the legal point to a larger Bench. It was accordingly heard by a Full Bench and the matter of its disposal is of no great interest, the order being in so far as it affects this case that the case was sent back to a Division Bench and now comes before us.

The main point which has been taken before us is that of the admission of the evidence by the lower appellate court. On behalf of the appellant and in assistance of his argument there has been produced before us an expression of opinion by the learned Judge, who first heard the case in second appeal, to the effect that the additional evidence should not have been received by the lower appellate court and that the case should have been indeed decided ignoring the additional evidence which was in fact admitted and taken into consideration. The argument of the learned Advocate and the opinion of the learned Judge of this Court are based upon the wording of Order XLI, rule 27, of the Code of Civil Procedure. It is suggested that the meaning of paragraph (*b*) of that rule is that the evidence should not be admitted except on the definite requirement of the Court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. It is sought to base this argument upon certain passages in a judgment of their Lordships of the Privy Council

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in the case of *Parsotim* v. *Lal Mohar*(1). In my opinion the judgment referred to lays down no such proposition. It is suggested from the wording of the judgment that unless the appellate court itself finds some good reasons for filling up some lacuna in the evidence the parties have no right to produce such further evidence. The wording of the paragraph (*b*) is quite against such a view and I am perfectly certain that their Lordships of the Privy Council intended to lay down no such principle. The appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, and, as was pointed out by their Lordships of the Privy Council in the case referred to, the word "requires" means that it is necessary. It may be necessary for the purpose of enabling the court to pronounce judgment, that is to say, the court may find that unless such evidence is produced before it, it has not sufficient material before it to decide the case or there may be some other good and substantial cause and the most common and frequent is that the evidence was not available in the trial court because the party was unaware of it at the time of the trial and it has since been brought to the notice of the party. It must be remembered that a party is entitled to obtain a review of a judgment and one of the grounds upon which it is entitled to obtain a review is that evidence which it could not be expected to have produced at the trial has become available since the trial which is material to the decision of the issue. It would be ridiculous to imagine that the appellate court should first of all ignore the profferred new evidence and then allow the proffered new evidence to be brought before it on an application for review of its own judgment. There is a point further which must be noticed in considering the judgment of the Privy Council: they did not decide that if the court should have exercised its discretion to admit further

(1) (1931) I. L. R. 10 Pat. 654; L. R. 58 Ind. App. 254.

evidence upon grounds which did not appeal to the Privy Council, the Privy Council would have proceeded to refer the matter back to the lower appellate court to be heard with directions that the additional evidence given was to be ignored, nor did they decide the matter themselves ignoring such additional evidence. The principles upon which the court is to exercise its discretion are well known. If that discretion, however, has been exercised and if the additional evidence has been admitted, and is admissible as relevant, the additional evidence must be heard upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds, for an appellate court does not interfere with the discretion of a lower court unless that discretion has been exercised upon fundamentally erroneous principles. The learned Judge of this Court, however, seems to have been led to the impression that the case ought to have been remanded by him to the lower appellate court to be decided on the evidence as it stood before the admission of the additional evidence, and I see no justification for that point of view. In the case before the Privy Council their Lordships as a matter of fact while stating that the additional evidence ought not to have been admitted considered that additional evidence on its merits which governed the decision on the appeal and nothing else.

There is one further small point which is conceded by the learned Advocate on behalf of the respondents. It is pointed out that the suit was to recover a certain mukarrari no. 635 as having belonged to the deceased lady and certain moveable property as having been owned by the deceased lady and that the trial court found as a matter of fact that she did not possess the mukarrari and did not possess any moveable property. This point of fact was not considered at all by the appellate court which reversed the decision of the Munsif on wider grounds, but it is quite clear that the judgment of the Munsif can only stand on the hypothesis of the findings of the Munsif as to these

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two items of property, which findings have not been disturbed by the appellate court. Therefore the decree will stand in favour of the plaintiff subject to the modification that those two items of property will be excluded from the decree.

COURTNEY TERRELL, C. J.

The appeal fails and must be dismissed with costs.

JAMES, J.—I agree entirely. The learned Subordinate Judge admitted this additional evidence on grounds which would have justified the admission of an application for review by the original court if no appeal had been preferred. If such grounds are made out by an appellant in an application under Order XLI, rule 27, they should always be regarded as substantial cause justifying the admission of the additional evidence. It appears to me that Order XLVII, rule 1, cannot be reasonably read as implying anything else; though if there should appear any danger of its being read in any other manner, I consider that this Court with the Rule Committee ought to amend it. It appears to me that it would be absurd to lay down as a general rule, that a respondent is permitted in certain circumstances to adduce additional evidence before the court of appeal, and a person who being a party to the suit is not a party to the appeal is similarly permitted to do so; and to provide that the only person who cannot in these circumstances produce additional evidence before the appellate court is the appellant himself. The whole of rule 1 of Order XLVII proceeds on the assumption that if the person who has discovered new and important matter or evidence which after exercise of due diligence was not within his knowledge at the time of the trial is a person who is in any way concerned in a pending appeal from the decree, he will be permitted to produce that evidence before the appellate court and it will be heard at the time of the appeal.

J. K.

Appeal dismissed.

LETTERS PATENT.

Before Courtney Terrell, C.J. and James, J.

1937.
March, 8.

PRATAP MANDAL

v.

SURPAT SINHA.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 50, 104-*H and* 115—*suit for declaration that plaintiff was permanent tenure-holder—uniform payment of rent for more than* 60 *years—record-of-rights, entry in—istemrari lekin mukarrari nahin—presumption of permanency of rent under section* 50, *whether can be raised in view of section* 115.

Where the plaintiff who was recorded in the record-of-rights as *istemrari lekin mukarrari nahin* brought a suit under section 104-H of the Bengal Tenancy Act for a declaration that he was a permanent tenure-holder at a fixed rate and it was found that the rent of the tenure had been paid at an unvarying rate for sixty years,

Held, that section 115 of the Bengal Tenancy Act had no application and the plaintiff was entitled to the benefit of the presumption mentioned in section 50 of the Act.

The presumption under section 50 applies to suits framed under Chapter X of the Bengal Tenancy Act whether they are suits under section 106 or under section 104-J of the Act.

Under section 104-J of the Act the presumption of correctness attaching to the record of rent settled under section 104 is expressly made subject to the provisions of section 104-H.

Pirthichand Lal Chowdhry v.*Basarat Ali*(1), relied on.

Rai Bahadur Gobind Lal Sijuar v. *Ramsaran Lal*(2) and *Ramsaran Mahton* v. *Syed Muhammad Aradut Hossain*(3), referred to.

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*Letters Patent Appeal no. 22 of 1936, from a decision of the Hon'ble Mr. Justice Wort, dated the 12th October, 1936.

(1) (1909) I. L. R. 37 Cal. 30, F. B.
(2) (1921) 2 Pat. L. T. 642.
(3) (1924) 6 Pat. L. T. 221.

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Section 111 merely prohibits for a certain period the institution of particular suits while the record-of-rights is under preparation. Prima facie it would appear that the provisions of section 115 would apply to suits of that nature instituted after the bar provided by section 111 has been removed; but it would not follow from this that the presumption would not apply to suits for which Chapter X of the Bengal Tenancy Act expressly provides, such as those under section 104-H, which are equivalent to applications under section 105 and suits under section 106.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of James, J.

Mahabir Prasad and *D. L. Nandkeolyar*, for the appellant.

J. C. Sinha, for the respondent.

JAMES, J.—This appeal arises out of a suit under section 104-H of the Bengal Tenancy Act wherein the plaintiff prayed for a declaration that he was a permanent tenure-holder holding at a fixed rent of Rs. 41-12-0. In the record-of-rights the status of the plaintiff was recorded as that of a permanent tenant holding at a rent which was not fixed (*istemrari lekin mukarrari nehin*).

The lower appellate court has found that rent for this tenure has been paid at an unvarying rate for sixty years before the suit, and that there has been no change in the area actually occupied by the tenant. Applying the presumption mentioned in section 50 of the Bengal Tenancy Act he found that the plaintiff was tenure-holder at a fixed rent and decreed the suit. A second appeal was preferred, which was heard by a single Judge of this Court, who held that the provisions of section 115 of the Bengal Tenancy Act barred the application of the presumption mentioned in section 50 of the Act after the record-of-rights had been finally published under section 103-A. He therefore reversed the decree of the Subordinate

Judge; but he gave leave to the plaintiff to appeal from his decision under clause 10 of the Letters Patent.

The question for decision is whether in a suit under section 104-H of the Bengal Tenancy Act a party can claim the benefit of the presumption mentioned in section 50 of the Act. In *Prithichand Lal Chowdhry* v. *Basarat Ali*(1) a Full Bench of the Calcutta High Court held that in proceedings under section 105 of the Bengal Tenancy Act a party could claim the benefit of the presumption under section 50 although final publication had taken place, because it could not be held that the particulars mentioned in section 115 had been completely recorded so long as any dispute remained pending which would immediately affect the record which was being prepared. That decision has been accepted in this Court in *Rai Bahadur Gobind Lal Sijuar* v. *Ramsaran Lal*(2) and in *Ramsaran Mahton* v. *Syed Muhammad Aradut Hossain*(3), though the decisions in those cases were not actually based upon the rule laid down by the Calcutta High Court. No instance has been cited before us in which a Bench of this Court has dissented from the view of the Calcutta High Court with regard to the applicability of the presumption under section 50 in suits framed under Chapter X of the Bengal Tenancy Act whether they are suits under section 106 or under section 104-H of the Act. Under section 104-J of the Act, the presumption of correctness attaching to the record of rent settled under section 104 is expressly made subject to the provisions of section 104-H; and under sub-section (*9*) of section 104-H the Court which passes final orders in a suit under this section is required to notify the same to the Collector of the District. If it cannot be held that the particulars mentioned in section 102(*b*) of the Bengal Tenancy Act have been recorded so long

(1) (1909) I. L. R. 37 Cal. 30, F. B.
(2) (1921) 2 Pat. L. T. 642.
(3) (1924) 6 Pat. L. T. 221.

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as any suit is pending under Chapter X of the Act which might lead to amendment of the record under section 107, it would also appear that no finality has been given to a record prepared under sections 103 and 104 of the Act so long as a suit under section 104-H remains undecided. I therefore consider that the reasoning which formed the basis of the decision in *Prithichand Lal Chowdhry's* case(1) must apply with equal force to suits under section 104-H of the Bengal Tenancy Act.

It is suggested on behalf of the respondents that this question was left open by the Calcutta High Court, because it was remarked that it was not necessary in the case before the Court to decide whether the presumption under section 50 of the Act could be applied to suits of the nature of those mentioned in section 111; but section 111 merely prohibits for a certain period the institution of particular suits while the record-of-rights is under preparation. Prima facie it would appear that the provisions of section 115 would apply to suits of that nature instituted after the bar provided by section 111 has been removed; but it would not follow from this that the presumption would not apply to suits for which Chapter X of the Bengal Tenancy Act expressly provides, such as those under section 104-H, which are equivalent to applications under section 105 and suits under section 106, when settlement of land revenue is being made or rents are being settled under section 112 of the Act. In the present case the learned Subordinate Judge has found that the plaintiff proved payment of rent at an unvarying rate for sixty years before the suit and he has not accepted the evidence by which the defendant sought to rebut the presumption which followed on this proof by the plaintiff of uniform payment. The Subordinate Judge, therefore, rightly decreed the plaintiff's suit unless some other grounds were made out for holding that the rent payable was

(1) (1909) I. L. R. 37 Cal. 30, F. B.

something other than the rent which had been paid during that period.

It is suggested on behalf of the respondent that there has been a large increase of area because the plaintiff says that he acquired 244 bighas and the area of the tenure has now been found to be 209 acres. It appears from the judgment of the learned Subordinate Judge that these two areas do not exactly correspond though it is not clear whether the area now held is in excess or something less. The plaintiff stated that the area which he held was 244 bighas and the learned Subordinate Judge thought that he had stated the area by guess; but he finds that it has not been proved that there has been any variation in the area held by the plaintiff, and in view of the manner in which the defendant conducted his defence he could hardly prove that rent was originally fixed at a rate of so much an acre. The learned Subordinate Judge was therefore right in holding that the defendants were not entitled to claim that additional rent should be assessed under section 52(*i*)(*a*) of the Act.

The result is that I would allow this appeal, set aside the decree of this Court and restore that of the Subordinate Judge decreeing the plaintiff's suit with costs throughout.

A copy of this judgment should be sent to the Collector of Purnea under section 104-H(*g*) of the Bengal Tenancy Act.

COURTNEY TERRELL, C.J.—I entirely agree.

J. K.

Appeal allowed.

PRIVY COUNCIL.

KEDARNATH GOENKA

v.

MAHARAJ KUMAR BAGESHWARI PRASAD SINGH.

J. C.* 1937.

March, 12.

On Appeal from the High Court at Patna.

Mesne Profits—Interest—Rate after delivery of possession.

The rate of interest on mesne profits depends on a variety of circumstances. The court should award a fair rate. A distinction cannot be made between the rate payable up to the date of delivery of possession and that awarded thereafter on the amount which represents the profits found to be due on that date.

Consolidated Appeal (no. 10 of 1935) from two decrees of the High Court (August 13, 1931) modifying a decree of the Subordinate Judge of Monghyr (November 16, 1927).

The material facts are stated in the judgment of the Judicial Committee.

1937, January 28 and 29. *Dunne, K. C.* and *Khambatta*, for the appellant.

J. M. Parikh, for the respondent.

The judgment of the Judicial Committee was delivered by—

SIR SHADI LAL.—These consolidated appeals arise out of proceedings in the execution of a decree obtained against the appellant by the respondents for the possession of land and for the mesne profits thereof. The questions raised by the appeals relate to the assessment of the mesne profits, and to the rate of interest which should be allowed on the profits.

The circumstances, which led to the decree sought to be executed, may be shortly stated. In the Monghyr district of the province of Bihar there was

* PRESENT: Lord Thankerton, Sir Shadi Lal and Sir George Rankin.

an estate called Mahal Bisthazari. The mahal comprised about 360 villages, but was entered in the Collector's register as a separate revenue-paying estate. There were numerous proprietors in the mahal owning specific shares, some in one village only, others in several villages. Ordinarily, all the proprietors in a revenue-paying estate are jointly liable for the payment of the land revenue assessed on that estate, and, in the event of a default in payment, the whole of the estate may be sold for the realisation of such amount as may be due to Government. But the Bengal Land Revenue Sales Act (Bengal Act XI of 1859), which prescribes rules for the realisation of land revenue, provides that

> "a recorded sharer of a joint estate held in common tenancy"

(section 10), or

> "a recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate" (section 11),

may, if he desires to pay his share of the revenue separately, ask the Collector to open a separte account with him for the payment of his share of the revenue separately from the other proprietors. The advantage of opening a separate account is that, when a default in the payment of land revenue takes place, the Collector

> "in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due" (section 13),

and the rest of the estate shall not be liable to sale unless

> "the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale," (section 14).

A large number of the proprietors, who owned specific but undivided shares in Mahal Bisthazari, availed themselves of these provisions of the statute, with the result that the Collector opened separate accounts with them in respect of their liabilities for

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the payment of their shares of the land revenue. A large area of the estate, however, remained *ijmali* or joint share, and the owners of this *ijmali* share were still jointly liable for the payment of the land revenue in respect of it.

In 1901 there was an arrear of land revenue payable in respect of the *ijmali* share, and the Collector, in exercise of the power conferred upon him by the statute, sold the share, on the 9th September, 1901, by auction. The appellant's father Baijnath Goenka was certified to be the purchaser of that share, and obtained possession thereof on the 15th May, 1902.

Thereupon, the respondents with some of their co-sharers in the *ijmali* share, after an unsuccessful appeal to the Commissioner of the division, brought an action in the Court of the Subordinate Judge of Monghyr for the annulment of the sale, and for the possession of the property. The Trial Judge allowed their claim and granted them a decree for possession of the land with mesne profits. This decree, though reversed on appeal by the High Court, was restored by His Majesty in Council in 1915, with certain modifications which are not material to the present appeals.

It is the decree of the Subordinate Judge, which, as modified by the Privy Council, the respondents are seeking to execute. But before dealing with the execution of that decree, their Lordships consider it necessary to refer to the proceedings for the partition of the mahal which were commenced in 1876 but were not concluded until the 31st March, 1908. It is common ground that before the partition the respondents had shares in certain *ijmali* villages, and were also co-sharers in other villages in respect of which they had separate accounts. In lieu of their entire holding in the mahal they were awarded on partition three villages, namely Singthu, Padmawat

and Dhandh, and these villages were given a separate tauzi number. The interest of the respondents in the ijmali villages, which were sold in September, 1901, and purchased by Goenka, was represented by 6 annas, 9 gandas, and 14 cowries in each of these three villages; and the remaining share in the villages represented their interest in the mahal in respect of which they had separate accounts.

It appears that, while Goenka was entitled to the fractional share specified above in each of the three villages, he took possession of the whole of the village Singthu, but did not get possession of any portion of the other two villages. There can be no doubt that the respondents obtained possession of these latter villages, and they have remained in actual possession thereof to the exclusion of the appellant. But, on the 13th January, 1915, an order was made in the Land Registration Department that Goenka should be entered in the Collector's register D as owner in respect of 6 annas, 9 gandas and 14 cowries in Singthu as well as in the other two villages, and that the respondents should be registered in respect of the remaining share in each of the three villages.

After the decision of their appeal by His Majesty in Council, to which reference has already been made, the respondents applied for the execution of the decree for the recovery of the land, and also for the mesne profits thereof. They obtained possession of the land on the 7th May, 1918, and the dispute is now confined to two issues:—

(*1*) Whether the respondents are entitled to recover, from the appellant, mesne profits for the whole of the village of Singthu, or for only 6 annas odd share of it, during the period which will be presently described.

(*2*) Whether interest at the rate of 12 per cent. per annum, which has been awarded to them on the mesne profits, is excessive and should be reduced.

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The period referred to in the first issue commenced on the 31st March, 1908, when the partition of the mahal was completed, and ended on the 13th January, 1915, when entries were made in register D recording the appellant to be the proprietor of 6 annas odd share in the village of Singthu, and the respondents as owners of the remaining share in that village. It is argued for the appellant that, as the interest purchased by him in 1901 was, on partition, represented by 6 annas odd share in Singthu, as in the other two villages, he was liable for mesne profits in respect of only that share in Singthu, but not in respect of the whole of the village in question. There is, however, no doubt that on the completion of the partition he came into actual possession of the entire 16 annas of that village, and the respondents' possession was confined to the other two villages. This division of possession, which was convenient to both parties, might have been the result of an arrangement arrived at between them, as explained by the respondents; but the fact remains that the appellant realised the profits of the whole of the village Singthu, and not of the fractional share thereof. It is, however, urged that in his capacity as purchaser he was entitled to get possession and profits of only the fractional share, and that, if he realised more than his legitimate share, he did so as a trespasser. In that case he might be held liable for the excess profits in an appropriate action brought for the purpose, but the respondents cannot recover from him those profits in the execution proceedings. It appears that, while he was entered as a co-sharer in the villages on the completion of the partition in March, 1908, the *quantum* of his share in them was not recorded until the 13th January, 1915, when the relevant entries were made in register D. During the intervening period his possession of the village of Singthu was referable only to his title as purchaser at the revenue sale, and he received profits on that basis only. He was admittedly a co-sharer in that village, and there

is no warrant for the suggestion that, while he was in possession of an undefined share as purchaser, he should be deemed to be in possession of the remaining share as trespasser.

It is to be observed that the appellant has not been made liable for any share of the profits of the other two villages, though he was a co-sharer in them on the strength of his purchase, the reason being that he was neither in possession of any share therein nor realised any profits from them. So far as his liability for the entire profits of the village of Singthu is concerned, he cannot invoke any principle which would support his contention. Their Lordships, therefore, concur with the High Court that his liability for the mesne profits of the whole of the village Singthu, which accrued during the period mentioned above, has been established.

The only other point, which requires determination, is what should be the rate of interest to be allowed on mesne profits. That interest should be awarded to the respondents is a matter which does not admit of any dispute. Indeed, the Indian law makes interest on mesne profits an integral part of mesne profits. It is enacted by section 2, sub-section (*12*) of the Code of Civil Procedure, 1908, that the expression " mesne profits " of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits.

Now, the rate, at which interest should be allowed, is not mentioned in the statute, nor is there any stipulation in any contract bearing on the subject. The rate is, therefore, in the discretion of the Court, but the discretion must proceed on sound principles.

The learned Judges of the High Court think that 12 per cent. per annum is the ordinary rate of interest, which should be awarded on mesne profits.

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They, however, hold that "this rate should be calculated only up to the delivery of possession, and thereafter the usual Court rate of 6 per cent. per annum should be allowed." But no reason has been assigned for making the distinction between the rate of interest payable on mesne profits up to the date of the delivery of possession, and that to be awarded thereafter on the amount which represents profits found to be due on that date. In either case a sum of money is due to the decree-holder, and he is entitled to recover it with interest for the period during which it has been withheld from him. In the absence of a statutory provision or a special contract, there is no valid ground for awarding interest at a higher rate up to a certain date during that period, and at a lower rate after that date.

The cases decided by the Courts in India do not disclose any uniform rule as to the rate of interest which should be granted on mesne profits. The rate must depend upon a variety of circumstances, but, as decided by this Board in the case of *Secretary of State for India in Council* v. *Saroj Kumar Acharjya Choudhury*(1), six per centum per annum is, in the absence of special circumstances, a fair rate of interest. The rate awarded by the High Court in that case was 12 per cent. per annum, but it was reduced by the Board to 6 per cent. per annum.

There are no special circumstances in the present case which would justify the award of a higher rate of interest; and their Lordships are, therefore, of opinion that 6 per cent. per annum is a reasonable rate of interest which should be allowed for the whole of the period during which the decree-holders were deprived of the use of the money which was due to them. Interest at that rate should be calculated on the items on both sides of the account, that is to say, on the amount of the profits due to the respondents as well as on the sums credited to the appellant on account of the collection charges.

(1) (1934) L. R. 62 Ind. App. 53.

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Their Lordships will, therefore, humbly advise His Majesty that the decrees of the High Court should be modified by the substitution of interest at 6 per cent. per annum for that at 12 per cent. per annum; but that in all other respects they should be affirmed. The appellant having succeeded on only one point should recover one-half of the costs of these appeals.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*

SIR SHADI LAL.

Solicitors for the respondents: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Courtney Terrell, C. J., and James, J.

MUHAMMAD WALIUL HAQ

v.

LUDPUD UPADHYA.*

1937.

Sept., 29.
Feb., 24, 25.
March, 12.

Record-of-rights—ghairmazrua-am, meaning of—zamindar, whether has any right of control over lands recorded as ghairmazrua-am.

The Muhammadans brought a suit for a declaration that they had a right to bathe in the Saptadhara *kund* (pool) at Rajgir which was recorded in the record-of-rights as *ghairmazrua-am* and it was found as a fact that the *kund* in question was a place of religious sanctity to the Hindus and the control of the *kund* was in the hands of Brahmin priests who received offering from Hindu pilgrims,

Held that the entry *ghairmazrua-am* in the record-of-rights meant that it was public waste or uncultivated land over which the zamindar had no right of control and further that the entry in question referred to the Hindu public only.

*Appeal from Appellate Decree no. 1379 of 1933, from a decision of Rai Bahadur Surendra Nath Mukharji, District Judge of Patna, dated the 18th September, 1933, confirming a decision of Rai Sahib Bhubaneshwar Prasad Pande, Subordinate Judge of Patna, dated the 9th July, 1932.

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MUHAMMAD WALIUL HAQ v. LUDPUD UPADHYA.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of James, J.

Sir Sultan Ahmad (with him *Khurshed Husnain*, *S. A. Khan*, *A. H. Fakhruddin*, *H. R. Kazimi*, *A. A. K. Warsi* and *S. Naimul Haq*), for the appellants.

Sir Tej Bahadur Sapru (with him *Dr. K. P. Jaiswal*, *Murari Prasad*, *C. P. Sinha*, *Ramchander Prasad*, *Ramnandan Prasad*, *R. K. L. Nandkeolyar*, and *Phulan Prasad Varma*), for the respondents.

JAMES, J.—This is a second appeal from the decision of the District Judge of Patna affirming the decision of the Subordinate Judge. It appears from the findings of facts of the courts below that from some of the springs at Rajgir the water has been led by artificial channels to artificially constructed tanks or pools (kunds), over a number of which certain families of Brahmans have for generations exercised supervision, and have collected the customary offerings from pilgrims who bathe at the pools. One of these pools is under the supervision of Muhammadans and is used by Muhammadans; while others are used by Hindus. The pool with which we are here concerned is entered in the survey map as plot no. 2349, and in the *gairmazrua-am* khatian of the record-of-rights it is described as Saptadhara kund. A Hindu temple bearing plot no. 2348 opens on to the pool, and access to the pool has been guarded by iron gates for a time longer than twenty-five years before the institution of the suit. The courts have found that this kund has been in actual possession of the Brahman custodians (Pandas) from ancient times. About eighty years ago one Sitaram, a Kayastha of Baksanda, introduced some improvement in the Saptadhara kund and built the temple of the seven Rishis which adjoins it. The Saptadhara kund is kept in repair and is cleaned by the Brahmans, who receive the offerings

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of pilgrims and are the defendants in this suit. The suit was instituted by five Muhammadans,—three of them residents of Rajgir village and two of other villages—praying for a declaration that they have a right to bathe in the waters of the kund whenever they please. The courts have found that the kund is in charge of its Brahman custodians, and that no general right has been proved of Muhammadans or of any persons who are not Hindus to enter the sacred precincts for the purpose of bathing.

The appeal would on the face of it appear to be concluded by the findings of fact of the courts below; but Sir Sultan Ahmad argues that the law has been misunderstood, and that in some respects the findings of fact are vitiated by misunderstanding of the effect of the evidence.

The entry in the record-of-rights is of *gair-mazrua-am* within an estate which was settled with the Nawabs of Hussainabad temporarily in 1781 and permanently eighty years later. Sir Sultan Ahmad argues that since this pool is shown as lying within this zamindari, it should be presumed that the zamindar has complete right of control and that no such right of control can be claimed by the Brahman custodians of the pool; but the lower appellate court has found that the rights of the Pandas were recognised at the time of the settlement, so that although this pool with its adjoining temple may lie geographically within the zamindar's estate, it did not at any time strictly speaking form part of that estate. It appears from the rubakari of 1840 that this estate was originally granted in life mukarrari to Muhammad Yahia Khan, ancestor of the Nawabs of Hussainabad and that it was resumed in 1840 when a record was prepared under Regulation VII of 1822. Resettlement was not made permanently until 1861; but this is apparently the rubakari of the resumption proceedings. The rubakari describes first the Muhammadan dedications in the estate, and what part of

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the estate may have been set aside to meet the expenses of such institutions. It describes in the second place the sacred places of the Hindus and how far they were sources of profit to the zamindar. It is there stated that the Brahman families who are custodians of the kund have the right of receiving offerings; and that these rights are ancestral so that persons who are not members of the families are excluded from the privilege. The report states that dues levied at a fair which was held every three years at Rajgir were excluded from the patwari's papers; but there is nothing in it which indicates that by the settlement any right was conveyed to the zamindar of interfering with the kunds which were places of worship for Hindus. I consider that taking this rubakari as a whole, the learned District Judge was entitled to come to the conclusion that the permanent settlement with the zamindar conveyed to him no right of interference with the kund. It has been observed by the courts below that although the Muhammadan zamindar may now say that these kunds form part of his zamindari in the strictest sense of the word, he is at the present time only proprietor of a share in the estate; and other co-sharers definitely say that they have no right to interfere with the kunds. The entry in the record-of-rights cannot be read as warranting any presumption that the zamindar more than any other person has a right of control over these kunds. There are two forms of khatian for non-agricultural land or waste land. In one, (*gairmazrua malik*), is entered land, waste or uncultivated or utilised for building or non-agricultural purposes, which is under the control of the zamindar. In the other, (*gairmazrua-am* or public waste) is land of that kind not under the control of the zamindar; and the only presumption in that connection which can properly be drawn from the entry in the record-of-rights is that this pool is not under the control of the zamindar.

In the second place Sir Sultan Ahmad argues that it ought to have been presumed from the entry

in the record-of-rights that the plaintiffs enjoyed the customary right which they claimed; that *gair-mazrua-am* means public waste, so that it should be presumed that all members of the public are equally entitled to enjoy it. In this khatian no. 483 we find that most of the entries are of Hindu temples and of their compounds or of Muhammadan mosques or sacred buildings; and it is manifest that the entry of a plot in khatian no. 483 conveys no presumption that every member of the public irrespective of race or religion is entitled to enter the precincts of every plot described in the khatian. The adjoining temple is entered as plot no. 2348 while for plot no. 2349 the pool on which the temple opens out, the entry is Saptadhara kund. The learned District Judge has found that the Saptadhara kund is a place of special sanctity to the Hindus—the kund of the seven Rishis; and, as Sir Tej Bahadur Sapru on behalf of the respondents reasonably observes, the framers of the record-of-rights though they plotted this appanage of the Hindu temple separately would not have considered that any other description than that of Saptadhara kund should be necessary to indicate its sanctity. I do not consider that it can be held that any right of the plaintiffs to enter the precincts can be presumed from the entry in the record-of-rights.

We thus find that this is an artificial pool forming part of the precincts of the Hindu temple, which has always been kept in repair by its Brahman custodians; it has always for the greater part been enclosed, and has actually been enclosed completely by iron gates for twenty-five years or more before the institution of the suit. A customary right of the public in general irrespective of caste or creed to enter the precincts for the purposes of bathing might possibly exist in such circumstances; but it is certainly not possible to say that in the present case the evidence adduced on behalf of the plaintiffs is such as to prove the existence of such a right. There is evidence on behalf of the plaintiffs to show that at

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different times particular Muhammadans have bathed in this pool as of right, which has not been believed on the whole by the courts below, who in these matters are final judges of fact. Sir Sultan Ahmad lays special stress upon the evidence of certain Muhammadan gentlemen of position who have at different times bathed in this pool and whose evidence has been believed by the courts below, though in one instance with certain reservations regarding the correctness of the witness's memory as to the particular pool in which he bathed. Sir Sultan suggests that if this evidence is believed, the existence of some kind of easement or customary right is proved; but, as Sir Tej Bahadur Sapru points out, this casual bath of a distinguished Muhammadan can hardly be treated as a representative bath; and this kind of evidence can certainly not be held to be sufficient to prove the existence of a general customary right of all Muhammadans to enter the precincts to bathe whenever they please. It may be possible that the courts in India have sometimes insisted too strictly on proof of immemorial practice and invariability before they would treat the establishment of customary right as proved; but it cannot be held that in this case the courts below have committed any error of law in finding that the customary right alleged has not been proved by the evidence adduced.

I do not consider that it can be said that any case has been made out on behalf of the appellants which would warrant our interference under section 100 of the Civil Procedure Code with the decision of the learned District Judge; and I would dismiss this appeal with costs to the contesting respondents.

COURTNEY TERRELL, C. J.—I entirely agree.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Dhavle and Rowland, JJ.

KISSEN GOPAL GANWARIWALA

v.

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Oct., 16; 19.
March, 15.

Forfeiture—execution—judgment-debtor, failure of, to pay sum agreed within certain time—time, if of the essence of the contract—forfeiture, whether court can relieve against —court, whether can extend time—equity.

Equity only intervenes to do complete justice between the parties. A Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence.

Harakh Singh v. *Saheb Singh*(1), referred to.

Where during the pendency of execution proceedings the decree-holder agreed to accept a smaller sum in full satisfaction of the entire decree if payment was made in two months and, in case of default, he was to proceed with the execution without the judgment-debtor being competent to raise any objection, *held*, that time was of the essence of the contract and this was not a case of forfeiture of the kind where equity would relieve the judgment-debtor.

Ford v. *The Earl of Chesterfield*(2), relied on.

Ram Gopal Mokerjea v. *Samuel Masseyk*(3) and *Neil, In re*(4), referred to.

An executing court cannot extend the time of payment agreed upon by the parties without the consent of the decree-holder.

Bhagat Narin Singh v. *Srinivas*(5), *Chaudhry Rameshwar Misser* v. *Chaudhry Sureshwar Misser*(6), *Jadav Chandra Poddar* v. *Rameshwar Marwari*(7), *Sheo Prasad Lal* v. *Tapeshwar Mahto*(8), *Musammat Nand Rani Kuer* v.

*Appeal from Original Order no. 295 of 1935, from an order of Babu Narendra Nath Banerji, Subordinate Judge at Purulia, dated the 21st September, 1935.

(1) (1907) 6 Cal. L. J. 176.
(2) (1854) 19 Beav. 428.
(3) (1860) 8 Moo. I. A. 239.
(4) (1881) 16 Ch. D. 675.
(5) (1936) I. L. R. 16 Pat. 202, S. B.
(6) (1917) 2 Pat. L. J. 164.
(7) (1929) I. L. R. 9 Pat. 332.
(8) (1933) I. L. R. 13 Pat. 1.

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Durga Dass Narain(1), *Kandarpa Nag* v. *Banwari Lal Nag*(2), *Ram Gopal Mookerjee* v. *Samuel Masseyk*(3), *Chandanbala Debi* v. *Probodh Chandra Roy Chowdhry*(4) and *Hansraj* v. *Jogeshwar Prasad*(5), referred to.

Akkach v. *Aminuddi*(6), distinguished.

Appeal by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

Manohar Lall (with him *Hareshwar Prasad Sinha*, *S. C. Mazumdar* and *K. P. Sukul*), for the appellants.

P. R. Das (with him *S. M. Mullick* and *G. N. Mukherji*), for the respondent.

DHAVLE, J.—This is an appeal by certain judgment-debtors from an order dismissing their objections in an execution proceeding. The decree under execution was passed on the original side of the Calcutta High Court against Kishun Gopal and Rameshwar Lal, personally, and also against Sitaram and Gigla, two minors, "out of their share or interest in the assets in or to come to their hands of the joint family estate of the defendants"; and it was a decree for over Rs. 19,000 besides interest and costs, the minor Sitaram alone being made liable for the difference between the costs of the suit as a defended suit and the costs as of an undefended suit. Execution was started in the court of the Subordinate Judge of Purulia in October, 1934. Two months afterwards the judgment-debtors filed an objection under section 47 of the Code of Civil

(1) (1923) I. L. R. 2 Pat. 906.
(2) (1920) 33 Cal. L. J. 244.
(3) (1860) 8 Moo. I. A. 239.
(4) (1909) 9 Cal. L. J. 251.
(5) (1925) 6 Pat. L. T. 511.
(6) (1918) 23 Cal. W. N. 439.

Procedure, which was disallowed in the following April. While that objection was pending, the judgment-debtors filed another objection in February, stating that the decree-holder had been satisfied to the extent of Rs. 12,500 and urging that he was therefore not entitled to proceed in respect of the entire amount decreed. Next month they filed another objection urging, among other things, that the decree was a nullity as it was a joint decree and one of the defendants, the minor Gigla, had died before the decree was passed. While these two objections were pending, the parties arrived at a compromise on the 29th of April, 1935, according to which the whole decree was to be treated as satisfied if the judgment-debtors paid Rs. 5,500 to the decree-holder within two months, and the decree-holder was to proceed with the execution if the judgment-debtors did not pay the agreed sum of Rs. 5,500 within the time fixed. This compromise was filed in court on the following day, and the Subordinate Judge stayed the execution proceedings till the 29th of June, 1935. On this day the decree-holder applied for time to proceed, and on the 4th of July, 1935, he asked for the issue of sale proclamations (certain properties of the judgment-debtors having already been attached) alleging that the judgment-debtors had not paid anything to him and that he was, therefore, entitled to realise the entire decretal amount. It appears from the order-sheet of the lower court, which is before us, that on the 2nd of August, 1935, Rameshwar Marwari filed an objection under section 47, which was allowed on the 10th of August; we understand that that was an objection regarding valuation. The sale was then fixed for the 16th of September, 1935, on which day an objection was filed by Kishun Gopal urging, among other things, the old objection that on account of Gigla's death before the passing of the decree, the decree which was joint was null and void. The sale was not actually held on the 16th September, but was "kept on hammer" from day to day till the 21st

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September, when the judgment-debtors filed another objection urging, among other things, that as the decree was against a firm, the personal properties of the judgment-debtors were not liable under it. The learned Subordinate Judge heard this objection and the objection of the 16th of September together on the 21st September, and finding them untenable, allowed the sale to proceed.

It is contended for the appellants that under the compromise of the 29th of April, 1935, the decree-holder was not entitled to proceed with the execution. It is not pretended that the decree-holder was paid Rs. 5,500 or any part of it within the stipulated period of two months, but it is urged that time was not of the essence of the contract, that the judgment-debtors were, therefore, only bound to pay Rs. 5,500 within a reasonable time, that the court had power to relieve against forfeiture, and that the learned Subordinate Judge should have investigated an allegation made in the judgment-debtors' petition of the 21st of September that the decree-holder was not willing to take Rs. 5,500 though the judgment-debtors had been ready to pay it.

According to the terms of the compromise of the 29th of April the judgment-debtors had two months from that day to pay Rs. 5,500 to the decree-holder in full satisfaction of the decree. As I have already stated, the decree-holder moved the court on the 4th of July for the issue of sale proclamations on the ground that the judgment-debtors had not paid anything. It has not been claimed before us that in his objection of the 2nd of August Rameshwar Marwari said anything regarding the readiness of the defendants to pay and the unwillingness of the decree-holder to receive Rs. 5,500. In his objection of the 16th September Kishun Gopal did urge that the decree-holder was not entitled to take out execution for the entire amount as he had contracted to take Rs. 5,500 in full satisfaction of the decree, but even then he did not say anything about the readiness of

the judgment-debtors to pay and the unwillingness of the decree-holder to receive that amount. The point was only mentioned for the first time in the judgment-debtors' objection of the 21st of September, five days after the date fixed for the sale and nearly three months after the expiry of the stipulated period of two months from 29th April. There is no reference to this point in the judgment of the lower court, nor is it clearly stated in the grounds of appeal that the Subordinate Judge omitted to deal in his judgment with this or any other point that was actually argued before him. It seems to me from all this that the point was not really taken—argued—below. The judgment-debtors had evidently been filing one objection after another without meaning it, and the compromise petition, after empowering the decree-holder to proceed with the execution in case he was not paid Rs. 5,500 within the stipulated time, went on to say:

> "In regard to the same (that is to say, execution for the decretal amount of Rs. 19,700) the judgment-debtors will not be competent to raise any objection. The judgment-debtors withdraw the objections they have raised regarding valuation, etc., in the execution, and they will not be competent to raise those objections in future."

The decree-holder, it is plain, agreed to take the Rs. 5,500 within a limited time in order to avoid the delay to be apprehended from what looked like the habit of the judgment-debtors of raising objections from time to time. The objections actually urged before the learned Subordinate Judge and dealt with by him relate to the death of Gigla as affecting what is claimed to be a joint decree, and the decree being against a firm and not against the individuals constituting the firm. What I have already stated about the details of the decree is sufficient to show how palpably untenable the objections actually urged were.

Although it is urged in appeal that the lower court should have investigated the judgment-debtors' allegation that though they had been ready to pay, the decree-holder was unwilling to receive Rs. 5,500,

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it does not appear that the Subordinate Judge was asked—moved—to do so, or that any evidence was offered or any adjournment asked for to enable them to produce it. The mere allegation was no proof, and this was probably one of the reasons why the point was not actually urged before the learned Subordinate Judge. I am not prepared in the circumstances to hold that an investigation should have been made by the lower court.

As regards the power of the Court to relieve against forfeiture, it is to be remembered that Equity only interferes to do complete justice between the parties. " No doubt, if forfeiture is occasioned by accident, fraud, surprise, or ignorance a Court of Equity will interpose and relieve against forfeiture so caused; but it is equally clear that a Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence "—as Mookerjee, J. observed in *Harakh Singh* v. *Saheb Singh*(1).

Nor does this appear to be a case of forfeiture of the kind that Equity would have relieved against, even if the judgment-debtors had made a serious attempt to pay according to the compromise into which they had entered and the attempt had failed for no fault of theirs. Where the creditor agrees to accept part of the debt in full satisfaction if paid within a stated time, Equity will not relieve against the provision as to time—*Ford* v. *The Earl of Chesterfield*(2), cited and distinguished by Lord Kingsdown in *Ram Gopal Mookerjea* v. *Samuel Masseyk*(3). In such a case there is no scope for the application of the doctrine of penalties—*Neil, In re*(4)—or forfeitures.

The contention of the appellants that time was not of the essence of the contract is also plainly

(1) (1907) 6 Cal. L. J. 176.
(2) (1854) 19 Beav. 428.
(3) (1860) 8 Moo. I. A. 239.
(4) (1881) 16 Ch. D. 675.

untenable on the facts of this case. The judgment-debtors had been repeatedly filing objections to the execution, when the decree-holder agreed to accept in full satisfaction Rs. 5,500 if paid in two months, the agreement further being that if not paid within time, he was to proceed with the execution without the judgment-debtors being " competent to raise any objection ". This provision in the circumstances makes it clear that the parties intended time to be of the essence of the contract; for it cannot be reasonably supposed that the decree-holder who had a decree for over Rs. 19,700 would agree to be satisfied with a much smaller sum not within the time stipulated, but within such period as the court may on evidence find to be reasonable.

In this view of the matter it is unnecessary to consider the larger question of the power of the executing court in such circumstances to extend the time of payment without the consent of the decree-holder. A similar question, we were informed, had arisen in a Full Bench Reference which was pending. That Reference has since been decided—*Bhagwat Narain Singh* v. *Srinivas*(1)—without pronouncing on the general question. It may be added that the view seems to have been taken in at least two cases in this Court—*Chaudhry Rameshwar Misser* v. *Chaudhry Sureshwar Misser*(2) and *Jadab Chandra Poddar* v. *Rameshwar Marwari*(3)—that time fixed for payment by consent of the parties in execution proceedings cannot be extended by the court without their consent. These were cases where payment was to be made in order to get an execution sale set aside or nullified. The same view was taken in *Sheo Prasad Lal* v. *Tapeshwar Mahto*(4), which was a case where the decree-holder was to proceed to realise the entire decree without any remission in case he was not paid certain instalments punctually. In *Mussammat*

(1) (1936) I. L. R. 16 Pat. 202, S. B.
(2) (1917) 2 Pat. L. J. 164.
(3) (1929) I. L. R. 9 Pat. 332.
(4) (1933) I. L. R. 13 Pat. 1.

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Nand Rani Kuer v. *Durga Dass Narain*(1), however, Mullick, J. referred to *Australian Automatic Weighing Machine Company* v. *Walter*(2) and the exhaustive discussion of the question in *Kandarpa Nag* v. *Banwari Lal Nag*(3), and took it as settled that "where the agreement is for the payment of money on a prescribed date and that on default of payment on that date, money is to be forfeited, time is not of the essence of the contract", and that in every case the court must determine upon the facts of that case whether relief against forfeiture is to be given or not. This would imply that the court has power to extend time if it should hold that there was a forfeiture involved in the agreement. In formulating his general rule about the forfeiture of money—the rule which was adopted by Mullick, J.—Mookerjee, J. in *Kandarpa's* case(3) proceeded on *Ram Gopal Mookerjee* v. *Samuel Masseyk*(4) as a case where relief against forfeiture was given to a defendant who was indebted to the plaintiff in a certain sum which the defendant agreed to pay, upon a remission by the plaintiff of part of his claim, in two instalments on specified dates. But, as pointed out by Lord Kingsdown, that was not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods, in which case the punctuality of the payment is the only consideration which the creditor receives for his indulgence" [*Ford* v. *Chesterfield*(5)] but "a case in which a third person, being under no liability, consents to incur that liability and binds himself in a penalty for the due performance of his engagement. The general rule about forfeiture of money laid down by Mookerjee. J. in *Kandarpa Nag* v. *Banwari Lal*(3), on which Mr. Manohar Lall has laid so much stress, and which was applied by Mullick, J. in *Nand Rani Kuer* v.

(1) (1923) I. L. R. 2 Pat. 906.
(2) (1891) W. N. 170.
(3) (1920) 33 Cal. L. J. 244.
(4) (1860) 8 Moo. I. A. 239.
(5) (1854) 19 Beav. 428.

Durga Das Narain(1) to a case where no debt was established apart from the compromise which terminated the suit, is thus of no help to the appellants, because, as I have already shown, the present case falls within the principle of *Ford* v. *Chesterfield*(2). In cases of this kind there is hardly any question of penalty or forfeiture or the analogous principle on which Equity relieves against mere lapse of time where it is consistent with the substance of justice to do so, if from the contract or from the nature of the case time is not shown to be of the essence of the contract. It is true that if the judgment-debtor does not pay in time, he becomes liable for the entire decretal amount. But the liability arises from the decretal debt, and default in the punctual payment of the smaller sum which the decree-holder had agreed to accept in full satisfaction, subject to payment within a fixed period, merely operates to remove an essentially temporary bar to execution. In the analogous case of an agreement under which an execution sale is to be set aside if the judgment-debtor pays a certain amount within a certain time, but is to stand confirmed if he does not, Mookerjee, J. himself held in *Chandanbala* v. *Probodh*(3), that the executing Court had no jurisdiction to extend the time " except by the assent of each and every one " of the parties to the agreement, not merely because time is of the essence of the contract in such cases but also because any modification of the agreement required the concurrence of all the consenting parties. In that case there was no question of any forfeiture—*see Hansraj* v. *Jogeshar*(4), but in *Akkach Aminuddi*(5), Teunon and Newbould, JJ. only extended the time fixed for payment by a compromise decree in a mortgage suit because the mortgagee did not seriously press his objection as regards the jurisdiction of the Court to extend time.

(1) (1923) I. L. R. 2 Pat. 906.
(2) (1854) 19 Beav. 428.
(3) (1909) 9 Cal. L. J. 251.
(4) (1925) 6 Pat. L. T. 511.
(5) (1918) 23 Cal. W. N. 430.

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DHAVLE, J.

Assuming, however, in favour of the appellants that the Court may in some cases have jurisdiction to vary a consent order as regards time without the concurrence of all the parties, it is clear that in the present case the contention that time was not of the essence of the contract and that the judgment-debtors were entitled to have the decree satisfied by paying Rs. 5,500 within a reasonable time is untenable and must be overruled. It follows that the decree-holder was entitled to proceed with the execution.

It was also urged incidentally that the compromise only entitled the decree-holder, in case the judgment-debtors did not pay the Rs. 5,500 within the stipulated time, to levy execution for Rs. 5,500 only. This contention is raised on the words of the compromise "*Tabe decreedar tahar decree babat prapya arthat* 19700 *takar jarite sampatti nilam bikray mate aday karia leite paribe.*" The translation of this clause in the paper book is entirely against the appellants' contention. The learned Subordinate Judge was a Bengali, and the contention was not raised before him. It is also not raised in the grounds of appeal. Nor is it easy to see any meaning in the interpretation suggested before us, namely, that the decree-holder was to realise Rs. 5,500 by levying execution for Rs. 19,700.

It was also similarly urged that according to the compromise the decree-holder was entitled to levy execution for Rs. 19,700 only. The decree was for Rs. 19,767-7-3p. We do not know for what amount execution was actually levied after the failure of the appellant to pay, nor is the point really raised in the grounds of appeal. It was not raised below. I would, therefore decline to entertain it.

In my opinion the appeal should be dismissed with costs.

ROWLAND, J.—I agree. The observation of Khaja Mohamad Noor, J. in *Bhagwat Narain Singh* v.

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Srinivas(1) that " The wording of the contract clearly shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time, or in other words, time was of the essence of the contract " applies in its entirety to this case. The question what a court can or should do if it thinks time not to be of the essence, hardly seems to arise.

The appeal was in my view nothing better than a frivolous device to delay the execution proceedings.

J. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Rowland, JJ.

MUSAMMAT WALIHAN

v.

PARMESHWAR NARAIN PATAKH.*

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March, 16.

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 26-*E*, 26-*N and* 26-*O—landlord's transfer fee, deposit of, during pendency of second appeal in High Court effect of—sections, whether retrospective.*

Where a landlord's suit in ejectment was decreed on the ground that the holding was non-transferable and during the pendency of the second appeal in the High Court the transferee deposited the landlord's transfer fee under section 26-E read with section 26-O of the Bihar Tenancy Act and the Collector granted the receipt, *held*, that the landlord shall be deemed to have given his consent to the transfer.

*Appeal from appellate decree no. 1011 of 1934, from a decision of S. K. Das, Esq., I.C.S., District Judge of Saran, dated the 15th September, 1934, affirming a decision of Babu Rama Nandan Prasad, Munsif of Chapra, dated the 13th December, 1933.

(1) (1936)I. L. R. 16 Pat. 202, S. B.

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Held, also, that as the second appeal was pending in the High Court the title of the transferee had not been extinguished and he had a subsisting title to deposit the landlord's transfer fee.

K. C. Mukherjee v. *Musammat Ram Ratan Kuer*(1), followed.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Syed Ali Khan, for the appellant.

Pandey N. K. Sahai, for the respondent.

ROWLAND, J.—This is an appeal by the defendant the transferee of an occupancy holding which was not transferable without the consent of the landlord. The tenant transferred 13 kathas by sale-deed dated 31st March, 1931, the entire holding being of 13 kathas 14 dhurs; but the courts below have held that the exclusion of 14 dhurs was purely nominal and that in fact the whole holding was transferred. This it was held amounted to an abandonment of the entire holding thereby giving the landlord the right to re-enter. Such were the decision and decree of the Munsif, dated the 13th December, 1933, which was upheld on appeal by the District Judge on the 15th September, 1934. Pending a second appeal to this Court, the Bihar Tenancy Act came into force and the present appeal now rests not on the contention that the courts below were wrong in the view they took of the law as it stood at the time, but that since the passing of the Act the consent of the landlord to such a transfer is deemed to have been given under certain conditions and those conditions have been fulfilled. The section of law applicable in this case is 26-O which deals with transfers made on or after 1st January, 1923, and before the commencement of the Bihar Tenancy (Amendment) Act. The transferee under this section is permitted to pay to the landlord

(1) (1935) I. L. R. 15 Pat. 268, P. C.

or deposit with the Collector in accordance with sub-section (*1*) of section 26-E a transfer fee and on his doing so and complying with the other requirements of section 26-E. the consent of the landlord is under section 26-O (*3*) deemed to have been given on the date on which the landlord's transfer fee having been deposited with the Collector the receipt for the same is granted by the Collector. The appellant has asked us at the hearing of this second appeal to admit and accept in evidence a receipt granted by the Collector on 18th June, 1936, for the sum of Rs. 12. The respondent not objecting and this being a piece of evidence which in the nature of things could not be produced before, we have admitted it in evidence. It shows that the deposit has been made with the Collector and, therefore, under section 26-O it ought to be deemed that the landlord has consented to the transfer. For the respondent the contention that sections 26-N and 26-O were not intended by the Legislature to have retrospective effect is hardly maintainable in face of the Privy Council decision in *K. C. Mukherjee* v. *Musammat Ram Ratan Kuer*(1); but it is pointed out that the terms of sections 26-N and 26-O are not indentical and it is argued that section 26-O can only come into operation if at the date of making the payment and obtaining a receipt from the Collector there is a subsisting title in the transferee and it is said that in this case the courts below having decreed the landlord's suit in ejectment, the title of the transferee was extinct and could not be revived by a subsequent deposit of the amount. The argument is at first sight attractive; there are no doubt difficulties in the way of holding that a title once finally extinct can be revived in such a manner. But can it be said that the title of the transferee had become extinct? The title of the transferee is from the outset good against all the world except the landlord and does not in my opinion become extinct by the passing of a decree against him unless and until such decree has become final as it

(1) (1935) I. L. R. 15 Pat. 268, P. C.

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might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. Failing that the title can hardly be deemed to be extinct while a second appeal is pending from the decision. To extinguish it there must have been a final decision of the litigation.

ROWLAND, J.

Therefore, I think that this appeal must be allowed as the effect of the deposit is that the landlord is deemed to have consented to the transfer. The decree of the courts below must be set aside and the suit dismissed; but in the circumstances of this case as the suit at the time of its institution was a good suit, there should be no order for costs.

MOHAMAD NOOR, J.—I agree.

J. K.

Appeal allowed.

REVISIONAL CIVIL.

1937.

Feb. 24.
March, 8, 17.

Before Agarwala and Madan, JJ.

RAJA BAHADUR SIR RAJENDRA NARAIN BHUNJ DEO

v.

DEBI CHOUDHARY.*

Code of Civil Procedure, 1908 (*Act V of* 1908)—*Order XXI, rule* 69—*Sale included in the sale list but held on the following date—sale, whether illegal—General Rules and Circular Orders, Volume I, Part I, Chapter VI—rules* 14 *and* 15.

The sale of the holding of the judgment-debtor was advertised to be held on the 4th January, 1935, and was included in the sale list of that day, but the sale could not be held on the date for want of time and it was actually held on

*Civil Revision no. 506 of 1936, from an order of H. Whittaker, Esq., I.C.S., District Judge of Monghyr, dated the 25th April 1936, confirming an order of Babu A. K. Saran, Munsif, 1st Court, Monghyr, dated the 14th December, 1935.

the 5th January, 1935. The Munsif set aside the sale holding that it contravened the provisions of Order XXI, rule 69,

Held, in revision, that the procedure was in accordance with rules 14 and 15 of the High Court General Rules and Circular Orders, Volume I, Part I, Chapter VI, and that rule 69 of Order XXI does not refer to a case where sales on the same list held in accordance with the rules of the court continue beyond the first day.

Rang Lal Singh v. *Ravaneshwar Pershad Singh*(1), *Lalmohun Chowdhuri* v. *Nunu Mohamed Talukdar*(2), *Nand Kishore Singh* v. *Nagendra Bala Debi*(3) and *Deonandan Thakur* v. *Musammat Hanso Kuer*(4), followed.

Application in revision by the decree-holder.

The facts of the case material to this report will appear from the judgment of Madan, J.

The case was first heard by Khaja Mohamad Noor, J. who referred it to a Division Bench by the following judgment:

KHAJA MOHAMAD NOOR, J.—This application in revision is directed against an order of the District Judge of Monghyr affirming that of the Munsif of that place whereby that officer set aside a sale held in the execution of a rent decree. The sale was fixed for the 4th of January, 1935, but, without any order of the court, was postponed to 5th of January, 1935, and took place on that day. The courts below have held that the sale on a day not fixed in the sale proclamation without an express order of the court was illegal and therefore they have set it aside.

It is contended on behalf of the petitioner in revision that in this particular case no order for postponement was necessary. Reliance has been placed upon the Circular of this Court issued on its administrative side whereby the procedure for holding various sales of a particular court and of sales of various courts have been prescribed and it is contended that when the monthly sale starts the officer conducting it has to continue the sales from day to day without any specific order of the court and therefore there was no illegality. Reliance was also placed upon the decision of Varma, J. in *Deonandan Thakur* v. *Musammat Hanso Kuer*(4) which followed a decision of the Calcutta High Court in *Lal Mohun Chowdhuri* v. *Nunu Mohamed Talukdar*(2).

(1) (1911) I. L. R. 39 Cal. 26, P. C.
(2) (1889) I. L. R. 17 Cal. 152.
(3) (1936) 17 Pat. L. T. 712.
(4) (1936) 17 Pat. L. T. 852.

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In my opinion, the correctness of the two decisions requires consideration. The Circular of the High Court cannot over-ride the express provision of law. The Circular only regulates the sales fixed by various courts for the same day and the same hour and also the sales fixed by different courts situated at one place. The High Court Circular only provides how these different sales of different courts are to be arranged. It provides that there should be prepared a general list of all the sales court by court and this list should be hung up where the sale is to be held, in the case of immovable property two weeks before the day on which the sale is to take place and on the fixed day the sale is to commence and is to continue from day to day unless some holiday intervenes. But this cannot be held to have overruled the specific provisions of Order XXI, rule 69, which definitely says that the officer conducting the sale may, in his discretion, adjourn the sale recording his reason for such adjournment provided that where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the court. The High Court Circular and the provisions of law read together, in my opinion, contemplate that at a place where there are various courts the sale will proceed in the order in which it is mentioned in the combined list prepared for that purpose and will continue from day to day. But it does not follow that sales which cannot be held on a fixed day can be postponed for the next day without the leave of the court. However, as this question is of importance affecting a large number of cases of setting aside sales which come up before courts, an authoritative decision by a Division Bench is required.

I, therefore, refer this case to a Division Bench.

On this reference—

S. K. Mitra and *G. C. Das*, for the petitioner.

K. N. Lal, for the opposite party.

MADAN, J.—This civil revision comes before us on a reference by a single Judge. The facts are that a sale in execution of a rent decree obtained by the appellant was fixed for the 4th January, 1935. The sale was included in the sale list for that day, but as the sales could not be finished on that day, the Nazir in charge continued them on the following day, on which date the holding of the judgment-debtor was brought to sale and purchased by the appellant. On objection filed by the judgment-debtor under Order XXI, rule 90, the Munsif set aside the sale holding that it was in contravention of Order XXI, rule 69, having been held on a date not advertised in the sale

proclamation and without an express order of the court adjourning the sale. This order of the Munsif was affirmed by the District Judge on appeal, and this civil revision has been filed against that order of the District Judge and has been referred for decision by a Division Bench.

The procedure adopted in this case was in accordance with rules 14 and 15 of the High Court General Rules and Circular Orders, Volume I, Part I, Chapter VI, but these rules must be held to be invalid if, as contended by the judgment-debtor, they contravene the express provisions of Order XXI, rule 69, which runs as follows :—

" 69. (*1*) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(*2*) Where a sale is adjourned under sub-rule (*1*) for a longer period than fourteen days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings.

(*3*) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale."

The question for our decision is whether or not this rule applies to the present case.

For the petitioner we were referred to the Privy Council decision in *Rang Lal Singh* v. *Ravaneshwar Pershad Singh*(1), which refers to section 291 of the old Code. In that case the property was included in the monthly sales fixed for the 13th July, but the sales did not begin until the 17th July owing to the absence of the presiding officer from the station, and the

(1) (1911) I. L. R. 39 Cal. 26, P. C.

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RAJA BAHADUR SIR RAJENDRA NARAIN BHUNJ DEO v. DEBI CHOUDHURY.

MADAN, J.

property was actually sold on the 20th July. Their Lordships held that there was no irregularity as the sale was held in the course of the monthly sales. In that case the sale appears to have been held by the presiding officer himself and not by a subordinate officer acting under his direction but their Lordships do not appear to have contemplated that the various postponements of the sale were adjournments within the meaning of section 291. In *Lalmohan Chowdhuri* v. *Nunu Mohamed Tulukdar*(1) a Division Bench of the Calcutta High Court pointed out that it was the practice of that Court to place all properties intended to be sold in execution on a list and to proceed with the sales from day to day. It was held that when sales commenced on the appointed day but continued on the following day there was no adjournment within the meaning of Order XXI, rule 69. The same view was taken by single Judges of this Court in *Nand Kishore Singh* v. *Nagendra Bala Debi*(2) and *Deonandan Thakur* v. *Musammat Hanso Kuer*(3). Following these decisions I would hold that rule 69 does not refer to a case where sales on the same sale list held in accordance with the rules of the court continue beyond the first day. I would allow this civil revision accordingly and direct that the executing court should now proceed to consider the other objections raised by the judgment-debtors in their application for setting aside the sale. Parties will bear their own costs in this Court.

AGARWALA, J.—I agree.

J. K.

Rule made absolute.

(1) (1889) I. L. R. 17 Cal. 152.
(2) (1936) 17 Pat. L. T. 712.
(3) (1936) 17 Pat. L. T. 852.

CRIMINAL REFERENCE.

Before Khaja Mohamad Noor and Rowland, JJ.

1937.

March 17, 18.

RAMESHWAR SINGH

v.

KING-EMPEROR.*

Trial by Jury—Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 307 *and* 438—*Judge, when should refer a case to the High Court—High Court, whether can direct the judge to refer the case—High Court's power of interference on an incompetent reference under section* 438.

The case for the prosecution was that a girl was induced to go with the accused by deceitful means and the deceitful means were the subject-matter of the charge of cheating. The offence under section 366 was tried by a jury and that under section 417 with the aid of the same gentlemen acting as assessors. The charge to the Jury was mostly in favour of the accused. The Assistant Sessions Judge acquitted the accused of the offence of cheating but agreeing with the verdict convicted him of abduction. The Additional Sessions Judge on appeal referred the case under section 438 of the Criminal Procedure Code so that the High Court may direct the Assistant Sessions Judge to refer the case under section 307 of the Code.

Held, that the High Court had no power to direct the Assistant Sessions Judge to refer the case under section 307 of the Code. The Legislature has made him the sole Judge to decide whether a reference should or should not be made. The decision whether a reference should or should not be made depends upon the extent of disagreement which the Judge alone can feel.

Saroda Charan Mistri v. *The King-Emperor*(1), dissented from.

Bepin Chandra Mandal v. *Emperor*(2), followed.

Bajit Mian v. *King-Emperor*(3) and *Ramdas Rai* v. *King-Emperor*(4), referred to.

*Criminal Reference no. 5 of 1937, made by J. S. Hardman, Esq., I.C.S., Additional Sessions Judge of Shahabad in his letter no. 243, dated the 30th January, 1937.

(1) (1925) A. I. R. (Cal.) 795.
(2) (1928) A. I. R. (Cal.) 444.
(3) (1927) I. L. R. 6 Pat. 817.
(4) (1928) I. L. R. 8 Pat. 344.

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It is highly undesirable that in every case in which the Judge finds himself in disagreement with the jury a reference should be made. This will practically make him a Judge of fact which in cases triable by a jury he is not, and will minimise the responsibility of the jury. In order to make a reference there should be disagreement of such a nature that the Judge holds that for the ends of justice the verdict of jury should be superseded.

Held, also, that although the reference by the Sessions Judge may be incompetent, the High Court could interfere if a case for interference had been made out.

Reference under section 438 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Khaja Muhamad Noor, J.

S. Naqui Imam, for the accused.

B. P. Sinha, for the Crown.

KHAJA MOHAMAD NOOR, J.—This case has come up to us in somewhat unusual circumstances. The facts leading up to this reference by the Additional Sessions Judge of Shahabad are these. The accused Rameshwar Singh was tried before the Assistant Sessions Judge of Shahabad under sections 417 and 366 of the Indian Penal Code. There were two alternative charges under section 366—one of abducting and the other of kidnapping a girl Chhatia with intent that she may either be compelled to marry against her will or seduced or forced to illicit intercourse. The case of the prosecution was that one Musammat Chhatia, daughter of one Gajinder Rai, the complainant in the case, was kidnapped by one Khublal Singh. On his complaint the Subdivisional Magistrate issued a search warrant for her recovery. Later on, somehow or other Gajinder Rai got back the girl, and filed an application to this effect before the Subdivisional Magistrate who recalled the search warrant and ordered the girl to be produced before him on the 20th of May, 1936. This was not done

and the learned Magistrate ordered her production on the 29th of May, 1936. Gajinder Rai's case is that the accused Rameshwar Singh who was looking after the criminal case on his behalf went to his house on the 20th May, 1936, and in his absence told his wife Moti Jhari that the girl had to be produced before the Subdivisional Officer and asked her to allow the girl to accompany him for production before the court. Moti Jhari allowed the girl to go with the accused, but instead of taking her to the court the accused took her on an ekka to his own house at Sinha. When Gajinder Rai returned home from Arrah and heard that the girl had been sent with the accused, he suspected his intentions and went to his house at Sinha and demanded the restoration of the girl. The accused did not consent and said that he intended to marry her. Thereupon Gajinder Rai apprehending a breach of the peace left the village and came to Arrah for filing a complaint in court. As the time for filing the complaint was over it was not filed on the 21st; but on the next day, that is, on the 22nd of May, 1936. On that complaint the Subdivisional Magistrate issued a search warrant for recovery of the girl, which was not executed for about two months. The accused surrendered in court on the 22nd of June and produced the girl on the 22nd of July, 1936. In the meantime the case was made over for disposal to an Honorary Magistrate, who did not examine the girl till a very late stage of the case. The accused was committed for trial to the court of session on the facts stated above. The defence of the accused was that the girl was made over to him by her parents for marriage for a consideration of Rs. 400 out of which Rs. 300 was actually paid and the marriage was in fact performed by the father himself and that this false case was instituted as the accused did not pay the balance, i.e., Rs. 100.

The offence under section 366 of the Indian Penal Code is triable by a jury, and the one under section

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417 of the Indian Penal Code with the aid of assessors. The same gentlemen who constituted the jury for the trial of the first offence acted as assessors for the trial of the second offence.

The charge of the learned Assistant Sessions Judge to which I will come later was as strongly for the acquittal of the accused as a charge can be. He pointed out to the jury the weakness and improbabilities of the prosecution case and the discrepancies in the evidence of witnesses. The jury, however, unanimously found the accused guilty of abduction under section 366 of the Indian Penal Code and the assessors found him guilty under section 417 of the Indian Penal Code. The learned Assistant Sessions Judge wrote a short judgment referring mostly to his charge to the jury, did not agree with the opinion of the assessors in respect of the offence under section 417 of the Indian Penal Code and acquitted the accused of that charge. He did not, however, think himself justified in referring the case to this Court under section 307 of the Code of Criminal Procedure in respect of the offence of abduction and accepting the verdict of the jury sentenced the accused to one year's rigorous imprisonment.

Rameshwar Singh appealed to the sessions court. The learned Additional Sessions Judge who heard the appeal agreed with the views of the learned Assistant Sessions Judge and held that the charge was not proved. He was strongly of opinion that in the circumstances of the case it was the duty of the learned Assistant Sessions Judge to refer the case to this Court under section 307 of the Code of Criminal Procedure. He held, and in my opinion rightly held, that cheating which is punishable under section 417 of the Indian Penal Code, was an ingredient of the offence of abduction as the prosecution case was that the girl was induced to go with the accused by deceitful means and these deceitful means were the subject-matter of the charge of cheating. Therefore if the

learned Assistant Sessions Judge was strongly of opinion that deceitful means were not used by the accused and acquitted him of cheating, he ought not to have accepted the verdict of the jury in respect of abduction. The learned Additional Sessions Judge was, however, of opinion that there was no misdirection in the charge to the jury, and the case did not come under section 423(*2*) of the Code of Criminal Procedure and he therefore found himself unable to interfere in appeal. He considered two alternative courses which he thought were open to him. One was to make a recommendation to the local Government to intervene and remit the sentence and the other was to refer the case to this Court under section 438 of the Code of Criminal Procedure for an order on the Assistant Sessions Judge to refer the case to this Court under section 307 of the Code of Criminal Procedure. He adopted the latter course and relying upon the observation of Mukerji, J. in *Saroda Charan Mistri* v. *The King-Emperor*(1) has recommended for an order on the Assistant Sessions Judge to refer the case to this Court.

I agree with the learned Additional Sessions Judge's opinion that having expressed himself so strongly in favour of the accused and having held that deceitful means were not used and further that the story of the accused about the negotiation of marriage had a ring of truth, the learned Assistant Sessions Judge would have been well advised if he had referred the case to this Court. Perhaps he was under the impression that reference is to be made only if a Judge finds the verdict of the jury to be entirely perverse. That view is incorrect as has been clearly pointed out by Courtney Terrell, C.J. in the case of *King Emperor* v. *Rafi Mian*(2). Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other the power of reference is not confined to those cases only in which in the opinion of the Judge

(1) (1925) A. I. R. (Cal.) 795.
(2) (1932) I. L. R. 11 Pat. 669.

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the verdict of the jury is entirely perverse. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference. No doubt, when a Judge finds himself in disagreement with the jury and has to decide whether a reference should be made, there is a heavy responsibility upon him as is the responsibility of the magistrate in a case triable by a court of session to decide whether the case should or should not be committed. But because the responsibility is great, there is no reason why it should not be undertaken. The fact, however, is that the learned Assistant Sessions Judge has decided not to refer, and the question is whether we can order him to do so. The observations of Mukerji, J. in the case referred to by the learned Additional Sessions Judge are as follows:—

"If under circumstances such as those that are in this case the learned Judge fails to do what the law requires him to do and thus deprives this Court of an opportunity to deal with the case on its merits, he does something more than merely acting in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and speaking for myself, I am of opinion that it is well within our power under section 439, Criminal Procedure Code to direct him to submit the case to us for our consideration under section 307, Criminal Procedure Code."

Strictly speaking the observation of that eminent and learned Judge is obiter dictum. The procedure indicated by him was not adopted in that case and the conviction was set aside on the ground that the verdict of the jury was erroneous owing to a misunderstanding on their part of the law as laid down by the trial Judge. Duval, J., who added a short judgment of his own, does not appear to have shared the view of Mukerji, J. which seems to have been dis-

sented from in the same High Court in the case of *Bepin Chandra Mandal* v. *Emperor*(1). Rankin, C. J. said :—

" Now, I am not of opinion that it is correct law to say that if the High Court thinks that the Judge ought to have been of opinion that it is necessary for the ends of justice to submit the case this Court can direct him so to do or can act as though he has, in fact, submitted the case. The conditions laid down are not merely that the Judge disagrees with the verdict of the jury, but also that the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case. The Judge is either clearly of opinion or not clearly of opinion and according as he acts in that matter the consequences must be. It is quite impossible, in my judgment, to direct the learned Judge to be clearly of a certain opinion and the language used by the statute shows that the Judge's view on that point is to be final for that purpose; and I am not prepared, in a case such as this, to enquire into the question whether or not the learned Judge ought to have been of opinion that it was necessary for the ends of justice to submit the case."

In this Court also the case of *Saroda Charan Mistri*(2) was distinguished in the case of *Bajit Mian* v. *King-Emperor*(3) which was followed in *Ramdas Rai* v. *King-Emperor*(4). In the last-mentioned case Macpherson, J. held that " it is not in every case where a Judge disagrees with the verdict of the jury that he should make a reference under section 307 of the Code of Criminal Procedure. A reference should be made only when the verdict of the jury is manifestly wrong, and this is equally so whether the verdict with which the Judge disagrees is one of acquittal or one of conviction. Section 307

(1) (1928) A. I. R. (Cal.) 444.
(2) (1925) A. I. R. (Cal.) 795.
(3) (1927) I. L. R. 6 Pat. 817.
(4) (1928) I. L. R. 8 Pat. 344.

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does not impose an obligation on the Judge to refer a case to the High Court except where the conditions set out in section 307 are satisfied." In my opinion it is highly undesirable that in every case in which the Judge finds himself in disagreement with the jury a reference should be made to the High Court. This will practically make him a Judge of fact which in cases triable by jury he is not, and will minimise the responsibility of the jury. In order to make a reference there should be disagreement of such a nature that the Judge holds that for the ends of justice the verdict of jury should be superseded. With my profoundest respect to the view expressed by Mukerji, J. I think there is no power in this Court in a case in which the Judge has not thought fit to refer a case to this Court under section 307 of the Code of Criminal Procedure, to direct him to do so. The Legislature has made him the sole judge to decide whether a reference should be made. The decision whether a reference should or should not be made depends upon the extent of disagreement which the judge alone can feel. An order by this Court will, as pointed out by Rankin, C. J., amount to directing the Judge to form a particular opinion about the verdict of the jury. The reference of the learned Additional Sessions Judge, therefore, cannot be accepted. He ought to have adopted the course which was taken by Rankin, C. J. in *Bepin Chandra Mandal* v. *Emperor*(1), and should have left the case in the hands of the executive authorities if he thought that injustice had been done and he could not interfere under the law.

The next question for consideration is what order should be passed when the record of the case is before us and the facts have been brought to our notice. It appears that though the learned Additional Sessions Judge has not expressly dismissed the appeal he has practically done so. He seems to have clearly come

(1) (1928) A. I. R. (Cal.) 444.

to the conclusion that the view of the learned Assistant Sessions Judge about the merits of the case was correct and had it been open to him to do so he would have set aside the conviction; but having found that there was no misdirection in the charge of the learned Assistant Sessions Judge he refrained from doing so and instead of referring the case for orders of the local Government has made a reference to this Court. The position, therefore, in my opinion is that the appeal of the accused has been dismissed. Had not the learned Additional Sessions Judge referred the case to this Court, it would have been open to the accused to move this Court in revision and ask us to interfere on the ground that the learned Additional Sessions Judge was wrong in holding that there was no misdirection and if we had found that there was misdirection by the learned Assistant Sessions Judge which had been ignored by the learned Additional Sessions Judge and which has occasioned failure of justice we would have interfered. The fact that we have examined the record on an incompetent reference by the Additional Sessions Judge does not alter the position. We must interfere if a case for interference has been made out. Therefore we have to consider whether there is a misdirection which has occasioned a failure of justice and the case comes within section 423(*2*) of the Code of Criminal Procedure. That there has been injustice admits of no doubt. Both the learned Additional Sessions Judge and the learned Assistant Sessions Judge were of opinion that the case was not proved and I agree with them. The only question is whether there is a misdirection in the charge.

* * * * *

[His Lordship then discussed the evidence in the case which is not material to this report.]

* * * * *

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RAMESHWAR SINGH v. KING-EMPEROR.

KHAJA MOHAMAD NOOR J.

The result is that the reference is discharged and in the exercise of our powers under section 439 of the Code of Criminal Procedure I would set aside the conviction and sentence, and acquit the accused.

ROWLAND, J.—I entirely agree.

Reference discharged.

J. K.

Conviction set aside.

FULL BENCH.

1937.

March, 1, 2.
April, 23.

Before Courtney Terrell, C.J., James and Varma, JJ.

KARAN SINGH

v.

MUSAMMAT TETAR KUER.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 7—"*discharge*", *significance of—Joint Hindu family consisting of brothers—alienation by guardian—elder brother and manager, whether competent to give up right to sue without the concurrence of the other—suit for setting aside alienation more than three years after elder's majority but within three years of the younger attaining majority—limitation.*

In an undivided Hindu family governed by the law of Mitakshara an elder brother who has attained majority and is the manager of the family can, without the concurrence of his minor brother or brothers, give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors.

Harihar Prashad v. *Bholi Pershad*(1), followed.

Held, therefore, that under section 7 of the Limitation Act, 1908, a suit brought by two brothers to set aside an alienation by their guardian more than three years after the elder brother, who was the karta of the brothers' family, attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the share of the younger brother in the family property, though the latter

*Appeal from Appellate Decree no. 50 of 1934, from a decision of J. A. Saunders, Esq., Judicial Commissioner of Chota Nagpur, dated the 5th of April, 1933, affirming a decision of Rai Sahib Shiba Priya Chattarji, Subordinate Judge of Ranchi, dated the 23rd of June, 1930.

(1) (1907) 6 Cal. L. J. 383.

attained majority within three years prior to the institution of the suit.

Doraiswami Serumadan v. *Nondisami Saluvan*(1), *Bapu Tatya* v. *Bala Ravji*(2), *Supdu Daulatsing Daji Patil* v. *Sakharam Ramji*(3), *Asutosh Ghose* v. *Sashi Mohan Roy*(4), *Gangdeo Singh* v. *Ramprasad Singh*(5), *Chatyrgun Pande* v. *Bindhachal Dubey*(6), *Baijnath* v. *Ram Bilas*(7) and *Shiam Lal* v. *Mool Chand*(8), followed.

Shonandan Prasad v. *Tahiran Bibi*(9), *Kamta Rai* v. *Rani Jaduraj Kunwari*(10) and *Rajagopala Ayyangar* v. *Srinivasa Raghava Ayyangar*(11), not followed.

Jawahir Singh v. *Udai Parkash*(12), *Bai Keval* v. *Madhu Kala*(13) and *Ranodip Singh* v. *Parmeshwar Pershad*(14), distinguished.

Kandasami Naiken v. *Irusappa Naiken*(15) and *Rati Ram* v. *Niadar*(16), referred to.

The term " discharge " in section 7 of the Limitation Act, 1908, does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immoveable property, such as, the equity of redemption or a release of other rights, as for instance, a right to institute a suit.

Parmeswaran Nambudripad v. *Sankaran Nambudripad*(17), followed.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of the Court.

(1) (1912) I. L. R. 38 Mad. 118, F. B.
(2) (1920) I. L. R. 45 Bom. 446.
(3) (1928) I. L. R. 52 Bom. 441.
(4) (1928) 48 Cal. L. J. 555.
(5) (1936) Pat. W. N. 856.
(6) (1933) S. A. 1397 of 1930 (Unreported).
(7) (1924) A. I. R. (All.) 738.
(8) (1925) A. I. R. (All.) 672.
(9) (1930) I. L. R. 52 All. 768.
(10) (1931) A. I. R. (All.) 398.
(11) (1927) I. L. R. 51 Mad. 627.
(12) (1925) I. L. R. 48 All. 152, P. C.
(13) (1921) I. L. R. 46 Bom. 535.
(14) (1924) L. R. 52 I. A. 69.
(15) (1917) I. L. R. 41 Mad. 102.
(16) (1919) I. L. R. 41 All. 435.
(17) (1914) 25 Ind. Cas. 755.

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The case was first heard by Fazl Ali and Madan, JJ. who referred it to a Full Bench by the following judgment:

FAZL ALI AND MADAN, JJ.—The subject-matter of this second appeal is a registered sale deed executed by Musammat Hiran Kuer, widow of Mahali Singh, who died in the year 1914 leaving two minor sons, Karan Singh and Charan Singh, who are plaintiffs in the suit. Mahali Singh possessed a half share in a permanent tenure in village Kurpani, and another one quarter share belonged to his cousin Suknath Singh. By the sale deed, which is dated the 12th June, 1914, Musammat Hiran Kuer as guardian of her two minor sons, and Suknath, sold their shares to Sheosankar Sahu, who afterwards resold them to Sheobhajan Sahu whose widows are defendants nos. 1 and 2. The suit was instituted in January, 1929, by Karan Singh, as major and as guardian of his minor brother Charan Singh, for setting aside the sale deed in respect of the half share sold by his mother, who was impleaded as defendant no. 3. Both courts have held that the sale deed was not for legal necessity and was voidable at the instance of the minors when they came of age, and they also found that the suit had been brought beyond three years from the date when Karan Singh attained majority, at which time he became karta of the joint Mitakshara family. The question of law arising on these findings of fact is whether the entire suit is barred under section 7 of the Limitation Act of 1908 which is as follows:—

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such persons, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased".

Both the lower courts dismissed the suit holding that Karan on attaining majority became capable of giving a discharge on behalf of his minor brother, and that time began to run against both brothers from that date with the result that the entire suit was barred by limitation.

On this point different High Courts of India have taken different views. In *Bapu Tatya Desai* v. *Bala Ravji Desai*(1), in which the circumstances were similar to those of the present case, a Division Bench of the Bombay High Court held that the suit was barred under section 7 of the Limitation Act on the ground that the powers of a karta of a joint Hindu family included that of giving a discharge on behalf of the minor members of the family, the question of family benefit being immaterial to the case. The object of the section was held to be to limit the indulgence which is otherwise given to minors, so that, if there are several minors who can claim the benefit of section 6 of the Act, that concession will not extend to cover the whole period of time till the youngest of those minors becomes a major, but can only be availed of by the eldest of them. This decision was followed by the same High Court in *Supdu Daulatsingh Daji Patil* v. *Sakharam Ramji*(2) and was distinguished in *Bai Keval* v. *Madhu Kala*(3). This was a suit brought by a major and a minor son

(1) (1920) I. L. R. 45 Bom. 446.
(2) (1928) I. L. R. 52 Bom. 441.
(3) (1920) I. L. R. 46 Bom. 535.

for redemption of a mortgage executed by their father, and the reason for not applying section 7 in that case was that there was nothing to show that the major plaintiff could have filed a suit for redeeming the mortgage without the concurrence of the minor plaintiff. The view taken by the Bombay Court was adopted by a Full Bench of the Madras High Court in *Doraiswami Serumadan* v. *Nondisami Saluvan*(1) and was followed by a Division Bench of that Court in *Jaddu Padhi* v. *Chokkapu Boddu*(2). The earlier case was with reference to section 8 of the Limitation Act of 1877 which corresponds to section 7 of the present Act. In *Rajagopala Ayyangar* v. *Srinivasa Raghava Ayyangar*(3), which was a suit brought for setting aside an alienation made by a Hindu father, the circumstances were different as the father was still alive and was manager of the joint family. The Calcutta High Court took the same view as the Bombay and Madras High Courts in *Asutosh Ghose* v. *Sashi Mohan Roy*(4).

The Allahabad High Court has taken the opposite view, the leading case being *Sheonandan Prasad* v. *Tahiran Bibi*(5) in which case the youngest of three brothers sought to set aside an alienation made by his mother and eldest brother. It was held that section 7 did not apply to the case on two grounds: the first was that the case was governed by article 44, Schedule 1, of the Limitation Act, but this view was not accepted in the Madras Full Bench case cited above, where it was pointed out that article 44 could not be treated as if it stood by itself, and no other section of the Act applied. The other ground was that no question of discharge arose as each minor had a separate right to impugn the transaction independent of the other members of the joint family. It was held that the case was not one in which the suit had to be brought by several persons jointly within the meaning of section 7. In another Allahabad case *Kamta Rai* v. *Rani Jaduraj Kunwari*(6) it was held that section 7 has no application except to debts and execution of decrees. The same reasoning was adopted by the Judicial Commissioner of Nagpur in *Shampuri* v. *Ramchandra*(7). *Jawahir Singh* v. *Udai Parkash*(8) was a case in which a similar question of limitation arose. In that case the Judicial Committee while upholding the decree of the Allahabad High Court setting aside an alienation for want of legal necessity observed that it agreed with that Court on the question of limitation. In that case the father who had made the alienation was still alive, and there was nothing to show that their Lordships were then considering the case where the father was not alive. This point was noticed by the Madras High Court in *Jaddu Padhi* v. *Chokkapu Boddu*(2) mentioned above.

(1) (1912) I. L. R. 38 Mad. 118, F. B.
(2) (1934) A. I. R. (Mad.) 469.
(3) (1927) I. L. R. 51 Mad. 627.
(4) (1928) 48 Cal. L. J. 555.
(5) (1930) I. L. R. 52 All. 768.
(6) (1931) A. I. R. (All.) 398.
(7) (1925) A. I. R. (Nag.) 385.
(8) (1925) I. L. R. 48 All. 152, P. C.

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On a consideration of these cases we are of opinion that the applicability of section 7 of the Limitation Act to a case like the present will depend on the determination of the following question of law: whether in a Hindu family governed by the law of Mitakshara, an elder brother who has attained majority and is the manager of the family can without the concurrence of his minor brother or brothers give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors. If the answer to this question is in the affirmative, a suit brought by two or more brothers to set aside an alienation by their guardian more than three years after the elder brother attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the share of younger brother or brothers in the family property though the latter attained majority within three years prior to the institution of the suit. If, however, the answer to this question is in the negative, another question may arise, namely, whether the suit will not be barred as regards the elder brother's share who notwithstanding his majority did not institute a suit within three years of his attaining majority. As both these questions are of some importance and as there is a conflict in the opinions expressed by the various High Courts on the first question which is the main question, we refer this case to a Full Bench. Let the record of this case be placed before the Hon'ble Chief Justice for necessary order.

On this reference.

K. K. Banerjee, for the appellant: Every co-parcener's right to challenge an alienation is independent of the right of the others, the cause of action being separate. Even if the cause of action be taken to be joint and all the co-parceners be deemed to be necessary parties to the suit, the elder brother alone cannot give a valid discharge under section 7 of the Limitation Act.

Every one of the co-parceners has a right to impeach the transfer, if it is not binding on the family. A suit by one of them would be maintainable without the others joining in the suit.

[Reliance was placed on *Sheonandan Prasad* v. *Tahiran Bibi*(1), *Kamta Rai* v. *Rani Jaduraj Kunwari* (2) and *Rajagopala Ayyangar* v. *Srinivasa Raghava Ayyangar*(3).]

The decision of the Judicial Committee in *Jawahir Singh* v. *Udai Parkash*(4) supports my contention.

(1) (1930) I. L. R. 52 All. 768.
(2) (1931) A. I. R. (All.) 398.
(3) (1927) I. L. R. 51 Mad. 627.
(4) (1925) I. L. R. 48 All. 152, P. C.

Their Lordships endorse the view of the High Court on the question of limitation. Unfortunately the decision of the High Court is not reported anywhere, but a reference to that judgment is made in *Sheonandan Prasad* v. *Tahiran Bibi*(1).

[CHIEF JUSTICE.—The point of limitation was not pressed in *Jawahir Singh* v. *Udai Parkash*(2), as it was found that the father who had made the alienation was then alive.]

That fact does not make any difference in principle because the father too, on the contention now raised, was competent to give a discharge.

[CHIEF JUSTICE.—No, he could not bring a representative suit and thus give a discharge.]

If a father cannot give a discharge, the brother, who happens to be the karta, cannot *a fortiori* do so.

[CHIEF JUSTICE.—Do you place your case as high as that a karta cannot bring a representative suit.]

No.

[CHIEF JUSTICE.—Then he could also compromise.]

Yes, but not without the leave of the court.

[JAMES, J.—Under what provision of law?]

Under Order XXXII, rule 7, Code of Civil Procedure.

[JAMES, J.—But that will not apply if the minors are not parties to the suit.]

This will lead to another complication whether the karta can at all bring a suit without impleading the minors.

My next point is that the " discharge " contemplated by section 7 relates only to a discharge of debts, execution of decrees or contractual obligations. It does not refer to a discharge of rights in immoveable property. This view has been taken in *Sheonandan*

(1) (1930) I. L. R. 52 All. 768.
(2) (1925) I. L. R. 48 All. 152, P. C.

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Prasad v. *Tahiran Bibi*(1) and *Kamta Rai* v. *Rani Jaduraj Kunwari*(2). A contrary view has in effect been taken in some cases, such as, *Supdu Daulatsing Daji Patil* v. *Sakharam Ramji*(3), *Asutosh Ghose* v. *Sashi Mohan Roy*(4), *Jaddu Padhi* v. *Chhokkapu Boddu*(5).

[CHIEF JUSTICE.—Illustrations are not exhaustive. The section itself does not put any such limitation as is contended for.]

If the head of the family could give a discharge of a right to sue or some right in immoveable property, no suit whatever could lie at the instance of younger members to avoid a transfer.

[Reference was made to *Bai Keval* v. *Madhu Kala*(6) and *Ranodip Singh* v. *Parmeshwar Pershad*(7).]

Raghosaran Lall, for the respondent, relied on *Babu Tatya* v. *Bala Ravji*(8), *Doraiswami Serumadan* v. *Nandisami Saluvan*(9), *Supdu Daulatsing Daji Patil* v. *Sakharam Ramji*(3), *Asutosh Ghose* v. *Sashi Mohan Roy*(4), *Gangdeo Singh* v. *Ramprasad Singh*(10), *Chatyrgun Pande* v. *Bindhachal Dubey*(11); *Baijnath* v. *Ram Bilas*(12) and *Shiam Lal* v. *Mool Chand*(13); and distinguished *Jawahir Singh* v. *Udai Prakash*(14) for the reasons given in *Jaddu Padhi* v. *Chokhapu Boddu*(5).

(1) (1930) I. L. R. 52 All. 768.
(2) (1931) A. I. R. (All.) 398.
(3) (1928) I. L. R. 52 Bom. 441.
(4) (1928) 48 Cal. L. J. 555.
(5) (1934) A. I. R. (Mal.) 469.
(6) (1920) I. L. R. 46 Bom. 535.
(7) (1924) L. R. 52 I. A. 69.
(8) (1920) I. L. R. 45 Bom. 446.
(9) (1912) I. L. R. 38 Mad. 118, F. B.
(10) (1936) Pat. W. N. 856.
(11) (1933) S. A. 1397 of 1930 (Unreported).
(12) (1924) A. I. R. (All.) 738.
(13) (1925) A. I. R. (All.) 672.
(14) (1925) I. L. R. 48 All. 152, P. C.

K. K. Banerjee, in reply.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C.J., JAMES AND VARMA, JJ.—This appeal arises out of a suit for confirmation of possession or in the alternative for recovery of possession over 8 annas of mauza Kurpani after setting aside the sale dated the 12th June, 1914, executed by the plaintiffs' mother Musammat Hiran Kuer, in favour of one Sheoshankar Sahu with respect to the share on the ground that the alienation was not for any legal necessity and consequently not binding upon the plaintiffs. The plaintiff-appellants also sought to redeem a zarpeshgi of the properties mentioned in schedule B of the plaint, for a partition of their share in the mauza and for mesne profits.

The plaintiffs Karan Singh and Charan Singh are two brothers. Their case shortly was that the entire mauza Kurpani belonged to Mahali Singh, their father, and his cousins Shankar and Sukhnath Singh, Mahali's share being eight annas and the remaining eight annas belonged to Shankar and Sukhnath, that in execution of a money decree obtained by Sheobhajan Sahu (the husband of defendants 1 and 2) against Shankar Singh eight annas share of the mauza was sold and purchased by Sheobhajan Sahu on the 30th March, 1911, that on the 18th of September, 1914, Sheobhajan succeeded in getting the remaining eight annas interest in the zarpeshgi properties by a deed of assignment after paying Rs. 505-8-0, that during their minority their mother (defendant no. 3) sold their eight annas share in the mauza by a sale deed dated the 12th June, 1914, to Sheoshankar Sahu reserving only a small quantity of land for their maintenance, and that she received no consideration from Sheoshankar Sahu for the sale although it is mentioned in the sale deed to be Rs. 800, that fraud was

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practised upon the mother of the plaintiffs by Sheoshankar in collusion with Sukhnath and Shankar's son Jai Singh, that the said alienation was not for any legal necessity or for the benefit of the plaintiffs but was contrary or highly detrimental to their interest, they being minors, that on 5th January, 1917, Sheoshankar Sahu executed a sale deed in favour of Sheobhajan Sahu in respect of the 12 annas of the mauza, that plaintiff no. 1 attained majority only eight months before the filing of the suit in 1928 (the suit having been filed on the 21st of January, 1929) and having come to know the state of affairs approached defendants 1 and 2 to redeem their share of the zarpeshgi but the said defendants were unwilling to do so, that the plaintiffs accordingly deposited the sum of Rs. 505-8-0 representing their share of the zarpeshgi on the 9th of January, 1925, in Court, that they also asked the defendants 1 and 2 to effect a partition of the shares in the mauza but that they refused to do so, and hence the suit.

Defendants nos. 1 and 2 contesting the suit alleged that Musammat Hiran Kuar sold the property for full consideration, that there was no fraud or misrepresentation, that the sale was for legal necessity to pay off antecedent debt, that plaintiff no. 1 attained majority long ago and fought several suits with the defendants with regard to some of the lands but was throughout unsuccessful, that the suit was barred by limitation, and that the plaintiffs were not entitled to recover possession of the disputed properties or to redeem the zarpeshgi nor were they entitled to have the property partitioned and get mesne profits.

The trial court dismissed the suit and that decision was upheld by the Judicial Commissioner of Chota Nagpur. Various issues were raised in the case, the important ones being nos. 3 and 4:—

"(3) Is the suit barred by limitation? and

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(4) Was the sale deed executed by defendant no. 3 obtained through fraud and misrepresentation and was it without consideration? Was there any legal necessity for the said transfer?"

The findings of fact arrived at by the lower appellate Court are that the plaintiffs failed to prove that Karan Singh attained majority within three years before the institution of the present suit; that Karan Singh was the managing member of the plaintiffs' family; and that there was no legal necessity for the sale.

The second appeal having come up for hearing before a Bench has been referred to this Full Bench in view of certain points of law involved in the case. On the findings of fact the question that arises and which has been referred to this Bench is, whether in an undivided Hindu family governed by the law of Mitakshara, an elder brother who has attained majority and is the manager of the family can without the concurrence of his minor brother or brothers give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors. In the event of the answer to this question being in the negative, another question which arises is whether the suit would not be barred as regards the elder brother's share who notwithstanding his majority did not institute a suit within three years of his attaining majority. If the answer to the question is in the affirmative, then the question arises whether a suit brought by two or more brothers to set aside an alienation by their guardian more than three years after the elder brother attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the share of the younger brother or brothers in the family property though the latter attained majority within three years prior to the institution of the suit.

The answer to the question depends mainly on the interpretation to be put on section 7 of the Indian

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Limitation Act of 1908. That section runs as follows:—

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

Mr. K. K. Banerji, appearing on behalf of the appellants, has with his usual thoroughness taken us through a number of decisions of the different High Courts and contends that every coparcener has a right to challenge the acts of his guardian or the manager of the joint family irrespective of the rights of the other coparceners, and if it is a case of a joint cause of action the elder brother could not give a valid discharge so as to bind the minor claimant who is his younger brother in this case.

In *Jawahir Singh* v. *Udai Prakash*(1) where a Hindu father had contracted to sell a part of the joint family property to discharge a mortgage upon other parts of it, but the mortgage was discharged before the receipt of the purchase price which the father applied to his own purposes, it was held by their Lordships of the Judicial Committee that the sale could not be supported as having been made to discharge an antecedent debt, and the suit brought by the younger son within three years of attaining majority to avoid the sale was not barred by limitation, although the elder son had attained majority more than three years earlier and had taken no steps to question the alienation. But in that case it is to be noticed that although the elder son had attained majority more than three years earlier the father was still alive and, therefore, it could not be said that the elder brother as the karta of the family could give a valid discharge as contemplated by section 7 without the concurrence of the younger brother.

(1) (1925) I. L. R. 48 All. 152, P. C.

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In a later case of the Allahabad High Court in *Sheonandan Prasad* v. *Tahiran Bibi*(1) the joint Hindu family consisted of three brothers, two of whom were minors. The eldest brother together with the mother expressly acting as guardian of the minors, sold a portion of the joint family property. Another portion was sold by a second sale deed in which the mother did not expressly profess to act as guardian. The elder of the two minors attained majority, but did not sue within the statutory period to challenge the sales. The younger sued within three years of his attaining majority, although more than three years after the elder had attained majority. There it was held that the suit was not barred by limitation. Mukerji and Bennet, JJ. observed as follows:

" In a joint Hindu family every member, ordinarily, claims for himself. When a father alienates property every one of the sons has a right to impeach the transfer if it is not binding on the family. It is an individual right and is enjoyed severally by each of the joint members of the family. Section 7 of the Limitation Act applies where any suit has to be brought " jointly " by several persons. A suit by one of several sons of a Hindu father who has transferred the property would be maintainable without the other sons joining in the suit. It cannot, therefore, be said that the right to sue is claimed "jointly" by the several sons of a father who alienated the joint Hindu family property. Further, the use of the words " a discharge can be given without the concurrence of such person " indicates that the section is applicable to cases like a debt where the question of discharge may arise. Here there is no question of discharge. The mother, on behalf of the minors, and the eldest brother alienated the property. If the head of the family (Debi Prasad at the time) could give a discharge within the meaning of section 7 of the Indian Limitation Act, no suit whatever could lie at the instance of the younger brother of Debi

(1) (1930) I. L. R. 52 All. 768.

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Prasad. We are of opinion that no question of giving a discharge arises in the present case ".

Evidently the interpretation is due to the illustrations given under section 7 of the Indian Limitation Act.

In *Kamta Rai* v. *Rani Jaduraj Kunwari*(1) Banerji and King, JJ. of the Allahabad High Court referring to the decision in *Jawahir Singh* v. *Udai Prakash*(2), already referred to, held that " section 7 of the Limitation Act clearly has got no application to any but the cases to which it is made applicable, namely, to debts and to execution of decrees.

In a Full Bench decision of the Madras High Court in *Doraiswami Serumadan* v. *Nondisami Saluvan*(3) it was held that according to sections 7 and 8 and Article 44 of the Indian Limitation Act a suit brought by two brothers of an undivided Hindu family to set aside an alienation by their guardian, more than three years after the elder attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the younger brother's though the latter attained his majority within three years prior to the institution of the suit. In that case it is noticed that the first plaintiff became the managing member of the family to which the second plaintiff belonged and that as such the first plaintiff represented the family.

In *Kandasami Naiken* v. *Irusappa Naiken*(4) the Full Bench decision in *Doraiswami Serumadan's* case(3) was distinguished on the ground that the cause of action of the two sons one of whom was still in the womb on the date of sale was different, because at the time of the execution of the sale deed in question the mother was acting as the guardian of only one of the sons and not of the other who was in the womb, and therefore their Lordships held that although the claim

(1) (1931) A. I. R. (All.) 398.
(2) (1925) I. L. R. 48 All. 152, P. C.
(3) (1912) I. L. R. 38 Mad. 118, F. B.
(4) (1917) I. L. R. 41 Mad. 102.

of the elder son was barred that of the latter was not so.

In *Rajagopala Ayyangar* v. *Srinivasa Raghava Ayyangar*(1) the earlier Full Bench decision of the Madras High Court in *Doraiswami Serumadan* v. *Nondisami Saluvan*(2) was dissented from, and the view taken by the Allahabad High Court which was upheld by the Privy Council in *Jawahir Singh* v. *Udai Parkash*(3) was followed. It was held there that a suit by a younger son within three years of his attaining majority, against his father and an alienee from the father, to set aside an alienation made by the father of joint ancestral family properties was not barred by limitation, even though the eldest son who had attained majority more than three years prior to the suit had allowed his claim to become barred by limitation.

The facts of the case in *Bapu Tatya Desai* v. *Bala Raoji*(4) are hardly distinguishable from the facts of the case in hand. There the facts were that in 1915 three brothers, members of a joint Hindu family, sued to recover possession of property after setting aside a sale deed made by their mother during their minority on the 28th July, 1905. Plaintiffs nos. 1 and 2 were minors and plaintiff no. 3 was more than twenty-one years of age at the date of the suit. The suit was held barred as against plaintiff no. 3 but a question having arisen whether it was barred as against plaintiffs nos. 1 and 2 under section 7 of the Indian Limitation Act, 1908, it was held that it was barred as against plaintiffs nos. 1 and 2 also inasmuch as plaintiff no. 3 on his attaining majority became the manager of the joint family and as such could give a valid discharge and acquittance of all claims against the defendants without the concurrence of the minor

(1) (1927) I. L. R. 51 Mad. 627.
(2)((1912) I. L. R. 38 Mad. 118, F. B.
(3) (1925) I. L. R. 48 All. 152, P. C.
(4) (1920) I. L. R. 45 Bom. 446.

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plaintiffs; and the decision in *Doraiswami Serumadan* v. *Nondisami Saluvan*(1) was followed. This decision was distinguished in *Bai Keval* v. *Madhu Kala*(2) but this was a case in which the plaintiffs sued to redeem a property mortgaged by their father. The suit was brought more than three years after the elder brother had attained majority but within three years of the majority of the younger brother. Although it was argued that the suit was barred against both the brothers it was held that, as there was nothing to show that the plaintiff who was a major could have given a discharge without the concurrence of the second plaintiff who was a minor, the suit was in time with reference to both the plaintiffs under section 7 of the Limitation Act.

The decision in *Bapu Tatya* v. *Bala Raoji*(3) was however, followed in *Supdu Daulatsing Daji Patil* v. *Sakharam Ramji*(4) and it was held that a manager of a joint Hindu family could give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree just as he can in the case of a suit, and the mere fact that one of the members is a minor will not prevent time running against all the members of the family.

In the Calcutta High Court in *Asutosh Ghose* v. *Sashi Mohan Roy*(5) it has been held that where some of the plaintiffs are major and some minor but they are all members of a joint Hindu family of which the major plaintiff is the karta, no extension of time can be availed of under the provisions of section 7 of the Limitation Act as the major plaintiff being the karta had authority to give discharge not only for himself but also for the minor plaintiff. In that case the suit was for accounts against the gomashta in

(1) (1912) I. L. R. 38 Mad. 118, F. B.
(2) (1920) I. L. R. 46 Bom. 535.
(3) (1920) I. L. R. 45 Bom. 446.
(4) (1928) I. L. R. 52 Bom. 441.
(5) (1928) 48 Cal. L. J. 555.

charge of a business that had belonged to the father of the plaintiffs. That decision distinguishes the decision in *Harihar Prashad* v. *Bholi Pershad*(1).

Mr. Ragho Saran Lal, appearing on behalf of the respondents, has drawn our attention to the decision of this Court in *Gangdeo Singh* v. *Ramprasad Singh*(2). In that case two persons were jointly entitled to a share during their minority, and a suit was instituted, for recovery of possession of properties wrongly recorded during their minority, at a time when one of them was still a minor. It was contended that the suit having been instituted after the period of limitation after one of them had attained majority it was barred notwithstanding the minority of the other. Mr. Justice James, sitting singly, held that mere coming of age of one of them, so long as the other one was minor will not render the suit barred by limitation, unless there was evidence to show that the one who had attained majority was the manager of the family or was authorised to ratify the arrangements made during their minority, and that that was a question of fact. The decision emphasises the importance of the question of fact whether the person who attained majority was in a position to give a valid discharge. If he was, then of course the suit will be barred, but if he was not then the suit will not be barred by limitation simply because it was filed beyond the period of limitation after the attainment of majority of one member and during the minority of the other.

In an unreported decision of this Court [*Chaturgun Pande* v. *Bindhachal Dubey*(3)] Agarwala, J. under similar circumstances referred to the decision of the Allahabad High Court in *Ganga Deyal* v. *Mani Ram*(4) where two brothers sued to set aside a sale

(1) (1907) 6 Cal. L. J. 383.
(2) (1936) Pat. W. N. 856.
(3) (1933) S. A. 1397 of 1930 (Unreported).
(4) (1908) I. L. R. 31 All. 156.

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effected by their guardian, more than three years after the elder of the two brothers attained majority, and it was held that, in the absence of a finding that the elder brother was the karta of the family, the younger brother's suit was not barred by limitation. The learned Judge, accordingly, while dismissing the suit of the major plaintiff no. 1, remanded the appeal of the minor plaintiff no. 2 to the lower appellate Court for disposal after coming to a finding on the point as to whether the major plaintiff in the suit was the karta of the family.

The decision of the Judicial Committee in *Ranodip Singh* v. *Parmeshwar Pershad*(1) has also been referred to, but that is not quite applicable to the facts of the present case. That was a suit instituted in June, 1920, by the four sons of a Hindu father, all members of a joint Mitakshara family, to set aside a sale made by their father on June 3, 1893, of an ancestral village. They alleged that the sale was made without legal necessity. The time from which the period of limitation began to run in that case was 3rd June, 1893, as the alienee took possession of the property on that date. The four plaintiffs were born respectively in the years 1886, 1891, 1897 and 1900. The courts below had held that the suit was barred by limitation, but the contention on behalf of the appellants was that limitation was saved by section 7 of the Indian Limitation Act. It was conceded that the suit on behalf of the first three plaintiffs was barred by limitation but it was contended that the minority of the fourth plaintiff saved limitation. Their Lordships held that the cause of action arose on June 3, 1893, and the fourth plaintiff was born in 1900 and that did not create a fresh cause of action or a new starting point from which limitation should be reckoned. Their Lordships held that the extended period can only be claimed by a person entitled to sue at the time from which the

(1) (1924) L. R. 52 I. A. 69.

period of limitation is to be reckoned, and as the fourth was not in existence at that time he was not entitled to the benefits of section 7 of the Indian Limitation Act.

Two other decisions of the Allahabad High Court have been cited. In *Baijnath* v. *Ram Bilas*(1) the decision of the Madras High Court in *Doraiswami Serumadan* v. *Nondisami Sulwan*(2) and that of the Bombay High Court in *Bapu Tatya Desai* v. *Bala Raoji Desai*(3) were followed. In *Shiam Lal* v. *Mool Chand*(4) the same view was taken and it was held that an elder brother of a joint Hindu family represented the entire family and therefore he could give a discharge within the meaning of section 7 of the Indian Limitation Act on behalf of the minor brother, and the decision in *Rati Ram* v. *Niadar*(5) was followed.

This being the trend of the various decisions it is necessary to look into the wording of section 7 of the Indian Limitation Act with reference to its applicability to the present case. It is clear that the disabilities in view under this section include that of being a minor as laid down in the foregoing section 6. Section 7 clearly governs the case of persons jointly entitled to institute a suit; and it provides that if any one of such persons is under a disability and none of the other persons could give a discharge without the concurrence of the person under disability, time will not run as against any of them until the disability of the one has ceased or any one of them becomes capable of giving a discharge. If the position is that any one of such persons is capable of giving a discharge then time will run against them all. In the case before us Karan Singh (plaintiff no. 1) attained majority more than three years before

(1) (1924) A. I. R. (All.) 738.
(2) (1912) I. L. R. 38 Mad. 118, F. B.
(3) (1920) I. L. R. 45 Bom. 446.
(4) (1925) A. I. R. (All.) 672.
(5) (1919) I. L. R. 41 All. 435.

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the institution of the suit, and it has also been found that he was the karta of the plaintiffs' family. The plaintiffs' action in the present case will be governed by the provisions of section 7 of the Indian Limitation Act. The question whether Karan Singh could or could not give a valid discharge will depend upon the law which governs him and his brother.

The term " discharge " in this section does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immoveable property such as even the equity of redemption or a release of other rights, as for instance, a right to institute a suit [*See Parmeswaran Nambudripad* v. *Sankaran Nambudripad*(1)]. It is settled law that a karta of a joint Hindu family can give a valid discharge without the concurrence of the other members: *see Harihar Pershad* v. *Bholi Pershad*(2). The divergence of opinions on the particular point has arisen chiefly on account of the difference in the facts of the various cases decided. The cases in which it has been held that the minor's claim was not time-barred were those in which either the brother who had attained majority was not the karta of the family or could not give a valid discharge.

Agreeing with the cases reported in *Doraiswami Serumadan* v. *Nondisami Saluvan*(3), *Bapu Tatya Desai* v. *Vala Raoji*(4), *Asutosh Ghose* v. *Sashi Mohan Roy*(5) and *Gangdeo Singh* v. *Ramprasad Singh*(6) we answer the question referred to us in the affirmative. That being the answer, it is not necessary to deal with the supplementary questions mentioned in the order of reference.

(1) (1914) 25 Ind. Cas. 755.
(2) (1907) 6 Cal. L. J. 383.
(3) (1912) I. L. R. 38 Mad. 118, F. B.
(4) (1920) I. L. R. 45 Bom. 446.
(5) (1928) 48 Cal. L. J. 555.
(6) (1936) Pat. W. N. 856.

On the findings of fact it must be held that the suit is barred by limitation, and the appeal must be dismissed with costs.

S. A. K.

Appeal dismissed.

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APPELLATE CIVIL.

Before Fazl Ali and Madan, JJ.

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v.

SIDHESHWARI PRASAD NARAIN SINGH.*

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February, 1, 2, 3; *March*, 19.

Hindu Law—promissory note executed by manager—suit —other co-parceners, whether liable—Negotiable Instruments Act, 1881 (*Act XXVI of* 1881), *section* 28—*manager, whether personally liable—co-parceners, extent of the liability of.*

Under the Hindu law all that is necessary to make every member of the family liable for the debt is that it should have been contracted for legal necessity or for the benefit of the family. Where, therefore, the benefit is proved the court will not be justified in refusing to grant the appropriate relief to the creditor unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it.

Under the law of negotiable instruments it is necessary that the name of the person to be charged should be disclosed in the document in such a way that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand.

But when the karta of a joint Hindu family, which is an institution peculiar to this country, borrows money for family purposes, he is not acting as an agent for an undisclosed principal or principals but may well be regarded as the principal. At any rate, when he acts as a karta, he acts in

* Appeal from Original Decree no. 139 of 1934, from a decision of Babu Raghunandan Prasad, Additional Subordinate Judge of Gaya, dated the 26th February, 1934.

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a capacity which is so well-known that there can be no misapprehension as to the identity of the person or persons whom he purports to bind by his act.

The rule laid down in *Sadasuk Janki Das* v. *Maharaja Sir Kishan Prasad*(1) is not, therefore, applicable to a Hindu family.

Abdul Majid v. *Saraswati Bai*(2), followed.

Sreelal Mangtulal v. *The Lister Antiseptic Dressing Co. Ltd.*(3), *Hari Mohan Ghose* v. *Sourenara Nath Milter*(4), *Thaith Ottathil* v. *Purushotam Dass*(5), *Jibach Mahto* v. *Shib Shanker Chaudhary*(6), *Birkeshwar Raut* v. *Ram Lochan Pandey*(7), *Krishnanand Nath Khare* v. *Raja Ram Singh*(8), *Krishna Ayyar* v. *Krishnasami Ayyar*(9), *Bhagwan Singh & Co.* v. *Bakshi Ram*(10), *Tikan Chand Chaudhury* v. *Sudersan Trigunait*(11), *Nagendra Chandra Dey* v. *Amar Chandra Kundu*(12) and *Baisnab Chandra De* v. *Ramdhon Dhor*(13), referred to.

A manager of joint Hindu family who has contracted the debt is liable not only to the extent of his share in the joint family assets, but, being a party to the contract, he is liable personally; other co-parceners, however, are liable only to the extent of their interest in the family property, unless in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified.

Jwala Prasad v. *Bhuda Ram*(14), followed.

(1) (1918) I. L. R. 46 Cal. 663, P. C.
(2) (1933) 15 Pat. L. T. 99, P. C.
(3) (1925) I. L. R. 52 Cal. 802.
(4) (1925) 41 Cal. L. J. 535.
(5) (1910) 21 Mad. L. J. 526.
(6) (1933) 15 Pat. L. T. 100.
(7) (1934) 16 Pat. L. T 117.
(8) (1922) I. L. R. 44 All. 393.
(9) (1900) I. L. R. 23 Mad. 597.
(10) (1933) A. I. R. (Lah.) 494.
(11) (1933) 14 Pat. L. T. 623.
(12) (1903) 7 Cal. W. N. 725.
(13) (1906) 11 Cal. W. N. 139.
(14) (1931) I. L. R. 10 Pat. 503.

Appeal by defendants 2 and 3.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Sushil Madhab Mullick (with him *B. P. Sinha* and *Rajkishore Prasad*), for the appellants.

Khurshaid Husnain and *Pares Nath*, for respondent no. 3.

S. N. Rai, for respondents 1 and 2.

FAZL ALI, J.—This is an appeal from a decree passed by the Subordinate Judge of Gaya in a suit brought by the plaintiffs to recover a sum of Rs. 26,795-11-8 pies from defendants 1 to 3. Defendants 1 and 2 are full brothers and defendant no. 3 is the son of defendant no. 1. These three defendants were admittedly members of a joint family of which defendant no. 1 was the manager or karta till 1932 (1339 F.). The case of the plaintiff is that defendant no. 1 as karta of the family borrowed—

(*1*) Rs. 4,869 on the 5th December, 1929,

(*2*) Rs. 7,200 on the 22nd March, 1931,

(*3*) Rs. 10,034-7-0 on the 27th September, 1931,

and executed a promissory note in favour of the plaintiffs for the particular sum borrowed on each occasion. The trial court decreed the suit against all the three defendants holding that the handnotes were genuine and that defendant no. 1 had borrowed the sums mentioned in them for family necessity. This appeal has been preferred by defendants 2 and 3 (defendant no. 1 not appealing) and the only questions which are raised by them are (*1*) that the plaintiffs' action being based upon promissory notes, no decree should have been passed against defendants nos. 2 and 3 who had not signed them and (*2*) that the finding of the trial court as to the existence of legal necessity for the loans taken by defendant no. 1 is not correct.

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In arguing the first point the learned Advocate for the appellants greatly relied on *Sadasukh Janki Das* v. *Maharaja Sir Kishan Prasad*(1). In that case a question arose whether a person whose name did not appear on certain hundis (which are negotiable instruments) could be made liable under them on the ground that the person who had drawn the hundis was his agent. Their Lordships of the Judicial Committee answered the question in the negative and observed as follows:—

"It is not sufficient that the principal's name should be 'in some way' disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills.

Their Lordships' attention was directed to sections 26, 27 and 28 of the Negotiable Instruments Act of 1881, and the terms of these sections were contrasted with the corresponding provisions of the English Statute. It is unnecessary in this connection to decide whether their effect is identical. It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

In view of these observations it has been held in a number of recent cases that the karta of a joint Hindu family cannot by executing a promissory note in his own name bind the other members of the family, no other names appearing on the document as those of persons to be charged [*see Sreelal Mangtulal* v. *The Lister Antiseptic Dressing Co., Ltd.*(2); *Hari*

(1) (1918) I. L. R. 46 Cal. 663, P. C.
(2) (1925) I. L. R. 52 Cal. 802.

Mohan Ghose v. *Sourendra Nath Mitter*(1); *Thaith Ottathil* v. *Purushotam Doss*(2); *Jibach Mahto* v. *Shib Shanker Chaudhary*(3); *Birkeshwar Raut* v. *Ram Lochan Pandey*(4)]. The Allahabad High Court has, however, taken a different view in *Krishnanand Nath Khare* v. *Raja Ram Singh*(5) and held that there is no inherent reason why the managing member of a joint Hindu family cannot in that capacity execute in his sole name a promissory note which should be binding on the family as a whole and the property owned by it. The learned Judges who decided that case have explained the decision of the Privy Council by pointing out that the position of the head of the joint Hindu family is not the same as that of an ordinary business agent and that a joint Hindu family, being a legal person according to Hindu Law lawfully represented by and acting through the managing member or head thereof, is included ordinarily in term " a person ". A similar view had been expressed by two eminent Judges of the Madras High Court in *Krishna Ayyar* v. *Krishnasami Ayyar*(6) and both these decisions have been followed by the Lahore High Court in *Bhagwan Singh & Co.* v. *Bakshi Ram*(7) and by a single Judge of this Court in *Tikan Chand Chaudhury* v. *Sudarsan Trigunait*(8). It may also be stated that before the decision of the Judicial Committee in the case of *Janki Das* v. *Maharaja Sir Kishan Prasad*(9) the High Court of Calcutta had also held in several cases that the karta of a joint Hindu family could bind the other members of the family by signing a promissory note for family purposes [*see Nagendra Chandra Dey* v. *Amar*

(1) (1925) 41 Cal. L. J. 535.
(2) (1910) 21 Mad. L. J. 526.
(3) (1933) 15 Pat. L. T. 100.
(4) (1934) 16 Pat. L. T. 117.
(5) (1922) I. L. R. 44 All. 393.
(6) (1900) I. L. R. 23 Mad. 597.
(7) (1933) A. I. R. (Lah.) 404.
(8) (1933) 14 Pat. L. T. 623.
(9) (1918) I. L. R. 46 Cal. 663, P. C.

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Chandra Kundu(1) and *Baisnab Chandra De* v. *Ramdhon Dhor*(2)].

Now the view expressed in these cases has this advantage that it enables the court to grant the same relief in a suit based on a promissory note as in a suit for debt and, therefore, makes it unnecessary for it to decide whether the suit belongs to one category or the other. The distinction between these two classes of suits is too well recognised to be overlooked, but so far as this country is concerned, the line of distinction becomes highly artificial in many cases, first, because except in a few mercantile towns a promissory note is not popularly regarded as a negotiable instrument; and, secondly, because the distinction depends largely on the view one takes of the pleadings and the pleadings in the mofussil courts are generally defective and badly drafted. Besides, so far as the Hindu Law goes, it does not recognise any distinction between the liability of the joint family when the debt is contracted by its karta under a promissory note and its liability when the debt is contracted otherwise. Under that law all that is necessary to make every member of the family liable is that the debt should have been contracted for legal necessity or for the benefit of the family. Where, therefore, the benefit is proved the court will not be justified in refusing to grant the appropriate relief to the creditor unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it.

Under the law of negotiable instruments as has been explained by the Judicial Committee in *Janki Das* v. *Maharaja Sir Kishan Prasad*(3) it seems necessary that the name of the person to be charged should be disclosed in the document in such a way that the responsibility is made plain and can be instantly recognised as the document passes from hand

(1) (1903) 7 Cal. W. N. 725.
(2) (1906) 11 Cal. W. N. 139.
(3) (1918) I. L. R. 46 Cal. 663, P. C.

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to hand. Now, the joint Hindu family is an institution peculiar to this country and the law gives its karta the power to contract loans for the benefit of the family according to his own discretion and without any express authority from the other members of the family. Therefore when the karta borrows money for the family purpose he is not acting as an agent for an undisclosed principal or principals but may well be regarded as the principal. At any rate when he acts as a karta, he acts in a capacity which is so well-known that there can be no misapprehension as to the identity of the person or persons whom he purports to bind by his act. On the whole, therefore, I am inclined to think that the rule laid down in *Janki Das* v. *Maharaja Sir Kishan Prasad*(1) is not applicable to a Hindu family and I am to some extent fortified in my view by the later pronouncement of the Judicial Committee in *Abdul Majid* v. *Sarasvati Bai*(2). In that case a suit had been brought on the basis of two promissory notes executed by the manager of a joint Hindu family against the surviving members of that family after the death of the manager who had executed the promissory notes. The Judicial Committee in dealing with the case observed (*1*) that it would be within the authority of the karta of the joint family to borrow money in his own name if it be necessary for the proper conduct of the joint family business that money should be borrowed from time to time on promissory notes and (*2*) the fact of the promissory note being signed by the karta is equally consistent with the borrowing by him for his own individual purpose or borrowing for the purpose of the joint family business. The matter, however, need not be pursued any further because I agree with the learned Subordinate Judge that on the pleadings of the parties the present suit should be treated as a suit for recovery of debt. This is clear on reading paragraphs 3 and 4 of the plaint where, after stating

(1) (1918) I. L. R. 46 Cal. 663, P. C.
(2) (1933) 15 Pat. L. T. 99, P. C.

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the amounts which were borrowed by defendant no. 1 on different occasions, it is stated that the three handnotes were executed "in proof of his taking the aforesaid loans". Again in paragraph 6 of the plaint the defendants are sought to be made liable on the ground that "they were benefited by the loans" and in paragraph 8 it is clearly stated that the cause of action accrued on the dates on which "the loans were taken and the handnotes sued upon were executed". It is true that in paragraph 9 of the plaint the plaintiffs asked for a decree "on account of the three handnotes sued upon" but the plaint must be read as a whole and if read as a whole, it supports the view taken by the learned Subordinate Judge that the suit was in essence a suit for debt and therefore all the members of the family would be liable to re-pay the debt if they were contracted for legitimate family necessity.

The next question to be considered is whether the debts were in fact contracted for family necessity. The finding of the trial court as to the existence of such necessity has not been seriously challenged before us so far as it relates to the promissory note exhibit 1(*b*) by means of which defendant no. 1 borrowed a sum of Rs. 10,034-7-0 on the 27th September, 1931. It appears that the defendants had obtained a lease of certain property from the plaintiffs after having given it to them in usufructuary mortgage. The handnote exhibit 1(*b*) recites that the rent for this property had fallen due, that the mortgagees were ready to institute a suit to recover the arrears and that if a suit was instituted, it was likely to put the defendants and the other members of the family to unnecessary loss and harassment. The correctness of these recitals is clearly established by the statement made in a mortgage bond to which defendant no. 2 was a party, it being executed by him and defendant no. 1 on the 19th September, 1932. This bond recites in very clear terms that the *two brothers* had paid rent for 1928 in respect of the property of which they were

sub-lessees by taking a loan of Rs. 10,034-7-0 from plaintiff no. 1. There can, therefore, be no doubt that all the defendants are liable for the dues under this handnote [exhibit 1(*b*)].

The other two handnotes [exhibits 1 and 1(*a*)] do not contain any recitals so as to indicate the purpose for which defendant no. 1 borrowed the amounts mentioned therein and the question as to whether the loans under these handnotes were justified by any family necessity or not has to be decided with reference to the evidence of the witnesses examined by the parties. It was contended by the learned Advocate for the appellants before us that the defendants being possessed of considerable property which yielded an annual income of about two lakhs of rupees (vide the evidence of defendants' witness no. 1) defendant no. 1 had no justification for contracting these debts. The evidence, however, which is before us shows that the pecuniary condition of the family was far from satisfactory. Exhibit 5 which is a mortgage bond executed by both defendants nos. 1 and 2 in 1926 for a sum of Rs. 76,800 shows that the family had incurred large debts and a decree for Rs. 1,39,000 had been passed against them by the Calcutta High Court. Again a simple bond executed by both the brothers (defendants 1 and 2) in October, 1931, contains among other things the following passage :—

" We the declarants..... had borrowed Rs. 40,000 bearing interest from Babu Ran Bhanjan Singh..... promising to pay interest and compound interest at Re. 1 per cent per month..... but we have not yet paid to the said mahajan a single shell out of either the principal or interest or compound interest due under the aforesaid mortgage bond..... Besides this we the declarants had borrowed Rs. 1,000 bearing interest at Rs. 2 per cent per month from the said Babu Saheb under a handnote, dated the 28th September 1931, for payment of court-fee and for instituting a rent suit against the tenants of mauza Chatar (?), pargana Narhat, district Gaya and having taken the loan we instituted rent suits, which if not instituted a large amount of the arrears would have been time-barred and at present we stand in need of money for making payment of income-tax, for the realisation of which a warrant has already been issued. We have also to pay road cess for our zamindar for the realisation of which several certificates have been issued. We also badly stand in need

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of money for making payment of rent to Dulhin Jageshar Kuer, wife of Babu Bansi Singh, resident of mauza Baijnathpur, pargana Narhat, district Gaya in respect of (lands of) mauza Majhgawan and mauza Sikanderpur and we have got no money at present in our khas tahbil and at present there is no income in kind from the zamindari and rent in cash is not realised from the tenants on account of rise in the price of grains. Without taking loan there does not appear any other source for raising money."

FAZL ALI J. From another mortgage bond (exhibit 3), dated the 19th September, 1932, to which reference has already been made it appears that the two brothers could not pay off certain arrears of rent without borrowing from the plaintiffs. These documents speak for themselves and do not justify the contention that the family was in no want of money. In fact it is not seriously disputed that the defendants were heavily indebted and, as the learned Subordinate Judge has rightly pointed out, that their income had been greatly reduced owing to economic depression.

On the question of actual necessity it is stated on behalf of the plaintiffs that defendant no. 1 had taken the loans in question for the purpose of paying Government revenue and cesses for the villages owned by them in Gaya and Patna districts and for defraying the expenses of an appeal pending before the Privy Council and meeting certain household expenses. P. W. 4 who is the servant of the plaintiffs has deposed that he had himself made enquiries in various quarters and was satisfied that defendant no. 1 wanted money for the purposes mentioned above. The evidence of the plaintiffs' witnesses has been accepted by the learned Subordinate Judge and on the whole I am not prepared to hold that he was not justified in doing so. The case put forward on behalf of defendants 2 and 3 is that defendant no. 1 could have paid the dues mentioned above without borrowing any money from the plaintiffs and that in fact he had paid them out of the income of the estate. These defendants, however, have offered no reliable evidence to establish their allegations. The learned Subordinate Judge has strongly commented upon the non-production of certain account books which he finds on

evidence to have been in possession of defendant no. 2; but apart from these account books there was nothing to prevent defendant no. 2 from coming into the witness box and disproving the case made out on behalf of the plaintiffs. It cannot be said that defendant no. 2 was not acquainted with the affairs of the family, for defence witness 1 Govind Lal has stated that defendant no. 2 used to look after the affairs of the family at times and also used to check the household accounts (deorhi jama kharach). The only witness who was examined by the defendant no. 2 to disprove the allegations made on behalf of the plaintiffs was Govind Lal, one of his servants, but his statement is not supported by any reliable evidence. The learned Subordinate Judge has dealt with the whole question at some length and I agree with him that the only reasonable conclusion which can be drawn from the evidence which is on the record is that defendant no. 1 contracted the loans in question not for his own use but for the benefit of the family and that both defendants 2 and 3 were benefited by the loans.

There is only one other point which remains to be dealt with. In cases where a loan is contracted by the managing member of a joint family a question often arises at the time of the execution of the decree as to the extent of the liability of the other members of the family for the debt. This question has arisen in this particular case also as will appear from the connected miscellaneous appeal before us and it seems, therefore, to be necessary that the decree of the court should be prepared in such a way as to make the position clear. In *Jwala Prasad* v. *Bhuda Ram*(1) two learned Judges of this Court have quoted with approval the following passage from Mulla's Hindu Law as correctly summarising the law on the subject:

"In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction

(1) (1931) I. L. R. 10 Pat. 503.

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SRIKANT LAL v. SIDDESHWARI PRASAD NARAIN SINGH.

FAZL ALI, J.

between the liability of a manager and the liability of his co-parceners. The manager is liable not only to the extent of his share in the joint family property, but, being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other co-parceners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified."

Now in this particular case so far as defendants 1 and 3 are concerned, the position is perfectly simple. The former as the executant of the handnotes is personally liable for the debts contracted under all of them and defendant no. 3 who is a minor is liable for these debts only to the extent of his interest in the joint family property. As to defendant no. 2 I am of opinion that he is personally liable for the loan contracted under the handnote, dated the 27th September, 1931. I have already stated that the mortgage bond (exhibit 3), dated the 19th September, 1932, which was executed by him as well as by defendant no. 1 refers in clear terms to the promissory note in question and I may quote the exact words used in the bond which are as follows:—

"*We paid rent* with interest on the default of instalment for 1928 to the said ijaradar *by taking a loan* from Babu Sidheshwar Prasad Narain Singh, etc., etc., under a handnote for Rs. 10,034-7-0."

I think that this statement, the correctness of which there is no reason to doubt, brings the case of defendant no. 2 within the exception referred to in the passage quoted above and amounts to a ratification of the loan. Defendant no. 2 is, therefore, personally liable so far as the debt contracted under the handnote of 27th September, 1931, is concerned but he is liable only to the extent of his share in the joint family

property in respect of the debts contracted under the other two handnotes. I would, therefore, dismiss this appeal with costs and direct that in the decree which is to be prepared in this Court the amount due under the three handnotes should be calculated separately and it should be made clear that defendant no. 1 is personally liable for the debts due under all the three handnotes, that defendant no. 2 is personally liable only in respect of the debt contracted under the third handnote and that defendant no. 3 is not personally liable under any of the debts but is liable only to the extent of his interest in the joint family property.

MADAN, J.—I fully agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Fazl Ali and Madan, JJ.

RAMESHWAR NARAIN MISRA

v.

RAGHUNANDAN PURBEY.*

1937.

January, 7.
March, 19.

Limitation Act, 1908 (*Act IX of* 1908), *Article* 182, *clause* (4)—*nature of amendment contemplated—amendment made after execution of decree is barred, whether saves limitation.*

Where an application for the amendment of decree was made more than three years after the decree was passed and without notice to the judgment-debtor and the amendment which was of a trifling nature was allowed, *held*, that the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term and not merely the correction of clerical error or trifling arithmetical mistakes

* Appeal from Appellate Order no. 161 of 1936, from a decision of V. Ramaswami, Esq., I.C.S., Additional District Judge of Darbhanga, dated the 7th May, 1936, reversing a decision of Maulavi Kabiruddin Ahmad, Munsif of Darbhanga, dated the 5th September, 1935.

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such as the court might at any time correct of its own motion and therefore Article 182(4) had no application and the application for execution was barred by limitation.

If clause (4) of Article 182 is to be literally construed there can be no escape from the conclusion that the amendment of a decree provides a fresh starting point for limitation and it is immaterial whether application for amendment was made within three years of the date of the decree or more than three years after it. But reading Article 182 as a whole it appears doubtful whether it was contemplated by the legislature that a decree, execution of which is barred under clause (1), should be revived by mere amendment.

Clauses (2) and (4) have been somewhat unhappily drafted and should be suitably amended.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Hareshwar Prasad Sinha and *P. Jha*, for the appellant.

Murari Prasad and *S. P. Srivastava*, for the respondents.

FAZL ALI, J.—The only question to be decided in this case is one of limitation and it arises on the following facts.

The respondent obtained an ex parte decree for money against the appellant on the 22nd June, 1931, but he took no step for executing the decree within three years of that date. On the 3rd May, 1935, (more than three years after the date of the decree) he made an application for the amendment of the decree under section 152 of the Civil Procedure Code on the ground that the pleader's fee and certain other costs awarded to him had been wrongly calculated. On the 3rd May, 1935, the court without issuing notice to the defendants but after hearing the decree-holder's pleader directed that the pleader's fee be raised from Rs. 26-5-0 to Rs. 26-13-0 and the other costs be

reduced from Rs. 3-5-6 to Rs. 1-11-9 with the result that the total cost awarded to the decree-holder was reduced by Rs. 1-2-0. Subsequently on the 26th April, 1935, the respondent (decree-holder) applied for the execution of the decree but the appellant (judgment-debtor) resisted the application on the ground that it was barred by limitation. The appellant's objection was upheld by the Munsif before whom the execution petition had been filed but was negatived by the District Judge on appeal. The judgment-debtor has accordingly preferred this second appeal under section 47 of the Civil Procedure Code.

Now, as the courts below have pointed out, the question whether the application for execution is barred or not, depends upon the proper construction of Article 182, clause (*4*), of the Indian Limitation Act. The period of limitation under Article 182 is three years and clause (*4*) provides that when the decree has been amended, the period of three years is to run from the date of the amendment. The construction of the clause presents no difficulty when the decree is amended within three years of the date on which it was passed. In those cases, however, in which the amendment is made more than three years after the date of the decree a question arises as to whether clause (*4*) of Article 182 is to be read independently of clause (*1*) or subject to it, or, in other words, whether a decree which has been amended after the execution is barred under clause (*1*) can be executed. The decisions of the High Courts are not uniform in such cases and may be classified under three groups:

(*1*) In a number of cases it has been held that where a decree has not been executed within three years from its date, it can no longer be executed under Article 182(*1*) and the amendment of such a decree after its execution has become barred under that clause, cannot give a fresh start to limitation from the date of amendment—*See Anandram* v. *Nityananda*

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Barham(1); *Rabiuddin* v. *Ram Kanai Sen*(2); *Jhaman Lal* v. *Daulat Ram*(3); *Haidri Khanam* v. *Bhwani Shankar*(4) and *Debi Baksh* v. *Shambhu Dial*(5).

(2) In another group of cases it has been decided that where the original decree is incapable of execution, time runs from the date when the decree is amended and when a proper decree capable of execution is drawn up—*See Sanatan Sant* v. *Dinabandhu Giri*(6) and *Mohamaya Prosad Singh* v. *Abdul Hamid*(7).

(3) There is a third group of cases in which it has been held that inasmuch as Article 182(4) expressly provides that the date from which the period of limitation for execution of a decree should be computed is the date of the amendment, it is not for the court of execution to enquire whether the amendment was properly made or whether the original decree was capable of execution or whether for any other reason the court was wrong in making an order for amendment of the decree—*See Durga Prosad* v. *Kedar Nath Nayek*(8); *Allada. Lakshmikanta Rao* v. *Nadella Ramayya*(9); *Musummat Bhagwati Kuer* v. *Narsingh Narayan Singh*(10) and *Maganlal Marwari* v. *Sitaram Pannalal*(11).

It was contended on behalf of the respondent that the last view is the view which should be adopted by us, first, because at least two previous decisions of this Court are based upon this view and, secondly, because it is supported by certain observations made by the Judicial Committee in *Nagendra Nath Dey* v. *Suresh*

(1) (1916) 32 Ind. Cas. 744.
(2) (1920) 59 Ind. Cas. 186.
(3) (1924) A. I. R. (Lah.) 329.
(4) (1934) A. I. R. (Oudh) 43.
(5) (1925) 24 All. L. J. 266.
(6) (1921) 64 Ind. Cas. 622.
(7) (1913) 18 Cal. W. N. 266, 21 Ind. Cas. 615.
(8) (1929) A. I. R. (Cal.) 650.
(9) (1935) A. I. R. (Mad.) 97.
(10) (1930) I. L. R. 9 Pat. 782.
(11) (1936) 18 Pat. L. T. 18.

Chandra Dey(1) as to the proper construction of clause (*2*) of Article 182 which provides that where there has been an appeal the period of limitation runs from the date of the final decree or order of the appellate court or the withdrawal of the appeal. The observations made by the Judicial Committee in that case were to the following effect:—

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article; 'where there has been an appeal' time is to run from the date of the decree of the appellate court. There is, in their Lordships' opinion no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

In my opinion these observations do not preclude the view that clause (*4*) of Article 182 should be read subject to clause (*1*) but as the view taken in the two earlier decisions of this Court is one which may well be taken on the language of the clause as it stands, I am not prepared to dissent from it. It was pointed out to us on behalf of the appellant that the facts of the two cases are somewhat different, for in *Musummat Bhagwati Kuer's* case(2) the application for the amendment was made within three years of the date on which the decree was passed, whereas in *Magan Lal Marwari* v. *Sitaram Pannalal*(3) it was made more than three years after the decree. Having regard, however, to the words of clause (*4*) of Article 182 it

(1) (1932) L. R. 59 I. A. 283.
(2) (1930) I. L. R. 9 Pat. 782.
(3) (1936) 18 Pat. L. T. 18.

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is difficult to distinguish these cases in principle. It appears to me that if clause (4) of Article 182 is to be literally construed there can be no escape from the conclusion that the amendment of a decree provides a fresh starting point for limitation and it is immaterial whether the application for amendment was made within three years of the date of the decree or more than three years after it. At the same time upon reading Article 182 as a whole it appears to me to be doubtful whether it was contemplated by the Legislature that a decree which is barred under clause (1) should be revived by mere amendment. In my opinion clause (4) of Article 182 has been somewhat unhappily drafted and if in fact the Legislature did not contemplate that a decree which was barred under clause (1) could be revived by an order of amendment, the clause should be suitably amended by providing that it will be applicable only if either the amendment or the application for the amendment is made within three years of the decree. If the decree as it is framed is incapable of execution or is to be amended in other respects, it will not be unreasonable to require the decree-holder to make an application for its amendment within three years of the date of the decree. I may also incidentally remark that the construction of clause (2) of Article 182 also presents certain difficulties which will be removed if it is made clear that the clause will not save limitation if the appeal is on the face of it incompetent. This will cover all those cases in which an appeal is preferred out of time or on insufficient court-fee or where it is preferred in cases in which no appeal can be preferred.

Coming now to the merits of the present case, it appears to me that the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term, that is, of some substance as affecting the rights of the parties, and not merely the correction of a clerical error or a trifling arithmetical mistake such as the court might at any time correct of its own motion. In the present case there

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was no real amendment of the decree and the court which was asked to amend it, did not issue notice to the opposite party before passing final orders upon the decree-holder's application. I am, therefore, inclined to think that Article 182, clause (4), cannot be availed of by the decree-holder and the execution is barred by limitation. I would, therefore, allow this appeal, set aside the order of the District Judge and restore the order passed by the Munsif. Parties will bear their own costs in this Court.

FAZL ALI, J.

MADAN, J.—I agree.

Appeal allowed.

J. K.

APPELLATE CIVIL.

Before Dhavle and Rowland, JJ.

1937.

October, 16.
April, 1.

BENI MADHAB MAHTO

v.

GANESH SINGH SARDAR.*

Chota Nagpur Encumbered Estates Act, 1876 (*Act VI of* 1876), *sections* 3, 7 *and* 12—*estate released under the first clause of section* 12—*restoration, whether operates as a revivor of prior debts—scheme and object of the Act—section* 7, *effect of—previous execution null and void—further proceedings, whether can be said to be taken in continuation of it.*

The object of the Chota Nagpur Encumbered Estates Act, 1876, is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to notify the debt and get it paid by the Manager; failing recourse to this procedure not only all remedies are barred but the debt itself is barred.

*Appeals from Appellate Orders no. 58 and 59 of 1936, from an order of W. W. Dalziel, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 18th November, 1935, affirming an order of Babu Narendra Nath Banerji, Subordinate Judge of Purulia, dated the 7th February, 1935.

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The liabilities are only revived when the object of the statute itself has failed and the estate has been restored without payment of the notified claims.

The wording of section 12 of the Act, as it now stands, fully agrees with this view of the intention, and, therefore, there can be no revivor of any debt or of any proceeding when an estate is handed back under paragraph (1) of section 12 after satisfaction of all notified debts.

Kameshwar Prasad v. *Bhikhad Narain Singh*(1), *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh*(2), *Khairullah Khan* v. *Panday Lachmi Ram*(3) and *Tikait Mahabir Prasad Narayan Deo* v. *Bhupal Ram*(4), reviewed.

W. H. Burton v. *Midnapur Zamindari Company*(5), distinguished.

Per DHAVLE, J.—Section 7 does not merely, like the first clause of section 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate.

The first and the third clauses of section 12 imply not the mere approval of a scheme but the discharge of the debts in accordance with the approved scheme or the satisfaction of the creditors in accordance with the approved composition; the restoration of the estate under these clauses does not involve any cancellation of the vesting order and on such restoration the holder or his heir takes the estate free from any liability for prior debts.

The intention of the Act does not seem to be different from its letter in the matter of debts not notified to the Manager of an estate released under the first or the third clause of section 12.

Appeal by the decree-holders.

The facts of the case material to this report are set out in the judgment of Rowland, J.

(1) (1893) I. L. R. 20 Cal. 609.
(2) (1926) I. L. R. 5 Pat. 404.
(3) (1927) I. L. R. 7 Pat. 109.
(4) (1929) I. L. R. 9 Pat. 385, F. B.
(5) (1921) 61 Ind. Cas. 902.

S. C. Mazumdar, for the appellants.

R. S. Chatterjee, for the respondents.

ROWLAND, J.—These are appeals by a decree-holder, whose application to execute a mortgage decree has been refused on an objection by the judgment-debtor (mortgagor's successor) on two grounds. One is that the application to execute the decree is barred by time, more than twelve years having elapsed since the passing of the decree. The other objection was that the whole claim was barred by the Encumbered Estates Act (VI of 1876).

The debt which is the foundation of the claim of the decree-holder was a debt incurred by Kartick Singh Sardar, proprietor of the Mudali estate, and secured by a mortgage executed in the year 1908. The mortgagee brought a suit on this mortgage on 9th April, 1915, impleading as defendant first party the mortgagor and as defendant second party persons who have been referred to as the Trigunaits. These were purchasers in 1914 from two pleaders who had bought the property in 1912 in an execution sale on foot of a mortgage decree on a mortgage which admittedly had priority over the mortgage of the plaintiff. The plaintiff, however, had not been impleaded in the earlier mortgage suit and was thus able to obtain on 11th July, 1916, a preliminary decree for sale subject to the lien of defendants second party over the property for the prior encumbrance consisting of the mortgage debt for which the property had been sold up in 1912.

The defendant first party allowed the plaintiff's suit to go uncontested so far as he was concerned, but the Trigunaits defended the suit and appealed to the District Judge who on 12th February, 1917, affirmed the decision of the first Court.

The Trigunaits presented a second appeal to the High Court, making the plaintiff a first party respondent and the mortgagor second party respondent.

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While this appeal was pending, the estate of Kartick Singh Sardar, the mortgagor, was taken under management under the Encumbered Estates Act on 19th October, 1917. The effect of this would naturally be that the Trigunaits' appeal was not maintainable against the proprietor of the encumbered estate except through the manager. The manager's name was substituted for that of the mortgagor as respondent on 19th February, 1919, and the appeal was dismissed the same day.

The plaintiff on the dismissal of the second appeal against the preliminary decree moved the court of first instance for preparing final decree which was done on 18th December, 1920. Thereafter the question arose whether the decree should be executed against the mortgage property or not. An execution was taken (no. 160 of 1921), and the Manager of the Encumbered Estates objected that it should not be allowed to proceed. But the court overruled the objection, holding that the village Kinutaur having been sold by auction in 1912 had never vested in the Manager, and, therefore, there was no bar to the execution proceeding. The execution was infructuous as no bidder came forward to purchase the property. This was not surprising as the interest of the judgment-debtor in the property had already been sold. The decree-holder took out executions in 1922, in 1925 and in 1926. All these were infructuous because no bidder was forthcoming or because the decree-holder declined to proceed with the case up to the stage of sale. The last execution taken during the period of management was numbered 221 of 1928. In this the prayer was to put the property to sale and the Manager objected pleading the Act. The objection was allowed on the 1st December, 1928, and the execution dismissed.

The present application was presented on the 6th June, 1934. The application is more than

fourteen years from the date of the decree, and it is more than five years from the date of disposal of the last previous application. The application, therefore, is prima facie barred by section 48 of the Code of Civil Procedure as well as by article 182 of the Limitation Act. It was also held in 1928 by the Subordinate Judge that execution was barred by the Encumbered Estates Act; and that decision whether correct or not has become final and is binding on the parties.

The contention of the decree-holder is that the release of the estate from management on 18th July, 1931, removed the bar of the Act and revived the proceedings which terminated in 1928 so that the present application to bring the property to sale may be considered to be in continuation of the earlier proceeding. Mr. Mazumdar argues that the effect of the release of the estate from management in 1931 was to revive his client's execution proceeding of 1928. The argument involves serious difficulties. The effect of an order under the Encumbered Estates Act, section 2, is considered in *Kameshwar Prasad* v. *Bhikhad Narain Singh*(1) where it is pointed out that all pending proceedings in respect of antecedent debts of the holder are barred by section 3 and that any new processes, executions and attachments for such debts are null and void in their inception. " Section 7 further expressly declares that every debt or liability other than debts etc., due to Government or rent due to the superior landlord, which is not duly notified to the Manager shall be barred ". The Judges thought that the section must be read in connection with section 3 and indeed in the light of the whole scope of the Act. " The only remedy enjoyed by the creditors is by claiming before the Manager and by payment, if he does pay, under the powers given to him " (page 628).

(1) (1893) I. L. R. 20 Cal. 609.

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It is conceded that the plaintiff decree-holder did not notify either his debt or his decree to the Manager with a view to obtaining satisfaction of his dues in the course of administration of his estate, and it seems to me hopeless to argue in face of the words of the Act that the appellant's debt was not barred by section 7.

Then it is contended that the release of the estate operated to revive the debt by virtue of section 12, sixth paragraph. What that paragraph says is that debts and proceedings will be revived if the estate is restored to the proprietor under section 12, second paragraph. The second paragraph provides for the cases in which it is not possible to frame and carry out a scheme by which all the notified debts can be satisfied. In these circumstances, the Act restores to the creditors their ordinary remedies, because the alternative remedy of payment of their claims through administration under the Act has failed. This was recognized to be the object of section 12, second and sixth paragraphs, in *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh*(1), and the Judges construed and applied section 12 liberally in order to give effect to that intention. The section which was being construed was the section as it stood before the amendment made in 1922 and to give effect to the intention of the statute the Judges held that where a scheme had been framed but had proved infructuous the debt was revived and the creditor could use an acknowledgment of the debt in proceedings before the Manager as a starting point for limitation. The Full Bench decision in *Tikait Mahabir Prasad Narayan Deo* v. *Bhupal Ram*(2) approved the decision in *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh*(1) on both points. These two were cases of creditors whose claim was admitted by the manager but not satisfied, and such

(1) (1926) I. L. R. 5 Pat. 404.
(2) (1929) I. L. R. 9 Pat. 385, F. B.

cases fall within the terms of section 12, second paragraph, as it now stands after the amendment. The case of *Khairullah Khan* v. *Panday Lachmi Ram*(1), though the facts are not fully stated, appears to be a case in which no claim was presented before the Manager, and it was held that the bar against the proceedings was not removed by the release of the estate in circumstances to which section 12, paragraph 2, did not apply. Now the argument for the appellant is that the decision in *Khairullah Khan* v. *Pandey Lachmi Ram*(1) having been overruled, there can be revivor even in cases to which section 12, paragraph 2, does not apply. The answer is that the law was amended in 1922, and we must now proceed on the assumption that the difficulty of interpretation which was felt regarding the section as it stood previously, was appreciated by the legislature and that the amendment was designed to remove doubts by expressing what the Act really did mean and had been intending to express all along. Therefore, in applying the Act, as it stands after the amendment, we should be unwilling to apply the sixth paragraph of section 12 to any case to which the second paragraph does not by its terms as now amended apply. We could only be induced to assent to such an interpretation if it could be shown that on any other view the whole scheme and main object of the Act would be frustrated. In the present case it is otherwise. In fact, to stretch the words of section 12, as Mr. Mazumdar invites us to do, would defeat rather than aid the objects for which the statute was enacted. These objects were explained in *Kameshwar Prasad* v. *Bhikhad Narain Singh*(2):

" The Act creates a sort of administration of the immoveable estate of a debtor, in some respects resembling that pursued in an administration suit,

(1) (1927) I. L. R. 7 Pat. 109.
(2) (1893) I. L. R. 20 Cal. 609.

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but with some material differences. It primarily aims at the preservation of the estate, which cannot be sold without the consent of the holder and his heir. The Act obviously aims at the complete protection of the estate from litigation, by barring the remedies creditors would otherwise have in the Civil Courts ".

ROWLAND, J.

The object of the statute is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the Manager and get the debt entered on the schedule of debts and paid by the Manager, failing recourse to this procedure not only all remedies are barred but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities. These are only revived when the object of the statute itself has failed and the estate has been restored without payment of the notified claims. The wording of section 12, as it now stands, fully agrees with this view of the intention, and there can be no revivor of any debt or of any proceeding when an estate is handed back under paragraph 1 of section 12 after satisfaction of all notified debts.

The Subordinate Judge was, therefore, justified in allowing the objection on the ground that the debt was barred and had not been revived. The execution was likewise not maintainable on the further ground that the execution proceeding of 1928, according to the finding of the Subordinate Judge in that proceeding, was ab initio null and void under section 3 of the Act. The bar to the execution has never been removed and is still subsisting. With reference to the argument that the execution of 1934 escapes the operation of the Limitation Act as being a continuation of the former execution, it is enough to say that the former execution being null and void no further

proceedings can be said to be taken in continuation of it. Therefore, the present application is barred by article 182 of the Limitation Act as well as by section 48 of the Code of Civil Procedure.

Mr. Mazumdar has attempted to found an argument on the decision in *W. H. Burton* v. *Midnapur Zamindari Company*(1) in which a party who had obtained a decree for costs in a litigation against the manager of an estate under the Encumbered Estates Act was held entitled to execute that decree. He has contended that the Manager having been made a party to the litigation in 1919, the decree-holder became thereby entitled to pursue his remedy by execution against the Manager. One answer to this is that this contention was negatived by the decision in the execution of 1928 which is inter partes and operates as res judicata against him. Further in the case cited, the liability sought to be enforced had been incurred by the Manager by prosecuting an infructuous litigation: we are dealing here with a debt contracted by the proprietor. And in *Purnendu Narain Singh* v. *Mathura Lal Marwari*(2) it was made clear that "on a construction of para. (*b*) of section 3, it should be held that the Court is incompetent to execute a decree in respect of debts or liabilities of the defaulting proprietor except debts due or liabilities incurred to Government".

The arguments adduced before us were on the same lines as those placed before the Courts below where they have been discussed with care and, in my judgment, effectively answered.

I would dismiss the appeals with costs.

DHAVLE, J.—I agree.

The estate was brought under the Chota Nagpur Encumbered Estates Act during the pendency of the

(1) (1921) 61 Ind. Cas. 902.
(2) (1928) A. I. R. (Pat.) 457.

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appeal to the High Court in the suit instituted by the present appellants to enforce their mortgage. The manager was brought, on the record of that appeal, but the appeal itself, which had been preferred by the Trigunaits, was dismissed. The preliminary decree thus remained intact; and I am unable to accept the contention that the dismissal operated to make it effective against the manager. Under section 3 of the Act there could in any case be no execution of such a decree. But it is unnecessary to labour the point, because even if the contrary were to be held, the restoration of the estate under the first paragraph of section 12 of the Act, as will be presently seen, leaves the decree-holders without any means of executing it.

It is true that in the execution case of 1921 the decree-holders succeeded in defeating the manager's objection that execution was barred under the Act. They did so by inducing the Court to hold that the Act had no application on the ground that the mortgaged property had ceased to be a part of the estate before it was brought under the Act. It appears, however, that the Trigunaits had not taken possession of the property and that the manager came into possession of this property along with the rest of the estate. And in the execution case of 1928 it was held against our appellants that the property was a part of the estate and could therefore not be sold under paragraph (*b*) of section 3 of the Act. There was no appeal against that decision, and the matter is now *res judicata*.

It has been argued for the appellants that the estate having since been restored to the heir of the late holder, and the debt being still unpaid, it should be held that there is no bar to execution. But in the first place the final decree of which execution is sought was passed more than 12 years before the application out of which this appeal arises, and the present execution is more than 3 years later than the

attempted execution of 1928 which, moreover, was "null and void" under the first paragraph of section 3 of the Act.

Upon this it has been argued that since the appellants' debt has not been paid, the case should be treated as governed by the principles followed in *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh*(1). This decision was criticized in *Khairullah Khan* v. *Panday Lachmi Ram*(2) which was itself, however, not approved by the majority of the Full Bench in *Tikait Mahabir Prasad Narayan Deo* v. *Bhupal Ram*(3).

It may be observed at once that the present case differs from the cases of *Lalu Mathura Prasad Singh* v. *Lalu Jageshwar Prasad Singh*(1) and *Tikait Mahabir Prasad Narayan Deo* v. *Bhupal Ram*(3) in a most important respect, in that it is a case of restoration under the first paragraph of section 12 of the Act. The drafting of the Act has frequently led to difficulty in interpretation, with the result that the rulings have not always been uniform and the Act has had to be often amended. The point raised before us is nevertheless perfectly clear both on the letter and on the spirit of the law.

The first consequence that ensues under section 3 of the Act on the publication of a vesting order is described in the margin as "Bar of Suits", and reads

> "*First*, all proceedings which may then be pending in any Civil Court in British India, or in any Revenue Court in Bengal in respect to such debts or liabilities, shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void;"

The other consequences given in the section—freedom from arrest (and attachment of movable property) for prior debts, and cessation of power to

(1) (1926) I. L. R. 5 Pat. 404.
(2) (1927) I. L. R. 7 Pat. 109.
(3) (1929) I. L. R. 9 Pat. 385, F. B.

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alienate etc.—are qualified by the phrase " so long as such management continues ". It is significant that there is no such qualification in the first clause. The inference is plain that the bar of suits mentioned in this clause is not limited to the duration of the management.

DHAVLE, J. A similar position is created by section 12. The first three paragraphs of this section describe the three contingencies in which an estate is restored to the holder or his heir, and which may be summarised respectively as (*i*) discharge of the debts and liabilities in accordance with the approved scheme, (*ii*) a decision by the Commissioner, before approval of a scheme under section 11A, that the Act should not continue to apply to the estate, or after such approval, that under section 11B the management of the estate should be relinquished, and (*iii*) a composition with the creditors, approved by the Commissioner. The sixth paragraph provides for the " revival of barred proceedings and debts " in these words:

> " Where the holder of the property or his heir is so restored under the circumstances mentioned in the second clause of this section, such restoration shall be notified in the *Calcutta Gazette*, and thereupon the proceedings, processes, executions and attachments mentioned in section 3 (so far as they relate to debts and liabilities which the Manager has not paid off or compromised), and the debts and liabilities barred by section 7, shall be revived;....."

The revival being expressly confined to the case dealt with in the second clause, the plain implication is that there is to be no revival of barred proceedings and debts if the restoration should be under the first clause (as in the present case) or under the third clause of the section.

In arguing against the concurrent implication of this clause and the first clause of section 3, the learned Advocate for the appellants has relied on the observation of Adami, J. in *Lalu Mathura Prasad's* case(1) that when the order under section 2 is

(1) (1926) I. L. R. 5 Pat. 404.

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cancelled by a subsequent notification, " the effect of the first clause of section 3 disappears. It could never have been in the contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress ". But, as I have already pointed out, that was not a case of release under the first clause of section 12. It is true that it was not a case strictly within the second clause either, as it stood at the relevant time, for the estate had been released after the Commissioner's approval of a scheme and the clause had yet to be amended to include relinquishment of management after such approval. Management under the Act had in that case apparently come to an end because the Board of Revenue had exercised the power conferred by section 21A (which was added to the Act by the Amending Act of 1909) to reverse the Commissioner's proceedings. That is how the vesting order appears to have been " cancelled by a subsequent Notification ". After such cancellation, the position was as if the Act had never been validly applied to the estate; and as to the interval between the vesting order and the final order of the Board cancelling it, the creditor had in his favour the manager's acknowledgment of the debt taken with the circumstance that during the management (invalid as it turned out afterwards to have been) it was not open to him to sue. This was partly recognised in *Khairullah's* case(1), and fully in the judgment of my learned brother (with whom James, J. concurred) in *Tikait Mahabir Prasad's* case(2). As was pointed out in *Khairullah's* case(1), it was not decided in *Lalu Mathura Prasad's* case(3) that the sixth clause of section 12 was applicable; Adami, J.'s reference to section 3 of the Act and to the intention of the Legislature suggests that in his view the

(1) (1927) I. L. R. 7 Pat. 109.
(2) (1929) I. L. R. 9 Pat. 385, F. B.
(3) (1926) I. L. R. 5 Pat. 404.

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Act had not in effect been applied to the estate. No such consideration can arise when an estate is released under the first or the third clause of section 12, for these clauses imply not the mere approval of a scheme but the discharge of the debts in accordance with the approved scheme or the satisfaction of the creditors in accordance with the approved composition, and the restoration of the estate to the holder does not involve any "cancellation" of the vesting order.

Unlike the creditor in *Lalu Mathura Prasad's* case(1), the appellants did not notify their claim to the manager in accordance with the Act, and section 7 of the Act provides that every debt which is not so notified "shall be barred". Reading this section with section 3 and in the light of the whole scope of the Act, Pigot, J. held in *Kameshar Prasad* v. *Bhikan Narain Singh*(2) that "the only remedy enjoyed by creditors is by claim before the manager and by a payment, if he does pay, under the powers given to him". The suits in that decision were no doubt brought during the continuance of the management; but the drafting of the Act (which has had to be commented upon in many cases) led the learned Judge to examine the whole scope of the Act. If his view of section 3 as barring the institution of suits by creditors was disapproved in *Khairullah's* case(3), it was accepted by the majority of the Full Bench in *Tikait Mahabir Prasad's* case(4). And no case has been brought to our notice in which the view the learned Judge took of section 7 was dissented from. The section does not merely, like the first clause of section 3, create a bar not restricted to the continuance of the management but takes away the very foundation for any proceedings by the creditors after the release of the estate.

The Act has been amended several times since Pigot, J.'s decision of 1893, and it seems clearer

(1) (1926) I. L. R. 5 Pat. 404.
(2) (1893) I. L. R. 20 Cal. 609.
(3) (1927) I. L. R. 7 Pat. 109.
(4) (1929) I. L. R. 9 Pat. 385 F. B.

than ever before that on restoration under the first or third clause of section 12 the holder or his heir takes the estate free from any liability for prior debts.

The Act is headed " An Act to relieve certain Landholders in Chota Nagpur ", and was described by Pigot, J. in the decision already referred to as " a law of privilege for the protection of the ' holders of land in Chota Nagpur ' enacted perhaps for reasons of State, applying to that non-regulation district, the state of society in which differs a good deal from that in Bengal ". The mode of relief is administration by a manager armed with exceptional powers; the management is vested in him on the application, not of any creditor, but of the holder, or the person who would be his heir in case of intestacy, or the Deputy Commissioner if any part of the estate be attached or advertised for sale in execution or (since the amendment of 1909) if the holder should have " entered upon a course of wasteful extravagance likely to dissipate his property ". This read with such provisions as the fifth paragraph of section 12 and section 12A makes it clear that the object is to preserve the estate not for the holder alone but for his heir as well. Section 23 expressly saves the jurisdiction of the Civil Court in respect of suits relating to succession or maintenance; and it appears from this and other provisions that the manager is intended to work without any interference from the Civil Courts and subject only to statutory rules and the control or sanction of the Deputy Commissioner and the Commissioner, whose proceedings were in 1909 made subject to the supervision and control of the Board of Revenue. In the exercise of these powers the manager can, on the one hand, cancel leases or rent-free or maintenance grants made by the proprietor for insufficient consideration within three years preceding the vesting order (section 9), and also remove mortgagees and

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conditional vendees from possession (section 16). On the other hand the manager is empowered to determine the amount of all principal debts " justly due to the several creditors of the holder of the property " and the interest on them (section 8)—a power which under the statutory rules and the instructions of the Board enables him to go behind decrees already obtained by creditors in the ordinary Courts and ("except where otherwise fixed by statute ") to cut down the interest to as little as four per cent. simple, " in order to make the estate solvent ". Creditors aggrieved by the exercise of such a power may appeal to the Deputy Commissioner and the Commissioner, but cannot obtain any relief from the Civil Court—*see Thakur Prasad Aurora* v. *The Manager of Barabhum Encumbered Estate, Purulia*(1). After determining the amounts due the manager prepares a schedule of debts and a scheme for their settlement; and the scheme is to be carried into effect as approved by the Commissioner. Since the amendment of section 18 in 1884 the manager has been empowered, in the execution of the scheme, to sell such part of the estate as may appear expedient, without the consent or concurrence of the holder or his heir. When the scheme is carried out—the debts " justly due " discharged—or if an arrangement is made for the satisfaction of the debts which is expected by the creditors and approved by the Commissioner, the estate is restored to the holder or his heir, " subject to the leases and mortgages (if any) granted and made by the manager—a qualification which like sections 3 and 7 (besides the wording of the sixth paragraph of section 12) suggests an intention that in such cases the estate should on restoration be free from prior debts. Further light is thrown on this aspect of the matter by the provisions regarding debts contracted by the holder or his heir during the management and also subsequent to the restoration. As regards the former the third clause of

(1) (1919) 4 Pat. L. J. 321.

section 3 places the holder and his heir under an incapacity to charge or alienate the estate or enter into any contract which may involve either or both of them in pecuniary liability. Section 12A which was added to the Act in 1909 completes the protection in respect of debts contracted by the holder during the management under the Act by enacting in clause 6 that no suit shall be brought to charge the holder, in cases of restoration under the first or the third clause of section 12 upon any promise, made after such restoration, to pay the debt, or upon any ratification, made after such restoration, of any promise made during the management. Clauses 1 to 3 of section 12A render void any alienation of the estate made by the holder after restoration under the first or the third clause to section 12, or any charge extending beyond his life-time, without the previous sanction of the Commissioner—a provision which has been interpreted to extend to involuntary alienations through court sales: *see Thakur Khitanarain Sahi* v. *Surju Seth*(1). Should the holder make or attempt to make any such alienation (or charge), the estate may under clause 5 of this section of 1909 be brought again under the Act, in which case it will only be restored to his heir " in due course "—*see* the proviso added to section 12 before the sixth paragraph in 1909. In view of these provisions regarding debts contracted by the holder or his heir during the period of management and alienations or charges made or attempted by the holder after restoration under the first or the third clause of section 12, it is impossible to conceive that the Legislature could have intended to leave the restored holder unprotected from such prior debts as the creditors may not have chosen to notify to the manager under the Act. The Act was passed at a time when there was " a germ, but only the germ, of an insolvent law " in the Civil Procedure Code of 1859 applicable to the mofassal, and it

(1) (1931) I. L. R. 10 Pat. 582.

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was only in 1920 that the Provincial Insolvency Act released the insolvent on his discharge from all debts *provable* in the insolvency proceedings. But the protection given to the landholder of Chota Nagpur by the Act of 1876 was based on other considerations than those that arise in ordinary insolvencies and was much more thorough.

The appellant's contention that the sixth paragraph of section 12 of the Act was by a beneficial construction applied in *Lalu Mathura Prasad's* case(1) to a case not strictly coming within that paragraph is, in my opinion, untenable. But even if it were otherwise, the intention of the Act does not seem to be different from its letter in the matter of debts not notified to the manager of an estate released under the first or the third clause of section 12.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

1937.

March, 31.
April, 1, 2, 14.

Before Agarwala and Madan, JJ.

MAHANTH RAMDHAN PURI

v.

MUSAMMAT PARBATI KUER.*

Hindu Law—Math—Mahanth, power of, to alienate math property—unavoidable necessity—alienation by compromise, whether permissible—suit by succeeding Mahanth to set aside compromise decree, whether barred.

Under Hindu law a mahanth is in no sense a trustee in the English sense of the term, but he is a mere manager or custodian of the *math* property on behalf of the deity who is

*Appeal from Appellate Decree no. 611 of 1934, from a decision of Babu Saudagar Singh, Additional District Judge of Patna, dated the 5th May, 1934, affirming a decision of Rai Saheb Bhuvaneshwar Prasad Pande, Subordinate Judge of Patna, dated the 10th October, 1931.

(1) (1926) I. L. R. 5 Pat. 404.

a juristic entity. The property is not vested in the mahanth who is in the position of a life-tenant.

Therefore, the power of a mahanth to create an interest in *math* property so as to enure beyond his own term of office is limited to cases of unavoidable necessity.

Even if a lease created by a mahanth and valid for his life-time be adopted by his successor, the effect will be the creation of a new lease valid only during the successor's term of office.

Palaniappa Chetty v. *Sreemath Devasikamony Pandara Sannadhi*(1) and *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(2), followed.

Likewise, a mahanth cannot by compromise alienate lands for debts not incurred for legal necessity and merely to avoid the expense and trouble of proceeding with a suit which had been brought for setting aside the alienation.

Kusodhaj Bhakta v. *Brojo Mohan Bhakta*(3) and *Anandi Lal* v. *Jagarnath Das*(4), followed.

Niladri Sahu v. *Mahanth Chaturbhuj Das*(5) and *Prosunno Kumari Debya* v. *Golab Chand Baboo*(6), distinguished.

While in such cases the actual pressure on the estate at the time of the loan is a matter to be considered, the case where the danger arises from misconduct to which the lender himself has been a party, is to be excluded.

Prosunno Kumari Debya v. *Golab Chand Baboo*(6), referred to.

A suit by the succeeding mahanth to set aside such a compromise, embodied in a decree of the court, and for recovery of the *math* property brought within twelve years of his succession to the *math*, is not, therefore, barred.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Madan, J.

(1) (1917) I. L. R. 40 Mad. 709, P. C.
(2) (1921) I. L. R. 44 Mad. 831, P. C.
(3) (1915) 19 Cal. W. N. 1228.
(4) (1927) 9 Pat. L. T. 214.
(5) (1926) I. L. R. 6 Pat. 139, P. C.
(6) (1875) 23 W. R. 253, P. C.; L. R. 2 Ind. App. 145.

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Manohar Lall (with him *N. K. Prasad II* and *Chowdhry Mathura Prasad*), for the appellant.

Dr. P. K. Sen and *B. C. Sinha*, for the respondents.

MADAN, J.—This second appeal is concerned with the indebtedness of a math known as the Islampur Math, situated in the Bihar subdivision of the Patna district. The original debt amounting to the sum of Rs. 3,000 was contracted by Mahanth Madho Puri who died in the year 1912. His successor Mahanth Mahabir Puri brought the total indebtedness up to the sum of Rs. 12,000. In 1917 this Mahanth for the satisfaction of this debt executed a permanent mokarrari of village Chak Barai, being one of the math properties, for a premium of Rs. 12,000 and an annual rental of Rs. 5. Eight annas of the mokarrari was in favour of defendants nos. 1 to 4 or their predecessors in interest, four annas in favour of defendants nos. 5 to 7 and the remaining four annas was in favour of certain Mahtos. Mahanth Mahabir Puri abdicated in 1919, and on the 1st April, 1920, his successor Mahanth Bed Narain Puri brought title suit no. 87 of 1920 in the court of the second Subordinate Judge of Patna for cancellation of the mokarrari and recovery of possession over the property. On the 12th May, 1921, this suit ended in a compromise whereby Bed Narain recovered an eight annas share and left the remaining eight annas in possession of the three sets of mokarraridars on a rental of Rs. 2-8-0. Out of the debt of Rs. 12,000 the sum of Rs. 569 had been paid in cash and Rs. 580 had been paid as Government revenue, while the balance of Rs. 10,851, which appears to have been mostly covered by usufructuary mortgages, had not been paid. Out of this balance Bed Narain contracted to pay the sum of Rs. 3,551 and the mokarraridars were to pay the balance of Rs. 7,301. There is some dispute as to whether the mokarraridars did pay this balance or whether Bed Narain paid it,

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but this matter was not put in issue between the parties and has not been decided by the lower courts. In the year 1926 Bed Narain abdicated and was succeeded by the present plaintiff Mahanth Ramdhan Puri. The plaintiff's case is that he approached the mokarraridars and represented that their mokarrari was illegal with the result that the Mahtos gave up the two annas share which had been left to them after the compromise. In the year 1929 he brought the present suit against defendants nos. 1 to 7 in respect of the remaining six annas share on the ground that the loans if really taken by the Mahanths were not for justifiable necessity and were not binding on the math properties. Defendants nos. 1 to 7 contested the suit on the ground that the loans were for legal necessity and for the benefit of the math. The Subordinate Judge who tried the case held that only Rs. 1,200 out of the debts contracted by Mahabir and the sum of Rs. 580 paid as Government revenue had been proved to be for legal necessity. The Additional District Judge on appeal held that the sum of Rs. 3,000 borrowed by Madho and the sum of Rs. 580 Government revenue were for legal necessity, but not the balance of the debt. Both courts, however, dismissed the suit on the ground that the plaintiff was bound by the compromise entered into by Bed Narain. The plaintiff has, therefore, appealed to this Court.

In *Vidya Varuthi Thirtha* v. *Balusami Ayyar*(1) the Privy Council has dealt with the legal position of a Mahanth in regard to the Math property. Their Lordships while reviewing the various authorities on the point observed that under Hindu law a Mahanth is in no sense a trustee in the English sense of the term, but that he is a manager or custodian of the Math property on behalf of the deity who is a juristic entity vested with the capacity of receiving gifts and holding property. The property is not vested in the

(1) (1921) I. L. R. 44 Mad. 831, P. C.

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Mahanth who is in the position of a life tenant. In these circumstances the power of a Mahanth to create an interest in math property so as to enure beyond his own life-time or, to be more accurate, his own term of office is limited to cases of unavoidable necessity. The Mahanth's personal enjoyment of the property is limited to such portion of the usufruct as accrues to him according to the custom and usage of the math. Even if a lease created by a Mahanth and valid for his life-time be adopted by his successor the effect will be the creation of a new lease valid only during the successor's term of office. In that case the suit which was brought by the transferees for recovery of possession over math property conveyed to them under a permanent lease was dismissed. In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(1) their Lordships had observed that it was a breach of duty by a Mahanth, unless constrained by an unavoidable necessity, to grant a lease in perpetuity of debottar lands even at a rental which was adequate at the time. Their Lordships while declining to give a precise definition had given, as instances of such necessity, the preservation of the estate from extinction by sequestration, and its defence against hostile litigation or from injury or deterioration by inundation. In the present case both courts have held that the alienation was not for legal necessity or for the benefit of the math, and the only question that arises before us is what was the effect of the compromise entered into in 1921 by Mahanth Bed Narain, the predecessor of the present plaintiff.

Now this compromise which was recorded in the decree states that the plaintiff had filed the suit on the ground that the lease was without consideration and illegal and that the defendants had claimed that the lease was valid and for consideration and had also denied that the property leased was debottar land. Some witnesses had been examined for the plaintiff,

(1) (1917) I. L. R. 40 Mad. 709, P. C.

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and then owing to the uncertainty as to the result of the suit and the loss and harassment involved in the litigation, and after consultation with a local Mahanth, the parties had decided to compromise. It was accordingly agreed that the alienation should be held to be valid and that each side should take one half of the property and satisfy an agreed proportion of the debt. The compromise does not recite that the plaintiff had satisfied himself that the debts were in fact incurred for legal necessity nor does it recite the necessities for the debts, and in this litigation both courts have found that the debts were not for legal necessity. It would appear therefore that the alienation agreed to by Bed Narain by means of this compromise was contrary to Hindu law. Mr. Manohar Lal for the plaintiff referred to the case *Kusodhaj Bhakta* v. *Brojo Mohan Bhakta*(1) where it is observed with reference to a compromise decree that it is well-settled that a contract between parties is nonetheless a contract because there is superadded to it a command of a Judge. Again in *Anandi Lal* v. *Jagarnath Das*(2) it was held that the court was right in refusing to record a compromise whereby a Mahanth agreed to alienate math property without legal and justifying necessity. In my opinion the principle of this ruling applies to the present case, and the compromise is not binding on the present plaintiff. The defendants also in that suit must be taken to have known that math property could not be permanently transferred except for unavoidable necessity to be proved by them, and by entering into the compromise without such proof they took the risk that the debt might not be satisfied during the tenure of the office by Bed Narain or that the arrangement might not be accepted by his successor. The present plaintiff has now sued for recovery of possession over the property conveyed, and in my opinion he was entitled to do so.

(1) (1915) 19 Cal. W. N. 1228.

(2) (1927) 9 Pat. L. T. 214.

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Dr. Sen for the defendants referred us to *Niladri Sahu* v. *Mahanth Chaturbhuj Das*(1). In that case a Mahanth had borrowed from various sources at a high rate of interest, namely, 24 per cent., with the result that an original debt of about Rs. 9,000 had increased to Rs. 25,000. In these circumstances, in order to relieve the pressure on the resources of the math, he had reborrowed Rs. 25,000 from the plaintiff at 12 per cent. interest. The High Court dismissed the suit on the ground that the debts were not incurred for legal necessity, but the Privy Council held that even if the borrowing was unjustified, which it did not consider in that case to have been proved, still the immediate cause for the borrowing from the plaintiff was the math's necessity for obtaining relief from the burden which the heavy rate of interest had imposed. In this view of the case the plaintiff was held to be entitled to a decree. It is noticeable, however, that the order passed by their Lordships in that case was that a personal decree should be passed against the Mahanth, and that in default enquiry should be held as to the amount legitimately attributable to the endowment under a Hindu, and that a receiver should be appointed to manage the estate and make over the Mahanth's share to the plaintiff after payment of a maintenance allowance to the Mahanth. The decree was therefore a personal decree against the Mahanth, and no question of alienating the math properties appears to have arisen. In that case their Lordships referred to the earlier decision in *Prosunno Kumari Debya* v. *Golab Chand Baboo*(2) in which case two decrees had been passed against a former Mahanth in respect of a debt held to have been legitimately incurred, and those decrees were held to be binding on his successor. In that case also the Privy Council pointed out that decree had been passed, and in their opinion had rightly been passed, against the rents and profits of

(1) (1926) I. L. R. 6 Pat. 139, P. C.
(2) (1875) 23 W. R. 253, P. C.; L. R. 2 Ind. App. 145.

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the debottar lands, and that the question had not been raised whether the lands could be sold under the decrees. Neither of these cases give support to the proposition that a Mahanth can by compromise alienate lands for debts not incurred for legal necessity, and merely to avoid the expense and trouble of proceeding with a suit which had been brought for setting aside the alienation. It is not recited in the compromise that in fact the Mahanth was unable to raise the funds necessary for carrying on a suit brought for recovery of a valuable property of the math. The compromise may have had the effect of postponing the issue so far as the parties to the compromise were concerned, but it could not operate to prevent the ultimate investigation into the nature of the original transaction, which issue has now been raised in a suit brought by the succeeding Mahanth within twelve years of his succession to the math. I must hold that the compromise entered into by Bed Narain is no bar to such a suit.

Another circumstance adverse to defendants is that a large proportion of the debt payable under the compromise was the debt of the defendants themselves or their predecessors in interest. In *Prosunno Kumari Debya* v. *Golab Chand Baboo*(1) the Privy Council while observing that actual pressure on the estate at the time of the loan is the matter to be considered excluded the case where the danger arises from misconduct to which the lender himself has been a party. On this ground also the defendants, in my opinion, are unable to take advantage from the compromise, and the plaintiff's suit must succeed. As has already been observed, the learned Additional District Judge held that legal necessity had been proved for the sums of Rs. 3,000 and Rs. 580 only out of the total debt. In the case of Rs. 3,000 he held that necessity had been proved merely because the debt had been ratified by two succeeding Mahanths

(1) (1875) 23 W. R. 253, P. C.; L. R. 2 Ind. App. 145.

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and on no other evidence. However this may be, it is reasonable to hold that these debts have been satisfied from the usufruct enjoyed by the defendants up to the year 1926, and no case arises for granting them an equitable relief in respect of these amounts. The result is that this appeal must be allowed and the plaintiff's suit must be decreed. The mokarrari is set aside, and the plaintiff is entitled to recover possession of the property in suit with costs throughout.

AGARWALA, J.—I agree.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Agarwala and Madan, JJ.

1937.

March 1, 2.
April, 2.

SHEIKH AMIRUDDIN

v.

SONELAL JHA.*

Ghairmazrua am land—landlord, whether can settle.

A landlord has no right to settle ghairmazrua am land even if the settlement does not interfere with the rights of the public.

Muhammad Waliul Haq v. *Ludpud Upadhya*(1), followed.

Ram Das Sah v. *Damodar Prasad*(2), not followed.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Madan, J.

* Appeal from Appellate Decree no. 894 of 1934, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Darbhanga, dated the 7th February, 1934, reversing a decision of Babu Satya Narayan Chaudhuri, Munsif of Darbhanga, dated the 6th June, 1932.

(1) (1937) I. L. R. 16 Pat. 389.

(2) (1923) 4 Pat. L. T. 223.

1937.

SHEIKH AMIRUDDIN v. SONELAL JHA.

Khurshaid Hasnain and *Rameshwar Misra*, for the appellants.

S. M. Mullick (with him *R. Chowdhury*, *R. K. Chowdhury*, *R. N. Jha and D. L. Nandkeolyar*), for the respondents.

MADAN, J.—This is an appeal by the defendants second party. The plaintiffs brought the suit alleging that in the year 1904 they took settlement from Bibi Wahidunnissa of 1 bigha 10 kathas forming part of plot no. 166 of village Bishunpur Fazila. This plot, the total area of which is 2 bighas 17 kathas, is said to have been in exclusive possession of Wahidunnissa as seven annas co-sharer landlord of the village, and settlement with the plaintiffs is said to have been made on a rental of Rs. 6/3/-. The defendants first party are the successsors in interest of Wahidunnissa, and defendants third party are the remaining co-sharer landlords. In the cadastral survey, finally published in about the year 1900, the entire plot was recorded as gairmazrua am in possession of the Muhammadans of the locality for use as a graveyard. The plaintiffs suggested that owing to the decline in the local Muhammadan population the landlords took possession of the surplus portion of the graveyard and settled it with them. The plaintiffs also claimed to have planted trees on the land and to have surrounded it with a fence. In the year 1929 the defendants first party interfered with the plaintiffs' possession, and there was a criminal case in which the defendants first party were discharged. In their written statement in that case the defendants first party claimed that the land was in possession of the defendants second party who are Muhammadans of the village. The plaintiffs therefore sued for a declaration of their occupancy right in the land and for confirmation or recovery of possession or for such relief as they might be entitled to. The

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SHEIKH AMIRUDDIN v. SONELAL JHA.

MADAN, J.

defendants first party denied the alleged settlement and claimed that the land was part of the graveyard. Defendants second party also claimed it as graveyard. The trial court dismissed the suit holding that the plaintiffs had not proved settlement or possession within twelve years of the suit. The Subordinate Judge on appeal decreed the suit, holding that the plaintiffs had taken settlement in the year 1904 and have remained in possession till the year 1929 when they were ousted illegally by the defendants first party.

The learned Subordinate Judge did not consider whether assuming that Wahidunnissa did purport to settle the land with the plaintiffs she had a right to do so. The land is recorded in the cadastral survey of the year 1900 as gairmazrua am in possession of the Muhammadans for use as a graveyard, and this entry has not been seriously challenged. We were referred for the plaintiffs to the decision of a single Judge in the case *Ram Das Sah* v. *Damodar Prasad*(1) where it is observed that there is nothing to prevent a landlord from settling gairmazrua am land in his zamindari so long as he does not interfere with the rights which have been acquired by the tenants. With all respect to the learned Judge who decided that case I am of opinion that the correct view of the law relating to gairmazrua am lands is that expressed by the Chief Justice and James, J. in a recently decided case of this Court *Muhammad Waliul Haq* v. *Ludpud Upadhya*(2). In that case with reference to an argument that the landlord had complete right of control over a bathing pool situated in gairmazrua am land in his zamindari, James, J. observed :—

" The entry in the record-of-rights cannot be read as warranting any presumption that the zamindar more than any other person has a right of control

(1) (1923) 4 Pat. L. T. 223.
(2) (1937) I. L. R. 16 Pat. 389.

over these Kunds. There are two forms of khatian for non-agricultural land or waste land. In one (gairmazrua malik), is entered land, waste or uncultivated or utilised for building or non-agricultural purposes, which is under the control of the zamindar. In the other (gairmazrua am or public waste), is land of that kind not under the control of the zamindar; and the only presumption in that connection which can properly be drawn from the entry in the record-of-rights is that this pool is not under the control of the zamindar."

It follows that Wahidunnissa had no right to settle the land which is the subject-matter of the present case and that the plaintiffs acquired no tenancy right by virtue of such settlement, which is repudiated by defendants first party, the successors in interest of Wahidunnissa. All that the plaintiffs have been able to establish in this suit, as against the defendants, is that they have been in actual possession of the land since the year 1904. The decree passed by the learned Subordinate Judge must therefore be modified as follows. The plaintiffs' prayer for declaration of their occupancy right under the defendants first party is refused, but it is declared that the plaintiffs are entitled to possession of the land as against the defendants first, second and third parties. The decree is only binding on the defendants second party, who are Muhammadans, in their individual capacity. The question what rights if any the plaintiffs have acquired against the local Muhammadan community with respect to their claim to use the land for the purposes of a graveyard is left for determination in a properly constituted suit.

The parties will bear their own costs throughout this present litigation.

AGARWALA, J.—I agree.

Appeal allowed in part.

J. K.

REFERENCE UNDER THE BAR COUNCILS ACT, 1926.

1937.

April 15, 20.

SPECIAL BENCH.

Before Courtney Terrell, C. J., Khaja Mohammad Noor and Varma, JJ.

AN ADVOCATE, IN THE MATTER OF.*

Vakalatnama—responsibitity in accepting—withdrawal of money.

It is extremely necessary that advocates having to withdraw money or to accept serious responsibility of the kind from and on behalf of client should, even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the vakalatnama and further more they should not accept a vakalatnama unless they have satisfied themselves of the bona fides of the person who offers it to them.

Reference under the Bar Councils Act, 1926.

The facts of the case material to this report are set out in the judgment of the Court.

B. N. Mitter, for the Bar Council.

Government Pleader, for the Crown.

COURTNEY TERRELL, C. J. AND MOHAMAD NOOR AND VARMA, JJ.—In this matter we have to consider the conduct of an Advocate of this Court and the report thereon by a tribunal appointed under the Bar Councils Act.

The facts are simple. Another Advocate whom we will designate as X was in charge of a certain first appeal pending in this court on behalf of the appellants. The appeal was eventually disposed of and a sum of money remained due to the Advocate X from his clients and a sum of money was lying to the credit of the appellants as surplus printing cost in the High Court. The Advocate X had a clerk who up to that time seems to have given satisfaction to his

* Miscellaneous Judicial Case no. 1 of 1937.

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AN ADVOCATE IN THE MATTER OF.

COURTNEY TERRELL, C. J., AND MOHAMAD NOOR AND VARMA, JJ.

employer. There is a rule governing the practice of the office. When money is to be withdrawn standing to the credit of a client, the Advocate has to go down personally to acknowledge the receipt of the money. This practice is sometimes inconvenient for Advocates of leading practice, with the result that a junior Advocate whose time is not so precious is instructed to take out the money. In this particular case the Advocate X was not accustomed to receive money in the office and the practice I have described seems to have been usually followed by him of advising the client to get the services of a junior Advocate for that limited purpose. On one morning the clerk of the Advocate X went to the Advocate whose conduct we are considering with what purported to be a vakalatnama on behalf of the appellants authorising him to withdraw the sum standing to the appellant's credit. The Advocate being aware of X's general unwillingness to perform that kind of duty and being directly approached by X's clerk accepted the vakalatnama from the clerk. He should have of course ascertained that the vakalatnama was genuine and that the person who gave it to him had authority to do so, but acting, as the tribunal have found and as we had no doubt, in perfect good faith in the circumstances he crossed out the endorsement which stood on the vakalatnama shown to him by the clerk "Received through Firangi Rai", and simply signed his name with the word "Accepted". When the application for withdrawal was presented in the office the irregularity of the precise form of acceptance was noticed, and the Advocate was called on for an explanation and eventually the matter was directed to be placed before the tribunal of the Bar Council who investigated the matter under the head of certain charges which the tribunal thought fit to hear against the Advocate: firstly, that he had accepted a vakalatnama from a person who was not authorised to give it; secondly, that he had not complied with rule 5(*f*) of Chapter IV of the General

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AN ADVOCATE IN THE MATTER OF.

COURTNEY TERRELL, C. J. AND MOHAMAD NOOR AND VARMA, JJ.

Rules and Circular Orders; thirdly, that he had accepted the vakalatnama without consulting Mr. X and thereby had assisted the client in an attempt to deprive Mr. X of the amount still due to him and, fourthly, that he had stated to the Registrar that he had consulted Mr. X before doing so which statement was said to be untrue. The tribunal investigated the matter and found that there was nothing to throw the slightest imputation upon the Advocate's professional honour. The tribunal found that in the particular circumstances of the case the admitted fact that Mr. X was unwilling to perform the kind of duty mentioned and the circumstance that the Advocate was approached by a person who was up to that time at least a clerk in the employ of Mr. X and trusted by him, deprived his mind of all cause for suspicion. With those findings we agree. The case is, however, of some importance, because it emphasises the extremely clear necessity that Advocates when having to withdraw money or to accept serious responsibility of the kind from and on behalf of client should, even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the vakalatnama and furthermore they should not accept a vakalatnama unless they have satisfied themselves of the bona fides of the person who offers it to them. Some discussion took place in the matter of the alleged statement by the Advocate to the Registrar as to the prior consultation with Mr. X, but the tribunal unanimously found that there was no intention on the part of the Advocate to deceive the Registrar and that the interpretation of his statement to the Registrar was a matter of a misunderstanding.

The tribunal make certain recommendations which will carefully be considered as to the advisability of altering the rules in certain respects which at this time it is not necessary to discuss.

With the emphasis of the importance to the profession and to the administration of justice of the

accurate verification of vakalatnamas, we see no reason to disagree with the report of the tribunal or to make any further order in this matter.

Report accepted.

J. K.

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AN ADVOCATE IN THE MATTER OF.

COURTNEY TERRELL, C. J. AND MOHAMAD NOOR AND VARMA, JJ.

REFERENCE UNDER THE COURT FEE ACT, 1870.

Before James, J.

NAND KISHOR KUMAR.

v.

ACHAMBIT KUMAR.*

1937.

April, 26.

Court Fee—suit for partition—averment in plaint, whether the sole guide for ascertainment of court-fee leviable—Ad valorem court-fee, whether can be demanded if the defendant pleads adverse possession—practice.

It has not ordinarily been the practice of the Patna High Court to depend exclusively on the averment in the plaint for the ascertainment of what should be the proper court-fee payable which should be determined on an appreciation of what the plaintiff really sought.

Jai Pratap Narain v. *Rabi Pratap Narain*(1) not followed.

The plaintiff cannot be required to pay ad valorem court-fee in a partition suit merely because the defendant pleaded adverse possession.

Sukha Nand v. *Musammat Shiva Devi* (2) and *Peshauri Lal* v. *Jai Kishan Das*(3), distinguished.

But the court should be astute to see that plaintiffs should not avoid liability to pay court-fee under section 7(*iv*)(*c*) or section 7(*v*) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit.

Reference under the Court Fees Act, section 5.

*In the matter of First Appeal no. of 1936.

(1) (1930) I. L. R. 52 All. 756.
(2) (1935) A. I. R. (Lah.) 14.
(3) (1931) 142 Ind. Cas. 829.

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NAND KISHOR KUMAR v. ACHAMBIT KUMAR.

The facts of the case material to this report are set out in the judgment of James, J.

Janak Kishore and *P. Jha*, for the appellant.

Government Pleader, for the Crown.

JAMES, J.—The plaintiff-appellant instituted a suit for partition of a fairly large area of immoveable property, consisting of several estates and certain subordinate tenures, claiming that he was in joint possession with the defendants. Three of these estates, Akbarpur Rani tauzi no. 1213, Srikishunpur tauzi no. 9190 and Mathura Sri Ram tauzi no. 8909 were entered in the Collector's registers in the name of Musammat Sanjho Kuer defendant no. 20 in the suit. The plaintiff asserted in his plaint that Musammat Sanjho Kuer had been permitted to obtain entry of her name in respect of these estates on the understanding that she was enjoying possession merely for her maintenance, but that she was putting forward a claim to proprietorship in the tauzis. The Subordinate Judge found that the plaintiff had no joint possession with Musammat Sanjho Kuer in these tauzis, and that she was entitled to occupy in her own right, the plaintiff having no title. The plaintiff had appealed, inter alia, from that part of the Subordinate Judge's decision. The Stamp Reporter objected that ad valorem court-fee should be payable on the value of the share claimed by the plaintiff in these estates. The Taxing Officer has made a reference under section 5 of the Court-Fees Act on this matter on grounds different from those of the Stamp Reporter. The Taxing Officer thinks that ad valorem court-fee should be payable on the memorandum of appeal on the additions which the plaintiff seeks to obtain for his share by his appeal in this Court.

Mr. Janak Kishore on behalf of the appellant suggests that since the plaintiff had not in his plaint

averred that he had title to the tauzis which were in the possession of Musammat Sanjho Kuer and since he did not specifically pray for possession of those shares, he should not be held liable to pay ad valorem court-fee on the value of that property. The plaintiff was careful to avoid stating in his plaint that Musammat Sanjho Kuer was adversely in possession of these tauzis; and he cast his claims for relief in such a form that the matter might well have escaped the notice of the trial court until the time came for the framing of issues, though the plaintiff took care to add what might be termed a residuary prayer for relief, which would cover any kind of relief which could be granted by the court. The Taxing Officer thought that because the plaint was so drawn up that it would not appear on the face of it that this was really a title suit in the guise of a partition suit, ad valorem court-fee could not properly be demanded from the plaintiff. It has not ordinarily been the practice in this High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper court-fee payable; to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. From the institution of the Patna High Court the Stamp Reporter and the Taxing Officer, acting under the directions from time to time given by the Taxing Judge, have followed what is, in my judgment, the correct procedure in this matter; determining the proper court-fee payable on an appreciation of what the plaintiff-appellant really sought, not requiring payment of ad valorem court-fee merely because a suit for partition was defended by a claim of adverse possession; but astute to see that plaintiffs should not avoid liability to pay court-fee under section 7(*iv*) (*c*) or section 7(*v*) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit.

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JAMES, J.

The Taxing Officer has suggested that ad valorem court-fee should be payable on the memorandum of appeal on the value of the plaintiff's share on every item of property of which he has been found to be out of possession by the trial court. The learned Government Pleader cites the decision in *Sukha Nand* v. *Musammat Shiva Devi*(1) and *Peshauri Lal* v. *Jai Kishan Das*(2). In each of those cases the appellant claimed that a higher valuation should have been placed on a particular property so as to increase the cash equivalent of his share in those items of property which is a different matter from that which we have now before us.

Mr. Janak Kishore suggests that it would not be proper to exact ad valorem court-fee before this Court has arrived at a decision on the appeal on the question of fact, relying upon the decision of Sir Carleton King as Taxing Judge of the Allahabad High Court in *Jai Pratap Narain* v. *Rabi Pratap Narain*(3); but the practice therein described has never been followed in this High Court. Where it has been found by this Court that the plaintiff-appellant ought prima facie to pay ad valorem court-fee on a portion of his claim, he has been required to pay the ad valorem court-fee on his memorandum of appeal before admission of the appeal in the High Court. It is not within my province to say whether the Subordinate Judge ought to have required payment of ad valorem court-fee before the trial of the suit in respect of the estates in possession of Musammat Sanjho Kuer; but it appears clear that ad valorem court-fee is properly payable on the value of these estates before the memorandum can be admitted in this Court, and to that extent I agree with the learned Taxing Officer. Ad valorem court-fee under section 7 (*v*) of the Court-fees Act is payable on the memorandum of appeal in respect of the share claimed by the plaintiff in Akbarpur Rani tauzi no.

(1) (1935) A. I. R. (Lah.) 14.
(2) (1931) 142 Ind. Cas. 829.
(3) (1930) I. L. R. 52 All. 756.

1213, Srikishunpur tauzi no. 9190 and Mathura Sri Ram tauzi no. 8902. The valuation on which court-fee has to be assessed can be ascertained if extracts from Register D or land revenue chalans relating to these estates are on the record; otherwise the appellant may be required to demonstrate what is the revenue payable in respect of each of the three estates, or what may be their market value, if revenue has not been assessed.

Order accordingly.

J. K.

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NAND KISHOR KUMAR v. ACHAMBIT KUMAR.

JAMES, J.

APPELLATE CRIMINAL.

Before Khaja Mohamad Noor and Madan JJ.

EMPEROR

v.

JUGAL KISHORE TEBERAWALLA.*

1937.

May, 3.

Boilers Act, 1923 (*Act V of* 1923), *sections* 2 *and* 23—*" owner " meaning of—appeal against acquittal.*

The definition of " owner " in section 2 of the Act is inclusive, that is to say, it extends the dictionary meaning of the word and does not restrict it. It says that the " owner " includes any person using a boiler as agent of the owner thereof and any person using the boiler which he has hired or obtained on loan from the owner thereof. The definition does not mean that an owner of a boiler who uses it through his agent is not its owner for the purposes of the Act. The only effect of this inclusive definition is that an agent who uses a boiler owned by his principal and who under the ordinary meaning of the term is not its owner, comes under the Act.

Held, therefore, that an absentee owner of a boiler, which is being used for his work comes within the purview of section 23 of the Indian Boilers Act, which makes the owner of a boiler liable for its use without a certificate.

*Government Appeal no. 2 of 1937 against an order of acquittal, dated the 3rd of November, 1936 passed by Mr. Shyam Narain Sinha, Magistrate, 1st class of Dhanbad.

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EMPEROR v. JUGAL KISHORE-TEBERA-WALLA.

Appeal against acquittal under section 417 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

Assistant Government Advocate, for the appellant.

S. N. Sahay, for the respondent.

KHAJA MOHAMAD NOOR, J.—This is an appeal by the Government under section 417 of the Code of Criminal Procedure against an order of acquittal passed by the Magistrate of Dhanbad in a case under section 23 of the Indian Boilers Act (Act V of 1923). The case of the prosecution was that a boiler owned by the accused was being used on the 20th of June, 1936 in a colliery belonging to him without the boiler having been certified under the provisions of the Act. The Inspector found it under steam on that day. The registration period of it had expired on the 28th of January, 1935. The fact that the boiler was used on the day in question seems to have been denied on behalf of the accused inasmuch as a witness was examined to prove that the boiler was unfit for use from some time before that date. The accused when examined under section 342 of the Code of Criminal Procedure denied any knowledge of the affair and said that he was living in Calcutta. A witness was also examined to prove that the accused never lived in his Gareria colliery. The learned Magistrate without deciding the question whether or not the boiler was under steam on the day in question has acquitted the accused, holding that he did not come within the term 'owner' as used in section 23 of the Indian Boilers Act. He has relied upon the definition of the word 'owner' in section 2 of the Act. Section 23 makes the owner of a boiler liable for its use without certificate. The definition of "owner" in section 2 of the Act is inclusive, that is

to say, it extends the dictionary meaning of the word and does not restrict it. It says that the

" ' owner ' includes any person using a boiler as agent of the owner thereof and any person using a boiler which he has hired or obtained on loan from the owner thereof."

The definition does not mean that an owner of a boiler who uses it through his agent is not its owner for the purposes of the Act. The only effect of this inclusive definition is that an agent who uses a boiler owned by his principal and who under the ordinary meaning of the term is not its owner, comes under the Act. The learned Magistrate seems to have been of the opinion that because an agent is liable to be prosecuted for breach of the provisions of the Act, inasmuch as he comes within the term ' owner ' the owner to whom the boiler belongs is absolved from responsibility. This view is not supported by the definition. The learned Advocate who appears on behalf of the respondent accused has contended that the word " owner " used in section 23 means the owner who actually uses the boiler. I am unable to accept this contention. If it be given effect to it will lead us to hold that the word " owner " in the section means the man who actually uses the boiler, either as owner, agent or hirer or the one who uses it having taken loan of it from the owner. In other words, the word " owner " will mean the one who uses the boiler. If the legislature had meant what the learned Advocate contends for, there was no need of using the word " owner ". It would have been enough to say that the one who uses the boiler without a certificate will be liable. Therefore I must take it that the word " owner " in the section has been used in its dictionary meaning and also includes an agent or other persons mentioned in section 2. The question whether an owner who is absent should or should not be prosecuted and if prosecuted how he should be dealt with is one which depends upon the facts and circumstances of each particular case. As a mere

1937.

EMPEROR v. JUGAL KISHORE TEBERA-WALLA.

KHAJA MOHAMAD NOOR, J.

proposition of law I am clearly of opinion that an absentee owner of a boiler, which is being used for his work comes within the purview of section 23 of the Indian Boilers Act.

The next question is whether the accused should be convicted. The learned Magistrate has not come to any conclusion in respect of the conflicting version of the fact. As I have said, according to the only witness of the prosecution the boiler was under steam on the day in question, but according to the manager of the colliery (D. W. no. 1) it was unfit for use. The learned Advocate for the respondent has contended that there is no evidence that the accused was the owner of the colliery or of the boiler on that particular day. The boiler was registered in the name of a firm Baijnath Jugal Kishore and as is generally the case, it bears two names, those of the father and the son. Baijnath was the name of the father of accused Jugal Kishore. It appears that the prosecution was first started against Baijnath, but later on it was discovered that he was dead and the prosecution proceeded in the name of the present accused. It does not appear on what date actually the father died. No doubt from the manner in which the case was defended, it does not appear that the accused denied the ownership of the colliery or the boiler on this date in question. But the point has not been made clear. Unfortunately the learned Magistrate did not strictly follow the procedure laid down in section 242 of the Code of Criminal Procedure for the trial of summons cases in spite of the fact that the attention of the Magistrates has been drawn to this more than once by this Court. When the legislature has provided a particular procedure to be followed in a particular class of cases, it is incumbent that that procedure should be strictly followed. The order-sheet shows that when the accused appeared on the first day he pleaded not guilty. But it does not appear whether the particulars of the offence were explained to him. Had this

been done the answer would have made it clear whether the accused admitted or denied the ownership of the boiler and the colliery on the day in question. Then, when examined under section 342 of the Code of Criminal Procedure, the accused was not asked about the ownership of the boiler and the colliery on that day. Strictly speaking, therefore, the necessary facts to justify a conviction are not on record.

The next question is whether we should order a retrial. Now, assuming that the accused was the owner of the colliery and the boiler on the date in question and that the boiler was being used on his behalf, the responsibility of the accused is somewhat technical. It appears from the evidence of the defence witness no. 1, who is a Mechanical and Mining Engineer and holds a first class certificate in mining, that he was in charge of the colliery since the previous May. Therefore the accused, if he was the owner of the colliery and the boiler, had placed a competent man in charge of them. The prosecution would have been well-advised had they proceeded against the manager who has also been made liable under the Act. The learned Magistrate has pointed out that the acquittal of the accused would not in any way interfere with the prosecution of the manager. This being so, I think we should not order a retrial. The object of this appeal was to have the points of law cleared up and that has been done.

I would, therefore, dismiss this appeal.

MADAN, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Fazl Ali and Dhavle, JJ.

1937.

Feb., 18.
March, 1, 2, 3, 4, 5, 8.
May, 4.

MISS G. B. SOLANO

v.

MAHARAJ KUMARI UMESHWARI KUER.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 22(2) *and* 26N—*section* 26N *whether applies to purchase made by co-sharer landlord—amendment whether retrospective—provisions of section* 26N, *whether overrides leases executed before the amendment—amount of rent payable by co-sharer purchaser.*

The plaintiff who held a six annas mukarrari interest in a mahal let it out to the defendant the mukarridar of the remaining ten annas interest. This lease expressly prohibited the grant of new rights either directly or indirectly. The defendant purchased certain non-transferable occupancy holdings and thereafter the plaintiff brought the present action for joint possession over the purchased holdings. The suit was decreed and during the pendency of the appeal in the High Court, section 26N, along with other sections, was enacted.

Held (*i*) that section 26N was intended to be retrospective and applied also to holdings which at the date of the commencement of the Act were in question in a pending suit.

K. C. Mukherjee v. *Musammat Ramratan Kuer*(1), relied on;

(*ii*) that the words of section 26N are very general and applied to transfers in favour of strangers as well as co-sharer landlords;

(*iii*) that after the amendment of the Bihar Tenancy Act the provisions of the lease were of no avail;

(*iv*) that the co-sharer purchaser was liable to pay rent of the original occupancy holding and not the rent payable in respect of the tenancies that might have been created by him.

* Appeal from Original Decrees nos. 102 and 103 of 1934, from a decision of Babu Ram Bilas Singh, Subordinate Judge of Gaya, dated the 8th May, 1933.

(1) (1935) I. L. R. 15 Pat. 268, P. C.

1937.

MISS G. B. SOLANO v. MAHARAJ KUMARI UMESHWARI KUER.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Sir Sultan Ahmed and *D. N. Varma*, for the appellants.

P. C. Manuk (with him *A. K. Mitra* and *S. N. Ray*, for the respondents.

FAZL ALI, J.—These appeals are directed against the decrees passed by the Subordinate Judge of Gaya in suits nos. 46 and 47 of 1929. Suit no. 46 relates to 1,752 bighas of land in mahal Belkhara, tauzi no. 299 in the district of Gaya, which were formerly the occupancy kasht of one Mr. G. L. Solano but were transferred by the latter to the defendants by a registered sale deed, dated the 28th February, 1909. Suit no. 47 relates to 819 acres (or about 1,300 bighas) of kasht lands which are situated in the same mahal and were purchased by the defendants between 1893 and 1921 at various auction sales held in execution of either rent or money decrees obtained by them against certain tenants who held them in occupancy right. The plaintiff who holds a six annas interest in mokarrari right in mahal Belkhara claims that she is entitled to joint possession of these lands with the defendants who hold the remaining ten annas in mokarrari right. The plaintiff further claims to be entitled to recover from the defendants her share of the profits made by the latter from the aforesaid lands from the beginning of the year 1333 Fs. to 1336 Fs. and in the alternative to recover fair and equitable rent for the period. For the purpose of estimating the amount of profits or rent chargeable in respect of the disputed lands, the plaintiff has attached to the plaint a statement showing in detail the rents which are actually received by the defendants from a number of tenants who have been inducted on the lands by them after their purchase and her case is that she is entitled to a six annas share in the total sum collected by the defendants during the period in suit.

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FAZL ALI, J.

The defendants' case in the court below was that the disputed lands were transferable by custom; that even if they were not transferable, their transfer had been acquiesced in and recognised in various ways by the plaintiff's predecessor-in-interest or his representative and that accordingly they were entitled to hold the lands under section 22(2) of the Bengal Tenancy Act. They also pleaded limitation and estoppel and contended that the plaintiff was entitled only to a share of the original rent which used to be paid by the occupancy tenants before the lands were transferred to them (the defendants). It may be noted here that apart from being mokarraridars of a ten annas interest in mahal Belkhara the defendants were also in possession of the six annas interest of the plaintiff from 1887 to 1925 by virtue of several thika leases granted to them successively by the plaintiff's predecessor-in-interest. The defendants had also in their turn granted a sub-lease of the whole 16 annas interest to various persons from time to time and one of the points which was raised on their behalf in the court below was that their right to hold the land under section 22(2) of the Bengal Tenancy Act had been recognised by these sub-lessees. This plea, however, as well as almost all the other principal pleas raised on behalf of the defendants have been rejected by the Subordinate Judge, who has held that on payment of six-sixteenths of the present value of the disputed lands to the defendants the plaintiff is entitled to joint possession of those lands with them and also to recover her share of the rents on which those lands have been settled with the present tenants. As to mesne profits, he has held that the plaintiff's claim for the year 1333 is barred but she is entitled to recover her share in the profits for the years 1334 to 1336 calculated at the rates mentioned in the schedule attached to the plaint.

The defendants now challenge the decrees passed by the Subordinate Judge by means of these appeals and the plaintiff has filed cross-objection. The main points taken in the memorandum of cross-objection

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are (1) that the claim for mesne profits for the year 1333 is not barred and (2) that the learned Subordinate Judge was wrong in passing a conditional decree under which the plaintiff cannot recover joint possession, unless she pays to the defendants six sixteenths of the present value of the disputed lands.

It may be mentioned here that since the decision of these suits by the learned Subordinate Judge the provincial legislature has passed a new Tenancy Act, and it has not been disputed before us that if the interpretation put by the appellants on section 26N of that Act is correct, it will not be necessary to deal with most of the points which were raised before the Subordinate Judge and which have been discussed by him at great length in his elaborate judgment. This section provides that—

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"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the 21st day of January, 1923."

The language of this section is plain, and there can be no doubt that it was intended to be retrospective in operation, the object of the legislature being to quiet titles which are more than ten years' old. It is also now beyond controversy that this provision applies even to holdings which at the date of the commencement of the Act are in question in a pending suit. This view has been expressed in the clearest possible terms by the Judicial Committee of the Privy Council in *K. C. Mukherjee* v. *Musammat Ramratan Kuer*(1) where their Lordships observe as follows:—

"The Act contains no saving clause modifying the effect of sections 26(N) and 26(O).

In these circumstances it appears to their Lordships that unless some saving can be implied as regards occupancy-holdings which at the date of the commencement of the Act are in question in a pending suit, section 26(N) must be applied to the present case and

(1) (1935) I. L. R. 15 Pat. 268, P. C.

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the plaintiff's appeal must fail in limine. Their Lordships are of opinion that no such saving can be implied. Section 26(N) is not a provision to the effect that no action shall lie in certain circumstances, nor has it any reference directly to litigation..... The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land. Within this class the legislature has not thought fit to discriminate against tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed."

Now, the principal questions raised before us on behalf of the respondents were these: (1) whether section 26N was intended to apply to transfers made by an occupancy tenant to a co-sharer landlord and (2) whether the provision made in that section can override certain special clauses in the leases granted by the plaintiff's predecessor to the defendants in respect of their six annas mokarrari interest by which the thikadars were expressly prohibited from permitting any new rights which were not in existence at the date of the lease to be created either directly or indirectly.

Before dealing with first question I wish to refer to section 22(2) of the Bengal Tenancy Act which is applicable to Bihar and which has been reproduced verbatim in the new Bihar Tenancy Act. This subsection runs as follows:

> If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them, and if such transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land.

It has been held in a series of cases that this provision refers only to an occupancy holding which is transferable by custom and that it does not apply to a non-transferable holding. There can be no doubt, however, that it would apply to a non-transferable holding also if the co-sharer landlord or permanent tenure-holder to whom the holding is transferred, can prove that the holding has been transferred to him with the consent of the other co-sharers or that the latter have waived their right to object to the transfer either expressly or by doing something which may amount to a recognition of the transfer.

Now, the words of section 26N which I have quoted already are very general and there is nothing in the section to restrict its application to those cases only where the holding is transferred to a stranger and not a co-sharer landlord. As, however, it has been rather strenuously contended on behalf of the respondent that such a view is opposed to the scheme of the Act, it becomes necessary to examine the contention. The argument which is put forward on behalf of the respondents in this connection may be summarised thus: The Bihar legislature in reproducing section 22(*2*) in the new Act must be taken to have known the settled law on the subject and therefore it may be supposed that the position of the co-sharer landlords is the same in the new Act as it was under the Bengal Tenancy Act after the amendments of 1907. Under the latter Act, section 22(*2*) could be of no avail to the co-sharer landlord if the holding was not transferable and inasmuch as the distinction between transferable and non-transferable holdings is maintained by the new Act and there is no clear provision in section 22(*2*) of the new Act to the effect that it must be read as subject to sections 26A to 26N, it must be held that these sections were intended to affect only a transfer between tenants inter se or between a tenant and a stranger and not a transfer between a tenant and a co-sharer landlord or mokarraridar. The effect of amending section 22 in

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1907 was that an occupancy right ceased to exist when the occupancy holding was acquired by (1) the sole landlord or the entire body of landlords, (2) the co-sharer landlord and (3) the ijaradar. In the first case it merged in the superior right of the landlord and in the third case the acquisition of such a right was expressly prohibited. As to the second case the effect of a series of decisions of this Court as well as of the Calcutta High Court is that upon a co-proprietor purchasing an occupancy holding, the holding does not cease to exist but the right of occupancy does. Thus a person cannot be a co-proprietor as well as an occupancy raiyat and cannot avail himself of the provisions of sections 26A to 26N which, as the language of section 26A shows, can apply only when an occupancy holding is transferred together with the occupancy right.

This argument may appear to be a plausible one, but it will not bear examination. It is true that section 26A provides that section 26B and the other connected sections which follow it, shall apply when the occupancy holding is transferred together with the occupancy rights therein. The language of section 22(*2*), however, also indicates that it applies only when the *occupancy right in the land is transferred* to a co-sharer landlord or permanent tenure-holder. The fact that in cases covered by section 22(*2*) the occupancy right ceases to exist upon transfer by operation of law or by virtue of some specific provision in the Act will not prevent section 26A and the other sections connected with it from being applicable to such a case, because the tenant who sells the holding purports to transfer it together with the occupancy right in it. Besides there is nothing in the Act to suggest that the legislature could have intended that the position of the co-sharer landlord when he acquires a raiyati holding should be worse than that of a third person acquiring such a holding. In my opinion therefore the defendants are entitled to the benefit of section 26N and they must be held to

have the right to hold the disputed land on the terms stated in section 22(2) of the Tenancy Act. As I have said the main object of the section was to prevent titles which were acquired long before the passing of the Act from being assailed and it will be contrary to the spirit of the Act to allow the plaintiff to assail the disputed transfers most of which were made as long ago as between 1893 and 1909.

The next point to be considered is whether the provisions of section 26N can override the special provisions made in the various leases granted to the defendants in respect of the plaintiff's six annas mokarrari interest by which they were prohibited from permitting new rights to be created either directly or indirectly. It appears that between 1887 and 1916 no less than five leases were executed by the plaintiff's predecessor-in-interest in favour of the defendants, these leases being exhibits 1, 1-a. 1-b, 4 and 1-c. The first four leases provide in clear terms that the lessee, his heirs, assigns or representatives shall not either directly or indirectly permit any new rights or tenure which were not in existence at the date of the lease to be created against the lessor and that if he or they shall create any new rights or tenures, the same shall be invalid and of no effect against the latter. In the last lease (exhibit 1-e) also which was granted to the defendant in 1916 the above provision is reproduced but it is made subject to the qualification that the lessees might permit new rights to be created with the consent of the lessor, such consent not to be withheld in a proper case. These provisions are clear enough and if the present suits had to be decided with reference to them alone, there was much to be said for the plaintiff's contention. But here again we have to consider the effect of section 26N under which the plaintiff must be deemed to have given her consent to all the disputed transfers. It cannot be disputed that even if in spite of their being a provision in the leases to the effect that the defendants shall not permit any new right to be created, the defendants did create

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any right, those rights could not be questioned by the plaintiff if she had given her consent to their creation. It is equally plain to me that the same result will follow if under the statute she must be deemed to have consented to the creation of the new right. In my opinion, therefore whatever the position of the parties may have been prior to the new Bihar Tenancy Act, there can be no doubt that by reason of this Act the defendants must be held to have acquired the right to hold the disputed land under section 22(*2*) of the Tenancy Act.

It appears that during the cadastral survey proceedings of the year 1914 a dispute arose between the parties as to the bulk of the lands which are the subject matter of the present litigation. While on the one hand the defendants claimed them as their raiyati jote, the plaintiff's predecessor-in-interest contended on the other hand that they were to be treated as bakasht of the 16 annas landlords. The survey authorities ultimately held that the defendants had the right to hold those lands which are the subject matter of suit no. 46 under section 22(*2*) and prepared a separate khewat in their name. As to the bulk of the lands of suit no. 47, they held that the defendants had a non-occupancy right in them. So far as the last entry is concerned both parties are agreed that it was wrong in law and that it was probably based upon a misreading of certain decisions of the Calcuta High Court according to which a thikadar might acquire a non-occupancy right in land purchased by him during the subsistence of his lease. However that may be, it is clear that neither the lands of suit no. 46 nor those of suit no. 47 were recorded as bakasht and the plaintiff and her predecessor-in-interest did nothing between 1914 when the record-of-rights was prepared and 1929 when the present suit were brought to assail the entries in the record-of-rights. It is true that the defendants had been in possession of the entire mahal until 1925 but this did not prevent the plaintiff from disputing their claim in 1914. Besides one would

have expected that when in 1916 the plaintiff's father granted a fresh lease to the defendants, the parties would have come to some understanding about these lands. In fact the defendants have led evidence to show that the lease was given to them after careful examination of the village papers and on the footing that they had a right to hold the lands according to the entries made in the survey papers; and the plaintiff, though she does not admit this fact has given no positive evidence to prove that the status attributed to the defendants in regard to the disputed land in the survey papers was brought into question on that occasion. I need not, however, pursue the matter as I have already held that section 26N is a complete answer to the plaintiff's case.

It was argued before us that the lands of suit no. 47 stand on a different footing from those which are the subject-matter of suit no. 46. As I have already stated these lands were differently recorded in the record-of-rights and it may also be mentioned that only a small proportion of these lands is proved to have been purchased by the defendants in execution of rent decrees and with regard to the remainder, it is not clear whether they were purchased in execution of rent or money decrees. It seems, however, that as section 22(*2*) applies as well to voluntary transfers as to transfers made in execution sales, we cannot properly discriminate between these lands. The mere fact that the entries in the record-of-rights with regard to the lands of the two suits are not the same is not at all material because it is both parties' case that the description of these lands as non-occupancy raiyati cannot be correct in law.

The next important question relates to the amount of rent which the plaintiff is entitled to receive from the defendants. That this is in fact the real question in the present litigation was made clear to us by the learned Counsel for the plaintiff in the course of his argument, it being also stated by him that he did

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not press his case for the joint possession of the disputed lands. Now, it is common ground that the defendants have, since their purchases, inducted a number of tenants on the lands and are realising from them in the shape of rent higher sums than used to be paid by the occupancy tenants from whom the purchases were made. The plaintiff's case is that she is entitled to a six annas share in the rent realised by the defendants from the sub-lessees, whereas the defendants' case is that the plaintiff is entitled to a six-sixteenths share of the sum which used to be paid as rent before the disputed lands were purchased from the original tenants.

Now the decision of the question as to which of these contentions is correct depends on the proper construction of the words " subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them " occurring in section 22(*2*). In my opinion if sub-section (*2*) is read along with the illustration which follows it, it will be tolerably clear that the word " rent " used in this sub-section means the rent which was payable in respect of the holding when it was transferred. The words " in respect of the holding " do not occur in the sub-section (*2*) but they do occur immediately after the words " payable to them " in the illustration and this seems to me to indicate clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer. This view is in consonance with the object of the section which was to place the purchasing co-sharer more or less on the same footing as a third person acquiring an occupancy holding by transfer. It is clear that if a third person acquires an occupancy holding by transfer and settles the lands comprised in it with sub-tenants at a higher rent than was payable by the previous tenant to the landlord, the landlord will be entitled to realise only the rent which was

formerly payable by the occupancy tenant for the holding and not the rent which is payable by the sub-tenants to the new transferee of the occupancy holding. If that is so, I do not see why the co-sharer should be in a worse position. It is for the co-sharer landlord who purchases the holding to decide whether he should cultivate it himself or settle it with tenants. The words in the first part of section 22(*2*) are general and there is nothing in the sub-section to suggest that where a co-sharer purchases a holding, the rent which the other co-sharers are entitled to get shall vary according to whether the purchasing co-sharer cultivates the lands himself or lets it out to other tenants. The latter part of the section which deals with the cases where the land is sublet to a third person, merely provides that the status of such third person would be that of a raiyat and does not provide that the other co-sharer landlord would be entitled to share the rent which may be payable by the sub-lessee. The view which I have expressed seems to have been taken also by the settlement authorities in the present case and the defendants have referred to this fact in paragraph 20 of their written statement. Counsel for the plaintiff however lays considerable stress on the words " from time to time payable " which are used with reference to rent in section 22(*2*) and points out that if the contention put forward on behalf of the defendants is accepted, these words would become meaningless inasmuch as the rent of an occupancy holding which is purchased by a co-sharer cannot be enhanced under section 30 of the Bengal Tenancy Act firstly because that section applies only when the holding is held at a money rent *by an occupancy raiyat* and therefore cannot be applicable when it is held by a co-sharer landlord; and, secondly, because a suit for enhancement cannot be maintained unless all the landlords join and this is not practicable when one of the landlords has himself purchased the holding concerned. The answer given on behalf of the defendants is that the words " from time to time "

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may refer to the fact that the rent of the holding is payable periodically, that is to say, either year by year or according to fixed instalments and alternatively that the rent may in some cases (e.g. in the case of diluvion) be liable to abatement not upon any specific provision of the Bengal Tenancy Act but upon the principles of justice, equity and good conscience. I am, however, not altogether satisfied that the framers of the Act had in view only the contingencies referred to on behalf of the defendants. In my opinion the section has not been happily drafted and probably it never occurred to those who drafted it that there would be any legal difficulty in enhancing the rent of the holding after its transfer to a co-sharer landlord. However that may be, as the question of the enhancement of rent does not arise in the present case, I do not wish to express any definite opinion upon it at this stage. It is enough to say that whatever may be the real significance of the words "payable from time to time" as used in section 22(2) and whether or not the co-sharers other than the purchaser of an occupancy holding are entitled to claim enhancement of rent under the provisions of the Bengal Tenancy Act or on general principles, one may safely lay down the negative proposition that if the purchasing co-sharer sublets the land to a third person and realises from him a higher rent than that paid by the original tenant, the other co-sharers are not entitled under this section to realise from the purchasing co-sharers their share of such rent. I notice that both in East Bengal and Bengal section 22(2) has been recast and in the section which is applicable to East Bengal it is clearly provided that if the occupancy right is transferred to a co-sharer landlord or permanent tenure-holder, such a person shall hold it as proprietor or tenure-holder and shall pay to his co-sharers a fair and equitable sum for use and occupation of the same. Even, however, if I were inclined to hold that the meaning of the section which we are asked to construe in this case implies what has been made explicit in the Act applicable to East Bengal,

I would not hold that the fair and equitable sum will necessarily be his quota of the amount which the purchasing co-sharer may realise from his sub-lessees. To take such a view will be to hold that the other co-sharers are entitled to nothing less than joint possession which could not have been intended by the framers of the Act. The plaintiff has also placed before us no adequate materials for the assessment of fair and equitable rent and I think that in the absence of any specific evidence on the point, the plaintiff is entitled only to her share of the rent which used to be paid by the occupancy tenants who previously held the land. The defendants have included in their written statement a schedule of such rents and as the correctness of the figures mentioned therein has not been challenged a decree will be awarded to the plaintiff for her share of those amounts.

The only other questions which arise in this case are whether the plaintiff's claim for the rent of 1333 is barred by limitation and whether the plaintiff is entitled to interest upon the arrears of rent. The first point is the only point which now arises for consideration in connection with the cross-objection filed by the plaintiff and it being conceded now on behalf of the defendants that the claim for the rent of 1333 is not barred, the cross-objection is allowed. So far as the other point is concerned, the defendants contend that inasmuch as they had tendered rent from time to time to the plaintiff and the latter had not accepted them no interest should be charged. There is no doubt some evidence to show that the tender was made and it is also not disputed that the amounts tendered were generally the amount which the old tenants of the disputed holding used to pay. In my opinion, however, the judgment of the Subordinate Judge who has held that the plaintiff is entitled to charge interest on the amount due to her should be upheld for the following reasons: (1) But for the new Bihar Tenancy Act the plaintiff would have been entitled to joint possession of the lands or in the alternative to

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realise her quota of the rent realised by the defendants from the tenants inducted by them inasmuch as the lands were not transferable and the defendants could not, under the Act as it stood before 1934 acquire the right to hold them under section 22(2). The defendants admittedly tendered the amounts which they alleged to have tendered before the passing of the new Act and at that time the tender was not valid and the plaintiff was entitled not to accept the amounts offered to her. Besides as the plaintiff never had the use of the money which the defendants are now liable to pay to her as rent, there seems to be no good reason for dismissing her claim for interest. (2) The defendants have not offered any definite evidence of the amounts actually tendered by them and unfortunately the learned Subordinate Judge has recorded no finding as to the exact amounts so tendered. The defendants have stated in their supplementary written statement of the 31st August, 1932, that some of the lands of village Amra and Rampur Wyna have diluviated and the plaintiff is not entitled to the rent of the entire holding in these villages. These allegations not having been substantiated, it is clear that if the defendants tendered rent according to their present case the plaintiff was entitled not to accept it.

I would therefore allow the appeals and cross-objection in part, set aside the decree of the court below and direct that a decree for rent be passed in favour of the plaintiff for the years 1333 to 1336, the rent of the disputed land being calculated according to the schedule appended to the written statement and on the basis that no part of the disputed land has diluviated. This will, however, not apply to the bhaoli lands, viz. khata nos. 51 and 52 of mauza Gauhara which are the subject-matter of suit no. 47 as regards which the decree of the trial court will stand. The interest on the arrears of rent shall be calculated at 12½ per cent. per annum as provided by the learned Subordinate Judge and the plaintiff shall be entitled to proportionate costs in both the courts.

The other reliefs claimed by the plaintiff would be disallowed.

DHAVLE, J.—I agree.

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The new section 26N introduced by the Amending Act of 1934 in effect makes transfers of occupancy holdings (with the right of occupancy therein) effected before the 1st of January, 1923 valid against the landlords, for it provides that the landlord shall be deemed to have given his consent to the transfer in such cases. Reading this section with sections 26B and 26A it is clear that these transfers are not restricted to any particular classes of transferee and may as well be in favour of a co-sharer landlord as of a stranger. Section 22 deals with a rather different matter.

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a marginal note which gives the scopes of the section accurately enough as far as it goes, and which may, I think, be referred to for the reasons given in *Ram Saran Das* v. *Bhagwat Prasad*(1). The first clause of this section originally provided that if the interest of the raiyat in an occupancy holding is transferred to a (sole) proprietor or permanent tenure-holder, the occupancy right shall cease to exist. As a result, it was held in several cases that upon such a transfer the tenancy subsisted (in the hands of the proprietor or permanent tenure-holder) divested of the incidents of occupancy; but the amendment of 1907 provided that the transferee is to have no right to hold the land as a tenant and is to hold it as a proprietor or permanent tenure-holder as the case may be, without prejudice to the rights of any third person. The position of a co-sharer landlord or permanent tenure-holder dealt with in clause (*2*) was different, as (even if the occupancy right ceased) a tenancy was still possible under the other proprietors or permanent tenure-holders. The section did not purport to be confined to transferable holdings, but it contemplated valid transfers from occupancy raiyats. No question

(1) (1928) I. L. R. 51 All. 411.

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of the landlord's consent could arise in the case of occupancy holdings which were transferable by custom or which were purchased in rent executions, though under the original clause (*2*) the occupancy right ceased to exist as in the case of a transfer to a sole proprietor or permanent tenure-holder. In the case of a non-transferable occupancy holding transferred to a co-sharer landlord with the consent of the other co-sharer proprietors or permanent tenure-holders, the transfer would be equally valid, and I am not aware of any reason why the second clause of section 22 should not apply to it. In *Naga Rai* v. *Buchi Rai*(1), where a part of a non-transferable holding had been transferred in 1908, Wort, J. made similar observations which were endorsed by the learned Chief Justice and James, J. in the appeal under the Letters Patent. The status of a co-sharer transferee under this clause has been discussed in many reported decisions, where it has been described as peculiar [see for example *Jhapsi Sao* v. *Musammat Bibi Aliman*(2), and *Kirtyanand* v. *Ram Lal*(3)]. Under the amendment of 1907 he holds the land

> " subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them."

I can see nothing in this provision or in section 26N or in the history of our Tenancy legislation to disentitle a co-sharer transferee to the benefit of section 26N, merely because the holding is non-transferable, though the transfer is supported by the actual or presumed consent of the other co-sharers. Much stress was laid on the fact that illustration (*1*) to section 183, which refers to a usage under which a raiyat may be entitled to sell his holding without the consent of his landlord, is still a part of our Act, but I am unable to see any reason in this to disentitle the co-sharer transferee to the benefit of section 26N or section 22(*2*). If, as is argued, the legislature

(1) (1936) 18 Pat. L. T. 173.
(2) (1925) I. L. R. 5 Pat. 281.
(3) (1926) I. L. R. 6 Pat. 134.

must be taken, when it enacted section 26N to have been aware of the view taken in the Courts regarding the scope of section 22, it was also plainly aware that the transfer of a non-transferable holding is validated as against the landlord by his consent, and the illustration has no bearing on non-transferable holdings for the transfer of which the new legislation has provided the presumed consent of the landlord on certain conditions. It has also been urged that section 22(*2*) contemplates a rent which may be enhanced under section 30 or altered in other ways *Raghunandan* v. *Lalit*(1), a decision which must be read with *Dukha Lal* v. *Musammat Manabati*(2). But it seems to me that in the provision that the co-sharer transferee holds subject to the payment:

> " of the shares of the rent which may be from time to time payable to them,"

the plural " shares " is used because the payment is to be made to:

> " his co-proprietors or joint permanent tenure-holders."

This rather suggests that the adjectival clause " which may be from time to time payable to them " goes not with " the rent " but with " the shares ". The whole rent is never " payable " since the transferee is himself a co-sharer. The adverbial expression " from time to time " before " payable " on which the whole argument is based is not unintelligible without any reference to possible variations in the rent, since the " rent " would, in any case, be payable from time to time, to say nothing of the fact that the shares of the co-proprietors or the joint permanent tenure-holders may quite easily vary from time to time. The co-sharer transferee was clearly not intended to occupy the position of an occupancy raiyat *vis-a-vis* his co-proprietors or joint permanent tenure-holders, and "the shares of *the* rent " payable by him could not, it seems to me, but refer to the rent that before

(1) (1934) 15 Pat. L. T. 784.
(2) (1936) I. L. R. 15 Pat. 594.

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the transfer was payable by the transferor tenant. The liability to enhancement of rent under section 30 would naturally disappear with the extinction of the occupancy right, and if the co-sharer transferee did not settle the land with a third party, " the " rent (of which shares were to go to the proprietors or joint permanent tenure-holders) would be the rent that the occupancy raiyat used to pay before the transfer. I can find nothing in clause (*2*) of section 22 to give the proprietors or joint permanent tenure-holders varying rights according as the co-sharer transferee keeps the land himself or settles it with third parties. It is therefore impossible to allow the claim of the plaintiff to a share of the rents that were actually realised by the co-sharer transferee.

As regards the clause in the defendants' leases against permitting new rights to be created either directly or indirectly, my learned brother has pointed out that no question can arise if under the law as it now stands the plaintiff is to be deemed to have given his consent to the transfers obtained by the lessee who, moreover, happened to be a co-sharer. There is also another consideration relating to the scope of the clause itself. In my opinion, it may well be doubted whether the lessee can be properly said to have permitted new rights to be created either directly or indirectly, within the meaning of that clause, merely because he proceeded against the tenants in money executions and purchased their holdings. It is true that as a result of these purchases he in his capacity of co-sharer landlord acquires a peculiar status under the Tenancy Act as it stands at present, but this is entirely due to the operation of the law, and the clause, in spite of the amplitude of its language (" permitting new rights to be created either directly *or indirectly* ") could not have been intended to bar to the lessee the relief that an ordinary creditor may obtain from the courts together with the consequences following from it under our tenancy legislation. It will be unreasonable to construe the clause in such

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a way as to prohibit routine zamindari operations, and this was in fact conceded by the learned Counsel, who could not suggest what the lessee was to do under the lease to a tenant who fell into arrears and against whom a *rent* decree or execution could not be obtained for some reason (as does happen sometimes). The lessee was a co-sharer landlord to the lessor's knowledge and it cannot be contended that the leases disentitled him to obtain or exercise rights accruing to him in the latter capacity under section 22(*2*).

Appeal allowed in part.

J. K.

Cross objection allowed in part.

APPELLATE CIVIL.

Before Dhavle and Varma, JJ.

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Nov., 10, 27, 30.
May, 6.

PHUL MOHAMMAD KHAN

v.

QUAZI KUTUBUDDIN.*

Pre-emption—mukarrari and raiyati land, whether can be subject of pre-emption—maintainability of suit.

Held, that there could not be any right of pre-emption with regard to a mukarrari or raiyati interest.

Sheikh Mohammad Jamil v. *Khub Lal Raut*(1), *Musammat Bibi Salcha* v. *Haji Amiruddin*(2), *Dhirakshal Singh* v. *Tirloki Prashad Singh*(3), followed.

Charitra Dusadh v. *Bhagwati Pandey*(4), distinguished.

Appeal by the defendants.

*Appeal from Appellate Decree no. 1302 of 1933, from a decision of Maulavi Saiyid Abul Fath, Subordinate Judge of Arrah, dated the 24th May, 1933, reversing a decision of Babu Jamini Mohan Mukharji, Munsif of Buxar, dated the 10th March, 1932.

(1) (1920) 5 Pat. L. J. 740.
(2) (1928) I. L. R. 8 Pat. 251.
(3) (1923) A. I. R. (Pat.) 217.
(4) (1934) 15 Pat. L. T. 796.

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The facts of the case material to this report are set out in the judgment of Varma, J.

Hassan Jan and *Syed Hassan*, for the appellants.

Khursaid Husnain and *Qazi Nazrul Hassan*, for the respondents.

VARMA, J.—This second appeal arises out of a suit for pre-emption filed by the plaintiff which was dismissed by the trial court but partly decreed by the lower appellate court. The defendants have come up in appeal before us. The facts out of which this appeal arises are as follows :—

The plaintiff's case is that he and defendant no. 3 are full brothers but they are on bad terms. Defendant no. 3 sold his properties to defendants 1 and 2 under a kebala, dated the 25th January, 1930 without the knowledge of the plaintiff. He learnt of this on the 26th of January, 1930 at 2 A.M. in the night at Gaya. As soon as he learnt of the sale he performed the ceremony of talab-i-mowasibat saying that he had a share and right of pre-emption in Kazipura, tauzi no. 1437 joint and separate account no. 1 and in Bhojpur Jadid tauzi no. 1296, he was claiming pre-emption and was ready to pay the price mentioned in the kebala in respect of the shares claimed. He started that very day and reached Dumraon that very noon. From there he went to Kazipura and in the presence of respectable persons performed the ceremony of talab-i-ishhad saying that he had a share in these two tauzies and so he had a right to pre-empt. He also informed the people there that he had already performed the ceremony of talab-i-mowasibat. From there he went to Bhojpur and performed the ceremony of talab-i-ishhad. After performing these ceremonies he offered the price of the shares to defendants nos. 1 and 2 but they refused and, therefore, the plaintiff filed the suit. It appears that along with the sale of these two tauzies some mokarrari as well as raiyati lands were transferred by the same transaction. The plaintiff claimed right to pre-empt in regard to the milkiat rights only.

Defendant no. 3 did not appear to contest the suit but defendants nos. 1 and 2 filed written statement. They denied many of the allegations made in the plaint and said that the two ceremonies of talab-i-mowasibat and talab-i-ishhad were never performed and also raised the question that the plaintiff was not entitled to pre-empt in regard to a part of the properties sold. These were their chief contentions apart from the usual questions of estoppel and limitation.

The trial court held that the ceremonies were not performed. It further held that as the ceremonies were not performed with regard to all the properties transferred, the plaintiff could not be said to have performed the ceremonies in accordance with law. On these findings the trial court dismissed the suit of the plaintiff. The lower appellate court, however, believed the evidence of the plaintiff and held that the ceremonies were performed as alleged by him.

The next question for determination was whether the plaintiff's suit was maintainable. In the course of argument it was stated before the lower appellate court that the plaintiff would have a right to pre-empt for the proprietary interest only if it was found that a right of pre-emption did not accrue on transfer of raiyati lands. The lower appellate court referred to Chapter XXVIII of Ameer Ali's Muhammedan Law, and *Mohammad Jamil* v. *Khub Lal Raut*(1) and *Dhirakshal Singh* v. *Tirloki Prashad Singh*(2) and held that the plaintiff was not entitled to pre-empt with regard to the raiyati lands. That being so, the plaintiff's suit was maintainable in respect of such properties only in respect of which the right of pre-emption accrued. The lower appellate court ordered that if the plaintiff deposited Rs. 1,700 with a period of three months to the credit of defendants nos. 1 and 2, a decree for possession of the property in suit would be finally passed in his favour; and if he deposited only Rs. 1,100 a decree declaring his right to possession would be passed but he would not be able to get

(1) (1920) 5 P. L. J. 740.
(2) (1923) A. I. R. (Pat.) 217.

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possession until he deposited Rs. 550 more and in case he made no deposit at all within the time allowed the plaintiff's suit would stand dismissed. I may note here that Rs. 550 represented the plaintiff's share of the encumbrances on the properties in suit after their purchase.

Mr. Hasan Jan appearing on behalf of the appellants attacks the judgment of the lower appellate court in the following manner. He urges that the pre-emptor must pre-empt with regard to the whole of the property transferred by the sale and as in this case the pre-emption was with regard to *milkiat* properties only and not with regard to the mokarrari and raiyati interests, the present suit must fail.

In this High Court it has been held in a number of decisions that there can be no pre-emption with regard to a mokarrari or raiyati interest, the earliest decision being the case of *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(1), where it was held that the doctrine of pre-emption applies only to the sale of the proprietary interest and, therefore, does not apply to the sale of the mokarrari interest. One of the arguments advanced in that case was that the right of pre-emption extended even to the mokarrari lease that was vended in that case. Sultan Ahmed, J. relying upon the cases of *Moorooly Ram* v. *Huree Ram*(2), *Baboo Ram Golam Singh* v. *Nursingh Sahay*(3) and *Dewanutulla* v. *Kazemmolla*(4) held that this objection was untenable. Mr. Hasan Jan has taken us through these cases with the object of showing that there was no authority for the proposition of law laid down in *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(1). The case of *Moorooly Ram* v. *Huree Ram*(2) was a case in which the question before the Court was whether a lease in perpetuity with a rent reserved amounted to a sale. Their Lordships held that it did not and, as

(1) (1920) 5 Pat. L. J. 740.
(2) (1867) 8 W. R. 106.
(3) (1875) 25 W. R. 43.
(4) (1887) I. L. R. 15 Cal. 184.

pre-emption applied only to sales, therefore, a lease in perpetuity could not be the subject of pre-emption.

In the case of *Baboo Ram Golam Singh* v. *Nursingh Sahay*(1) the plaintiffs sued the defendants to recover possession by determination of right and for registration of his name in the milkiat and malgoozar's column of the Government record jointly with the name of Khookum Singh, the recorded proprietor, in respect of a certain share in a particular tauzi on the ground of a right of pre-emption as a partner in the property sold. In the plaint it was alleged that the defendant no. 2 had without the plaintiff's knowledge, sold her mokarrari right and the defendant no. 1, his milkiat or proprietary right to the same defendant, that is, the defendant no. 4, who is a stranger to the parties under a deed of sale dated the 26th of January, 1874. Getting information of it he performed the various ceremonies connected with pre-emption. The defendants contested the suit and in his written statement defendant no. 4 alleged that he had purchased the mokarrari and milkiat rights of two different persons; that according to the law of pre-emption no claim for pre-emption could be valid in respect of a mokarrari property and therefore the claim of the plaintiff with reference to the mokarrari property must be dismissed. There were other points taken in the written statement with which we are not concerned. Of the points discussed before the lower court in that case, one was whether with regard to the mokarrari a claim for pre-emption could be allowed by the Muhammadan Law, and if not, whether the Court had jurisdiction. The lower court had held that there was no right of pre-emption with regard to a mokarrari interest. It was argued before the High Court that the learned Judge was wrong in holding that under the Muhammadan Law a claim to the mokarrari by right of pre-emption would not lie. The other points urged before it do not affect the case in hand. While dealing with the first point their Lordships observed:

(1) (1875) 25 W. R. 43.

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"Now the plaintiff comes into Court claiming the right of pre-emption on the ground that he is a partner in the property of the land sold. Can it be said that he is a partner in the mokurruree? And if the plaintiff, as a partner in the milkiat, can interfere in the sale of the mokarrari right by the mokarraridar, on the ground that he is a partner in the property sold, it follows that the mokurrureedar can also interfere in the exercise of his rights by the proprietor in selling his proprietary rights but this, the pleader for the appellant admits, the mokurrureedar cannot do."

They referred to the case reported in *Moorooly Ram* v. *Huree Ram*(1) with approval and finally agreed with the finding of the lower court that the plaintiff was not entitled to claim the right of pre-emption with regard to the mokarrari right.

Mr. Hasan Jan urges that the remarks of their Lordships at page 44 in *Baboo Ram Golam Singh* v. *Nursingh Sahay*(2), support the proposition of law laid down in the case of *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(3). I cannot accept this contention. There also it appears from the facts that defendant no. 2 sold her mokarrari right and the plaintiff as a partner in the proprietary right wanted to claim pre-emption and this was, for the reasons given by their Lordships, held to be untenable.

In the case of *Dewanutulla* v. *Kazem Molla*(4) the facts were as follows: The plaintiff and defendant no. 1 were joint proprietors of a certain mokarrari tenure. Defendant no. 1 granted a sub-lease in perpetuity of his share. The plaintiff wanted to enforce his right of pre-emption. Their Lordships referring to the cases of *Moorooly Ram* v. *Huree*

(1) (1867) 8 W. R. 106.
(2) (1875) 25 W. R. 43.
(3) (1920) 5 Pat. L. J. 740.
(4) (1887) I. L. R. 15 Cal. 184.

Ram(1) and *Ram Golam Singh* v. *Nursingh Sahay*(2) held that the grant of a permanent lease does not give rise to the right of pre-emption. Their Lordships did not express any opinion on the question whether the parties being merely lessees in perpetuity had such a milkiat in the property as would entitle either of them to claim the right of pre-emption.

Mr. Hasan Jan next refers to Volume III, Chapter III, Book XXXVIII at page 558 of Grady's edition of Hamilton's Hedaya and says that pre-emption relates to immovable property whether they are capable of division or not and from this he concludes that as the mokarrari land sold in this case is an immovable property the law of pre-emption applies. He further urges that the term " milkiat " may have a technical meaning now but it means landed property, revenue or rent free property. To this Mr. Khursaid Husnain replies that in early times only full ownership was contemplated by the Muhammadan legislators and the Hedaya refers to proprietary interest only. For the latter statement, Mr. Khursaid Husnain relied on the case of *Gobind Dayal* v. *Inayatullah*(3), where Mahmood, J. gives the definition of pre-emption in the following terms: " Pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immovable property is sold to another person." He next relied on the case of *Sakina Bibi* v. *Amiran*(4), where Mahmood, J. says that in the pre-emptive tenement (the tenement by the ownership of which the pre-emptor wants to exercise his right of pre-emption), the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right,

(1) (1867) 8 W. R. 106.
(2) (1875) 25 W. R. 43.
(3) (1885) I. L. R. 7 All. 775 (799).
(4) (1888) I. L. R. 10 All. 472 (477).

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or any interest which falls short of full ownership. The learned Advocate refers to another authority, viz., Baillie's Muhammadan Law, Book VII, Chapter I at page 478 and urges that " when it is said that *akar* are proper objects of the right of pre-emption it is by virtue of a right of *milk* or ownership, that they are so, and one of the conditions mentioned in the early parts of the chapter is that the thing sold must be *akar*, or what comes within the meaning of it, whether the *akar* be divisible or indivisible, as a bath or well or a small house or a mill or road ". In Siv Saran Lal's book on the Law of Pre-emption, the various definitions of *akar* have been collected together in Chapter III at page 64. According to Fatwa Alamgiri (Volume III, page 605) the strict meaning of the word *akar* is " a space covered with buildings " so that properly speaking the term is not applicable to a *zuyut;* but according to the *Kifayah* (Volume IV, page 940) and the *Inayah* (Volume IV, page 263) *akar*, in the sense in which it is liable to pre-emption, includes *zuyut*. According to Freytag, *zuyut* is a field, whether arable or pasture (Baillie, Volume I, page 472).

In our own High Court in the case of *Musammat Bibi Saleha* v. *Haji Amiruddin*(1) it was held that a mukarraridar holding under a co-sharer had no right to pre-empt as against another co-sharer and, as a mukarraridar could not claim pre-emption, the co-sharer, on the doctrine of reciprocity, which is well understood in the Muhammadan Law, could not claim pre-emption against the mukarraridar. This case relied on the case of *Sheikh Mohamad Jamil* v. *Khub Lal Raut*(2) and explained the cases of *Katyayani Debi* v. *Uday Kumar Das*(3) and *Ram Bali Singh* v. *Jagdat Singh*(4).

In the case of *Dhirakshal Singh* v. *Triloki Prashad Singh*(5) Das, J. delivering the judgment of

(1) (1928) I. L. R. 8 Pat. 251.
(2) (1920) 5 Pat. L. J. 740.
(3) (1924) I. L. R. 52 Cal. 417 P. C.
(4) (1925) 89 Ind. Cas. 421.
(5) (1923) A. I. R. (Pat.) 217.

the Court held that there was no right of pre-emption with regard to the mokarrari land.

In the case of *Chariter Dusadh* v. *Bhagwati Pandey*(1) the question was whether the right of pre-emption could be exercised in respect of a birit land. It was held that the definition of proprietor in the Bengal Tenancy Act did not include all kinds of proprietorship and that the fact that the biritdar is treated as a tenant in the record-of-rights is not incompatible with the conception of his ownership of the land. From this it is clear that their Lordships relied upon the preposition that the full owner of a property has a right to pre-empt but not a person who is in the possession of a right falling short of it. Therefore, relying upon the various decisions of our own High Court, I am of opinion that the court below was right in holding that there could not be any right of pre-emption with regard to a mokarrari or raiyati interest. I would, therefore, dismiss the appeal with costs.

DHAVLE, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Dhavle and Varma, JJ.

LADURAM MARWARI

v.

BANSIDHAR MARWARI.*

Handnote—suit on handnote found to be forged—decree whether can be passed to the extent of the amount admitted.

The plaintiff instituted a suit for the recovery of Rs. 1,950 on the basis of a handnote alleged to have been executed by the defendant. It was not the case of the plaintiff that there was a previous debt independent of the handnote. The

*Appeal from Appellate Decree no. 1370 of 1933, from a decision of Babu Anjani Kumar Sahay, Subordinate Judge at Monghyr, dated the 16th September 1933, modifying a decision of Mr. Muhammad Shamsuddin, Munsif of Monghyr, date the 24th February 1933.

(1) (1934) 15 Pat. L. T. 796.

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defendant admitted that he had borrowed Rs. 950 only and that the handnote had been tampered with.

Held, that the handnote having been found to be forged no decree could be passed in plaintiff's favour.

Ram Autar Shukul v. *Baldeo Shukul*(1), followed.

Sheikh Akbar v. *Sheikh Khan* (2), *Dula Medh* v. *Maulavi Abdul Rahman*(3) and *Gour Chandra Das* v. *Prasanna Kumar Chandra*(4), applied.

Domoo Khan v. *Agha Arshad Khan*(5) *Nazir Khan* v. *Ram Mohan*(6), *Moti Lal Saha* v. *Monmohan Gossami*(7), *Lakshmanmal* v. *Narasimharaghava Aiyangar*(8), *Suraj Lal* v. *Anant Lal*(9), *Khosal Mohammad* v. *Amiruddin Mohammad Paramanik*(10) and *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*(11), reviewed.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Varma, J.

S. S. Bose, for the appellants.

Rajkishore Prasad, for the respondents.

VARMA, J.—This second appeal arises out of the appellate judgment of the officiating Subordinate Judge at Monghyr, dated the 16th of September 1933, by which he partly decreed the suit of the plaintiffs. In order to understand the point of law that has been urged before us it is necessary to give the short facts of this case. The suit was to recover a sum of Rs. 1,950 principal besides interest at the rate of Rs. 1-12-0 per cent. per mensem. It was said that the loan was advanced by plaintiff no. 2 out of her own money but in the name of her son the plaintiff

(1) (1932) I. L. R. 11 Pat. 782.
(2) (1881) I. L. R. 7 Cal. 256.
(3) (1924) A. I. R. (Cal.) 452.
(4) (1906) I. L. R. 33 Cal. 812.
(5) (1933) I. L. R. 12 Pat. 862 F. B.
(6) (1930) I. L. R. 53 All. 114 F. B.
(7) (1900) 5 Cal. W. N. 56.
(8) (1913) I. L. R. 38 Mad. 746.
(9) (1920) 1 Pat. L. T. 203.
(10) (1923) A. I. R. (Cal.) 318.
(11) (1926) A. I. R. (Cal.) 831.

no. 1. The defendant admitted that he had executed a handnote but with regard to the particular handnote that was produced in the case his contention was that the original handnote that had been executed was tampered with and that the sum of Rs. 950 had been altered into Rs. 1,950. He further alleged that the handnote which he had executed for the sum of Rs. 950 was not for consideration paid in cash at the time of the execution but that it was for sums found due from him on an old account. He further said that on account of certain acts of his the plaintiff was annoyed with him and therefore he had filed the suit for a sum of Rs. 1,950. The trial court found that the handnote was a forged document and also that the sum of Rs. 950 was advanced to the defendant in cash by plaintiff no. 1 on 21st Pus, 1338 Fasli. For these reasons the trial court dismissed the suit on the ground that when the plaintiff had tampered with the handnote a decree could not be passed even for the amount admitted by the defendant. On appeal the lower appellate court agreed with the trial court that the handnote was tampered with and that Rs. 950 was converted into Rs. 1,950, but gave a decree to the plaintiffs for the sum of Rs. 950. In the course of the judgment the lower appellate court has observed as follows:

"A reference to the plaint will show that the suit is not based on the handnote alone. But the plaintiffs' case is that the defendant took the amount in cash and executed the handnote for the same. The suit is thus principally based on the advance of the amount though the handnote is put in evidence to show the advance and also the terms in which the advance was made. It is proved apart from the handnote that the defendant took Rs. 950 in cash from the plaintiffs on 21st Pus 1338 Fs. The defendant admitted that Rs. 950 was actually due by him on the date the handnote was executed, but he says that it was due on account of previous transactions. If his case had been accepted then the suit would probably have failed as being barred by limitation."

Mr. Satya Sundar Bose on behalf of the appellant has drawn our attention to paragraph 3 of the plaint which runs as follows in the paper book:

"The defendant took a loan of Rs. 1,950 in cash from the plaintiff in order to meet his necessities and executed the handnote in suit

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payable on dmand, dated the 26th Poos 1338 Fs. and, affixed his thumb impression and signature by his own pen thereon and made it over to the plaintiff."

Mr. Bose, however, takes exception to the expression " Handnote in suit " and urges that " handnote *bunai dawi indultalab* " should be translated as " the handnote which is the basis of the suit ". He has also referred to paragraph 6 of the plaint where the cause of action is mentioned. That paragraph runs as follows :

" The cause of action arose on the 26th Pus 1338 Fs. the date of the execution of the handnote and on 1st April 1932 when the demand was made for the last time. As the defendant resides at a place within the jurisdiction of this Court, hence taking into consideration the value of this suit, this suit has been instituted in this Court."

Mr. Bose urges that looking at these two paragraphs of the plaint it is clear that the suit was based on the handnote and, as the handnote has been found to be a document which has been forged, the case is covered by the decision in *Ram Autar Shukul* v. *Baldeo Shukul*(1). In that case their Lordships (Khaja Mohamad Noor and Dhavle, JJ.) observed as follows :—

" Having come to Court with tampered handnotes the plaintiff is not entitled to any decree as was held in the case of *Dula Meah* v. *Maulavi Abdul Rahaman*(2). The same principle seems to have been laid down in an earlier case of *Gour Chandra Das* v. *Prasanna Kumar Chandra*(3)."

Our attention has been drawn to a number of cases in which this point has been discussed.

In *Shaikh Akbar* v. *Shaikh Khan*(4) the distinction between two types of cases was pointed out: (1) when the cause of action is complete in itself and the debtor gives a bill or note to the creditor for payment of the money at a future time, the plaintiff

(1) (1932) I. L. R. 11 Pat. 782.
(2) (1924) A. I. R. (Cal.) 452.
(3) (1906) I. L. R. 33 Cal. 812.
(4) (1881) I. L. R. 7 Cal. 256.

can sue for the original consideration, and (2) when the original cause of action is the bill or note itself and does not exist independently of it, then if the note is not admissible in evidence for want of proper stamp or some other reason, the creditor must lose his money. But in the same volume in the case of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul*(1) it was held that a person, who had a bond executed in his favour by one of three brothers, forged the signatures of the other two brothers to the bond, and brought a suit upon it in its altered form against the three brothers, the suit when based upon such a document must fail. Their Lordships went further and held that no court should allow any amendment to enable the plaintiff to succeed on a document in its forged state.

Moti Lal Saha v. *Monmohan Gossami*(2) has been relied upon for the proposition that even if the promissory note be a forgery the plaintiff could succeed if he could prove the loan by independent evidence.

In *Lakshmammal* v. *Narasimharaghava Aiyangar*(3) where the case in *Gour Chandra Das* v. *Prasanna Kumar Chandra*(4) was relied upon, a negotiable instrument was altered by causing the words " or order " to disappear. The alteration was such as enabled the plaintiff to sue at a place where he could not sue without the alteration. It was held that if the document upon which the suit is based was materially altered the plaintiff could not be allowed to succeed, and the decision in *Gour Chandra Das* v. *Prasanna Kumar Chandra*(4) was approved in this case.

Mr. Rajkishore Prasad appearing on behalf of the respondents has drawn our attention to a number of cases. He has first referred to the case of *Suraj Lal* v. *Anant Lal*(5) where their Lordships of this

(1) (1881) I. L. R. 7 Cal. 616.
(2) (1900) I. L. R. 5 Cal. W. N. 56.
(3 (1913) I. L. R. 38 Mad. 746.
(4) (1906) I. L. R. 33 Cal. 812.
(5) (1920) 1 Pat. L. T. 203.

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Court (Mullick and Sultan Ahmed, JJ.) held that even if the handnote produced in the case was found to be forged the plaintiff could maintain the suit on the basis of their accounts. There the plaintiff alleged that the defendant had money transactions with him and had purchased cloths from the shop of the plaintiff, which were entered in the books of accounts kept in the shop. After an adjustment of accounts which the defendant admitted he executed the handnote in suit and handed it over to the plaintiff, and the date of cause of action according to the plaint was 21st April, 1914, when the handnote was executed. The trial court held that the statement of accounts between the parties as alleged by the plaintiff was not proved nor that the defendant executed the handnote, and therefore dismissed the suit. The lower appellate court observed that " The shop books may be good, bad or indifferent but as they are not the basis of the case they cannot avail except as corroborative evidence on only one point, viz., whether there were any dealings between the parties and whether anything was due to the plaintiff by the defendant. The case before me, as framed, stands or falls on the genuineness of the handnote." Mullick, J. observed :

" Now if the handnote is a forgery, then undoubtedly the plaintiffs can fall back upon their claim on the account stated. But the finding of both courts is that the allegation that there was a stated account is false, and that in fact and truth no account was stated or adjusted between the parties."

In that view of the matter their Lordships dismissed the appeal in spite of their observation that even if the note produced was a forgery the plaintiff could sue on the accounts stated.

In *Khosal Mohammad* v. *Amiruddin Mohammad Paramanik*(1) a contrary view was expressed that even if the promissory note sued upon was a forgery the plaintiff would succeed on proof of the loan by independent evidence.

(1) (1923) A. I. R. (Cal.) 318.

The next case for consideration is *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*(1) where although a mortgage deed was found to be invalid on account of subsequent alterations it was held that the mortgagee could recover upon the original consideration. In that case their Lordships of the Calcutta High Court distinguished the case of *Gour Chandra Das* v. *Prasanna Kumar Chandra*(2) on the ground that there the suit was based not upon the original consideration but upon the bond itself. Their Lordships further referred to the case of *Pramatha Nath Sandal* v. *Dwarka Nath Dey*(3) for the proposition that if the original consideration could be proved by independent evidence the plaintiff was entitled to succeed even if the document produced in support of the case be found to be altered.

In *Dhaneshwar Sahu* v. *Ramrup Gir*(4) the handnote in suit was found to have been insufficiently stamped. Kulwant Sahay, J. was of opinion that where a handnote bore a one-anna stamp instead of a two-annas stamp the plaintiff was entitled to prove the loan by other evidence. Macpherson, J. expressed some doubt on the point but yielded to the authority of the series of decisions of the Calcutta High Court prior to 1916; and he said that had it been open he should have experienced considerable hesitation in rejecting the opposite view.

Mr. Rajkishore Prasad further observes that the lower appellate court had found that the suit was on the loan itself and in support of this he refers to paragraph 2 of the plaint which runs as follows:

"As the amount sued upon belongs to the private fund of plaintiff no. 2 she is made plaintiff no. 2 and as she was a pardanashin lady the handnote in suit was got executed in the name of plaintiff no. 1."

But it must be remembered that the construction of a plaint is a question of law.

(1) (1926) A. I. R. (Cal.) 831.
(2) (1906) I. L. R. 33 Cal. 812.
(3) (1896) I. L. R. 23 Cal. 851.
(4) (1928) I. L. R. 7 Pat. 845.

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VARMA, J.

The Full Bench decision in *Nazir Khan* v. *Ram Mohan*(1) lays down that it is not open to a party who has lent on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provisions of section 91 of the Evidence Act. In cases in which there is already a completed cause of action for recovery of money on foot of a distinct and separate transaction and a promissory note is afterwards given as a collateral security the creditor may, if the promissory note be inadmissible in evidence, recover on the original consideration and evidence *aliunde* can be given to prove the same. But where the promissory note and the lending of the money are part and parcel of the same transaction and the terms of the loan are the very terms of the promissory note, the contract of loan cannot be proved apart from the document itself and the plaintiff's suit must fail if the document itself be inadmissible in evidence.

Our attention has been drawn further to a Single Bench decision in *Indra Chandra Bag* v. *Hiralal Rong*(2) where it has been held that if a promissory note is not admissible in evidence on account of its being insufficiently stamped the plaintiff is entitled to sue on a cause of action which is independent of the promissory note.

In a Full Bench decision of the Madras High Court in *Ramaswami Pillai* v. *Murugiah Padayachi*(3) it has been held that if the promissory note itself is a contract then no further evidence can be permitted but if it is expressed in such a way as to leave the parties in any doubt then the facts must settle the question.

A Full Bench decision of our Court in the case of *Domoo Khan* v. *Agha Arshad Khan*(4) follows the decision in *Sheikh Akbar* v. *Sheikh Khan*(5) and lays

(1) (1930) I. L. R. 53 All. 114 F. B.
(2) (1936) A. I. R. (Cal.) 127.
(3) (1935) I. L. R. 59 Mad. 268, F. B.
(4) (1933) I. L. R. 12 Pat. 862, F. B.
(5) (1881) I. L. R. 7 Cal. 256

down that when a cause of action for money is once complete in itself whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note. But this was a case which was based on the finding of the lower court that the plaintiff had proved that there was an independent contract to repay the advance.

Now in the case before us, the plaintiff relies upon a handnote for a sum of Rs. 1,950 executed by the defendant on the 26th Poos 1338 Fs. for the said amount received in cash. There is no story of there being a previous due independent of the handnote and this handnote has been found to be forged. In most of the cases dealing with forged handnotes to which I have referred, it was clear from the plaint that there was originally a previous consideration and then a handnote was executed which was found to be forged, *Sheikh Akbar* v. *Sheikh Khan*(1), *Moti Lal Saha* v. *Monmohan Gossami*(2), *Lushmammal* v. *Narasimharaghava Aiyangar*(3), *Suraj Lall* v. *Anant Lal*(4), *Khosal Mohammad* v. *Amiruddin Mohammad Pramanik*(5), and *Prabati Charan Mukherjee* v. *Amarendra Nath Bhattacharjee*(6) (case of an altered mortgage deed). But here in the present case looking at the plaint it is clear that there was no story of any previous account of which the handnote was merely a piece of evidence. The cases of *Sheikh Akbar* v. *Sheikh Khan*(1), *Nazir Khan* v. *Ram Mohan*(7), *Dula Meah* v. *Maulavi Abdul Rahaman*(8)

(1) (1881) I. L. R. 7 Cal. 256.
(2) (1900) 5 Cal. W. N. 56.
(3) (1913) I. L. R. 38 Mad. 746.
(4) (1920) 1 Pat. L. T. 203.
(5) (1923) A. I. R. (Cal.) 318.
(6) (1926) A. I. R. (Cal.) 831.
(7) (1930) I. L. R. 53 All. 114 F. B.
(8) (1924) A. I. R. (Cal.) 452.

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and of *Gour Chandra Das* v. *Prasanna Kumar Chandra*(1) are more applicable to the facts of the present case. Cases of handnotes which were held to be inadmissible on account of insufficiency of stamps or otherwise are distinguishable from cases of forged handnotes and in such a case I prefer to follow the decision of our own High Court in the case of *Ram Autar Shukul* v. *Baldeo Shukul*(2). I would, therefore, allow the appeal with costs throughout.

The matter, however, does not end here. Mr. Rajkishore Prasad appearing on behalf of the respondents urges that he should be given an opportunity to amend his plaint and relies upon the cases of *Official Assignee* v. *V. A. Kuppuswami Naidu*(3) and *Sarafalli Mahomadali* v. *Mahasukhbhai Jechandbhai*(4) where the handnote was executed for a previous debt which was agreed to be paid by instalments. It was held in the former case that the suit brought within three years of the last payment of instalment was not time-barred. The Court allowed the plaint to be amended. A similar view was taken in the case reported in *Sarafalli Mahamadali* v. *Mahasubhai Jechandbhai*(4) but both these cases were dealing with cases in which there was no promissory note which was found to be forged. But authority is not wanting [*vide Sheikh Akbar* v. *Sheikh Khan*(5)] in which it has been held that when a party comes to a Court with a forged document he should not be allowed to amend the plaint in second appeal.

DHAVLE, J.—I agree that the appeal should be allowed and the suit dismissed.

The lower appellate court observed that the suit was " principally " based " on the advance of the amount though the handnote was put in evidence to show the advance and also the terms on which the

(1) (1906) I. L. R. 33 Cal. 812.
(2) (1932) I L. R. 11 Pat. 782.
(3) (1936) A. I. R. (Mad.) 785.
(4) (1933) I. L. R. 57 Bom. 802.
(5) (1881) I. L. R. 7 Cal. 256.

advance was made." This point was not expressly dealt with by the learned Munsif because he dismissed the suit on the authority of such cases as *Lala Baru Mal* v. *Dwarka Dass*(1) following *Gour Chandra Das* v. *Prasanna Kumar Chandra*(2) and *Sheikh Diljan* v. *Makbul Khan*(3). The learned Subordinate Judge points out correctly enough that the former of these rulings related to a suit based on the handnote itself; as to the latter, he observes that it " was decided by a single Judge of the Hon'ble Calcutta High Court ", when he might with greater propriety have pointed out that the learned Judge, Duval, J. found that it could not be said that the plaintiff had really produced any evidence at all apart from the tampered deed to prove the debt. The extract quoted by my learned brother clearly shows that the lower appellate court was wrong in concluding that the suit was based " principally " on the advance. At the same time paragraph 2 of the plaint speaks of the advance which is the basis of the suit (*zar-karza bunae davi*) and paragraph 5 mentions the defendant's agreement to pay interest. Though, as in *Ram Raghubir Lal* v. *The United Refineries (Burma), Limited*(4) which was followed in *Maung Po Chein* v. *C. R. V. V. V. Chettyar Firm*(5), the plaint was apparently drafted as for a suit on the handnote, it discloses a cause of action in respect of the advance even independently of the handnote notwithstanding the fact that the cause of action is dated " the 26th Pus 1338 Fasli, the date of the execution of the handnote " and the later date of demand.

The learned Subordinate Judge says that it is proved "apart from the handnote" that the defendant

(1) (1914) 25 Ind. Cas. 667.
(2) (1906) I. L. R. 33 Cal. 812.
(3) (1927) 107 Ind. Cas. 475.
(4) (1930) I. L. R. 9 Rang. 56.
(5) (1935) 158 Ind. Cas. 533.

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took Rs. 950 in cash from the plaintiffs on the 21st Pus, 1938 Fasli. It seems to me that this finding is clearly vitiated by an error of law. It was not the case of the plaintiffs that Rs. 950 was advanced in cash on the 21st of Pus, and the evidence adduced by them, which was all to the effect that Rs. 1,950 had been advanced on the 26th of Pus, has been concurrently disbelieved by the lower courts. Nor was it the defendant's case that Rs. 950 was advanced in cash on the 21st Pus or on any other date. Both the courts below have found that Rs. 950 was advanced in cash on the 21st of Pus only because the handnote in its original condition said so and the defendant's story of the handnote being executed in consideration of dues on two other notes was found unacceptable by them. But it is well settled that a plaintiff who sues upon a fraudulently altered document is not entitled to relief on the document even in its original condition—see cases like *Gogun Chunder Ghose* v. *Dharonidhur Mundul*(1) and *Dula Meah* v. *Moulavi Abdul Rahaman*(2), though (a consideration which does not arise in the case of handnotes) such alterations may not affect a title to property already created. And yet this is what the learned Subordinate Judge has done in substance. It is true that he carefully leaves the handnote out of consideration when, dealing with the consequences if the defendant's story of past advances had been accepted, he observes

> " then the suit would probably have failed as being barred by limitation. For the plaintiffs would not have been able to take advantage of the fresh acknowledgment and promise to pay as made in the document ".

Under the issue relating to the interest claimed he also speaks of the handnote

> " having been eliminated from evidence ".

But he clearly overlooks this—as did the trial court—when arriving at the finding that Rs. 950 was

(1) (1881) I. L. R. 7. Cal. 616.
(2) (1924) A. I. R. (Cal.) 452

advanced in cash, and actually relies on the circumstance that

" the handnote itself shows that it was for a cash loan ".

On the plaintiff's story the defendant was under no pre-existing liability; the fraudulent alterations made the handnote void, and though no doubt the document could be used for collateral purposes, it was, in my opinion, erroneous in law to use it as the foundation of any relief to be given to the plaintiffs in respect of a loan not of the 26th but of the 21st Pus, 1338 (a date not in suit). No cash advance could legally have been found by the courts of fact independently of the altered handnote, and the suit must fail whether it is regarded as a suit on the handnote or as a suit on an original consideration of the 26th Pus.

In this view the question which has been recently discussed by Full Benches in Allahabad, Rangoon and Madras—*Nazir Khan* v. *Ram Mohan*(1), *Maung Chit* v. *Roshan N. M. A. Karrem Oomer and Company*(2), and *Ramasami Pillai* v. *Murugiah Padayachi*(3), does not really arise—the question, viz., whether it was open to the plaintiffs to sue on the loan apart from the altered hand-note. In *Sheikh Akbar's* case(4) referred to by my learned brother, Garth, C.J. distinguished between (1) cases in which a bill or note is taken by the creditor *on account of the debt* and (2) cases where " the original cause of action is the bill or note itself and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay with interest at six months date ", so that " there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained

(1) (1930) I. L. R. 53 All. 114 F. B.
(2) (1934) I. L. R. 12 Rang. 500 F. B.
(3) (1935) I. L. R. 59 Mad. 268, F. B.
(4) (1881) I. L. R. 7 Cal. 256.

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in the note and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money." If the learned Chief Justice spoke of a deposit by way of example, that, I think, was because the cases that he distinguished on this ground immediately afterwards—*Ankur Chandra Roy Chowdry* v. *Madhub Chunder Ghose*(1), *Prossunno Nath Lahiree* v. *Tripoora Soonduree Dabee*(2) —were cases of deposits, though the particular case before him was a case of what he calls " a sort of loan transaction " though without any loan independently of the note. In *Radhakant Shaha* v. *Abhoychurn Mitter*(3) which was decided about a year afterwards, the learned Chief Justice indicated clearly that his second class of cases included cases of advances on bills—for he said that " if the consideration for the bill (a hundi for Rs. 500) had been an independent cause of action, complete in itself, before the bill was given ", the appellant's contention that, though the instrument itself was not admissible in evidence, they were entitled to recover upon proving the consideration for the bill, would have been well-founded. In *Pramatha Nath Sandal* v. *Dwarka Nath Dey*(4) Petheram, C. J. was of opinion that Garth, C. J., when he spoke of a deposit, did not mean a loan, and that an implied contract to repay money lent always arises from the fact that the money is lent, even though no express promise, either written or verbal, is made to repay it, and that the creditor may maintain an action against the debtor for breach of his implied promise or contract, entirely independently of any security which may have been given for the advance. The same view was

(1) (1873) 21 W. R. 1.

(2) (1875) 24 W. R. 88.

(3) (1882) I. L. R. 8 Cal. 721.

(4) (1896) I. L. R. 23 Cal. 851.

apparently taken by Jenkins, C.J., in *Krishnaji. Narayan Parkhit* v. *Rajmal Manikchand Marwari*(1). A handnote given by a debtor to a creditor may—like negotiable instruments in England—be a conditional payment of the debt or it may be a collateral security which the creditor may or may not avail himself of as he pleases, or again, as usually happens in the mofassal in this country, it may be the sole consideration for the advance embodying in writing all the terms on which the advance is made. In the last class of cases, and it was evidently this class that Garth, C. J. had in mind in the case before him for he distinguishes *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*(2) and *Farr* v. *Price*(3), it seems clear that it is not open to the creditor to recover his money independently of the handnote by proving orally the advance and the terms of an implied contract in contravention of the provisions of section 91 of the Evidence Act. As was pointed out in *Pothi Reddi* v. *Valayudasivan*(4), "it is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of section 91 of the Evidence Act." Another way of putting the case against treating the money paid at the very time of the execution of a promissory note which is inadmissible in evidence as giving rise to a contractual or other obligation is found in the observations of Sadasiva Ayyar, J. in *Muthu Sastrigal* v. *Visvanatha Pandarasannadhi*(5):

(1) (1882) I. L. R. 8 Cal. 721.
(2) (1878) I. L. R. 3 Cal. 314.
(3) (1800) 1 East. 55.
(4) (1887) I. L. R. 10 Mad. 95.
(5) (1913) I. L. R. 38 Mad. 660.

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"To import the doctrine laid down in English cases about vague obligations to repay arising out of equity and not out of contract or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify section 91 of the Evidence Act."

Where there is an express contract or promise of repayment put into writing, as part of the loan transaction it seems to me that if the plaintiff recovers at all, it must be on the contract actually made and not on some implied contract, though it will of course be open to a creditor, who lends irrespective of a hand-note and afterwards takes a hand-note merely by way of conditional payment or collateral security, to rely on the implied promise contained in the receipt of the money by the debtor. Whether a hand-note is the sole consideration for the advance, and not merely a conditional payment or a collateral security, must be a question of fact. This question has not been investigated below. I should be inclined to doubt very much whether the hand-note in the present case was anything other than the entire consideration for the advance. The learned Subordinate Judge relied on *Khosal Mohammad* v. *Amiruudin Mahammad Puramanik*(1) in support of the proposition that "if a promissory note sued for is a forgery the plaintiff will succeed on proof of the loan by independent evidence". That was a case where the defendant admitted executing a bond for a smaller sum than the plaintiffs claimed to have advanced, and the court of fact had found that this smaller sum had been paid to the defendant. Upon this Newbould and Panton, JJ. accepted the creditor's contention, following *Moti Lal Saha* v.

(1) (1923) A. I. R. (Cal.) 818.

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Monmohan Gossami(1), that " even if the promissory note sued upon were a forgery, the plaintiff would succeed on proof of the loan by independent evidence." In *Dula Meah* v. *Moulavi Abdul Rahaman*(2) Newbould, J. himself noticed that *Moti Lal Saha's*(1) was not a case of material alteration of a bond but a case where the whole bond was held to be a forgery, so that all that the case established was that the plaintiff may succeed even though some of the evidence that he produces is entirely forged—a proposition which on the doctrine of *Master* v. *Miller*(3), is of little help in cases where plaintiffs sue on notes materially altered by them. Rankin, J. in the same case pointed out how an independent cause of action must be shown if the doctrine of *Master* v. *Miller*(3) is not to take effect and how where there is an express promise, an implied promise will not be inferred. This was the case on which the decision in *Ram Autar Shukul* v. *Baldeo Shukul*(4), to which I was a party, a suit on the basis of handnotes that had been tampered with—was based. Reference was also made to *Gour Chandra Das* v. *Prasanna Kumar Chandra*, a case in which the contention was negatived that the plaintiff was entitled to succeed on the basis of the original consideration and to rely upon the altered bond as embodying an acknowledgment sufficient to save the bar of limitation. This case was commented upon in *Parbati Charan Mukherjee* v. *Amarendra Nath Bhattacherjee*(5) the other case relied on by the Subordinate Judge, who has, however, overlooked the fact that Chatterjee, J. and Page, J. both held in this case that to quote Page, J. at page 431 of the report " if the execution of a document is the consideration for a contract, the legal obligations of the party executing the document

(1) (1900) 5 Cal. W. N. 56.
(2) (1924) A. I. R. (Cal.) 452.
(3) (1791) 2 R. R. 399.
(4) (1932) I. L. R. 11 Pat. 782.
(5) (1925) I. L. R. 53 Cal. 418.

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to the other party to the contract are limited to those which can be enforced under the document and not otherwise. In our own Court Kulwant Sahay, J. held in *Dhaneswar Sahu* v. *Ramrup Gir*(1) that " even in cases where the lending of the money and the execution of the promissory note are contemporaneous, the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence, other than the instrument or the promissory note itself, in order to prove the loan ". The learned Judge put this on the ground that " apart from the instrument, namely, the promissory note, there is always a contract to repay a loan, and such contract can be proved independently of the instrument ". Macpherson, J. however, who agreed to the answer proposed by Kulwant Sahay, J. in that case, was, by no means of the same view, and sitting with Agarwala, J. in *Domoo Khan* v. *Agha Arshad Khan*(2) referred the matter to the Full Bench, Kulwant Sahay, J. (sitting with Jwala Prasad, J.) having in the meanwhile reaffirmed his view in *Abdul Muhammad Khan* v. *Mahananda Upadhaya*(3). The point was, however, not decided by the Full Bench, as the learned Judges found that by reason of the terms of the judgment of the lower court the general question whether parallel evidence of what was said to be a written contract could be allowed did not arise. That question, as I have already indicated, does not arise in the present case because it is clear not only that the alterations of the handnote make relief on it impossible, but also that the learned Subordinate Judge has not been able to arrive at a finding that the plaintiff had advanced any money to the defendant on the date stated in the plaint.

J. K.

Appeal allowed.

(1) (1928) I. L. R. 7 Pat. 845.

(2) (1933) I. L. R. 12 Pat. 862, F. B.

(3) (1931) I. L. R. 11 Pat. 135.

APPELLATE CIVIL.

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Before Wort and Dhavle, JJ.

AMBALAL KHORA

v.

THE BIHAR HOSIERY MILLS, LTD.*

December, 17, 18, 21, 22, 23.
January, 4, 5.
May, 6.

Tort—subsidence of mines—right of owner of surface rights to damages caused to buildings and machinery—joint Hindu family—liability of members in possession of the mines for subsidence due to working of the mines in the lifetime of the father—personal liability—damages.

The father of the defendants who died in a state of jointness with them in 1923 had mining rights in certain plots and he worked the mines. The mines subsided in 1930 and the plaintiff who had surface rights sued for damages caused by the subsidence. The trial court found that the subsidence was due to the working before 1923 and held that it was not a case of tort but the defendants were under a contractual obligation to support the surface.

Held, (*i*) that the action was in tort. The owner of the surface has a right in law of support or, in other words, in truth his right is a right to the ordinary enjoyment of his land and the infringement of that right is tortious.

Backhouse v. *Bonomi*(1) and *Lamb* v. *Walker*(2), relied on.

The question whether the action died with the father or not did not arise in this case. There was no right of action against the father at the time of his death as nothing happened which gave rise to any. The working did not become actionable until after his death, i.e. when the subsidence took place in 1930.

(*ii*) that the defendants who were members of a joint family with their father and who continued to work the

*Appeal from Original Decree no. 114 of 1932, from a decision of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 3rd of May, 1932.

(1) (1861) 9 H. L. C. 503.
(2) (1878) 3 Q. B. D. 389.

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mines on the authority of the lease in the name of their father, although the business was not ancestral, were liable for damages to the plaintiff in common law, but the liability of the defendant was confined to the assets of the joint family.

Annabhat Shankarbhat Alvandi v. *Shivappa Dundappa Manvi*(1) and *Venkatasami Naiker* v. *Palaniappa Chettier*(2), relied on.

(*iii*) that the fact that the subsidence took place while the defendants were in possession would not make them personally liable.

Backhouse v. *Bonomi*(3), referred to.

(*iv*) that as it was not shown that the subsidence was caused by the erection of the buildings the damages may include their value.

Charles Dalton v. *Henry Angus and Co.*(4) and *Brown* v. *Robins*(5), referred to.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of the court.

Manohar Lal and *S. C. Mazumdar*, for the appellants.

B. C. De and *N. N. Roy*, for the respondents.

WORT AND DHAVLE, JJ.—This appeal is by the defendants and arises out of an action in which the plaintiffs claimed damages against the defendants for working their colliery in such a manner as to cause the surface to subside. The learned Judge in the court below has decided the case in favour of the plaintiffs but allowed damages to the extent of Rs. 61,349-13-3 only out of a total claim of Rs. 1,09,500.

(1) (1928) I. L. R. 52 Bom. 376.
(2) (1928) I. L. R. 52 Mad. 227.
(3) (1861) 9 H. L. C. 503.
(4) (1881) 6 App. Cas. 740.
(5) (1859) 4 H. & N. 186.

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WORT AND DHAVLE, JJ.

The plaintiff is a company in liquidation engaged in the manufacture of hosiery, the factory being situate on survey plots nos. 458, 463, 465 and 467. The proprietor of the land and of the colliery interest was the Jharia Raj. In August, 1895, the coal mining rights were demised to one Bhoja Dhanji. The patta was in respect of coal mining rights in plots nos. 458 and 463 which were 135 bighas in area under villages Fatepur and Jharia. Another 6 bighas were demised to the same person in June of 1901. In 1901 and 1902 Bhoja Dhanji sold 45 bighas to one P. D. Hamid and Gangi Dosha and 2½ bighas to the said P. D. Hamid; the remaining 93½ bighas were transferred by a deed, dated the 17th of November, 1902, to Khora Ramji deceased who was the father of defendants 1 to 3. There was an exchange in 1911 between Khora Ramji and the Jharia Raj under which Khora Ramji got 12½ bighas in exchange for 12½ bighas out of 93½ bighas held by him. But in the meantime on the 17th of January, 1923, Khora Ramji acquired mineral rights with regard to an additional 32 bighas. The subsided area is confined to about 3 acres of which plots nos. 458 and 463 have completely subsided and plot no. 465 has subsided in part. Plot no. 467 has not sunk. The plaintiffs acquired the surface rights by a registered deed (Exhibit 2-h) from persons described as the Bauris and Malliks who were labourers.

It has been one of the contentions of the defendants that the plaintiffs had no title to the land and that therefore the present action is not maintainable. The record-of-rights describes the predecessor in title of the plaintiffs as persons in possession rent-free, and it is the finding of the learned Judge in the court below that there is nothing on the record which would indicate that the Bauris and Malliks had not such a permanent interest. The Judge in the court below has entered into a somewhat elaborate examination of this point and has come to a conclusion in favour of the

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plaintiffs. It is true that the record-of-rights is not conclusive of the title of the predecessors of the plaintiffs but in the absence of any evidence on the part of the defendants, especially with regard to any objection on the part of the Jharia Raj, in our judgment the plaintiffs have disclosed a sufficient title to enable them to claim damages in this suit if they have otherwise established their right.

There is no dispute about the subsidence and, apart from the question with which we have already dealt, the case was confined in the Court below and in this Court to the question whether defendants 1 and 2 were liable in damages to the plaintiffs. The facts as regards the position of the defendants is as follows. The father of defendants 1, 2 and 3 died in the year 1923. Defendants 1 and 2 were born in 1916 and 1918 and were therefore minors at the time of the death of their father. As far back as 1908 defendant no. 3 separated from his father and it was the contention of defendants 1 and 2 that neither defendant no. 3 nor defendants 4 to 9, who claimed at one time to have been partners in respect of a 10 annas share in the colliery business with the defendants' father, had any interest in or connection with this colliery. This has been accepted by the Judge in the Court below and now no question arises as to this. When the colliery business was started it appears, as we have stated, that defendants 4 to 9 were shareholders to the extent of 10 annas, and of the remaining 6 annas share of the father 2 annas were given to defendant no. 3. In February, 1926, this 2 annas share was sold to the mother of defendants 1 and 2 as their guardian and again in 1927 the share of defendants 4 to 9 was purchased by defendants 1 and 2. At the time of the action defendants 1 and 2 owned the 16 annas interest in the colliery by reason of these purchases and the death of their father in 1923. In these circumstances the liability of defendants 1 and 2 alone arises.

In the written statement it was averred that the colliery under the land in question had not been worked for about 10 or 12 years. The action having been brought in 1930, that would mean that no work had been done since about 1920. Expert and other evidence has been called and the result has been that the learned Judge in the Court below has held that the working of the colliery which caused the subsidence was prior to 1923, the date of the death of the defendants' father. It is as a result of that finding (which is not disputed in this Court) that the question of the liability of defendants 1 and 2 arises. In addition to the above finding the Judge in the Court below has held that the pillars which were left to support the surface were at the time thought to be sufficient but proved to be insufficient, and that even if small quantities of coal were taken subsequently from the pillars, such working was insignificant and insufficient to contribute to the subsidence.

This being the case and it being thus established that the working which caused the subsidence was done in the life-time of the father of defendants and not during the time in which the defendants were in possession, it was contended on their behalf, both in the Court below and in this Court, that they could not be held liable for damages. There is no contention on their behalf that the absence of any evidence that the working was negligent in any way assists them as it is admitted that the owner of the surface has a right to support, but the nature of that right is questioned. Nor is it contended that the weight of the buildings erected by the plaintiffs caused the subsidence. Leaving for the moment the question whether the defendants, although minors at the time but being members of a joint Hindu family are liable as such, it is contended by the defendants on the authority of the cases of *Greenwell* v. *Low Beechburn Coal, Co.*(1) and *Hall* v. *Duke of Norfolk*(2) that as

(1) (1897) 2 Q. B. D. 165.
(2) (1900) 2 Ch. 493.

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the defendants were not in possession at the time of the workings and not having worked the colliery since the death of their father, they cannot be held liable in damages for the subsidence which took place in 1930. It is clear that if the defendants were not responsible for the working of the colliery which caused the subsidence, they are not liable in damages to the plaintiffs. The cases to which we have referred and which are relied upon by the appellants, are authorities for that proposition. The Subordinate Judge has held that the cause of action was the breach of an implied contract under which the defendants were under the obligation to support the surface and was of the opinion that the action was not in tort. Accordingly he has held that the principle *actio personalis mortiur cum persona* did not apply and that therefore the defendants were liable for the payment of damages to the extent of the assets of the father which came into their hands on his death. The Judge is in error on this point and the question whether the action against the father died with him or not is irrelevant in the circumstances of the case, and in any event the Judge is clearly wrong in holding that the action is not in tort. The owner of the surface may have a right in law of support, or, to put it in the words of Lord Cranworth in the House of Lords in *Backhouse* v. *Bonomi*(1), " in truth his right is a right to the ordinary enjoyment of his land but the infringement of that right is tortious ". A sufficient authority for that, if authority were needed, is found in the case of *Lamb* v. *Walker*(2), referred to by Bruce, J. in the case of *Greenwell* v. *Low Beechburn Coal Co.*(3). But the question does not arise. There was no right of action against the father at the time of his death as nothing had happened which gave rise to any; he had done nothing other than that which he was entitled to do, namely,

(1) (1861) 9 H. L. C. 503.
(2) (1878) 3 Q. B. D. 389, 402.
(3) (1897) 2 Q. B. D. 165.

work his colliery and no damage had resulted therefrom. This working did not become actionable until after his death, that is to say, when the subsidence took place in 1930. On this view of the case, unless the defendants can be held to have done something to cause the subsidence, they are not liable to the plaintiffs.

But it is said that as the subsidence was the cause of action and as that took place during the time of the possession of the defendants they are personally liable. This argument is based on the decision of *Backhouse* v. *Bonomi*(1). This argument was discussed in the two cases to which we have already referred and upon which the defendants relied for another branch of their argument and, in the light of those decisions, the argument is untenable.

In connection with the general argument as to the liability of the defendants, it is contended that as the damage claimed is confined to the loss which the plaintiffs have sustained by the destruction of the buildings and the machinery therein, there being no proof that the plaintiffs have acquired an easement of support, the buildings not having been in existence for 20 years and upwards, the plaintiffs cannot recover: *Dalton* v. *Angus*(2). However a direct authority against this contention is found in the case of *Brown* v. *Robins*(3). When it is established that the erection of the buildings on the land has not in any way contributed to the subsidence of the buildings the damages recovered may include their value.

Another argument as to the liability of the defendants was that as they are now in possession of the land and the benefits of the original patta granting coal-mining rights to Bhoja Dhanji, they are liable under one of the clauses contained in the said patta.

(1) (1861) 9 H. L. C. 503.
(2) (1881) L. R. 6 App. Cas. 740.
(3) (1859) 4 H. & N. 186.

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The document is Exhibit E—1 in the case and reliance is placed upon clause 14 which is in these words:

"That if any land and house, etc., or any other valuable property is destroyed or rendered useless on account of your work, you will be bound to pay proper damages therefor; and if any occurrence takes place within the leasehold land, you will be wholly answerable therefor".

Quite apart from the question whether the defendants not being parties to this lease are liable thereunder, or whether the covenant is a covenant which runs with the land and the defendants being in possession are laible, it seems to us that the clause adds nothing to the liability of any person bound thereby for whatever reason. The clause deals with the 'liability to valuable property' which may be destroyed or rendered useless; it in no way deals with the support of the surface, although it goes without saying that in the majority of cases buildings would be rendered useless unless the surface were supported. On the other land it might be said that the clause would make the persons bound thereby liable whether the damage was caused by subsidence or for any other reason. We have already dealt with the question of liability for buildings and this clause has not been used by the respondents except for the purpose of fixing the liability on the defendants for the subsidence. We are therefore not concerned with the question whether it has the wider application which we have suggested. In so far as the liability for subsidence is covered by the clause, it adds nothing to the defendants' liability at common law; in other words, their liability would be just the same whether that clause existed or not.

We now come to the matter which we mentioned in the earlier part of our judgment. It was contended that the defendants, being members of a joint Hindu family at the time of the working of the colliery by their father (the karta of the family), were bound by the acts of the karta and were therefore liable. On the other hand defendants urged

that this was not so much as suggested in the lower court. As a matter of fact the plaint made no distinction between one defendant and another as regards the liability for damages, but merely spoke of the " wrongful, negligent and improper working of coal by the defendants from the subjacent and adjacent areas ", even denying that the defendants had any right at all to work the coal. In their written statement defendants 1 and 2 set out " the right of these defendants to work " the coal under the conveyance of 1902 in favour of their father (and later documents) and claimed that other defendants had been unnecessarily made parties. In paragraph 15 they denied removing any pillar coal (while claiming the right to do so) and said that they did not work coal in the affected area during the last ten or twelve years. They went on to repeat that they had kept substantial pillars for supporting the surface and worked in a workmanlike manner and with due care and attention; and they denied that they had at all contributed to the subsidence, adding that the subsidence was not due to any act on their part. It is clear that these defendants nos. 1 and 2 did not deny working the subjacent coal before " the last ten or twelve years ", though they denied negligence in such working and claimed to have left substantial pillars for supporting the surface. Nor was there any issue framed or any finding recorded in the lower court on the point whether defendants 1 and 2 were or were not responsible for the working of the coal before 1923. There was no dispute on the point; it was probably not realized that on subsidence liability to damages would arise even without any negligence in the original working of the coal though the pillars may not have been improperly interfered with. Defendant no. 10 was added as a party by an application to amend the plaint which was filed long before the written statements of defendants 1 and 2 and which prayed for his addition as a member of an undivided Hindu Mitakshara family taking an

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interest in the colliery " from his very birth ". The learned Judge says that it is mentioned in Exhibit E (2), a deed of family arrangement which has not been placed before us, that at the separation between Khora Ramji and defendant no. 3 in 1908 or 1909 properties other than those given to defendant no. 3 were retained by Khora Ramji for himself and his other sons or such sons as might be born to him in future, and that no share in the coal lands of the colliery now in question was given to defendant no. 3. The colliery would thus appear to have been kept by Khora Ramji as joint family property. It was open to him to do so as the head of the family, even though the business may not have been ancestral [*see Annabhat Shankrbhat Alvandi* v. *Shivappa Dunduppa Manvi*(1) and *Venkatasemi Naiker* v. *Palaniappa Chettier*(2)]; and if debts had been contracted in the course of this business the other members of the family would have been bound by them. The extraction of the coal, so far as Khora Ramji was a party to it, was in the interest of the joint family of which he was the karta and into which defendants 1 and 2 were born in 1916 and 1918. It was not tortious *per se*, but a liability for damages arose on the subsidence which occurred in 1930, long after Khora Ramji's death, but at a time when defendants 1 and 2 were the sole surviving members of the joint family that had extracted the coal and were in sole possession of the family interest in the colliery and had further bought out defendant no. 3 and defendants 4 to 9. The learned Judge below says that it appears that Khora Ramji was carrying on the business of this colliery with some partners who had a ten-anna share in the business and that defendant no. 3 was given a two-anna share out of his father's six-anna share in the profit and loss of the business. Later on he comes to the conclusion that defendant no. 3 never

(1) (1928) I. L. R. 52 Bom. 376.
(2) (1928) I. L. R. 52 Mad. 227.

had any share in the coal lands but only a two-anna share in the profit and loss of the colliery business from the date of his separation from his father up to the date he transferred his interest to defendants 1 and 2 in 1926. This finding is accepted by the appellants before us. The exact nature of Khora Ramji's partnership with defendants 4 to 9 does not appear. The learned Judge refers to the fact that the coal land was acquired by Khora Ramji and as regards the ten-anna share in the business, he says that there is no evidence who the partners that owned his share were, though there is some indication that they were defendants 4 to 9 or their predecessors in interest. He did not regard the matter as one of any practical importance because the plaintiffs gave up their claim against these defendants towards the end of the hearing—on the ground, as their learned Advocate has shown, that they had been unable to prove the liability of these defendants. Upon this it was contended before us that the release of defendants 4 to 9 meant the release of defendants 1 and 2 as well; but this was not a case of release by way of accord and satisfaction and did not in any way destroy the cause of action, nor was it the case of defendants 1 and 2 that defendants 4 to 9 were in any way liable for damages for the subsidence. We do not know enough of the partnership which was only alleged by defendants 3 and 10 (claiming, however, as the learned Judge puts it, that " the workings under the affected area were made subsequent to 1926 and that pillars were also robbed from the subjacent soil and from below the adjacent lands " by defendants 1 and 2), to say how defendant no. 3 was given a share in it or what the relation of Khora Ramji was to the ten-anna partners. Probably defendants 1 and 2 who, as Mr. Mazumdar for the appellants informed us, took the entire family interest in the colliery by survivorship, were no parties to the partnership such as it was; but this will only prevent contractual relations from arising between them and the ten or

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twelve-anna partners in the course of the partnership without affecting their liability to others as members of the joint family of which their father was the karta and which had a six or four-anna interest in the colliery fron 1908 or 1909 to the death of Khora Ramji. The liability that is sought upon defendants 1 and 2 is limited to what the learned Judge has called " the assets of their father's estate that has devolved on them by inheritance ". The description is not quite accurate, and the learned Judge really meant no more than the assets of the joint family left by Khora Ramji at his death. It is thus clear that the joint family represented by the karta was concerned in the working of the coal, whether or not it did so in partnership with others; and the joint family still continues in spite of the death of Khora Ramji in the persons of defendants 1 and 2. They cannot, therefore, escape liability on the ground that it was a personal liability of Khora Ramji, though the learned Judge is in error in holding them liable on the ground of an implied contract to keep up the surface.

A half-hearted attack was made by the appellants on the findings of the learned Judge as regards the quantum of damages. Damages have been awarded on three out of six accounts claimed. These include damages to furniture to the extent of Rs. 1,150 odd, as to which the learned Judge refers to certain ledgers and balance-sheets which have not been printed. It has been urged that the balance-sheets are no evidence against the appellants. Rs. 25,000 has been awarded as damage to machinery, and it has been contended that no evidence was given as to this damage. Plaintiffs' first witness, however, did say in reply to a Court question that the damage to the Mill machinery was Rs. 18,000 and that to the machinery given by Government Rs. 7,000. As to this, it was urged that the lower court should not have put the question. But it is not suggested that the appellants were prevented from cross-examining

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the witness on the point after he had replied to the Court question. Rs. 37,000 and odd was awarded as damage on account of lands and buildings. This is based on a sale deed [Exhibit 2(*h*)] for Rs. 34,000 and vouchers for Rs. 5,000 or more for subsequent additions to the properties purchased besides the balance-sheets of the plaintiffs Company. Here again it is said that the balance-sheets are no evidence against the appellants. But the balance-sheets, whether in this connection or in connection with the furniture account, can be regarded in the light of claims made by the plaintiff Company against the appellants, and it does not appear that the appellants could not have subjected these claims to cross-examination. In our opinion, there is no room for interference with the quantum of damages awarded by the lower court. The result is that the appeal is dismissed with costs.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Wort and Dhavle, JJ.

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January, 18, 19, 20, 21. *February*, 1, 2. *May*, 6.

Contribution—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 82—*sale of mortgaged properties—consideration left with vendee and mortgagee—purchaser taking free from encumbrance, if liable to contribute Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order* XLI, *rules* 20 *and* 33—*necessary parties in a contribution suit—"contract to the contrary", whether includes a contract between the mortgagee and purchasers from mortgagor—interest pendente lite, whether in the discretion of the court.*

B mortgaged villages *T* and *L* along with other properties to *S* and subsequently sold them to *G* and also executed a

*Appeals from Original Decrees nos. 187, 165 and 196 of 1932, from a decision of Mr. Muhammad Shamsuddin, Subordinate Judge of Gaya, dated the 19th May, 1932.

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mortgage in his favour, but left the consideration for payment to *S* and other mortgagees. *G*, from whom the two villages ultimately passed to the plaintiff under an *ekrarnama* of his heirs and other transactions, did not pay the mortgagees who obtained decrees and the plaintiff had to pay. The plaintiff thereafter sued for contribution and impleaded as defendants the persons who were in possession of the other mortgaged properties and persons liable under the *ekrarnama*. The Subordinate Judge decreed the suit but exempted the purchasers who had purchased free from encumbrances:

Held, that as *G* had enough money in hand to pay off the mortgagees the defendants who had purchased free from encumbrances were not liable to contribute. *Shah Muhammad Abbas* v. *Muhammad Hamid*(1), relied on.

Ganeshi Lal v. *Charan Singh*(2), referred to.

The words "contract to the contrary" in section 82 of the Transfer of Property Act does not necessarily refer to a contract between the mortgagor and mortgagee, but may include a purchaser from the mortgagor.

Ramabhadrachar v. *Srinivasa Ayyangar*(3), *Thoppai M. Muthiah Bhagavathar* v. *T. V. Venkatrama Ayyar*(4) and *Khudavand Karim* v. *Narendra Nath*(5), referred to.

In a contribution suit it is necessary that all the parties should be before the court, and in such a suit the powers of the appellate court under rule 33, read with rule 20, of Order XLI will be used without any hesitation although the suit was based on more than one cause of action, namely, liability arising under section 82 of the Transfer of Property Act and under the *ekrarnama*.

Payne v. *British Time Recorder Co.*(6) and *Harendra Nath Singha Ray* v. *Purna Chandra*(7), referred to.

Interest *pendente lite* is a matter in the discretion of the court.

Bank of Bihar v. *Ramghulam Singh*(8), referred to.

(1) (1912) 14 Ind. Cas. 179.
(2) (1930) I. L. R. 52 All. 358; L. R. 57 Ind. App. 189.
(3) (1900) I. L. R. 24 Mad. 85.
(4) (1935) I. L. R. 59 Mad. 121.
(5) (1935) I. L. R. 58 All. 548.
(6) (1921) 2 K. B. 1.
(7) (1927) I. L. R. 55 Cal. 164.
(8) (1932) 14 Pat. L. T. 188.

Appeals nos. 187 and 196 by the defendants.

Appeal no 165 by the plaintiff.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

Manohar Lal (with him *Sarjoo Prasad, B. K. Prasad* and *R. K. Sinha*), for the appellants in Appeal no. 196.

A. B. Mukharji and *U. N. Banerji*, for the appellants in Appeal no. 187.

N. K. Prasad, II and *K. N. Lal*, for the appellants in Appeal no. 165.

Manohar Lall, Sarjoo Prasad, B. K. Prasad, S. N. Ray and *Rai Parasnath*, for the respondents in Appeals nos. 165 and 187.

A. B. Mukharji and *U. N. Banerji*, for the respondents in Appeals nos. 196 and 165.

N. K. Prasad, II and *K. N. Lal*, for the respondents in Appeals nos. 187 and 196.

R. K. Sinha, for the respondents in Appeal no. 165.

Syed Ali Khan, for the respondents in Appeals nos. 165, 187 and 196.

DHAVLE, J.—These appeals arise out of a suit for contribution.

Baijnath Prasad Singh, defendant no. 70, the owner of (certain shares in) mauzas Tungi Hasanpur and Latawar Faridpur, mortgaged them on the 25th of October, 1905, and again on the 21st November, 1905, along with the first thirteen properties mentioned in Schedule III of the plaint, to Rai Sahib Surju Lal, defendant no. 71, Babu Sri Lal, ancestor of defendants 1 to 6, and another Sri Lal, adoptive ancestor (father) of defendant no. 7. On the 23rd of

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December, 1907, the mortgagor sold the two villages Tungi Hasanpur and Latawar Faridpur to Gendan Singh, a money-lender (since deceased), from whom the plaintiff derives his title. On the same date Baijnath Prasad Singh executed a mortgage in favour of the same Gendan Singh. The consideration of the *kebala* and the mortgage (Ex. 5 and 7) was left with Gendan Singh to pay off six mortgages including those of the 25th of October and the 21st November, 1905. These two mortgages were, however, not paid off on the ground of the insufficiency of the money left in the hands of Gendan Singh and the mortgagees brought a suit in 1914 to enforce them and obtained a preliminary decree in 1915 and the final decree in 1918. In 1926 and 1927 the plaintiff had to pay Rs. 23,065-6-15 dams to save the two mauzas from sale in execution of the mortgage decree. In 1929 he brought the suit out of which these appeals arise, asking for contribution from defendants 1 to 58 as parties to whom the thirteen other mortgaged properties had passed. Contribution was also sought from defendants 59 to 67 for other reasons. Defendants 59 to 65 are descendants of Jagannath, a brother of Gendan's, and defendants 66 and 67 are descendants of Gendan. There was a third brother Fagu Singh, to whom the mauzas Tungi Hasanpur and Latawar Faridpur were allotted at a partition of the family in 1916, the *ekrarnama* (Ex. 2) providing, in view of the decree already obtained by the mortgagees upon the mortgages of October and November, 1905, that in case the properties be brought to sale in execution, the other two branches of the family would indemnify Fagu to the extent of two-thirds of Rs. 25,000-0-0, the value fixed for these properties at the partition. Plaintiff is Fagu's daughter's son, and received the two mauzas under a will executed by Fagu. He sought contribution from defendants 59 to 67 (along with the owners of the other properties) as the quondam part-owners of the two mauzas and in the alternative, i.e., if the other defendants should

be held to be free from liability, as persons bound by the special arrangement of the *ekrarnama* at the partition.

The principal grounds on which the suit was contested were that Gendan Singh had sufficient money left in his hands by the mortgagor to pay off the two mortgages and that therefore the plaintiff was entitled to no contribution at all from those defendants into whose hands the other thirteen properties had passed, and that several of these defendants were under no obligation to contribute because the properties had been conveyed to them free from encumbrance. The learned Subordinate Judge came to the conclusion that Gendan did have enough money to pay off the two mortgages, but that plaintiff was nevertheless entitled to contribution under section 82 of the Transfer of Property Act from the present owners of seven out of the thirteen properties. He found the other owners not liable for contribution on various grounds—and more particularly, defendants 8 to 10 (owners of properties nos. 3 and 4) and defendant no. 11 (owner of properties nos. 8 and 9) on the ground that these (four) properties had been conveyed to them free from encumbrance. As against defendants 59 to 67 the learned Subordinate Judge passed a decree for the whole of the money that plaintiff had had to pay *minus* the amount found due from the owners of the seven properties and *minus* also one-third of the rateable share of the two mauzas of Tungi Hasanpur and Latawar Faridpur.

Of the three appeals before us the one that has raised the most serious questions is First Appeal no. 187, which was preferred by defendants 59 to 67. The contentions advanced on their behalf were (*1*) that it was really immaterial to the liability under section 82 of Transfer of Property Act whether or not Gendan had enough money left with him by the mortgagor to pay off the two mortgages, but that in any case the lower court was wrong in holding that he

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had enough, (2) that defendants 8 to 10 and defendant 11 should not have been exempted because what they took was only the equity of redemption, and (3) that the liability of the appellants has been wrongly calculated.

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Dealing first with the question of fact raised in this appeal, there is a dispute regarding the amount that Gendan actually paid in satisfaction of the four mortgages (one referred to in his *kebala*, Ex. 5, and three specified in his mortgage bond, Ex. 7) out of the money left with him, and also about the amount payable on the two mortgages of October and November, 1905.

* * * * * *

[His Lordship then discussed the evidence on the record and proceeded as follows:]

In my opinion, the learned Subordinate Judge was quite correct in holding that Gendan had enough in hand on the mortgagor's account to pay off the bonds of October and November, 1905, and that Gendan was not entitled to withhold payment merely on account of the extra Rs. 1,425 which may well have been due to him from Baijnath.

On the question of law raised by Mr. Mukherji the present case is not distinguishable in principle from *Shah Muhammad Abbas* v. *Muhammad Hamid*(1) which, as the learned Subordinate Judge has said, "was not overruled or disapproved" but explained by their Lordships of the Judicial Committee in *Ganeshi Lal* v. *Charan Singh*(2). It is unquestionable that we cannot introduce any extraneous principle to modify the liability to contribution imposed by section 82 of the Transfer of Property Act. But, as Lord Tomlin further said in *Ganeshi Lal's* case(2), the decision in *Shah Muhammad Abbas's* case(1) may be justified on the footing that in that case there passed

(1) (1912) 14 Ind. Cas. 179.

(2) (1930) I. L. R. 52 All. 858; L. R. 57 Ind. App. 189.

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to the party, from whom the contribution was sought, the benefit of the contract by which the money was to be applied, so that he could say " I have a contract which frees me from the liability to contribution which the section would otherwise impose upon me. " No such plea is available to the appellants in this case. They were not parties to the contract of May, 1914, nor has the benefit of that contract passed to them in law or in equity. The facts of *Shah Muhammad Abbas's* case(1) were that the purchasers of mauza Bangaon who had contracted with the mortgagors to make a certain payment towards a mortgage of 1898, and to pay off a mortgage of 1899, on certain shares in mauza Jamalpur as well as Bangaon, had brought a suit for contribution against defendants who had subsequently purchased mauza Jamalpur " free from encumbrances". Contribution was in fact allowed, but the plaintiffs were debited with the amounts payable by them under their agreement or agreements with the mortgagors. The defendants were not parties to these agreements; but Chamier, J. had found that the plaintiffs had been supplied with funds for the express purpose of making payments towards those mortgages and that it was not the intention of any of the parties concerned, after the purchase of the plaintiffs, that Jamalpur and Bangaon should contribute rateably to the mortgage debts. The benefit of the contract between the plaintiffs and the mortgagors by which the money was to be applied by the plaintiffs was thus regarded by their Lordships of the Judicial Committee as having passed to the defendants who had purchased Jamalpur " free from encumbrances" and to free them (*pro tanto*) from the ordinary liability to contribution under section 82. In the present case defendants 8 to 10 and defendant 11 have been found by the lower court to be in the same position as the defendants in the case of *Shah Muhammad Abbas* v. *Muhammad Hamid*(1). They

(1) (1912) 14 Ind. Cas. 179.

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purchased free from encumbrance, and as Gendan is found to have had enough money in hand to pay off the bonds of October and November, 1905, their liability to contribution would be nil. Mr. Mukharji has argued that the "contract to the contrary" referred to in section 82 of the Transfer of Property Act must be a contract between mortgagor and mortgagee and not, as in the present case, a contract between the mortgagor and a purchaser from him, and has relied upon *Ramabhadrachar* v. *Srinivasa Ayyangar*(1), in support. The learned Judges did observe in this case that "the words 'contract to the contrary' were intended to apply to contracts between mortgagor and mortgagee—contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others only to be liable in the event of the security of the properties liable in the first instance being insufficient." But the question for actual decision before them was whether or not the plaintiff, who had purchased a part of the quarter share that had been taken by his vendor on a family partition between his father and three sons, together with one quarter of the mortgage debt, " was only entitled to contribution in respect of moneys paid by him in excess of his own liability for one quarter of the mortgage debt," or whether he could claim rateable contribution from the eighteenth defendant, a purchaser from the father who had raised the point. As to this, the learned Judges said " The proportionate liability of the members of the family *inter se* for the amount of the mortgage debt existed apart from any express contract which they may have chosen to make. The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assignees." This shows that notwithstanding their observation regarding " contracts to the contrary ", the learned Judges would have given effect to a contract, if there had been

(1) (1900) I. L. R. 24 Mad. 85.

any, which was binding between the plaintiff and the defendant from whom rateable contribution was claimed: *see* also *Thoppai M. Muthiah Bhagavathar* v. *T. V. Venkatrama Ayyar*[1] and *Khudavand Karim* v. *Narendra Nath*[2]. In any event, having regard to what was said in *Ganeshi Lal's* case[3], about the case of *Shah Muhammad Abbas*[4] the present must be regarded as a case, not indeed of a contract to the contrary within section 82, but of a contract between the mortgagor and Gendan his transferee, the benefit of which has passed to the defendants who made subsequent purchases free from encumbrance. Mr. Mukharji has argued that defendants 8 to 10 and defendant 11 could not but have known that the properties they were purchasing were in fact not free from the encumbrances of October and November, 1905. This may be conceded. For, the earliest of the sale deeds of these defendants is Exhibit A, which appears from the evidence of the recitals in Exhibits 5 and 7—we have not before us the recitals in Exhibit A, though we have been told that they are on the same lines—to have been part of the same transaction as these two deeds of Gendan : and defendants 8 to 10 made their purchase in 1921 long after the decree obtained by the mortgagees on the mortgage bonds of October and November, 1905. As against the mortgagees they clearly took only the equity of redemption ; but it is equally clear that as against the mortgagor and his representatives in interest they paid for and were to have the properties free from encumbrance. After Baijnath's arrangements with Gendan for the payment of the mortgages of October and November, 1905, it could not have been either in his contemplation or in the contemplation of any of his purchasers that the properties subsequently purchased should be subject to any contribution under section 82, having regard

(1) (1935) I. L. R. 59 Mad. 121.
(2) (1935) I. L. R. 58 All. 548.
(3) (1930) I. L. R. 52 All. 358; L. R. 57 Ind. App. 189.
(4) (1912) 14 Ind. Cas. 179.

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to the fact that they paid and he received the value not of the equity of redemption in the properties but of the properties themselves.

The appellants sought to fasten liability upon defendants 8 to 10 and defendant 11 because of their liability under the *ekrarnama* (Exhibit 2) to make good the loss that would fall on the plaintiff to the extent of two-thirds of Rs. 25,000. Mr Manohar Lal who appears for defendants 1 to 11 argued *in limine* that the appellants were not entitled to raise the question of the liability of defendants 8 to 10 and defendant 11 as the plaintiff who has preferred appeal no. 165 is content with the decision of the lower court in their favour and has not appealed on that point. He also contended that defendants 1 to 7 have been unnecessarily dragged to this Court. But the suit was a suit for contribution, and in such suits it is so necessary that all the parties should be before the Court that the powers of the appellate Court under rule 33, read with rule 20, of Order XLI will be used without any hesitation. Upon this Mr. Manohar Lal contended that Order XLI, rule 33, is not intended to apply to cases which, like the present case, are brought on more than one cause of action—the liability of the purchaser defendants arising under section 82 of the Transfer of Property Act, and the alternative liability of the appellants under the *ekrarnama*. But suits on such alternative grounds are specifically provided for in Order I, rule 3—*see* also *Payne* v. *British Time Recorder Co.*(1), referred to by my learned brother during the arguments, and *Harendra Nath* v. *Purna Chandra*(2) where the law on the subject was elaborately discussed. Appeals in such suits have been dealt with under Order XLI, rule 33, in several reported decisions, nor is there anything in the rule or in the illustration to it to confine its application to cases where there is but one cause of action or ground of

(1) (1921) 2 K. B. 1.
(2) (1927) I. L. R. 55 Cal. 164.

liability against the defendants. In my opinion, defendants 1 to 6 were necessary parties to the appeal, and defendant 7 a proper, though not a necessary, party ; and the appellants were entitled to raise the question resisted by Mr. Manohar Lal.

Much need not be said regarding another point raised by Mr. Manohar Lal, who argued that the lower court was wrong in holding that the mortgagor and Gendan had not assured defendant no. 11 that the properties purchased by him were free from all encumbrances and that the suit was not barred as against defendant no. 11 by estoppel. As I have already observed, the first sale deed of defendant no. 11, Exhibit A, appears to have been part of the same transaction as the sale deed and the mortgage bond of Gendan. It was no doubt executed a couple of days later, but was registered at the same time as the other two deeds ; and all the three deeds bear the attestation of Gendan or defendant no. 11 as the case may be. The oral evidence that Gendan had brought defendant no. 11 into the transaction is not very satisfactory by itself, but is strongly supported by the recitals in the deeds in favour of Gendan. At the same time, the case is one not so much of estoppel grounded on the conduct of Gendan as of a covenant by Baijnath in favour of defendant no. 11 that the properties sold were free from encumbrance. Except as against the mortgagees defendant no. 11 clearly purchased not the equity of redemption in the properties but the properties themselves.

The only point that remains to be dealt with in this appeal (no. 187) relates to the calculation of the liability of the appellants. In calculating the rateable shares of the fifteen mauzas, the learned Subordinate Judge had to take into account no less than twelve other mortgages to which one or more of those properties were subject, and his calculations on this point have not been assailed before us. He found that the rateable share of the seven properties that were liable

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to contribution under section 82 of the Transfer of Property Act was Rs. 8,882-4-0, and that of Tungi Hasanpur and Latawar Faridpur Rs. 3,112-1-0. Deducting one-third of this last amount as plaintiff's own share of contribution, the learned Judge held that plaintiff was entitled to receive Rs. 22,028-1-1 dam; and out of this sum he ordered the purchasers of the seven properties to contribute Rs. 8,882-4-0, and defendants 59 to 65 and defendants 66 and 67 to pay the balance in equal shares. It has been contended for the appellants that under the *ekrarnama* plainiff's liability was not limited to one-third of the rateable share of Tungi Hasanpur and Latawar Faridpur but extended to one-third of the entire loss that would fall on the plaintiff as the owner of those mauzas. The learned advocate for the plaintiff endeavoured to meet this by urging that it was conceded by defendants 59 to 67 in the lower court that plaintiff was entitled to receive from these defendants so much of the sum he had had to pay " as is dismissed out of the claim made against defendants 1 to 58 ". The judgment of the lower court on issue no. 8 shows that some kind of concession was made, but it is quite clear that it has not been very correctly expressed because the actual order of the lower court leaves the plaintiff to bear one-third of the rateable share of his two mauzas, which is inconsistent with the concession as put by the learned Judge. In any case it was not a concession of fact. On the terms of the *ekrarnama*, it seems clear that plaintiff must bear one-third of the amount that he is found not entitled to recover from defendants 1 to 58, and it has not been argued before us that the liability of the mauzas bound to contribute should be recalculated after leaving out the other mauzas. Deducting Rs. 8,882-4-0 from Rs. 23,065-6-15 dams, we get Rs. 14,183-2-15 dams. The share of plaintiff, defendants 59 to 65 and defendants 66 and 67, each, out of this balance is Rs. 4,727-11-12 dams, and this should have been the amount awarded to the plaintiff against these

two sets of defendants instead of Rs. 6,572-15-6 dams, the figure adopted by the lower court.

To the extent indicated in the last paragraph F. A. 187 succeeds. I would allow the appellants costs of this Court in proportion to their success.

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F. A. 165 of 1932 was preferred by the plaintiff on the ground that he should have been allowed interest *pendente lite*. The learned advocate for the appellant has cited *Bank of Bihar, Ltd.* v. *Ramghulam Singh*(1). Interest *pendente lite* is, however, a matter of discretion and in the present case there were various circumstances, though the learned Judge below has not referred to them, which may well have led the court to say nothing about such interest. In the first place, interest up to the date of suit was allowed at 9 per cent. per annum with annual rests not only as against defendants 59 to 67 but also against the owners of the seven properties, even though there was no written contract making them liable to pay interest and it was not proved that any demand of payment had been made from them in writing. Secondly, the interest claimed by the plaintiff was 2 per cent. per month, and though this is the rate given in the *ekrarnama*, it was plaintiff's own case, and it was admitted by Ramdeo Singh for defendants 59 to 67, that he had paid off the mortgage decree by raising a loan at 9 per cent. per annum. In my opinion, the plaintiff has failed to make out any sufficient reason for our interfering with the order passed by the lower court in this respect.

One cross-objection was filed in this appeal by defendant no. 8, and another by defendant no. 11, claiming that the lower court had erred in not awarding costs to them against the plaintiff. The suit was dismissed as against them, but the question of costs was apparently overlooked. There does not appear

(1) (1932) 14 Pat. L. T. 133.

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to be any reason why they should be deprived of their costs. I would modify the decree of the lower court in this respect. It appears from the decree that their costs were calculated as if they were among the defendants who had lost and that these costs included a pleader's fee on the whole amount claimed in the suit. In calculating their costs the pleader's fee must be computed on the amount claimed from them by the plaintiff. There is also an expert's fee put at Rs. 1,040-0-0 included in the "Costs of Defendant no. 11 Lost". This was apparently the fee of a handwriting expert whose evidence we find printed in the third appeal before us, no. 196. It is clear from the judgment of the lower court that little enough turned on the evidence of this expert, and the fee paid seems grossly out of proportion to the standing of the expert or the importance of the evidence. I would reduce it to Rs. 100.

I would, therefore, dismiss this appeal no. 165, with costs and allow the cross-objections, defendants 8 to 10 and defendant 11 getting their costs in both courts in proportion to their success.

The third appeal before us, no. 196, is preferred by defendants 13 to 27 who were impleaded as owners of properties nos. 6 and 7 in Schedule III of the plaint. The learned advocate for these appellants has urged that there should have been no decree against defendant no. 13 because, as stated in paragraph 2 of his written statement (at page 19 of Parts I and II of the paper book), he had made a gift of the properties to defendant no. 16 in 1901. Neither the deed of gift nor the deed of sale that preceded it was produced. The evidence of Rajeshwar Lal, which has been printed for the purposes of this appeal, appears from his cross-examination to be mere hearsay. The appeal, therefore, fails, and I would dismiss it with costs.

The only other matter that requires to be referred to is an application put in on behalf of defendant no. 56 in appeal no. 187 that the decree should be

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"made clear", as the learned advocate put it, by providing that as against this petitioner the plaintiff is to realise his decree by the sale of the property no. 13 of the third schedule, with which he is concerned. It is true that there was a prayer in the plaint regarding the sale of the properties in the schedule in case of default in payment by the purchasers. But this prayer was evidently given up during the trial. It was, at any rate, not allowed by the lower court, and the plaintiff had not appealed on the point. If the applicant was really aggrieved by the refusal of the lower court to confine the plaintiff to a sale of the porperty, he should have appealed. The matter is not one of mere amendment, nor has the plaintiff even now asked for this particular relief. I would, therefore, dismiss the application.

WORT, J.—I agree.

Appeals nos. 165 *and* 196 *dismissed.*

Appeal no. 187 *allowed in part.*

Cross-objections allowed.

J. K.

APPELLATE CRIMINAL.

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June, 24, 28, 29.
July, 1, 2, 20.

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Penal Code, 1860 (*Act XLV of* 1860), *sections* 196 *and* 211—*making false charge against Subordinate Judge before District Judge—sanction by local Government—complaint by District Judge, whether necessary under section* 195 (1) (b) *of the Code of Criminal Procedure*, 1898 (*Act V of* 1898)—*District Magistrate, whether can take cognizance under section* 190 (*c*).

*Government Appeal no. 6 of 1937, from a decision of A. P. Mukharjee, Esqr., I.C.S., Sessions Judge of Purnea, dated the 30th September, 1936.

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K filed an application for permission to sue as a pauper before the Subordinate Judge who rejected the same and thereafter he sent a petition to Mr. Chaudhuri, the District Judge, addressed to the Governor in Council for permission to prosecute the Subordinate Judge for an offence under section 196 of the Penal Code. Mr. Chaudhuri enquired into the allegations and found them to be false and forwarded the petition to the Governor in Council. The Governor in Council declined to sanction the prosecution and directed the Public Prosecutor to move the District Judge to make a complaint in writing against *K* under section 195 (*1*) (*b*) for having committed an offence under section 211 of the Penal Code and in case the District Judge was of opinion that no complaint was necessary to make the complaint himself. The Public Prosecutor moved the District Judge and Mr. Mukharji, the successor in office of Mr. Chaudhuri, made a complaint in writing to the District Magistrate who took cognizance of the case, and transferred it to a Deputy Magistrate for trial and *K* was convicted, but acquitted on appeal by the Sessions Judge.

No criminal court can take cognizance of an offence under section 196 of the Penal Code against a Subordinate Judge without the sanction of the local Government under section 197 of the Code of Criminal Procedure and without a complaint in writing by the District Judge under section 195 (*1*) (*b*).

Held, that making false allegations against the Subordinate Judge to the District Judge who had statutory authority over him with the intention of setting the criminal law in motion amounted to the making of a false charge within the meaning of section 211 of the Penal Code, 1860. But as the false statement was not made in or in relation to any proceeding in court the complaint by the District Judge was invalid.

Held, that as section 476 of the Code was inapplicable, there was nothing to prevent the District Magistrate from taking cognizance of the offence under section 190(*c*) of the Code and the trial was not without jurisdiction.

Appeal by the local Government under section 417 of Code of Criminal Procedure, 1898.

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The facts of the case material to this report are set out in the judgment of Dhavle, J.

Government pleader, for the appellant.

S. M. Gupta, for the respondent.

DHAVLE, J.—Kumar Singh or Kumar Singh Lal who described himself as " by profession Mukhtar, practising as Mukhtar in Chamber, at Purnea ", filed a plaint claiming damages for defamation from Babu Durga Prasad, a senior member of the Purnea Bar, together with an application for permission to sue as a pauper. The application was opposed by the opposite party and also by Government, and was dismissed by Mr. S. A. Fath, Subordinate Judge of Purnea, to whom it fell to dispose of it. Kumar Singh thereupon made a petition to the Governor in Council through the District and Sessions Judge, Purnea, praying for sanction under section 197 of the Code of Criminal Procedure to prosecute the Subordinate Judge, under section 196 of the Indian Penal Code for corruptly using the evidence of Ram Khelawan Mistry (a witness for the opposite party in the pauper proceedings) as true, knowing it to be false. The petition was sent by post in an envelope addressed to the then District and Sessions Judge by name. Mr. P. C. Chaudhuri, the District Judge, noticed this and called upon Kumar Singh to appear and state the facts fully and swear an affidavit in support of them. Kumar Singh appeared and stated that he had addressed the envelope personally to Mr. Chaudhuri as the petition was of a confidential nature and that the petition was really meant for the Court of the District Judge. He also offered to make a statement in support of the charges made by him against the Subordinate Judge in the petition, and Mr. Chaudhuri accordingly recorded his statement. Kumar Singh also swore an affidavit before the Sheristadar of the District Judge in support of his allegations, but Mr. Chaudhuri required an affidavit sworn before a first class Magistrate. Kumar Singh

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did not supply this nor did he appear again before Mr. Chaudhuri. After looking into the papers Mr. Chaudhuri decided that Kumar Singh's application be forwarded to Government for orders with a copy of his orders in which he had arrived at the conclusions that there was no reasonable ground whatever for attributing a corrupt intention to the Subordinate Judge in dismissing Kumar Singh's pauper application, that Kumar Singh ought to be prosecuted under section 211 of the Indian Penal Code, and that Mr. Chaudhuri would have had no hesitation in filing a complaint under that section but for the fact that the petition was really addressed to the Governor in Council. The petition together with Mr. Chaudhuri's order was actually forwarded to Government by Mr. Chaudhuri's successor Mr. A. P. Mukharji. The Governor in Council declined to sanction the prosecution of Mr. S. A. Fath under section 196 of the Indian Penal Code or under any other section of the Indian Penal Code, and further directed the Public Prosecutor of Purnea to move the District and Sessions Judge to make a complaint against Kumar Singh under section 211 of the Indian Penal Code, acting under section 195 (*1*) (*b*) of the Code of Criminal Procedure. If the District Judge should decide that no such complaint was necessary on the ground that the charge against the Subordinate Judge was not made in relation to a proceeding in court and if he should also decline to make a complaint in his capacity of a public servant concerned in a false charge against his subordinate, the Public Prosecutor was ordered himself to file "a complaint by direction of Government in the Magistrate's Court". The Public Prosecutor accordingly moved Mr. A. P. Mukharji, the District Judge, who made a written complaint to the District Magistrate of Purnea for Kumar Singh's prosecution under section 211 of the Indian Penal Code. The District Magistrate took cognizance and transferred the case for disposal to a Deputy Magistrate, from whose file

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it was later on transferred to the file of another Deputy Magistrate. Maulavi Shah Wali-ur-Rahman, a Deputy Magistrate of the first class, thus tried the case. He found that the Subordinate Judge had not corruptly used the evidence of Ram Khelawan Mistry as true, knowing that it was false, and that Kumar Singh had falsely charged him with intent to cause injury to him. After overruling the contentions of law that were advanced before him, he held that Kumar Singh could " very well be convicted under section 211 of the Indian Penal Code or even under section 182 of the Indian Penal Code ". The charge as framed was, however, one under section 211 of the Indian Penal Code, and on this charge the Magistrate found Kumar Singh guilty, awarding a sentence of eighteen months' rigorous imprisonment.

Kumar Singh appealed, and Mr. Mukharji who heard the appeal came to the same conclusion on the facts as the trying Magistrate. He, however, held that the complaint of the District Judge was not legal as section 476 of the Code of Criminal Procedure was inapplicable, that there was no offence committed under section 211 because the false charge of an offence under section 196 of the Indian Penal Code was made to Mr. Chaudhuri who had no statutory standing in the matter [*Banti Pandey* v. *The King Emperor*(1)] and that section 182 of the Indian Penal Code was also inapplicable because the complaint was made not by Mr. Chaudhuri but by his successor in office [*Kantir Missir's case*(2)] and also because the District Judge had no lawful power which he could use to the injury or annoyance of the Subordinate Judge under him. He accordingly allowed the appeal and set aside the conviction and sentence passed upon Kumar Singh.

Against this acquittal, Government have filed the present appeal under section 417 of the Code of Criminal Procedure.

(1) (1929) 12 Pat. L. T. 109.
(2) (1929) 11 Pat. L. T. 88.

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There is no dispute that Kumar Singh sent the petition (Ex. 17) to the Governor in Council through the District and Sessions Judge of Purnea, in which sanction under section 197 of the Code of Criminal Procedure is prayed for to prosecute Mr. Fath, the Subordinate Judge, for corruptly using (in the proceedings upon Kumar Singh's pauper application) the evidence of Ram Khelawan Mistry as true, knowing it to be false. Both the lower courts have come to the conclusion on the facts that the accusation was groundless and false and that an offence under section 211 was made out against Kumar Singh. This is not accepted by Kumar Singh who has urged that at any rate he reasonably believed that Mr. Fath had corruptly used Ram Khelawan's evidence as true. I propose, however, first to deal with the law points in the case.

The charge framed against Kumar Singh was—

"That you on or about the 1st day of August, 1935, at Purnea with intent to cause injury to Mr. S. A. Fath, Subordinate Judge at Purnea, falsely charged the said Mr. S. A. Fath in your petition, dated the 29th July, 1935, to His Excellency the Governor of Bihar and Orissa in Council through the District and Sessions Judge of Purnea, with having committed an offence under section 196 of the Indian Penal Code, to wit, having corruptly used as true evidence the evidence of witness Ram Khelawan Mistry in Miscellaneous Pauper Case no. 45 of 1934 (*Kumar Singh* v. *Babu Durga Prasad*) in the court of the Subordinate Judge of Purnea, which he (Mr. S. A. Fath) knew to be false, knowing at the time that there was no just or lawful ground for such charge against the said Mr. S. A. Fath, and thereby committed an offence punishable under section 211 * * *".

Now section 211 deals in the first part with two alternative, (*1*) instituting or causing to be instituted any criminal proceedings against a person and (*2*) falsely charging any person, while the second and graver part of the section deals with a case in which

"such criminal proceeding is instituted on a false charge of an offence punishable with * * * imprisonment for seven years * * *".

It may be noticed in passing that the charge under section 196 of the Indian Penal Code against Mr. Fath,

if made out, would have been punishable with imprisonment for seven years. Under section 197 of the Code of Criminal Procedure, however, no court could, except with the previous sanction of the local Government, have taken cognizance of any offence alleged to have been committed by the Subordinate Judge while acting in the discharge of his official duty. The Governor in Council having refused sanction, there could be no cognizance taken and no criminal proceedings instituted against Mr. Fath in respect of the accusation made by Kumar Singh. But this was not the only apparent bar to Kumar Singh's institution of criminal proceedings against the Subordinate Judge. His allegation was that Mr. Fath had committed an offence under section 196 of the Indian Penal Code in the pauper proceeding in his court, and this section is among those mentioned in section 195(*1*) (*b*) of the Code of Criminal Procedure. No court could thus have taken cognizance of the offence alleged except on the complaint in writing of the court of the Subordinate Judge (which would obviously have been out of question in this case) or of some other court to which such court was subordinate. Had Government come to the conclusion that the prosecution ought to be sanctioned, they could under sub-section (*2*) of section 197 have determined the person by whom, ... the offence or offences for which the prosecution of the Subordinate Judge was to be conducted and could also have specified the court before which the trial was to be held; but in view of the particular bar arising in the case from section 195 (*1*) (*b*) action would also have had to be taken to move the District Judge as presiding in a court to which the court of the Subordinate Judge was subordinate to make a complaint of the offence in writing. If this aspect of the matter had been borne in mind, it may be doubted whether the learned Sessions Judge would have applied to this case the observations made in *Banti Panday's* case(1) and other

(1) (1929) 12 Pat. L. T. 109.

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cases in which no question of sanction or complaint by a court or public servant arose, and whether he would have held that the District Judge had no statutory standing in the matter of the charge or accusation made by Kumar Singh against Mr. Fath.

DHAVLE, J. Although section 211 of the Indian Penal Code speaks of falsely charging any person with having committed an offence, neither the Penal Code nor the Code of Criminal Procedure defines what constitutes the making of a " charge " of an offence. It is at the same time settled law that the expression " falsely charges " must be construed along with the words which speak of the institution of proceedings in the earlier part of the section, so that the test is " whether the person who made the statement which is alleged to constitute the charge did so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed " [*See Zorawar Singh* v. *Emperor*(1)]. An accusation made to a person who has nothing to do under the law with setting the criminal law in motion would thus not amount to a charge within the section. In *Empress* v. *Jamoona*(2) where the question was whether there could be a conviction under the section in respect of a false charge or allegation of rape made against a non-commissioned officer to the Station Staff Officer, Mitter and Maclean, JJ. held that the section had no application as the Station Staff Officer had neither magisterial nor police powers. The learned Judges went on to observe—

" We do not think it is unduly refining the words of the section to say that the false charge must be made to a court or to an officer who has powers to investigate and send up for trial."

(1) (1911) 11 Ind. Cas. 617.
(2) (1881) I. L. R. 6 Cal. 620.

The language goes further than was probably meant, as Mr. Mayne commented (*see* his Criminal law of India, paragraph 376, third edition). In *Karim Buksh* v. *Queen-Empress*(1)—a case which has been repeatedly followed in this and other High Courts—a Full Bench of the Calcutta High Court held that by lodging at the police-station a false information of mischief by fire under section 436, Indian Penal Code, the appellant had committed an offence falling within the second part of section 211 of the Indian Penal Code—instituting a criminal proceeding on a false charge, etc. Wilson, J. in delivering the judgment of the Full Bench dealt with the distinction to be made under section 211 of the Indian Penal Code between instituting proceedings, falsely charging, and instituting proceedings on a false charge. After referring to proceedings under sections 107 and 109 of the Code of Criminal Procedure as apparently criminal proceedings which did not necessarily involve a charge of any offence, the learned Judge said—

" On the other hand, a charge to the police of a non-cognizable offence may very possibly be a charge within the meaning of the section, but could hardly be called the institution of Criminal proceedings. So a charge made to the Judge of a civil court, or to public officers of other kinds, in order to obtain sanction to prosecute, may well be a charge, but is not the institution of criminal proceedings."

The latter half of this passage is relied on by the Government Pleader. It was also pointed out in this case that there is no mode by which a private accuser can institute criminal proceedings except by making a charge; and reference was made to two modes of putting the criminal law in motion—giving information of cognizable offence to the proper officer of police and making a complaint to a (competent) magistrate.

(1) (1888) I. L. R. 17 Cal. 574, F. B.

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The reference was not altogether exhaustive as the Code of 1882 then in force provided for complaints by courts on lines more or less similar to those now found in sections 195 (*1*) (*b*) and (*c*) and 476 and private parties could move the courts to make such complaints and thus bring about the institution of criminal proceedings.

The proposition that a false charge must be made to an officer who has power to investigate and send it up for trial was accepted as perfectly sound in *Amanat Ali* v. *King-Emperor*(1), another case relied on by Kumar Singh. This was done on the authority of *Empress* v. *Jamoona*(2) (already referred to) but the actual point decided merely was that the breach of trust alleged against the Sub-Deputy Collector not being so related to his official capacity as to attract the operation of section 197 of the Code of Criminal Procedure, the contention could not be accepted that this section was a bar to the trying magistrate taking cognizance. Another case relied on for Kumar Singh is *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetti*(3), in which the majority of the Full Bench held that a complaint of dacoity made to a village magistrate (the village headman of section 45, Criminal Procedure Code) amounts to a "charge" and is also an institution of criminal proceedings within section 211 of the Indian Penal Code. This case was cited in *Banti Panday's* case(4) and is the basis of the rule formulated in the latter case that a false charge within the meaning of section 211 of the Indian Penal Code must be made to a competent magistrate or other person with a statutory standing in the matter. But this was said in a case where a dying declaration, which did not amount to

(1) (1929) 33 Cal. W. N. 1058.
(2) (1881) I. L. R. 6 Cal. 620.
(3) (1909) I. L. R. 32 Mad. 258, F. B.
(4) (1929) 12 Pat. L. T. 109.

a complaint, was recorded by a second class magistrate who had no power to take cognizance. No question arose in that case regarding the effect of allegations of an offence made to a public servant or a court without whose complaint in writing cognizance cannot be taken by any court of the offences specified in the three clauses of section 195 (*1*) of the Code of Criminal Procedure. But it may be pointed out that the words used " a competent magistrate or other person with a statutory standing in the matter " are comprehensive enough to include the public servant or Court referred to in section 195 (*1*) of the Code of Criminal Procedure vis-a-vis private persons or parties aggrieved. Before the amendments of this Code in 1923 it was open to civil and revenue as well as criminal courts when the offences specified in section 195 (*1*) (*b*)—to take only one clause out of the three by way of example—were committed in or in relation to any proceedings in such courts or in some Subordinate court, not only to set the criminal law in motion themselves by making a complaint as they can do even now (by a written complaint), but also to grant sanction to prosecute and thus leave the institution of a criminal proceeding in the hands of an applicant. But the applicant would have to allege an offence before he could be given sanction to prosecute, and I cannot conceive how it could have been said in such a case that no charge was made within the meaning of section 211 merely because the court in giving sanction exercised neither magisterial nor police powers including the power to send up for trial. The authority to give such sanction is moved with the object of setting the criminal law in motion and acts in furtherance of that object when it sees fit to do so. Allegations of an offence made to such an authority for the purpose of obtaining sanction to prosecute would not amount to the institution of criminal proceedings, but would certainly, as I regard the matter, amount to the making of a charge within the meaning of section 211.

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Under the present Code of Criminal Procedure, the court of the District Judge could not be asked to sanction, nor sanction, the prosecution of the Subordinate Judge for the alleged offence under section 196 of the Indian Penal Code. It could only proceed by way of complaint, but no court could have taken cognizance of the offence on such a complaint except with the sanction of the local Government. This, however, does not affect the question whether Kumar Singh's allegations to the District Judge that Mr. Fath had committed an offence under section 196 of the Indian Penal Code did or did not amount to the making of a charge within the meaning of section 211 of the Indian Penal Code. Kumar Singh's object in making the allegations (if any) to the District Judge was to set the criminal law in motion, and the District Judge had statutory power to further that object, though the sanction of the local Government was also necessary before any criminal court could take cognizance of the offence.

It has been contended that the allegations in Kumar Singh's petition of the 29th July, 1935, were addressed to the local Government and not to the District Judge and that therefore the charge on which he has been tried and which gives as the date of his offence the 1st of August 1935, the day on which the petition was placed before the District Judge is not made out as no accusation against the Subordinate Judge was—so it is argued—made to the District Judge. This argument seems to have impressed the learned Sessions Judge, though he preferred to rest his decision on the ground that even if Kumar Singh made any allegations to the District Judge, they could not amount to charging the Subordinate Judge with an offence because the District Judge had no statutory standing in the matter. I have already indicated how the District Judge did have a statutory standing in the matter; he would plainly

have been guilty of a grave dereliction of duty if he had not in due course inquired into those allegations and proceeded (if the facts warranted it) to make the complaint required under section 195 (*1*) (*b*) after obtaining the sanction of Government even if Kumar Singh had not asked for it. The petition to the local Government was deliberately addressed " Through the District and Sessions Judge ", and Kumar Singh told Mr. Chaudhuri (as the latter noted in his ordersheet on the 5th August) that the petition was really meant for the court of the District Judge. Paragraph 7 of the petition also read—

" An inquiry, into the truth of the allegations by the District Judge, Purnea is prayed before sanction under section 197.....is given to the petitioner."

The learned Sessions Judge was apparently inclined to accept the contention that this only meant a prayer that the Governor in Council might, if he so pleased, order an inquiry by the Disrtict Judge; but this view would completely ignore Kumar Singh's own statement that the petition was really meant for the court of the District Judge. It is plain that he did not intend to ask the District Judge merely to forward the petition like a Post Office. The conclusion is, therefore, irresistible that the petition conveyed, and was intended to convey, allegations against Mr. Fath to the District Judge no less than to the local Government. The District Judge was deliberately brought into the chain of correspondence in order that the Subordinate Judge might be prosecuted, and the " intention and object " of Kumar Singh in making those allegations was to set the criminal law in motion against Mr. Fath. It follows that Kumar Singh did charge Mr. Fath before the District Judge with an offence under section 196 of the Indian Penal Code within the meaning of section 211 of the Indian Penal Code.

In this view it is unnecessary to deal in detail with the question whether Kumar Singh's allegations to the District Judge were rightly regarded by the

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learned Sessions Judge as affording to Mr. Mukharji himself as District Judge no ground for proceeding under section 182 of the Indian Penal Code. Relying on *Kantir Missir's* case(1) the learned Sessions Judge holds in the first place that a District Judge cannot proceed under section 195 (*1*) (*a*) of the Code of Criminal Procedure in respect of information given to his predecessor in office. But what was ruled in that case was that as information had been given to Sub-Inspector D. Mukharji, the officer in charge of the Police-Station, Junior Sub-Inspector Ram Singh who had investigated the case had no power to make a complaint under section 182 of the Indian Penal Code as he was not the public servant to whom the information had been given. The complaint prescribed in section 195 (*1*) (*a*) is a simple duty and responsibility and must not be mistaken for a personal privilege; and there is nothing in the ruling in *Kantir Missir's* case(1) against a successor in office of the public servant to whom information was given making the complaint under section 182 of the Indian Penal Code—*see* also section 18 of the General Clauses Act (X of 1897) and section 559(*1*) of the Code of Criminal Procedure. The only other reason given by the learned Sessions Judge for his view was that it cannot be said that the District Judge has lawful power which he can use to the injury or annoyance of a Subordinate Judge under him. As an example of the power he meant, the learned Sessions Judge referred to the power of a police officer to arrest, make a house search and send up a person for trial. But he overlooked the fact that under section 24 of the Code of Civil Procedure and section 22(*2*) of the Bengal, Assam, etc. Civil Courts Act (XII of 1887) the District Judge has power of his own motion to transfer suits and appeals pending in the file of a Subordinate Judge to some other competent court, and the exercise of such a power by the District

(1) (1929) 11 Pat. L. T. 88.

Judge, on receiving information about corruption on the part of a Subordinate Judge would manifestly be to the annoyance, if not also to the injury, of the Subordinate Judge. I do not propose to take notice of other contentions raised before us regarding the applicability of section 182 of the Indian Penal Code in the circumstances of this case; for after all Kumar Singh was charged with and convicted of an offence under section 211 of the Indian Penal Code, and this is the conviction which has been set aside by the lower appellate court.

The next question is whether the District Judge was competent to complain of an offence under section 211. It will be noticed that this section is also mentioned (like section 196 of the Indian Penal Code) in section 195(*1*)(*b*) of the Code of Criminal Procedure. No court could, therefore, have taken cognizance of the offence without the complaint of the District Judge, if the offence had been committed in or in relation to a proceeding in his court; and the complaint would in that case have had to be made in accordance with section 476 of the Code of Criminal Procedure. The District Judge could also have complained under section 476A of the Code of Criminal Procedure if the offence under section 211 of the Indian Penal Code had been committed in or in relation to a proceeding in the court of the Subordinate Judge. Now it would appear that no offence under section 211 could be said to have been committed in or in relation to the only proceeding before the Subordinate Judge, namely, the proceeding on Kumar Singh's pauper application, for otherwise a prosecution would have been possible on a complaint by the Subordinate Judge, even though the offence under section 211 arose out of the petition to the local Government through the District Judge which, though it related to the pauper proceeding, never came before the Subordinate Judge at all. As to the District Judge the offence under section 211 was constituted by the allegations in the petition of the 29th of July, 1935, and was repeated

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in Kumar Singh's voluntary statements to the District Judge on the 5th of August, 1935. The charge as framed sets out the former. Mr. Chaudhuri, though informed by Kumar Singh that the petition was "really meant" for the court of a District Judge, does not seem to have started a judicial proceeding on it but dealt with it as an administrative matter, the reason apparently being that Kumar Singh had only applied for the sanction of the local Government and had not asked the court of the District Judge to make a complaint of the offence under section 196 with which he had charged Mr. Fath. The proceeding contemplated in section 195(*1*)(*b*) of the Code of Criminal Procedure seems to be a judicial proceeding [*See Daroga Gope* v. *King Emperor*(1)] and the refusal of the local Government to sanction the prosecution of Mr. Fath for an offence under section 196 or under any other section of the Indian Penal Code put it out of the queston for any District Judge of Purnea in future to start a judicial proceeding on Kumar Singh's allegations against Mr. Fath and make a complaint under section 476 of the Code of Criminal Procedure when no criminal court could even take cognizance of the offence. The learned Sessions Judge has shown how, when he himself was asked to complain and did complain, the matter was dealt with as if section 476 of the Code of Criminal Procedure was applicable; and he holds that "as a matter of fact the section was not applicable because the offence (under section 196, Indian Penal Code) was not committed in any proceeding or in relation to any proceeding in Court". In this he was clearly right. But it is difficult to say what exactly he took to be the effect of this finding. If the offence was not committed in or in relation to any proceeding in court, the bar of section 195(*1*)(*b*) did not apply and Kumar Singh could be prosecuted under section 211 in any of the ordinary modes of prosecution. The complaint forwarded by Mr. Mukharji as District Judge to the District Magistrate under section 476 of the Code of Criminal

(1) (1925) I. L. R. 5 Pat. 83.

Procedure of course ceased to be a valid complaint under the special procedure applicable to such an offence when committed in or in relation to a proceeding in court. But there was nothing to prevent the District Magistrate from proceeding under clause (*c*) of sub-section (*1*) of section 190 of the Code of Criminal Procedure as on " information received from any person other than a police officer or of his own knowledge or suspicion " that an offence under section 211 had been committed. The point of the decision in *Cheta Mahto* v. *King Emperor*(1) to which the learned Sessions Judge has referred, was that a District Magistrate who had received a complaint under section 476 of the Code of Criminal Procedure in circumstances where section 476 was not available was not incompetent to take cognizance under section 190(*1*)(*c*) and transfer the case to a Subordinate Magistrate. The learned Sessions Judge says that " as section 476 of the Code of Criminal Procedure was inapplicable, the complaint was not a legal one ". But he does not say that the trying Magistrate had no jurisdiction to try the case, and I have no doubt that the trial of Kumar Singh was not without jurisdiction.

Having disposed of the law points on which the lower appellate court set aside the conviction of Kumar Singh, I now turn to the facts. Kumar Singh's complaint (if I may use the word in a non-technical sense) in his petition of the 29th of July, 1935, was that in the pauper proceeding Mr. Fath had corruptly used the evidence of Ram Khelawan Mistri as true, knowing it to be false.

* * * * *

We are not now sitting in appeal on the judgment of the learned Subordinate Judge, but are concerned with the questions whether Ram Khelawan's evidence in the pauper proceeding was false, whether the

(1) (1925) I. L. R. 2 Pat. 459.

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DHAVLE, J.

Subordinate Judge used it as true though he knew it to be false, and whether he did so corruptly. I find it impossible, on the materials before the learned Subordinate Judge, to say that the evidence of Ram Khelawan was false; and the further evidence that Kumar Singh produced in this case only serves to show that Ram Khelawan's story was substantially true.

* * * * *

It was apparently not realised in the lower courts that the use of evidence contemplated in section 196 of the Indian Penal Code is use by a party or witness and not use by the court. When we referred to this during the arguments, it was urged on behalf of Kumar Singh that there could be no conviction under section 211 of the Indian Penal Code in respect of an impossible offence with which Kumar Singh had charged Mr. Fath. That the offence was impossible does not, however, do away with the fact that Kumar Singh with his practice as 'Mokhtear in Chamber' chose to charge Mr. Fath with it; section 196 may have been inapplicable, but corrupt orders by judicial officers are not outside the Indian Penal Code (*see* section 219 for instance), which no doubt was the reason why the local Government refused to sanction Mr. Fath's prosecution not only under section 196 but also under any other section of the Indian Penal Code.

It was also urged on behalf of Kumar Singh that even if Mr. Fath did not corruptly use Ram Khelawan's evidence to be true knowing it to be false, Kumar Singh had in the facts and circumstances of the pauper proceeding good reason honestly to believe that Mr. Fath had done so.

* * * * *

Taking all the circumstances relied on by Kumar Singh together it is impossible to hold that he had any just or lawful ground for the charge he made against Mr. Fath under section 196. It was of course for the

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prosecution to show that he had no such ground, and the onus was discharged by placing before the court what Mr. Fath had done in the pauper proceedings and why. What I am now dealing with is Kumar Singh's contention in opposing this appeal that he had reason to believe that Mr. Fath had acted corruptly, and I consider that the contention must be overruled.

DHAVLE, J.

The intent to cause injury to Mr. Fath is also clearly made out.

I would accordingly allow this appeal, set aside the appellate order of acquittal and restore the conviction and sentence passed by the trying Magistrate.

JAMES, J.—I agree.

J. K. *Appeal allowed.*

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Manohar Lal, J.

1937.

July, 22.

MOTI JHA

v.

JOWALA PRASAD MARWARI.*

Code of Civil Proccdure, 1908 (*Act V of* 1908), *Order XXI, rule 57 and Order XXXVIII, rule* 11—*" attached in execution ", whether covers " attachment before judgment " —attachment bcfore judgment, whether comes to an end upon the dismissal of application for execution under rule* 57.

Order XXI, rule 57, Code of Civil Procedure, 1908, lays down :—

" 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."

*Appeal from Original Order no. 195 of 1936, from an order of Babu Nirmal Chandra Ghosh, Subordinate Judge, Monghyr, dated the 29th of May, 1936.

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Held, that the phrase " attached in execution " occurring in rule 57 does not cover an attachment before judgment, and the words " the attachment shall cease " refer to an attachment in execution of the decree.

Therefore, an attachment before judgment does not come to an end upon the dismissal of an application for execution under that rule.

Shibnath Singh v. *Shaikh Saberuddin*(1), followed.

Arunachalam Chetty v. *Periasami Servai*(2), *Meyyappa Chettiar* v. *Chidambaram Chettiar*(3) and *Hari Sabaji Kamat* v. *Shrinivas Vithal*(4), not followed.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of the Court.

A. P. Upadhaya and *K. P. Upadhaya*, for the appellant.

S. Mustafi, for the respondent.

COURTNEY TERRELL, C. J. AND MANOHAR LAL, J.—This is an appeal by the judgment-debtor against an order of the Subordinate Judge of Monghyr, dated the 29th of May, 1936, passed in Miscellaneous Case nos. 15 and 49 of 1936 in an execution matter. It appears that the property of the judgment-debtor has been sold for a sum of Rs. 10,000 for recovery of balance of a decree that was passed against him sometime ago. It also appears that during the pendency of the money suit which resulted in this decree under execution, the plaintiff applied for and obtained attachment before judgment against the defendant-judgment-debtor, but this attachment was raised on the objection that certain idol was involved whose shebait the defendant was. The plaintiff having lost his rights which he had secured by attachment before judgment, instituted a suit under Order XXI, rule 63 of the Code of Civil Procedure which was

(1) (1928) I. L. R. 56 Cal. 416.
(2) (1921) I. L. R. 44 Mad. 902, F. B.
(3) (1923) I. L. R. 47 Mad. 483, F. B.
(4) (1931) I. L. R. 55 Bom. 693.

decided in his favour with the result that the attachment before judgment was revived. After this revival the decree-holder proceeded to execute his decree in the year 1933 when the execution in that year proceeded on part satisfaction. For the remaining portion of the decree another execution was started by the decree-holder on the 30th November, 1934, but in this execution the decree-holder simply proceeded to realise his decree by asking for the arrest of the judgment-debtor and did not make any prayer for execution of the decree by selling any immoveable property of the judgment-debtor. This execution, we are told, was dismissed for default on the 22nd of November, 1935, and the present execution was then lodged on December the 6th in 1935 in the course of which the properties were sold for a certain sum which is said to be inadequate in consideration of the real value of those properties.

Mr. A. P. Upadhaya in presenting this appeal before us has argued that the sale must be held to be void inasmuch as there was no attachment in these execution proceedings of the properties which were actually sold. His argument further is that inasmuch as the decree-holder allowed his previous execution of 1934 to be dismissed for default in November, 1935, it must be held in law that the attachment before judgment which had once failed by reason of an adverse decision in the money suit and which was revived by a decision in a regular suit under Order XXI, rule 63, came to an end. He relies upon two cases of the Madras High Court—*Arunachalam Chetty* v. *Periasami Servai*(1) and *Meyyappa Chettiar* v. *Chidambaram Chettiar*(2)—and also on a decision of the Bombay High Court in *Hari Sabaji Kamat* v. *Shrinivas Vithal*(3). The decision of the Calcutta High Court in *Shibnath Singh Ray* v.

(1) (1921) I. L. R. 44 Mad. 902, F. B.

(2) (1923) I. L. R. 47 Mad. 483, F. B.

(3) (1931) I. L. R. 55 Bom. 693.

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COURTNEY TERRELL, C.J. AND MONOHAR LAL, J.

Shaikh Saberuddin(1) has been brought to our notice. In that Calcutta case Sir George Rankin has clearly laid down after an examination of the very rulings relied upon by the learned Advocate before us, that "there is nothing, however, in rule 11, Order XXXVIII, to give colour to the view that for the purposes of rule 57, Order XXI, 'attached in execution' is a phrase that covers 'attachment before judgment'." We respectfully agree with this exposition of law. The very language of rule 57 of Order XXI is abundantly clear when it enacts

> "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..... Upon the dismissal of such application the attachment shall cease".

It is to be noticed that the legislature has used the words "the attachment shall cease". In our opinion the words 'the attachment' must mean the attachment referred to above, that is to say, the attachment in execution of the decree.

Another argument presented to us was that there has been some prejudice by reason of the fact that the properties had been sold for a lesser sum than could reasonably have been realised by any kind of sale. We are satisfied upon a consideration of the evidence in the case that the appellant can have no real grievance upon this score.

The result is that the appeal fails on both points and is dismissed with costs.

S. A. K.

Appeal dismissed.

(1) (1928) I. L. R. 56 Cal. 416.

APPELLATE CRIMINAL.

1937.

July, 28, 29 30.

Before Varma and Rowland, JJ.

KING-EMPEROR

v.

SOMRA BHUIAN.*

Evidence Act, 1872 (Act 1 of 1872), section 32—statement as to motive in dying declaration, admissibility of—written record of statement made by deceased—mode of proof required.

Where in the dying declaration the deceased stated that the accused had assaulted him " on account of enmity caused by my acting as a wizard ", *held*, that the statement made by the deceased was a statement " as to the circumstances of the transaction which resulted in his death ", so as to be admissible under section 32(*1*) of the Evidence Act, 1872.

Edula Venkatasubba Reddi, In re(1), distinguished.

The law is not that the written record of a statement made by a deceased person cannot be used at all but that it is not to be used without first examining as a witness the person who heard the statement made.

The case against the accused persons was instituted on the first information laid by the deceased himself and recorded by a police officer. Subsequently a Magistrate took his statement as a dying-declaration. The statement to the police was sought to be proved by the evidence of the police officer who deposed that the information was recorded by him on the statement of the deceased in presence of attesting witnesses who also signed the first information and that he took down the first information report " in the own words of the injured ". The Magistrate who had recorded the dying declaration proved the statement and deposed that the deceased was in his senses and that he read over the statement to him and he admitted it to be correct.

*Death Reference no. 26 of 1937 and Criminal Appeal no. 178 of 1937. Reference made by M. M. Philip, Esq., I.C.S., Sessions Judge of Gaya, dated the 3rd July, 1937, and appeal from his decision, dated the 2nd July, 1937.

(1) (1931) I. L. R. 54 Mad. 931.

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Held, that there was sufficient proof of the statements to make them admissible under section 32 of the Evidence Act, 1872.

Emperor v. *Balram Das*(1) and *Partap Singh* v. *The Crown*(2), followed.

Empress v. *Samiruddin*(3), distinguished.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Rowland, J.

K. K. Banarji, for the appellant,

The Advocate-General, for the Crown.

ROWLAND, J.—This is a reference under section 374 of the Code of Criminal Procedure, by the Sessions Judge of Gaya, who agreeing with all the assessors has convicted Somra Bhuian of the murder of Kudrat Mian. Two other persons, Sukna and Nagwa, were accused along with Somra, but these the learned Judge disagreeing with all the assessors has acquitted.

The case for the prosecution was that the deceased Kudrat had about two years before the occurrence settled in mahalla Maranpur of Gaya, where he practised as a medicine man (*ojha*), that the accused Somra Bhuian used to practise as an *ojha* and resented Kudrat setting up in the village as his rival. On the 16th March, 1937, Kudrat had a visit from some clients who brought a child as a patient. Kudrat was performing some incantations when suddenly the three accused persons came into the courtyard and attacked him with cutting instruments. The clients fled away. As they escaped from the courtyard, two of them received incised injuries from one or other of

(1) (1921) I. L. R. 49 Cal. 358.
(2) (1925) I. L. R. 7 Lah. 91.
(3) (1881) I. L. R. 8 Cal. 211.

the assailants who were coming in. Kudrat received more than a dozen injuries, some on the head and face, others on the chest and abdomen, the small intestine was perforated, and a portion of the intestine protruded through the opening of two of the wounds. He raised an alarm, neighbours came and the accused fled. He was taken to the police-station where he himself laid the first information on which the case was instituted. He was then removed to the hospital where he died the same night. As his condition became critical a Magistrate came and took his statement as a dying declaration. He named Somra, Sukna and Nagwa as his assailants, and these were the three persons who were put on trial.

The case for the prosecution rested on the statement of Kudrat admitted in evidence under section 32, Indian Evidence Act, and the evidence of the deceased's wife, Musammat Marunwa who claimed to have identified the assailants. The accused were all arrested the same night, and Somra was found to be wearing a shirt which was stained with spots of blood. This blood on chemical examination has been proved to be human. The Sessions Judge was not satisfied with the identification of the accused by the woman Marunwa, as it appeared that when first examined by the police she had failed to identify or name any of the accused. He, therefore, considered the case as resting on the statements of Kudrat corroborated in the case of Somra by the recovery from his person of the blood-stained shirt. He has convicted Somra while acquitting the other two.

In appeal it is contended, firstly, that so much of Kudrat's statement as refers to motive is not admissible under section 32 of the Indian Evidence Act, and for this proposition reference is made to *In re Edulla Venkatasubba Reddi*(1). The headnote of the report states a much broader proposition than the Judges appear to have intended to lay down, in fact the observations made in the judgments appear to be made with reference to the facts of the case then under

(1) (1931) I. L. R. 54 Mad. 931.

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consideration, and the particular statement which the prosecution had sought to prove. This was a statement made several months before the murder by Sivamma, the person who was eventually murdered, and the statement was to the effect that she intended to cut the accused out of her will. The prosecution case was that this intention on the part of Sivamma had been the motive for the accused to murder her; but the prosecution had failed altogether to establish that the accused had any knowledge of Sivamma having made such a statement. It was observed that the statement cannot be deemed to be " one made as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death ". The argument for the prosecution in that case was that the statement though not coming within the provisions of section 32, might be admissible under section 8 of the Act as showing a motive for the murder. This line of reasoning was negatived by Beasley, C. J. The position here is quite different. We are not concerned with section 8 of the Indian Evidence Act, but with the question whether the statement is one " as to any of the circumstances of the transaction which resulted in the death " of Kudrat. It would be a very far cry from anything that was said in the decision *In re Edulla Venkatasubba Reddi*(1) to hold that the statement made by Kudrat is not a statement as to the circumstances of the transaction which resulted in his death. What he has said regarding motive is at two places: firstly, in his first information report, and secondly in the dying declaration. In the first information report (Exhibit 4/1) he says " Somra Bhuian is a wizard and cultivator. Nagwa and Sukna are his comrades. They did not want that I should act as a wizard there. This was the cause of the dispute "; and in the dying declaration (Exhibit 3) he says

" They assaulted me on account of enmity caused by my acting as a wizard ".

(1) (1931) I. L. R. 54 Mad. 931.

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I do not see how any reasoning can make these statements to be anything other than statements as to the circumstances of the transaction which ended in Kudrat's death.

The next point of law raised was that the statements of Kudrat to the Sub-Inspector and to the Magistrate were not properly admitted in evidence, because neither of them has been proved in accordance with law. In each case the officer who recorded the statement, has been examined as a witness, and the written record of the statement has been attested by him and exhibited. The argument is that the witnesses in each case should have given his parol evidence in full as to each sentence of what Kudrat stated to him, and that the written record is not evidence of the statements. For this proposition reliance is placed on *Empress* v. *Samiruddin*(1). In this case the dying statement of the deceased Baber Ali had been recorded by the Deputy Magistrate as a deposition but not apparently in the presence of the accused It was held that unless the deponent had been so examined by the Deputy Magistrate exercising judicial jurisdiction, the statement required to be proved in the ordinary way by a person who heard it made and could not be proved by the writing made by the Magistrate, though if the Deputy Magistrate had been called to prove the statement he might have refreshed his memory with the writing made by himself at the time when the statement was made. This decision appears to have been sometimes cited in support of more than the Judges intended to lay down. In my opinion the law is not that the written record cannot be used at all but that it is not to be used without first examining as a witness the person who heard the statement made. This is the view taken in *Emperor* v. *Balram Das*(2). Here the statement which was sought to be proved had been made

(1) (1881) I. L. R. 8 Cal. 211.
(2) (1921) I. L. R. 49 Cal. 358.

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in the presence of a Sub-Deputy Collector and an Assistant Surgeon. The Sub-Deputy Collector recorded the statement but was dead at the time of the trial in which it was sought to use the statement in evidence. The Assistant Surgeon, however, was called and deposed that the declaration had been recorded in his presence by the Sub-Deputy Collector on the statement of the dying man and that it had been read over in his presence to the deceased who admitted it to be correct. This was held to be sufficient proof of the statement to make it admissible under section 32 of the Indian Evidence Act. This case was cited and approved in *Partap Singh* v. *The Crown*(1) where the proof offered of a dying declaration was the testimony of a head-constable who deposed in Court that he had recorded the statement correctly and that the deponent was in his senses at the time, the witness had not repeated in his own words what the deponent Nawab had said to him. Following *Emperor* v. *Balram Das*(2), it was held that the evidence was certainly admissible. The evidence regarding the first information of Kudrat is given by Ramkripal Kumar, Sub-Inspector, who says that the information was recorded by him on Kudrat Mian's statement in presence of two attesting witnesses who also signed the first information. It would have been better if it had been elicited from the Sub-Inspector in his examination-in-chief that he recorded the information correctly in the words used by the informant. But it is definitely stated in his cross-examination

> "I took down the first information report in the own words of the injured."

There is, therefore, the clearest evidence that the first information report is a correct record of the statement made by Kudrat. The dying declaration (Exhibit 3) is proved by Maulavi Minhajul Islam, Sub-Deputy Magistrate, who proves the statement recorded by him and proves that Kudrat was in

(1) (1925) I. L. R. 7 Lah. 91.
(2) (1921) I. L. R. 49 Cal. 358.

his senses. He deposes that he read over the statement to Kudrat who admitted it to be correct. This is sufficient attestation and proof of the statement to make it admissible for the purposes of section 32, Indian Evidence Act.

ROWLAND, J.

It was further argued on the merits that it was not safe to act on the statement of Kudrat standing as it does almost alone. We were invited to consider cases in which such dying declarations have not been acted on on the ground that the identification might be mistaken, or that there was inadequate opportunity of observation owing to surprise, or that the names of accused might have been given by the deponent not on his own initiative but on being suggested to him by others, or that the circumstances suggested a possibility of malicious implication. It is not necessary, I think, to refer to the cases in which it has been held for one or other of these reasons too unsafe to convict. Every such case must in the last resort be decided on its own facts. On the evidence and in the circumstances of this case we do not think that so far as this accused was concerned there was any mistake by Kudrat. There was a light and he was awake. There might no doubt be some surprise but the assault was continued for some time, and we find no difficulty in believing that he had sufficient opportunity to recognize his assailants. We were reminded that the witnesses have not said that immediately after the occurrence Kudrat forthwith gave out the names of his assailants. In fact the witnesses have said that he was in great pain and was screaming. As soon as he was brought to the police-station and questioned he appears to have given the names without hesitation. I do not feel inclined in the circumstances to discard this naming of the accused as an afterthought. Then in the case of the appellant there is the corroboration which consists in the finding of blood stains on the shirt which he was wearing. This, in my opinion, is a material corroboration. No doubt there have been cases in which the finding of a

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ROWLAND, J.

few spots of blood on the wearing apparel of an Indian have been taken to be insufficient corroboration of a dying statement for the purpose of supporting a conviction; but here again every case needs to be considered on its own facts and what is done in one case can hardly be authority in another set of facts. The course of the occurrence, the manner in which the attack was made, and the number of persons concerned in it receive corroboration from the evidence of Bandua and Ramdhani, the clients who met and were wounded by some of the assailants. The only point on which corroboration is wanting is the identification of the accused. In the circumstances the finding of spots of blood on Somra's shirt seems to me to be sufficient to corroborate the statement of Kudrat. I feel no doubt that Somra was one of those taking part in the murder.

There is no extenuating circumstance which would justify the accused receiving less than the extreme penalty. I would therefore dismiss the appeal, accept the reference and confirm the sentence of death.

VARMA, J.—I agree.

S. A. K.

Reference accepted.

Sentence confirmed.

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April, 16. August, 9, 10.

SPECIAL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and Manohar Lal, JJ.

BAIJNATH PRASAD SINGH

v.

UMESHWAR SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908), section 149 and Order VII, rule 11—plaint insufficiently stamped—

*Appeal from Original Decree no. 5 of 1934, from a decision of Maulavi Saiyid Muhammad Ibrahim, Subordinate Judge of Gaya, dated the 26th January, 1933.

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power of court to grant time for filing the deficit court-fee — validity of order granting time, whether can be challenged in appeal from the decree—power of High Court to interfere—power of superintendence—Court-fees Act, 1870 (*Act VII of* 1870)—*section* 6—*fiscal statutes, interpretation of.*

Where a plaint filed on the last date of limitation was insufficiently stamped and the court granted time to the plaintiffs to make good the deficiency and ultimately the plaintiff's suit was decreed, *held*, that the order of the court granting time to the plaintiffs could not be questioned in appeal from the decree.

Debi Charan Lal v. *Sheikh Mehdi Hussain*(1) and *Durga Tewari* v. *Ramrati Kuer*(2), followed.

Held, also, that in view of the provisions of section 149 and Order VII, rule 11, the court had power to grant time to the plaintiffs to make good the deficiency in the court-fees and on such payment the plaint should be taken to have been filed on the date on which it was actually filed.

The court has a double function, it has its judicial function to hear and decide cases, it also acts as a collector of revenue, and its duty is to collect the revenue for the Government in the shape of court-fees according to the statutes provided and in exercising that function it has a discretion granted it to allow time. In exercise of both these functions subordinate courts are under the direction of the High Court. Although the defendant is no proper party to questions of revenue as between plaintiff and the Government, it is open to him to move the High Court if the discretion to grant adjournment has been improperly exercised to his detriment, at an earlier stage of the proceedings and the High Court might in appropriate cases interfere.

Per KHAJA MOHAMAD NOOR, J.—Order VII, rule 11, Code of Civil Procedure, 1908, makes it compulsory for the courts before rejecting the plaint to give some time to the plaintiff to make up the deficiency.

Per MANOHAR LAL, J.—On a fair construction of Order VII, rule 11, clause (*c*), it is clear that the two conditions which are conjunctive and not disjunctive must be satisfied

(1) (1916) 1 Pat. L. J. 485.
(2) (1937) I. L. R. 16 Pat. 371.

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before a plaint can be rejected. Therefore, courts, before whom insufficiently stamped plaints are presented, are required to determine judicially the extent of time which must be given to make good the deficiency.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

The appeal was in the first instance heard by Courtney Terrell, C.J. and James, J. who referred it to a larger Bench.

On this reference—

Sushil Madhab Mullick (with him *N. K. Prasad II*), for the appellant: The insufficiently stamped plaint filed on the last day of limitation was no plaint at all. Section 6 of the Court-fees Act referred to.

[CHIEF JUSTICE.—The section does not contain the words " at the time it is filed ". It only says " no document.....shall be .....received.....unless in respect of such document there be paid a fee.....".]

But until the fee was paid the document could not be received by the court. By the time the deficit court-fee was put in the period of limitation had already expired.

[NOOR, J.—There was a conflict of opinion before 1908 as to the effect of payment of court-fee on a subsequent date. To settle the conflict section 149 of the Code of Civil Procedure was enacted.]

[MANOHAR LAL, J.—Order VII, rule 11, clause (*c*) makes an express provision in this behalf. The court is bound to grant some time to the plaintiff to make up the deficiency.]

This section does not empower the court to grant time. The order granting time having been passed in my absence, I can question the propriety of the order, under section 105 of the Code, in an appeal

against the decree itself. As for instance, if time is extended under section 5 of the Limitation Act behind the back of the opposite party the latter can question it at a subsequent stage. See *Krishnasami Panikondar* v. *Ramasami Chettiar*(1).

[NOOR, J.—The defendant may have a right to oppose when the question arises after the service of summons but not at the stage when the court proceeds to reject the plaint for non-payment of the deficit court-fee.]

But I am now entitled to show that the suit was barred by limitation.

[NOOR, J.—The Limitation Act does not make any distinction between stamped and unstamped plaints. It does not lay down that if the plaint is not properly stamped the suit would be deemed to be barred by limitation.]

But I am relying on the provision in the Court-fees Act.

[MANOHAR LAL, J.—The High Court has no power to interfere in Second Appeal with the exercise of discretion by the lower appellate court admitting or refusing to admit an appeal under section 5 of the Limitation Act: *Debicharan Lal* v. *Sheikh Mehdi Hussain*(2).]

Second Appeals stand on a different footing from First Appeals. In a First Appeal an appellate Court can interfere with the exercise of discretion. The exercise of discretion must not be outrageous.

[NOOR, J.—The language of section 149 of the Code is mandatory. The plaint "shall have the same force and effect as if such fee had been paid in the first instance".]

S. N. Ray (with him *B. N. Rai* and *R. S. Sinha*), for the respondents, not called upon.

S. A. K.

(1) (1917) I. L. R. 41 Mad. 412, P. C.
(2) (1916) 1 Pat. L. J. 485.

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BALJNATH PRASAD SINGH v. UMESHWAR SINGH.

COURTNEY TERRELL, C.J.—This is a first appeal from a decision of the Subordinate Judge of Gaya and is directed to be heard by a Special Bench because of a point of importance arising in connection with the levying of the court-fee on the plaint. The suit was brought by the plaintiff on a mortgage bond, dated the 8th June, 1918, the claim being for Rs. 6,549-8-0 upon which the court-fee as is admitted would be a sum of Rs. 502. The suit was filed on the last day of limitation having regard to extensions of time which the plaintiff was entitled to by reason of the occurrence of certain holidays. It was filed on the 1st June, 1931, with a court-fee of Rs. 11. The plaintiff petitioned, when filing his plaint, that he be allowed time to file the deficiency on the court-fee stamp which deficiency amounted to Rs. 491-8-0 and he undertook to pay it on the 29th June. On the 29th June the plaintiff had not complied with the order for the payment of the balance. The Subordinate Judge, who was in charge of the matter at the time, for some reason took an extremely lenient view of the failure on the part of the plaintiff to pay up the deficit. He directed that the pleader was to comply with the order for payment by the 3rd July, and on the same day the plaintiff paid up a further Rs. 50 and asked for one month's time. The order by the Subordinate Judge was that the matter should be put up on the 3rd July as he had already directed. When the 3rd July came the Judge allowed a further extension until the 20th July. On the 20th July the plaintiff was again not ready and the learned Subordinate Judge allowed him until the 31st of the same month. On the 31st the plaintiff paid a further Rs. 30 and the Judge thereupon allowed him till the 10th August to pay up the balance. When the 10th August in its turn came the plaintiff asked for time until ' to-morrow ', undertaking to pay on the following day Rs. 295 and the Judge allowed him until the following day. On the next day, the plaintiff paid up the Rs. 295 and prayed for two weeks'

further time to deposit the balance, after the payments I have mentioned, which amounted to Rs. 116-8-0. On the 25th August further excuses were advanced owing to an alleged difficulty in the purchase of stamps. The Judge allowed two further days' time, directing payment of the deficit on the 27th August and it was not until the 27th August that the plaintiff paid up the deficit of Rs. 116.

Now the Court has a double function: it has its judicial function to hear and decide cases; it also acts as a Collector of revenue, and its duty is to collect the revenue for the Government in the shape of court-fees according to the statutes provided and in exercising that function it has a discretion granted it to allow time. In the exercise of both of these functions subordinate courts are under the direction of the High Court. There is no doubt whatever that in this particular case the learned Judge, in exercising his discretion to grant time for the payment of the deficit court-fee, acted in a most undesirable manner and that that undesirable exercise of his discretion undoubtedly prejudiced the defendant, although the defendant was no proper party to questions of revenue as between the plaintiff and the Government. It would have been quite possible for the defendant, who was injured by this repeated and unnecessary delay in the levying of the court-fee, to come to this Court and complain that in the exercise of its function as a Revenue Collector the Court had acted in the matter prejudicially to the defendant and that the discretion vested in the court to grant adjournments had been improperly exercised. Had such an application been made no doubt the Court would have, by virtue of its general powers of superintendence of lower courts, checked the action of the Subordinate Judge.

The suit was, after the payment of the deficit, heard on its merits and was decided against the defendant and the action of the Judge in the wrongful exercise of his discretion in permitting extensions of time for the payment of the court-fee is not a matter

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which concerns in any way the merits of the dispute in the suit which he had to try. It is contended, however, by the defendant that the plaint as originally filed without an adequate court-fee of Rs. 502 was no plaint at all inasmuch as the original plaint was filed on the last day permitted by the Limitation Act after all the extensions had been granted. It is contended that when the deficit on the court-fee had actually been paid and the plaint had become on the contention of the defendant a regular plaint, the period of limitation for the bringing of the suit had expired.

I am unware of any provision which states that a plaint must be a plaint on which the whole of the leviable duty has been paid and that if the whole of the leviable duty has not been paid, the plaint is as though it had not been lodged at all. The argument is based in the main upon section 6 of the Court-Fees Act which states:

> "..... No document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

The Court-Fees Act was passed in 1870 and section 149 of the Civil Procedure Code which was newly added in 1908 expressly provides:

> "Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

The Judge, therefore, at the very least clearly had a discretion to allow the payment of the court-fee and when the court-fee had been paid the plaint upon which it was paid must be deemed as having been filed on the day on which it was actually filed. The provision for the payment of court-fees has really nothing whatever to do with the litigation as such: it merely means that notwithstanding that a suit may

be brought to compel payment of a debt due, the Court is not allowed to go into the matter and adjudicate upon its merits until the court-fee has been paid and the provisions for court-fees are merely provisions enforcing the payment of revenue by a denial of judicial process to a person who does not pay the provided fees.

Now in this case the learned Judge having a discretion to allow time did exercise his discretion. As I have indicated, if the discretion were exercised in an outrageous fashion it would be quite right for the person injured, that is to say, the defendant, to come to this Court for relief; but the defendant took no such step and claims to be entitled in appeal to attack the order ultimately passed by the trial court on the basis of the wrongful exercise of discretion by the Judge in allowing extensions of time for payment of the court-fee. That argument cannot be entertained: it has been attempted in similar cases. I may instance, for example, the case of a court allowing an extension of time under section 5 of the Limitation Act. It is not possible after the extension has been granted and after the case has been decided on the merits for the appellate court to interfere with the final order upon the basis of a wrongful extension of time. That point was decided finally by this Court in the case of *Debi Charan Lal* v. *Sheikh Mehdi Hussain*(1) where the Chief Justice Sir Edward Chamier stated:—

"It is now settled by a long string of authorities that where a court, after considering all the circumstances of the case, has come to the conclusion that sufficient cause has or has not been established for filing an appeal within time, the High Court in second appeal will not interfere."

The same reasoning is applicable to a court sitting in first appeal, because the matter which was under discussion in that case was in connection with an

(1) (1916) 1 Pat. L. J. 485.

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extension of time given by the first appellate court for lodging the appeal. A second illustration is to be found where the first appellate court has exercised its discretion to admit further evidence. Let it be supposed that the first appellate court in exercising that discretion exercised it wrongfully and admitted further evidence which was relevant to the issues in dispute. It has been decided by this Court in *Durga Tewari* v. *Ramrati Kuer*(1) that no interference in second appeal could take place. In that case the first appellate court had allowed the admission of further relevant evidence. A learned Judge of this Court, sitting singly in second appeal, was disposed to send the matter back to the lower appellate court with a direction to dispose of the appeal on the evidence on the record, ignoring the evidence which had been in his view wrongfully admitted though relevant to the issue. On a reference to a Division Bench, however, that view was dissented from and it was held that the lower appellate court having exercised its discretion to take further evidence and there having been no steps taken by the other party to have that discretion interfered with by way of revision or otherwise, the evidence was rightly taken into account by the Judge in disposing of the case on its merits. I may instance a further possibility. A Judge might grant an adjournment of a case for a period, let us say, of five years. At the end of that five years no steps having been taken by the party aggrieved to have such outrageous exercise of discretion corrected, the Judge takes up the hearing of the case upon its merits. It would not be possible for the court of appeal to say that the case should not have been disposed of on its merits after the adjournment, although the court might properly censure the trial court for having granted such an outrageous adjournment. In short these exercises of discretion by lower courts, whether the trial court or the first appellate court, must be remedied if at all at once by the superior court on the application of the

(1) (1937) I. L. R. 16 Pat. 371.

party aggrieved and it is too late if that party allows the case to proceed and then seeks to interfere with the discretion in appeal.

A further point was argued in connection with the construction of Order VII, rule 11, of the Civil Procedure Code. That order is somewhat unfortunately worded: it provides for the rejection of the plaint in certain cases, one of them specified in paragraph (*c*) being as follows:—

> "Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so."

It has been argued that the meaning of the rule is that in such circumstances the court is bound to grant an extension in a case where the plaint is insufficiently stamped and the plaintiff asks for an extension of time for filing the deficit. If the matter had been *res integra*, I, speaking for myself, would have been disposed to hold that that was not the meaning of the rule and that the rule necessarily implies, first, an application to the court to grant an extension and does not imply that the court has no discretion to refuse the application. But a different view of the section has for long been held in this province and by the Courts of other provinces and it has been thought and it is still thought by many that the rule necessarily implies an obligation on the part of the court to grant an extension of time. Speaking for myself, I would not be disposed to give any decision which might express as a matter of ruling any dissent from that view, for it is manifestly a convenient rule for the disposal of justice. It is a matter of some misfortune that the method of collection of revenue should be done through the courts. An instance of the convenient working of the rule on the interpretation that it involves an obligation to grant an extension is seen in the case of rent suits. In a great number of cases a tenant merely requires stimulation of legal proceedings to pay up the rent which may be due and if the landlord could not sue without filing the whole of the court-fee on the first filing of the suit,

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the result might ultimately be a great deal worse for the tenant: it would be, firstly, a hardship on the landlord and, in the event of the decision being against the tenant, the tenant would ultimately have to pay up the whole of the court-fee in addition to the debt which he owed to the plaintiff landlord. Therefore no great injustice occurs. Indeed there is a convenience in allowing an extension of time. Nevertheless in applications for extension as regards the period of extension of time, Judges should have regard to the justice in each particular case. It might easily be that the proper extension of time in some cases might be a period as short as half an hour or even less and in some cases the extension might be greater and Judges should not automatically grant long extensions of time for the payment of court-fee because of the duty which is owed by the Judicial authorities to protect the revenue. This, however, is not a matter which concerns the defendant; the matter is as between the Crown and the plaintiff.

In this case the defendant was actually sued in time as provided by the Limitation Act. The fact that the plaint was not properly stamped does not in the least militate against its efficacy, although it might very likely happen that the court might be prevented from entering into the merits of the suit and from making an order by way of judgment. So much for the point which led to the constitution of this Bench to hear this first appeal.

As regards the merits of the appeal itself, that has become a matter of arrangement between the parties: they have consented to the disposal of the first appeal on the basis that the claim for interest made by the plaintiff is to be reduced to 12 per cent. simple interest instead of the compound interest originally claimed. It will be for the office to work out the amount of the decree in accordance with this compromise.

The decree of the trial court will accordingly be modified.

The plaintiffs are entitled to the full costs of the lower court as well as the full court-fee, and to the costs of the appeal.

KHAJA MOHAMAD NOOR, J.—I entirely agree with the judgment which is delivered by my Lord the Chief Justice. I would, however, wish to add that in my opinion Order VII, rule 11, makes it compulsory for the courts, before rejecting the plaint, to give some time to the plaintiff to make up the deficiency, however short that time may be, and the court cannot straightaway reject the plaint without giving such time.

MANOHAR LALL, J.—I also agree. I wish to add that in my opinion the duty of this Court is only to interpret the plain meaning of the words deliberately used by the legislature in Order VII, rule 11, sub-clause (*c*), and not to guess the possible intention of the legislature. When I consider this language, keeping in mind the well-known rule of construction that where there are two possible alternatives, the one more favourable to the subject must be preferred when a question of forfeiture of rights is involved (because all fiscal statutes should be strictly construed and in cases of doubts in favour of the subject), I find that on a fair construction the statute lays down two conditions which are conjunctive and not disjunctive and which must both be satisfied before a plaint can be rejected. This view has been adopted by various other High Courts and is based upon a reasonable construction of the words used by the legislature. The courts before whom plaints are presented insufficiently stamped are required to determine judicially the extent of time which must be given to make up the deficiency. It may be that in some cases a short time should be allowed, while in other cases the facts of the case demand that a longer interval of time should be given to the plaintiff to make good the deficiency, but some time must be given before the plaint can be rejected.

Decree modified.

J. K.

APPELLATE CRIMINAL.

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August, 6.

Before Varma and Rowland, JJ.

KING-EMPEROR

v.

MANGRU KISAN.*

Criminal Trial—retracted confession of an accused, whether admissible against co-accused—corroboration—rule of prudence.

A retracted confession by an accused person is admissible against a co-accused but the rule of prudence is to seek corroboration before the conviction of the co-accused is based thereon; the question as to what the nature of the corroboration should be depends upon the facts of each particular case.

Sheonarain Singh v. *King-Emperor*(1), *Guja Majhi* v. *King-Emperor*(2) and *Partap Singh* v. *The Crown*(3), followed.

Emperor v. *Gangappa Kardeppa*(4), *Kashimuddin* v. *Emperor*(5), *Emperor* v. *Lalit Mohan Chuckerbutty*(6), *Yasin* v. *King-Emperor*(7) and *Barnabas Christian* v. *King-Emperor*(8), referred to.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Varma, J.

K. K. Banerji, for the appellants.

The Advocate-General, for the Crown.

VARMA, J.—This is a reference under section 374 of the Code of Criminal Procedure by the Judicial

* Death Reference no. 25 of 1937 and Criminal Appeal no. 155 of 1937. Reference made by T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 8th June, 1937, and appeal from his decision, dated the 3rd June, 1937.

(1) (1928) I. L. R. 8 Pat. 262.
(2) (1917) 2 Pat. L. J. 80.
(3) (1925) I. L. R. 6 Lah. 415.
(4) (1913) I. L. R. 38 Bom. 156.
(5) (1934) I. L. R. 62 Cal. 312.
(6) (1911) I. L. R. 38 Cal. 559.
(7) (1901) I. L. R. 28 Cal. 689.
(8) (1934) 15 Pat. L. T. 711.

Commissioner of Chota Nagpur, who has passed the sentence of death upon Mangru Kisan aged 25 years and Bagul Kherwar aged 27 years, under section 302 of the Indian Penal Code, for the murder of one Lakhu *alias* Labha Kisan, aged about 20 years according to the post-mortem report. The accused have also appealed from jail and their appeal has been heard along with this reference.

The murder seems to have been committed on the night of the 25th of January, 1937. It came to light in a peculiar manner. One Kashi Prasad (p. w. 1), a constable, while he was passing the Dak Bungalow in Mahuadanr noticed a dead body covered with a cloth and a deg near about it. He informed the Sub-Inspector who came to the spot. The Sub-Inspector found that the throat of the dead man had been cut. He drew up a first-information-report (Exhibit 8) on his own information, as well as an inquest report and a list of articles found. The dead body was naked except for a vest, and the dhoti covered the dead body (Exhibits V and IV, respectively). A neck thread with ornaments (Exhibit VI) and a waist thread with a purse and tweezers (Exhibit VII) and some rice dyed yellow (Exhibit X) were found lying near the dead body. Similar rice was found tied in a corner of the dhoti. It was on the 26th of January, which happened to be a chaukidari parade day, and the Sub-Inspector showed the dead body to the various chaukidars who had assembled. One Ghunja chaukidar of Nawatoli identified the dead body as that of Lakhu Kisan of his village. Later on the dead body was identified by Lakhu's wife (p. w. 3), Raghu Kisan (p. w. 6) and Damber Kisan (p. w. 20) of Nawatoli. After identification the dead body was sent for post-mortem examination.

The Assistant Surgeon who held the post-mortem examination found three incised wounds on the right side of the cervical region (neck) at the level of the 3rd, 4th and 6th cervical vertebrae. All the injuries

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were almost horizontal but at slightly lower level in front. The wounds measured 6 inches, 6½ inches and 7 inches, respectively, in length. The depth of each was 4 inches to 5 inches, and the width of each was 1½ inches to 2 inches. Death, according to the Assistant Surgeon, was due to the neck injuries which had been caused by a sharp cutting instrument by some man or men, and each injury was sufficient to cause instantaneous death. In the opinion of the Assistant Surgeon the injuries could be caused by a balua.

The Sub-Inspector started investigation and on the 27th of January, 1937, on receipt of some information he went to the house of Bagul accused in Gawalkhar village. He found Bagul there and searched his house. Inside the house he found a vest (Exhibit XIV) and a pair of shorts (Exhibit XV) which bore suspicious stains. Then the Sub-Inspector went to village Berapahar where Mangru lives, and found Mangru's wife in the act of washing three male garments (Exhibits XI, XII and XIII). These garments also bore suspicious stains. The Sub-Inspector then went out in search of Mangru and found him in village Narhari where he arrested Mangru. Mangru was wearing a dhoti (Exhibit XVII) which bore suspicious stains. Then in consequence of certain statements made by Mangru, the Sub-Inspector went to the house of Sudan Kisan in Gurgurtoli where Sudan's wife produced an axe (Exhibit IX) from under the eaves at the back of the house belonging to another Sudan. The axe also had some stains which the Sub-Inspector took to be blood stains. Then on the 28th of January the Sub-Inspector on the strength of some statements made by Mangru went to Berapahar jungle where Mangru produced three garments (Exhibits I, II and III). The Sub-Inspector noticed suspicious stains on Exhibits I and II. These materials were sent to the Chemical Examiner from whose report (Exhibit 4) it appears that he found human blood on Exhibits I and II found in the

jungle, on Exhibits IV, V and VI found on the dead body, on Exhibits XII and XIII found with Mangru's wife, on Exhibit XV the shorts found in Bagul's house, on Exhibit XVII found on Mangru's person, on Exhibit IX the balua, and also on some bark taken from the mahua tree and in a sample of earth taken from underneath the corpse. Blood stains were found on Exhibits XI (found with Mangru's wife) and XIV (found in Bagul's house), but the Chemical Examiner could not determine the origin of the blood.

From the post-mortem examination it appears that the deceased had three injuries on the right side of the neck each of which was sufficient in itself to cause his death, and further the Doctor was of opinion that the wounds could be inflicted with an axe, and judging from the nature of the wounds he thought that the man was either asleep or intoxicated when he sustained the injuries.

There is no direct evidence in this case, and the witnesses examined can be classified into sets speaking about the motive for the crime, the incidents immediately preceding the crime, and incidents after the crime.

So far the motive for the crime is concerned, the evidence of Musammat Ghasni (p. w. 3) and Musammat Jhauli is important. Musammat Ghasni says that she made the acquaintance of Mangru Kisan in Jeth previous to the date of the occurrence in Mahuadanr Bazar, when she was intrduced to Mangru by Jhauli. At that time Bagul accused was also with Mangru. Jhauli and Ghasni used to meet the two accused on every Bazar-day (i.e. Monday) and have sexual intercourse with them, Ghasni with Mangru and Jhauli with Bagul. (In passing it may be mentioned that Jhauli's husband was not at home in these days and was working somewhere in Assam, but Ghasni's husband the deceased was living in Ghasni's house.) Her husband used to take her to task for reaching home late but she did not give up her intrigue with

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Mangru and, in fact, she says that she had told the chaukidar of the village that if her husband did not treat her better she would go and live with Mangru. On a Monday before the date of the occurrence Mangru had asked Ghasni to live with him but she said that she could not do so as her husband was alive. Mangru then enquired as to whether she would live with him if he killed her husband, and Ghasni replied that she would. Jhauli's evidence is to the same effect. She gives a further piece of information that when she, Ghasni and some other women had been to the Juri hill to collect fuel they met Mangru there and he enquired of Ghasni where her husband was, and she replied that her husband had gone to his father's house and would be coming back on Monday next. Raghu Kisan (p. w. 6) supports Ghasni in her statement that she had told him that if her husband did not treat her better she would go to live with Mangru. The father of the deceased, Laua Kisan (p. w. 8) tells us that the deceased was his son, that after his marriage he lived in his father-in-law's house at Nawatoli, that his son came to his house on the Friday before the day of occurrence and stayed till the following Monday when he left after taking his morning meal. Lakhu the deceased had for his meal rice, dal and sag. When he was about to depart the witness gave him some rice dyed with turmeric as an invitation to join his nephew's marriage. It may be mentioned that some rice found in the house of this witness was of the same colour as that of the rice found near the dead body and in a corner of the dhoti covering the dead body. We have then witnesses who saw Mangru and Lakhu the deceased before the latter's death. Jambu Oraon (p. w. 7) says that he saw them drinking together at the liquor shop in Mahuadanr Bazar. Towards sunset witness asked Lakhu to come home with him but Lakhu refused. The witness further says he found Lakhu quarrelling with other two men. The next witness on this subject is Sibta Kisan (p. w. 24). He is a postal runner and had been to the liquor shop in Mahuadanr

Bazar on Monday where he met Mangru and Bagul but did not notice anyone else with them. This witness had a balua with him, which Bagul wanted to borrow but the witness refused. He knew Mangru and Bagul from before because he used to meet them in Bazar on Mondays, his own village being two miles off from Mahuadanr. From the evidence of these two witnesses (p. ws. 7 and 24) there is no doubt that on the evening previous to the night of occurrence Mangru and Bagul were seen in the liquor shop at Mahuadanr Bazar. Jambu, of course, noticed the deceased also with them, but Sibta does not seem to have noticed the deceased there. It may be that till then the deceased had not arrived there. Then comes the evidence of witnesses who speak about the balua. Mangru's wife Mehri Kisain (p. w. 9), her brother Sudhan (p. w. 5) and Sudhan's wife Pardesia (p. w. 17) speak on this point. Sudhan says that on a Monday in Magh after supper when he was in his house Mangru went to him and said that he was to go home and pass through a jungle and would like to take some weapon with him. He borrowed the axe or balua (Exhibit IX) from Sudhan which Sudhan had purchased from Ratan Lohar two years ago. That same night Mangru came to Sudhan's house at about midnight. Sudhan was called out by Mangru. Sudhan woke up. Mangru asked for water to be poured on the balua. The witness noticed blood on the balua, and when asked as to whom he had killed Mangru replied that he had killed Ghasni's husband. It is better to quote verbatim the portion of the witness's evidence, which runs thus:

' I asked where he had killed him. He said ' in Nawatoli '. I asked why he had killed Lakhu. He said ' I want his wife '. I asked who else was there. He said ' my friend (phul) Bagul helped me ' ".

On this point Sudhan is supported by his wife Musammat Pardesia (p. w. 17) who after referring to the other incidents repeats the conversation between Mangru and Sudhan as follows:

" I heard my husband asking Mangru ' What have you been doing, that there is blood on the axe? ' Mangru said ' I have killed Ghasni's

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husband '. My husband asked ' Why? '. Mangru said ' I want to take his wife '. After washing the balua Mangru hid it in the thatch of our house. My husband also asked Mangru if he had killed Ghasni's husband by himself. Mangru said that he and Bagul had done the deed."

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Ratan Lohar (p. w. 16) identifies the balua (Exhibit IX) as it was made by him for Sudhan.

The next witness of importance is Mahadeo Ahir (p. w. 23) who speaks about what he saw immediately after the occurrence. He had taken his daughter who was suffering from burns to the hospital at Mahuadanr. No accommodation being available he was lodging outside under a *machan*. At about midnight he heard thrice the cry of " aia " and saw two men running away. He did not recognize them.

On this evidence the learned Judicial Commissioner has convicted both the accused under section 302, Indian Penal Code, and awarded the capital sentence.

Mr. K. K. Banerji while dealing with the case of Mangru has referred to the various items of evidence against him and tried to point out that these taken individually do not lead towards the guilt of the accused; but where it is a case of circumstantial evidence the Court has to see whether the evidence taken as a whole points conclusively towards the guilt of the accused. In the case of Mangru the evidence is conclusive. His intrigue with Ghasni afforded sufficient motive for the crime, his inquiries about the movements of the deceased, his finding out articles from the Berapahar jungle which bore signs of blood, the finding of blood-stained clothes from his house, his borrowing the balua from his brother-in-law which bore blood stains, and finally his extra-judicial confession to his brother-in-law Sudhan which was heard by his brother-in-law's wife Pardesia leave no room for doubt that Mangru committed the crime of which he has been convicted and sentenced.

Mr. K. K. Banerji lays special stress on the case of Bagul and says that the evidence against him is

not conclusive. He raises a point of law that the retracted confession of a co-accused should not be taken into consideration to come to a finding of guilt of any person, and for this proposition he refers to various cases. He refers to *Barnabas Christian* v. *The King-Emperor*(1) where it was held that a confession which has been retracted must be viewed with suspicion, but if it is considered to have been a voluntary confession and substantially true, it can be admitted into evidence and used against its maker, and that if it is considered to be such a confession as substantially implicates its maker in regard to the crime with which he and the co-accused are charged, it can be used also against the co-accused, but even then it can carry no weight, except where it is substantially corroborated by good evidence from other sources. He then refers to *Emperor* v. *Gangappa Kardeppa*(2) where it was pointed out that the High Courts in India have laid down the rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained, although there was nothing in section 30 of the Indian Evidence Act which prevented the Court from convicting after taking the confession of a co-accused into consideration. The strongest case in his favour is *Kashimuddin* v. *Emperor*(3) where dealing with a retracted and uncorroborated confession of an accused person their Lordships observed that such a confession has no value at all against the co-accused. This they have stated as a proposition of law relying on *Emperor* v. *Lalit Mohan Chuckerbutty*(4) which in turn is based on *Yasin* v. *King-Emperor*(5).

But whatever views may have been expressed elsewhere, in our own High Court it was laid down in *Guja Majhi* v. *The King-Emperor*(6) that a retracted

(1) (1934) 15 Pat. L. T. 711.
(2) (1913) I. L. R. 38 Bom. 156.
(3) (1934) I. L. R. 62 Cal. 312.
(4) (1911) I. L. R. 38 Cal. 559.
(5) (1901) I. L. R. 28 Cal. 689.
(6) (1917) 2 Pat. L. J. 80.

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confession was admissible in evidence against the accused. In *Sheonarain Singh* v. *King-Emperor*(1) it was laid down that a retracted confession is admissible in evidence but should have no weight attached to it unless it is corroborated in material particulars or the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement must be given full weight and may be used against a co-accused. In the judgment, speaking of retracted confessions, their Lordships said that a retracted confession must be regarded with stronger suspicion than that which attached to the confession of an approver who gives evidence in Court. But nevertheless such evidence is admissible and criticisms upon it can only be directed to its cogency.

In *Partap Singh* v. *The Crown*(2) it was laid down in agreement with the Patna view that the fact that a confession once made has been retracted is immaterial as regards the legality of the admission of the confession as evidence either against the person who made it (of whose conviction it may form the basis even without corroborative evidence) or as against other persons tried jointly with him for the same offence. But the weight to be attached to a retracted confession depends upon the circumstances of each particular case.

Looking at these cases I feel no doubt that the law is as stated in *Sheonarain Singh* v. *King-Emperor*(1) and has not been affected by any observations in *Barnabas Christian* v. *King-Emperor*(3). A retracted confession by a co-accused is admissible in evidence but the rule of prudence is to seek corroboration before the conviction of a co-accused is based thereon; as to what the nature of the corroboration

(1) (1928) I. L. R. 8 Pat. 262.
(2) (1925) I. L. R. 6 Lah. 415.
(3) (1934) 15 Pat. L. T. 711.

should be will depend upon the facts of each particular case. In accordance with this proposition of law we have to consider the case of Bagul. Now, Sibta's evidence is clear that Bagul asked for a loan of Sibta's balua on the evening previous to the day of occurrence and that Bagul and Mangru were together when this demand was made. Then Jambu's evidence is to the effect that at the liquor shop he saw the deceased quarrelling not only with Mangru but with both the accused, and at midnight we find Mahadeo seeing two persons running away after he had heard the cry of "aia" thrice. This evidence, at any rate, shows that there were at least two persons connected with the crime. Then comes the finding of blood stained shorts in the house of Bagul. Two witnesses identify the shorts as belonging to Bagul. Search-witness Doman Ahir (p. w. 11) speaks about the finding of the shorts from the house of Bagul accused, although he says he had not seen him wearing shorts. But Pachal Gosain (p. w. 18) another search-witness says that he had seen Bagul wearing these shorts. Bagul's own statement is that the shorts did not belong to him and he gave no explanation for the blood stains found on them. These circumstances are ample corroboration of the confession made by Mangru to Sudhan, which was heard by his wife. In these circumstances I have no doubt that the charge of murder has been brought home to Bagul conclusively.

Then comes the question of sentence. So far as Mangru is concerned, his motive was a sordid one, he wanted to have the deceased's wife and for this purpose he committed the crime. There is no extenuating circumstance. Although I have no doubt about the guilt of Bagul, at first sight the part taken by him did not appear to be so important as that of Mangru; but on further consideration I am of opinion that this accused is equally responsible. Mangru may have been influenced very much by his anxiety to get the deceased's wife, but whatever Bagul did was done in cold blood. Mangru is aged 25 according to the

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Sessions Judge, and Bagul is aged 27 years. It cannot be said that he was coerced into giving his help because he was an older man than Mangru. I do not find any extenuating circumstance in his case either.

I would therefore accept the reference, dismiss the appeal and confirm the sentence of death passed against both the accused.

ROWLAND, J.—I agree.

Appeal dismissed.
Sentence confirmed.

S. A. K.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Manohar Lall, J.

NIRMAL KUMAR NAWLAKHA

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August, 9.

v.

SANT LALL MAHTO.*

Mortgage—co-sharer, mortgage by, of undivided share in property jointly held by co-sharers—partition—other co-sharers take mortgaged property free from mortgage—mortgagee's right to proceed against the property allotted to his mortgagor—onus of proof, when shifts from one side to the other.

In order to shift the onus from one side to the other, the evidence adduced by the party on whom the onus lies must be held to be sufficient to establish a prima facie case.

Stoney v. *Eastbourne Rural District Council*(1), referred to.

Where a co-sharer mortgages his undivided share in a property held jointly by all the co-sharers and the mortgage is followed by a partition and the mortgaged property is allotted to the other co-sharers, they take the property, in the absence of fraud or collusion, free from the mortgage and the mortgagee is entitled to seize only that property which, after the partition, has fallen to the share of the mortgagor.

*Appeal from Original Decree no. 89 of 1933, from a decision of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Purnea, dated the 20th December, 1932.

(1) (1927) 1 Ch. 867.

Byjnath Lall v. *Ramoodeen Chowdhry*(1) and *Mohammad Afzal Khan* v. *Abdul Rahman*(2), followed.

Obhoy Churn Sircar v. *Huri Nath Roy*(3), distinguished.

Appeal by defendant no. 16.

The facts of the case material to this report are set out in the judgment of Manohar Lall, J.

S. M. Mullick (with him *Mahabir Prasad*, *Hareshwar Prasad Sinha*, *P. Jha* and *R. J. Bahadur*), for the appellant.

B. C. De (with him *M. K. Mukherjee* and *P. B. Ganguli*), for the respondents.

MANOHAR LALL, J.—The plaintiff-respondent instituted the suit giving rise to this appeal on the 1st August, 1930, for partition of 5 annas 4 pies share in the property mentioned as lots 1 to 17 in Schedule A and lots 1 to 4 in Schedule B and 1 bigha out of lot no. 5 in Schedule B. There were a number of defendants to this action but we are here concerned with defendant no. 16 Nirmal Kumar Nawlakha who resisted the claim for partition so far as the properties with which he was concerned as purchaser from two ladies of the family of Bansing Mahto, the remote ancestor of their husbands. The learned Subordinate Judge has given a decree to the plaintiff as claimed and defendant no. 16 alone has appealed.

The following facts are necessary in order to understand the nature of the controversy and the points that arise for our decision. Bansing Mahto, the remote ancestor already named, had four sons Bhagwan, Hardayal, Makhan and Madan. Bhagwan had two sons Kishun, the father of Kamla and Lachmi, and Rajbahadur who was the husband of Musammat Sampato. (It is not necessary to state that Bhagwan had another son Chandi but the evidence is not clear on this point and therefore he is

(1) (1874) L. R. 1 Ind. Ap. 106.
(2) (1932) L. R. 59 Ind. Ap. 405.
(3) (1881) I. L. R. 8 Cal. 72.

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ignored for the purpose of this decision.) Hardayal had a son Shib Prasad who left a widow Musammat Saro. Makhan had two grand-sons, Jagat and Bhukhan, and the last son Madan had two sons Gopal, father of Mewa, and Tilak, father of Khantar and Ajodhya. The remoter descendants of these persons named above are not being mentioned in this statement. The plaintiff took a mortgage on the 9th September, 1920, with respect to 5 annas 4 pies share of the Schedule A properties mentioned above from Kamla and Lachmi who, according to the plaintiff, were entitled to this share on the death of Rajbahadur who died in a state of jointness with Kishun and his sons. The plaintiff also alleges that Hardayal and Shib Prasad having died in a state of jointness with the brothers of Hardayal, the joint family property came to be owned by three branches, namely, Bhagwan, Makhan and Madan's branch and they continued as such till 1914 when he alleges that the partition took place between these surviving branches with the result that each branch came to own an ascertained share of 5 annas 4 pies in the joint family property. The plaintiff obtained a mortgage decree which was made final on the 5th November, 1927, and he purchased the properties which were mortgaged to him in execution of his decree on the 22nd December, 1928. The plaintiff also purchased on the 17th November, 1927, some of the properties in suit by a sale deed from the same Kamla and Lachmi. The plaintiff, therefore, bases his title upon these transactions and claims to be entitled to be placed in possession of the 5 annas 4 pies share of his vendors. So far as this appeal is concerned it is only necessary to state that this action was also resisted by defendant no. 16 who asserted his title in the following circumstances: His case is that the joint family of Bansing effected a separation by ascertainment of shares in or about the year 1894 with the result that each of the four brothers named above was entitled to a four annas share in the family properties. Therefore Hardayal was entitled to four annas and

on his death his son Shib Prasad became entitled to that four annas which became the inheritance of his widow Musammat Saro. Similarly Bhagwan having died his share descended to his sons Kishun and Rajbahadur in equal two annas share each. Rajbahadur having died his share descended to his widow Musammat Sampato and Kishun's two annas descended to his two sons Kamla and Lachmi by survivorship. Therefore defendant no. 16 contends that the plaintiff is entitled to only 2 annas share of his mortgagors and not 5 annas 4 pies as erroneously asserted by him.

The next relevant event which is necessary to state is that the two Musammats Sampato and Saro instituted partition suits in 1925 in the court of the Subordinate Judge of Purnea in which they made all the members of the joint family defendants. Kamla and Lachmi (who are defendants 33 and 34 in this action) resisted the claim on the ground that the ladies had no right to claim partition but were entitled to maintenance only and these defendants also asserted in that suit that they were entitled to 5 annas 4 pies of the properties and that the Musammats were entitled to no share. But the learned Subordinate Judge in his judgment, dated the 8th July, 1925, (exhibit M) decreed the suit of the two ladies holding that he was satisfied that the share of those ladies was as asserted by them and he was also satisfied that the partition in the family took place in 1894. This was followed by actual partition effected by a commissioner appointed by the court at the instance of the plaintiff Musammats. Defendant no. 16 has taken two conveyances, dated the 9th August, 1928, from these two ladies, with respect to six items of property from Musammat Saro (defendant no. 19) for Rs. 4,000 and for eight items of property from Musammat Sampato (defendant no. 20) for Rs. 2,000. This defendant says that he is a bona fide purchaser for value from these two ladies whose title was determined in judgment exhibit M. He also relies upon the survey of 1905 which supports the case of partition

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before the survey. He accordingly resists the claim of the plaintiff to partition and he contends that the plaintiff being the simple mortgagee is bound by the result of the partition action unless it is held to be fraudulent and that the plaintiff cannot question the title and possession of this defendant no. 16. The plaintiff is fully alive to the difficulty in his way and accordingly he alleged in his plaint that the partition action was instituted with the object of defrauding him of his just claim and that the same was collusive and fraudulent.

It will be noticed that the critical points which will determine this appeal are whether the partition took place in this family in 1894 or in 1914 and also whether the partition decree of the 8th July, 1925, is collusive and fraudulent. The learned Subordinate Judge has written a most painstaking judgment and has held that the oral evidence adduced by both parties does not establish beyond all doubt the partition as alleged by them; that is to say, in his opinion the plaintiff has failed to prove the partition in 1914 and the defendants have failed to prove the partition as alleged by them in 1894 by the oral evidence in the case. Neither party in their elaborate arguments before us challenged this finding of fact of the learned Subordinate Judge based upon his appreciation of the oral evidence adduced and I am also satisfied that this estimate of the learned Subordinate Judge is perfectly correct.

What then is the evidence of reliable character adduced by the plaintiff which will go to establish the partition in 1914 or which will go to establish that the family was joint in 1905? The plaintiff has two difficulties in his way, first, the survey record-of-rights prepared and finally published in 1905 which goes to support that there was a partition in this family before that date. It is a matter of common experience that the survey records-of-rights are prepared with the utmost care and with full publication of the orders which are passed in the khanapuri

and attestation stages and that the parties are as a rule fully alive to the great value of these records. It is also to be remembered that it takes about three years or more to complete a survey. Therefore it may safely be assumed that a partition must have taken place in this family about the year 1901 or 1902, if not earlier. The entries in the survey record as printed in this paper-book are inconsistent with any other hypothesis. The plaintiff has another difficulty in his way and that is the partition decree of 8th July, 1925, which again in that year affirmed that the survey entry was correct upon the evidence adduced by the parties.

Mr. Bankim Chandra De, in presenting the case on behalf of the respondents, most strenuously argued that even if his client has not been able to show satisfactorily the date of the alleged partition in 1914, the defendants' case also is wholly false and therefore he asked us to draw some kind of presumption or inference in favour of the plaintiff. With great respect, Mr. De wants to completely misplace the onus of proof. In my opinion the onus is upon the plaintiff and nonetheless so, even when he has adduced some kind of evidence. The onus will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a prima facie case. The true test of onus in such a case has been well put by Lord Hanworth, M. R. in the case of *Stoney* v. *Eastbourne Rural District Council*(1) in the following words :—

" It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus.

(1) (1927) 1 Ch. 367, 397.

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What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given."

Applying this test to the present case it is clear to my mind that the onus which was originally on the plaintiff and which was shifting from time to time during the course of the evidence adduced, lay on the plaintiff the moment the learned Subordinate Judge held that oral evidence adduced by him as to the date of partition was not satisfactory. It then was incumbent upon the plaintiff to prove how he claimed his title to 5 annas 4 pies against the defendant who was in possession with an apparent title.

Mr. De with great vigour suggested that there are a series of transactions evidenced by registered sale deeds, mortgages and leases between 1894 and 1925 which were executed either by the members of the family in favour of strangers or by strangers in favour of members of this family or by members of the family inter se which contain recitals of an unequivocal character from which the only reasonable inference that can be drawn is that the partition took place in this family in 1914 as alleged by him. I propose to consider some of these documents which were placed before us seriatim.

* * * * *

* * * * *

It is enough to say that the documents beginning from the 28th September, 1915, right up to 1925 contain recitals in many of them to the effect that the members of this family effected a partition in or about the year 1914; and, as the learned Subordinate Judge has pointed out, these documents may be taken to amount to dealings with the property of the family by defendants 1, 7, 8, 13, 33 and 34 as their own property to the exclusion of defendants 19 and 20 (vendors of defendant no. 16) by making purchases and transferring the properties not only to third

persons but also among themselves with an allegation of partition of the lending business and the specification of shares in the manner alleged by the plaintiff. No doubt this is a circumstance of a somewhat reliable character in favour of the plaintiff and ordinarily if there was nothing else in the case I would be inclined to attach great importance to these recitals by competent members of this family as to the state in which the family properties were being held and as to the shares asserted by each branch to the knowledge of the other. The only explanation which Mr. Mullick appearing for the appellant offered as to the recitals mentioned in these documents was that for some reason or other the male members from 1915 onwards began to enter into these transactions with a view to enlarge their shares and to deprive the ladies of their rights in the family property of their husbands. I am not satisfied that this explanation is quite correct and it would be simply acting upon mere suspicion if effect is given to this contention of Mr. Mullick.

It is necessary to examine now whether the plaintiff has succeeded in showing that the partition decree of 1925 was fraudulent or collusive. The only allegations as stated above with respect to this partition decree are found in paragraphs 12 and 13 of the plaint wherein the plaintiff has asserted that the decree was obtained with the sole object of defrauding him of his just claim. No other particulars of the fraud are given evidently because none was known to the plaintiff. In his evidence in court the plaintiff stated on oath—

> "At that time I first came to know of a partition suit by defendants 19 and 20. When the commissioner came to the house of defendant no. 1 for the partition there was a hulla in the village that defendants first party had brought the commissioner for effecting partition under a fraudulent suit brought for defrauding me and other creditors and hence I inferred about the fraudulent character of the suit."

It is obvious that upon this evidence it would be impossible to hold that this decree was fraudulent.

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Mr. De next contended that in view of the manner in which the suit was fought out, and in considering that Lachmi Prasad readily admitted in his cross-examination that the joint family had separated in 1894, it must be held that the decree was obtained fraudulently by putting up a sham fight and therefore it was not binding upon the plaintiff. Now Mr. De has not cared to print any of the other oral evidence which was relied upon by the learned Subordinate Judge in 1925 and it is impossible for us to hold upon a mere reading of the evidence of Lachmi Prasad (Ex. J), who was only thirty years old in 1925, that the learned Subordinate Judge was imposed upon and that his judgment and decree must be held to be fraudulent. I have looked into all the surrounding and attendant circumstances and am constrained to disagree with the reasonings and the finding of the learned Subordinate Judge in the present case that the partition suit of Musammat Saro and Sampato was fraudulent. The learned Subordinate Judge appears to have based his conclusion upon mere suspicion and did not base his conclusion upon legal evidence admissible in the case.

Mr. De next contends that even if the partition suit and the decree of 1925 were not fraudulent, he is not bound by that decision inasmuch as he was no party to that action and his previous title derived from the mortgage of 1920 which was earlier than the partition suit, stood unaffected by the decision to which he was no party. This contention is met by the decisions of their Lordships of the Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdhry*(1) and in *Mohammad Afzal Khan* v. *Abdul Rahman*(2). Mr. De sought to place reliance upon the case of *Obhoy Churn Sircar* v. *Huri Nath Roy*(3). In my opinion this case has no application to the facts of the present case which are fully covered by the authorities of the Privy Council referred to above. To sum up

(1) (1874) L. R. 1 Ind. Ap. 106.
(2) (1932) L. R. 59 Ind. Ap. 405.
(3) (1881) I. L. R. 8 Cal. 72, 76.

it is the admitted case of both parties that at the date of the suit this family had actually separated. Each party sought to set up a case of partition on different dates. The evidence oral and documentary is insufficient to prove the case of partition as set up by the plaintiff. The survey record-of-rights prepared in 1905 which must be presumed to be correct, unless it is established on the evidence that it is incorrect, is consistent with the case of the defendant that the partition took place some time before 1905. This survey record-of-rights was again accepted as correct by the Subordinate Judge in 1925 upon oral evidence. The partition decree passed by the Subordinate Judge in that year is not proved to be fraudulent or collusive and, therefore, binds the plaintiff mortgagee who took a mortgage of an undivided share from his mortgagors and he is entitled to seize only that property which after the partition has fallen to the share of his mortgagor. The onus lies upon the plaintiff to prove his case and also the extent of his title and I hold that he has been unable to prove that his title can prevail against defendant no. 16, the appellant before us.

It is unnecessary to consider whether defendant no. 16 is a bona fide transferee for value.

The result is that the appeal succeeds. The case of the plaintiff is dismissed so far as he seeks to partition the properties which fell to the share of the two Musammats and which were transferred to the appellant by the sale deed, dated the 9th August, 1929.

In view of the fact that the suit of the plaintiff was not wholly without prima facie reasonable foundation, I would direct that as between the appellant and the plaintiff there will be no order for costs here and in the court below.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Madan, J.

1937.

August, 19.

BARAIK RAM GOBIND SINGH

v.

CHOWRA URAON.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 190(*1*) *and* 213—*non-issue of notice under section* 190(*1*), *whether renders the sale void—section, whether applies to warrants issued against immoveable property—section* 213, *whether applies to cases where court had no jurisdiction to sell—remand for rehearing of issues not raised in the plaint, legality of—suit against minor—notice served on mother as guardian—absence of order of appointment and consent of guardian—decree, whether is a nullity.*

An appellate court may remand a suit for rehearing on issues not raised in the plaint, if the remand is on questions of jurisdiction such as can be raised at any time.

The failure to issue notice under section 190(*1*) of the Chota Nagpur Tenancy Act, 1908, is a matter of jurisdiction and renders the subsequent sale in execution void.

There is nothing in section 190(*1*) of the Act to limit its operation to warrants to be issued against the person or moveables of the judgment-debtor; it applies to all warrants issued in execution proceedings under the Act.

Raja Baldeo Das Birla v. *Lal Nilmani Nath Sahi Deo*(1), followed.

Section 213 of the Act applies to cases of irregularity or fraud in conducting the sale, and does not apply to cases where the court had no jurisdiction to sell.

Therefore, the dismissal of an application under section 213 does not bar a subsequent suit under section 214 to set aside the sale.

*Appeals from Appellate Decrees no. 877 to 882 of 1933, from a decision of Babu Kshetra Nath Singh, Special Subordinate Judge of Ranchi, dated the 15th March, 1933, confirming a decision of Babu Nirmal Chandra Ghosh, Munsif of Ranchi, dated the 16th February, 1932.

(1) (1928) I. L. R. 8 Pat. 122.

In the case of minor defendants the court must see not merely that a guardian is appointed, but that the guardian has consented to act.

Rani Chhattra Kumari Debi v. *Panda Radha Mohan Singari*(1), followed.

Where, therefore in a suit the defendants were minors and notices were served on them through their mothers as guardians, but no appearance was made on their behalf, and there was no order of the court appointing the mothers as their guardians or showing that the guardian consented to act on their behalf,

Held, that the decree passed in the suit was a nullity.

Appeal by the defendants.

The appeals were in the first instance heard by Dhavle, J. who referred them to a Division Bench by the following judgment:

DHAVLE, J.—These are appeals by the defendants in suits for having the sales of 6 holdings in mauza Kaimbo in the district of Ranchi in execution of rent decrees declared illegal, null and void and for recovery of possession. According to the plaintiffs the rent decrees were without a foundation of arrears of rent and were fraudulently obtained by suppression of processes; and the execution proceedings were also vitiated by a fraudulent suppression of processes. The trial Court found that there were no arrears of rent due and that there had been no supression of processes. The suits brought by the plaintiffs, now respondents, were accordingly dismissed. There were appeals which were heard by Babu Narendra Nath Banerji, Additional Subordinate Judge. This officer allowed the appeals without reversing the findings of the trial Court; he remanded the suits for re-hearing on two grounds which are not to be found in the plaints but which were urged before him. One ground was that in 4 of the rent suits, which had been decreed in May, 1919 (the dates are not always accurately stated; in Rent Suit no. 723 of 1918-19 for instance, Ex. J1, an execution petition gives the date of the decree as the 8th of January, 1919, while Ex. 1(2) a copy of the decree, gives the date as the 12th of June, 1919, and Ex. G2, the order-sheet, shows that the suit was decreed on the 8th of May, 1919) the sales were without jurisdiction as notices under section 190 of the Chota Nagpur Tenancy Act were not shown to have been issued. The second ground was that in the other two rent suits which were decreed in January, 1921, the sales were without jurisdiction because it did not appear that any guardians *ad litem* had been

(1) (1922) 8 Pat. L. T. 451.

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appointed for the minor defendants or had appeared in the suit. An issue had been raised in the trial Court regarding the jurisdiction of the Civil Court to try the suits in view of the fact (which was not disputed) that the plaintiffs had applied under section 213 of the Chota Nagpur Tenancy Act for getting the sales set aside and had failed. The learned Munsif had held that the suits were accordingly barred under section 258 of the Act. The Additional Subordinate Judge held that section 258 was no bar because the Revenue Court had not treated the applications made by the plaintiffs as applications under section 213 but as applications under section 212—as if both the sections were not mentioned in section 214: and he further held that under section 214 a suit would lie to set aside a sale on the ground of want of jurisdiction.

The remand order of the Additional Subordinate Judge was challenged by appeal to this Court. Macpherson, J. held that no appeal lay as the remand did not come within Order XLI, rule 23.

The suits were re-heard by the Court of first instance in accordance with the remand order, with the result that they were decreed. The learned Munsif inferred that in the four suits of 1918-19 it was more likely than not that more than a year had elapsed between the passing of the rent decrees and the institution of the first execution cases which were dismissed in November, 1921; and as the records of those execution cases had been destroyed under the rules and the decree-holders had failed to produce extracts from the rent suit and execution registers to show when the first execution cases were instituted, and there was no evidence to show that notices under section 190 had been served, he held that the sales were without jurisdiction. I have stated this finding at length because the lower appellate Court has expressly dissented from it and yet upheld the order of the lower Court on another ground. The sales in these four rent suits were held in the course of the second execution cases which were started in November, 1922, and the learned Munsif held that as the interval between the end of the first execution cases and the beginning of the second execution cases was less than a year, no notices under section 190 were necessary in connection with the second set of executions. This the learned Subordinate Judge dissented from in view of the fact that section 190 makes notices necessary when a period of more than a year has elapsed " from the date of the last previous application for execution " and not, as we have in Order XXI, rule 22, of the Civil Procedure Code " from the date of the last order against the party against whom execution is applied for ". As regards the other two rent suits the learned Munsif held that the rent decrees were invalid and inoperative (and therefore the sales also) because it did not appear that the guardians proposed by the plaintiffs in the rent suits for the minor defendants had expressed their willingness to act as guardians or had been appointed to act as such by order of the Court. This view was accepted by the lower appellate Court also.

The first question that arises before me is the effect of the remand order of Babu Narendra Nath Banerji. That order on the face of it was entirely unjustified by anything that appears in the plaints of the

title suits and converted suits based on fraud into suits for want of jurisdiction. There has been a difference of opinion among the High Courts of Allahabad, Calcutta and Madras as to the effect of such improper orders of remand. As the remand order was not appealable, though the defendants did endeavour to get it set aside, clause (2) of section 105 of the Civil Procedure Code does not apply and operate to prevent them from disputing its correctness. Clause (1) of the section entitles appellants to take their stand upon "any error, defect or irregularity in any order affecting the decision of the case". But the powers of the Court in second appeal are limited, while the findings about notices depend less on positive evidence than on inferences and there is the further difficulty caused by the fact that the cases that have now come to me are cases based on want of jurisdiction while the cases that had gone up to the Additional Subordinate Judge were cases grounded on fraud.

Assuming that the remand order of the Additional Subordinate Judge is not (as it possibly might) ignored in second appeal, the question would arise how far a notice under section 190 of the Chota Nagpur Tenancy Act was really essential in these cases. The point is not *res integra* for it was held in *Raja Baldeo Das Birla* v. *Lal Nilmaninath Sahi Deo*(1) that though section 190 provides for a notice before issue of "a warrant of execution" section 185 does not limit such warrants to warrants against the person or against the movable property of a judgment-debtor, and that, therefore, a notice under section 190 is necessary to give the Court jurisdiction to sell the holding or tenure under section 208 of the Code. This raises several questions including one that has been referred to by the lower appellate Court, as I have already indicated, viz. whether the interval of one year is to be counted "from the date of the last previous application for execution" as the section says, or "from the date of the last order against the party against whom execution is applied for" as we have in the analogous provision in Order XXI, rule 22, which was referred to by Ross, J. in the case of *Raja Baldeo Das Birla* v. *Lal Nilmaninath Sahi Deo*(1). The proposition that such a notice goes to jurisdiction is itself open to some doubt as will be seen from my discussion of it in *Chrestien* v. *Jaideo Prasad Rai*(2). I referred on that occasion, among other cases, to *Fakhrul Islam* v. *Rani Bhubaneswari Kuer*(3) in which Kulwant Sahay, J. said that there is no sense in insisting on the issue of a fresh notice under Order XXI, rule 22, to give the executing Court jurisdiction where the judgment-debtor has appeared in the execution proceedings without such notice. In *Chandra Nath Bagchi* v *Nabadwip Chandra Dutt*(4) Rankin, C.J. said that it would be piling unreason upon technicality to do so. But if this is accepted, how can it be said that the notice goes to jurisdiction? What the Privy Council seem to have decided in *Raghunath Das* v. *Sundar Das*

(1) (1928) I. L. R. 8 Pat. 122.

(2) (1934) I. L. R. 13 Pat. 467, 474.

(3) (1928) I. L. R. 7 Pat. 790.

(4) (1931) A. I. R. (Cal.) 476.

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Khetri(1) seems to be that the notice is necessary in order to obtain jurisdiction to sell property by way of execution as against an official assignee or other legal representative who has to be brought on the record. This distinction, however, did not commend itself to the Full Bench of the Madras High Court in *Rajagopala Ayyar* v. *Ramanuja-chariar*(2) but the learned Judges did not, if I may say so with the greatest respect, consider the question of jurisdiction with reference to the facts of such cases as *Fakhrul Islam* v. *Rani Bhubaneshwari Kuer*(3) and *Chandra Nath Bagchi* v. *Nabadwip Chandra Dutt*(4). And would a notice be essential for jurisdiction to sell in execution of a mortgage decree if it has not become necessary to replace the mortgagor on the record by his legal representative? *See Kaniz Mehdi Begum* v. *Rasul Beg*(5). This aspect of the matter is important because we are dealing with rent decrees and rent is a first charge on the holding. Apart from this it is noticeable that the only warrants of execution that are spoken of in Chapter XVI of the Chota Nagpur Tenancy Act—the Chapter in which section 190 occurs—seem to be warrants issued against the person of judgment-debtor (section 191) and warrants against the movable property of a judgment-debtor (section 199). I can find no reference to warrants of execution in respect of tenures or holdings dealt with in section 208, and though section 202 speaks of " warrants for the sale of property under this chapter ", it would appear from the sections 199 to 201 and sections 203 to 207 that section 202 was intended to deal with sale of movable property only. It is also not altogether impossible to see some reason for limiting the warrants of execution in section 190 to warrants of arrest and warrants for the sale of movable property; for in these cases the officer charged with the execution of the warrant has to take immediate action unlike the officer concerned in processes connected with execution against immovable property. Sales under section 208 are effected in accordance with the Bengal Rent Recovery Act, 1865 and apparently require no preliminary but notices to be hung up in various places. At the same time I find that Form no. 27 in Appendix E of the Civil Procedure Code is headed " *Warrant* of sale of property in execution of a decree for money (Order XXI, rule 66)". A still more important consideration is the fact that section 190 speaks of more than one year " from the date of the last previous application for execution ". Warrants of arrest and warrants for the sale of movable property presumably do not take as long as a year for execution; but execution against immovable property often takes much longer than that period, and it is difficult to imagine that it was the intention of the Legislature to provide that when execution is going on against immovable property, there could be no further execution even if the prior execution should for some reason or other fail unless the decree-holder safeguarded himself by taking out a notice under section 190 within one year of his application though not yet disposed of.

(1) (1914) I. L. R. 42 Cal. 72, P. C.
(2) (1923) I. L. R. 47 Mad. 288, F. B.
(3) (1928) I. L. R. 7 Pat. 790.
(4) (1931) A. I. R. (Cal.) 476.
(5) (1918) 48 Ind. Cas. 39.

About the guardians ad litem for the minors there is a great deal of conflict of opinion regarding the effect of absence of proof that the guardian had consented to his appointment. The question was elaborately considered by Das, J. in *Pande Satdeo Narain* v. *Ramayan Tewari*(1). The learned Judge's views, however, have provoked comment in other quarters—*see* the decision of Rankin, C.J. in *Satish Chandra Banarji* v. *Hasemali Kazi*(2) and is not consistent with the views expressed in several reported decisions of this Court *Lala Rampirit Prasad* v. *Babu Thakur Saran*(3), *Rani Chhattra Kumari Devi* v. *Panda Radha Mohan Singari*(4) and *Shaikh Sajjad Husain* v. *Sakal Rai*(5) (a decision to which Das, J. was a party).

In comparison with these matters, the question whether section 258 does not bar the present suits presents little difficulty. The applications made by the plaintiffs under section 213 cannot be brushed aside in the way adopted by the Additional Subordinate Judge. The Deputy Collector may have been and probably was wrong in the way he disposed of them without looking into the question of fraud, but section 214 cannot be so read as to make it possible for the Civil Court to interfere with the order of the Deputy Collector, right or wrong, even on the ground of want of jurisdiction as understood by the Additional Sub-Judge, in view of the bar imposed by section 258. As I read section 258, now that the case of fraud has disappeared, plaintiffs can only succeed, in spite of the dismissal of their applications under section 213, by showing not that the order of the Deputy Collector was wrong but that the Deputy Collector had no jurisdiction at all to entertain those applications. If any relief had been permissible to them on the ground of fraud it has been definitely held under section 258 that the fraud that will have to be established would be fraud in the other party obtaining those orders under section 213—*see Gossain Das* v. *Gopal Singh*(6).

I consider it desirable that the various questions raised in these appeals should be decided by a larger Bench. In coming to this conclusion I took into account the means and wishes of the parties. The case will, as already ordered, be referred to a larger Bench under proviso (*a*) to rule 1 in chapter 2 of part 1 of the Rules of the High Court.

On this reference.

Ray Gurusaran Prasad and *Ray Paras Nath*, for the appellants.

M. N. Pal, for the minor respondents in appeal no. 877 only.

(1) (1923) I. L. R. 2 Pat. 335.
(2) (1927) I. L. R. 54 Cal. 450.
(3) (1921) 2 Pat. L. T. 617.
(4) (1922) 3 Pat. L. T. 451.
(5) (1922) I. L. R. 2 Pat. 7.
(6) (1925) 8 Pat. L. T. 688.

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MADAN, J.—These six appeals by the defendants have been referred to us by a single Judge. The unfortunate history of this litigation begins from the year 1918 when rent suits nos. 693 and 723 were filed under the Chota Nagpur Tenancy Act by the landlords of village Kaimbo in the Ranchi district. The suits were for recovery of three years' rent due in respect of four holdings of Uraon tenants of the village. The order-sheets record that the suits were contested, and in the year 1919 they were decreed for very trifling amounts, ranging from 4 annas 3 pies to 4 rupees 3 annas 6 pies, found to be due after crediting various part payments. Two years later in the year 1921 executions were taken out, but were allowed to be dismissed for default. As a result of further *ex parte* execution proceedings the holdings were sold in June, 1922, and purchased by the landlords. Meanwhile in the year 1920 rent suit no. 330 had been filed in respect of two further holdings of Uraons in the village. *Ex parte* decrees were obtained in the year 1924, and the holdings were purchased in execution by the landlords in the same year. In all six cases the landlords took out delivery of possession through the court in the year 1925. Thus in four of these cases, as appears from the facts stated above, the landlord waited till the sixth year before seizing through the court the entire holdings of the tenants for insignificant decretal amounts, which in three of the cases were actually less than one rupee. Meanwhile the landlords had obtained and realised other rent decrees from the tenants. I cannot but conclude that in the circumstances there might have been good reason for the rent court to set aside the sales, but unfortunately applications filed by the tenants under section 213 of the Chota Nagpur Tenancy Act before that court were rejected as having been filed more than thirty days after the sales, although the tenants pleaded that they had filed them within thirty days of their knowledge of the sales.

The tenants then filed title suits nos. 94 to 99 of 1926 against the landlords, the present appellants, for setting aside the decrees and the consequent sales on the ground of fraud. Title suits nos. 94, 95, 98 and 99 were in respect of the rent decrees of the year 1918, and title suits nos. 96 and 97 were in respect of those of the year 1920. The plaintiffs claimed that no rents were due, and that they were ignorant of both the decrees and the execution proceedings until a peon came to the village to deliver possession to the landlords. They asked to be restored to possession of their holdings as they had been found to be out of possession in proceedings under section 145 of the Criminal Procedure Code. These suits were dismissed by the Munsif in the year 1927 on the ground that no fraud had been established. This decision was upheld by the Subordinate Judge in the year 1928, but the suits were remanded for rehearing on a wholly different ground, namely that, as contended for the first time in the appeal, all six sales were without jurisdiction and void for non-issue of notice under section 190(*1*) of the Chota Nagpur Tenancy Act, while in suits nos. 96 and 97 the decrees were void because the tenants were minors and were unrepresented. An appeal to this Court against the order of remand was dismissed in the year 1932 on the ground that that order was not subject to appeal.

On remand the trial court held that in suits nos. 84, 85, 88 and 89 the sales were void for non-issue of notice under section 190(*1*) in the first execution cases. The court held that in the second executions no such notices were required. In suits nos. 86 and 87 it was found that notices under section 190(*1*) had been issued, but that the decrees were a nullity as having been passed against minors who were not properly represented by a guardian. An

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appeal against this decision was dismissed by the Subordinate Judge, who upheld the findings of the Munsif except that in suits nos. 84, 85, 88 and 89 he found that there was no proof of non-issue of notices in the first execution cases, the records of which had been destroyed; but that the second executions were void for non-issue of notices as more than one year had elapsed between the dates of filing of the two sets of executions. Against this decision the landlords have appealed to this Court.

The first question that has been raised is whether the Subordinate Judge in the year 1928 was entitled to remand the suits for rehearing on issues not raised in the plaint. The remands were on questions of jurisdiction such as can be raised at any time, and it is immaterial that the tenants, as it appears, were not advised by their lawyers to raise those objections in their plaint. I hold therefore that the order of remand was legal. The next question that arises is the effect of non-issue of notice under section 190(*1*) in relation to suits nos. 84, 85, 88 and 89. The section runs as follows:—

> "A warrant of execution shall not be issued upon any decree or order without previous notice to the party against whom execution is applied for, if, when application for the issue of the warrant is made, a period of more than one year has elapsed from the date of the decree or order, or from the date of the last previous application for execution."

The section corresponds to Order XXI, rule 22, of the Civil Procedure Code, except that in the latter case notices are required only if a year has elapsed between the date of the last order in the previous execution and the date of filing the next execution. It has been found by the learned Subordinate Judge in connection with the four suits mentioned above that notice under section 190(*1*) was required to be issued, and that it was not issued. A similar case arose in *Raja Baldeo Das Birla* v. *Lal Nilmani Nath*

Sahi Deo(1), where it was held that failure to issue notice under section 190(*1*) is a matter of jurisdiction, and that the subsequent sale in execution is void. It was contended for the appellants that notice under section 190(*1*) is only necessary where warrant is to be issued against the person or moveables of the judgment-debtor, and that it is not required in the case of immoveable property. The section, however, contains nothing to suggest that it was not intended to apply to all warrants issued in execution proceedings under the Act. It is true that in the same chapter there are sections which refer only to warrants against the person and moveable properties, but I do not see that this is any reason for importing the same limitation into section 190. The same point arose in the case cited above where it was held that the section applies to all warrants, and following this authority I find that the sales in execution in these four cases were void. It was suggested that the plaintiffs were debarred from raising this objection owing to the dismissal of their applications under section 213. That section applies to irregularity or fraud in conducting the sale, and does not apply to cases where the court had no jurisdiction to sell. In such a case the plaintiffs were entitled to file a suit under section 214 of the Act, and I find that in suits nos. 84, 85, 88 and 89 the sales in execution have rightly been held to have been void.

In suits nos. 86 and 87 the decrees themselves have been found to be a nullity. In *Rani Chattra Kumari Debi* v. *Panda Radha Mohan Singhari*(2) it has been held that in the case of minor defendants the court must see not merely that a guardian is appointed, but that the guardian has consented to act. In this case the defendants were minors, and notices were served on them through their mothers as

(1) (1928) I. L. R. 8 Pat. 122.

(2) (1922) 3 Pat. L. T. 451.

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guardian. No appearance was made on their behalf, and there is no order of the court appointing the mothers as their guardians or showing that the guardians consented to act on their behalf. In the circumstances the decrees were rightly found to be a nullity. The result is that I find no reason to interfere with the decision of the learned Subordinate Judge in regard to any of the suits, and I would therefore dismiss these appeals. The plaintiffs are entitled to be restored forthwith to possession of their holdings.

There remains the question of costs. It has been found that in four of these cases the landlords seized the entire holdings of their aboriginal tenants after long delays and for non-payment of ridiculously small amounts. Meanwhile they obtained and realised other rent decrees against the tenants, who no doubt fully believed that all their dues had been satisfied. This conduct of the landlords is such as to admit of no excuse. In the other two cases it has been found that *ex parte* decrees were obtained against minors who were unrepresented with the result that the landlords again got possession of the holdings. It is true that the plaintiffs were held to have been late in filing their applications under section 213 of the Tenancy Act, and were late in putting forward their objections regarding jurisdiction on which they were ultimately successful, but I do not think that they should be made to suffer for these delays I would direct that the appellants should pay to the plaintiffs the entire costs of this litigation.

COURTNEY TERRELL, C.J.—I agree.

Appeals dismissed.

S. A. K.

APPELLATE CIVIL.

Before James and Dhavle, JJ.

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BHAGWAT PRASAD

v.

SUDARSAN BHAGAT.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 208 *and* 213—*reversioner to the husband of a Hindu widow, whether entitled to maintain an application under section* 213—*applicant, duty of, to show that he was owner in possession immediately before sale and that his application was not barred by limitation—sale under section* 208 *void—right, title and interest of parties to proceedings, whether passes by the sale.*

In order that a person should be entitled to prefer an objection under section 213 of the Chota Nagpur Tenancy Act, 1908, the applicant must demonstrate that he is the person who owned the property sold immediately before the sale, and also that his application is not barred by limitation.

A right of succession as reversioner to the husband of a Hindu widow is merely a spes successionis, and the expectant reversioner has no vested interest so long as the widow lives, so that he cannot be regarded as the owner in possession immediately before the sale, within the meaning of section 213.

When partition has been made by metes and bounds, whether by the Civil Court or by private arrangement, the owner of one separate patti is no longer the owner of the other, even though there may be a joint liability for rent.

Quaere: Whether, upon the sale of a tenure under section 208 of the Chota Nagpur Tenancy, 1908, the right, title and interest of the parties to the proceeding passes by the sale, when the sale itself is ultra vires by reason of the fact that the whole of the interests in the tenure were not represented before the Court?

* Appeal from Appellate Order no. 147 of 1936, from an order of F. F. Madan, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 20th May, 1936, reversing that of Babu M. S. Mukherjee, Deputy Collector of Giridih, dated the 2nd January, 1936.

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Jagdishwar Dayal Singh v. *Pathak Dwarka Singh*(1), *Raja Sri Sri Jyoti Prasad Singh Deo Bahadur* v. *Tara Sankar Chatterji*(2) and *Chandra Nath Tewari* v. *Protap Udai Nath Sahi*(3), referred to.

Appeal by the auction-purchaser.

The facts of the case material to this report are set out in the judgment of James, J.

G. C. Mukarji, for the appellant,

Mahabir Prasad and *L. K. Chowdhury*, for the respondents.

JAMES, J.—This is a second appeal under section 224 of the Chota Nagpur Tenancy Act from the appellate order of the Judicial Commissioner made under section 215(*3*) of the Act. On the 10th of May, 1895, the zamindar of Palganj granted a thika of mauza Manjhiladih for a term of forty-seven years to two brothers Kali Charan Bhagat and Ram Prasad Bhagat at an annual rent with cesses of Rs. 115/4. When the record-of-rights was prepared in 1915 the tenure was in possession of Ram Prasad Bhagat and the widow of Kali Charan, holding equal shares in severalty, for which separate khewats were prepared, with a shamilat khewat for lands which were then waste which had not been divided. Under section 13 of the Chota Nagpur Tenancy Act the landlord was not obliged to recognise the subdivision of the tenure; and it would appear that in 1915 no such recognition had been made. In 1931 the landlord jointly sued Sudersan Bhagat and his brothers, sons of Ram Prasad Bhagat, with Musammat Mankumari, widow of Kali Charan Bhagat for rent of the tenure. Sudersan Bhagat defended the suit, denying that he was liable for more than half the rent and alleging that he had paid Rs. 57/10 for his half share of the tenure to the landlord. That suit did not reach

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1933) I. L. R. 12 Pat. 799.
(3) (1913) 18 Cal. W. N. 170.

the stage of decree as the claim was settled out of court. In 1933 the landlord sued Sudersan Bhagat and Musammat Mankumari separately for their shares in a collective suit under section 140 of the Chota Nagpur Tenancy Act, when it appears that Musammat Mankumari in respect of her share was in arrears for only one kist of 1340 Fs. to the extent of Rs. 28/13; while Sudersan Bhagat was in arrears for the whole of 1339 and a kist of 1340, so that the total claim against him was Rs. 87/7. The suit was decreed; and it appears that in due course the landlord's claim was satisfied. In 1935 the landlord again sued the pattidars separately for arrears of rent; and in execution of his decree against Musammat Mankumari he brought to sale her patti which was described in khewat no. 2/2 of the record-of-rights. The sale was confirmed on the 31st of October, 1935. On the 10th of December Sudersan Bhagat preferred an objection under section 214 of the Chota Nagpur Tenancy Act on the ground that he should have been a necessary party to the proceeding. The objection was disallowed by the Deputy Collector who found no substance in it. Sudersan Bhagat appealed to the Judicial Commissioner who allowed the appeal and set aside the sale. The learned Judicial Commissioner remarked that there was no documentary evidence of division of the tenure and that the half share had been sold for an inadequate price to the detriment of the appellant whose reversionary interest had thus been destroyed.

Mr. G. C. Mukharji on behalf of the appellants argues that there is no documentary evidence whatever nor any evidence at all of the existence of the tenure otherwise than as divided by partition into two defined pattis. He also argues that in any view of the matter, the order of the Judicial Commissioner setting aside the sale could not be justified, because the right, title and interest of Musammat Mankumari would have passed to the purchaser; and that the Deputy Collector had no jurisdiction to entertain the

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application under section 213 unless he found that the application was made within the period of limitation prescribed by the section. There is no such finding in the decision of the Judicial Commissioner.

On the question of whether the right, title and interest of Musammat Mankumari passed by the sale under section 208 of the Chota Nagpur Tenancy Act, Mr. Mukharji addressed the Court at some length; and it must be admitted that the question is one of some difficulty. The learned Judicial Commissioner relied upon the decision of the Judicial Committee in *Jagdishwar Dayal Singh* v. *Dwarka Singh*(1) in which it was held that in order that a purchaser might be empowered to annul the encumbrances under section 208 it was necessary that every co-sharer in the tenure must be joined as defendant in the proceeding. That decision was followed by this Court in *Jyoti Prasad Singh* v. *Tarasankar Chattarji*(2), when it was regarded as implying that unless the whole of the interests in the tenure were represented before the court, an order for sale of the tenure under section 208 was ultra vires, and the right, title and interest of the parties to the proceeding could not be conveyed by the sale. In delivering the decision of the Privy Council in the earlier case Lord Thankerton referred with approval to the decision in *Chandra Nath Tewari* v. *Protap Udai Nath*(3) for the purpose of considering whether the purchaser in the case before the Judicial Committee could annul encumbrances. In *Chandra Nath Tewari's* case(3) it was held that a decree against persons who did not represent the entire tenure could not be executed under section 208 of the Chota Nagpur Tenancy Act, but it could be executed as a money decree in the civil court; and the citation of this case together with Lord Thankerton's remark that the sale of the tenure was ultra vires of the revenue court

(1) (1933) I. L. R. 12 Pat. 626, P. C.
(2) (1933) I. L. R. 12 Pat. 799.
(3) (1933) 18 Cal. W. N. 170.

would appear to give justification for the decision of this Court in the later case. Mr. Mukharji draws attention to Lord Thankerton's remark that " the decree is thus only apt to attach the interest of the defendants in the tenure, and is no sufficient warrant for a sale of the whole tenure under section 208 " as implying that the interest of those tenure-holders who had been parties to the suit was liable under the decree. On the principle of *Chandra Nath Tewari's* case(1) that interest was liable under the decree, but it could not pass by a sale under section 208 of the Chota Nagpur Tenancy Act. It did in fact pass as a result of the decision of this Court in *Jagadiswar Dayal Singh* v. *Dwarka Singh*(2); but the question of whether the right, title and interest of those defendants would pass by the sale did not come under consideration because there was no contest on that point. In the case of *Jagdishwar Dayal Singh* v. *Dwarka Singh*(2) the superior landlord had granted a khorposh tenure, which was in the hands of four co-sharers, three of whom, defendants 2, 3 and 4 of the suit, held an eight annas share, while Musammat Shiva Kumari Kuer, defendant no. 5 held the remaining eight annas share. One of the villages of the khorposh grant had been settled by the khorposhdars with the family of Dwarka Singh. The khorposh tenure was brought to sale under section 208 of the Chota Nagpur Tenancy Act and purchased by the superior landlord who proceeded to annul the mokarrari tenure of Dwarka Singh's family. The mukarraridars instituted a suit in which the ultimate decision was that in *Jagdiswar Dayal Singh* v. *Dwarka Singh*(2), praying for an injunction against the superior landlord restraining him from attempting to take possession of any part of mauza Maran which formed the plaintiff's mukarrari grant. The khorposhdars were joined as defendants in the suit,

(1) (1913) 18 Cal. W. N. 170.

(2) (1933) I. L. R. 12 Pat. 626, P. C.

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but none of them contested it, so that the only contest was between the encumbrancer and the superior landlord. It was held that since all the tenure-holders were not impleaded in the rent suit, the sale of the tenure was not a valid sale under section 208 of the Chota Nagpur Tenancy Act and so the proprietor when he purchased in execution had no power to annul the khorposhdar's mukarrari grant. But the plaintiff's suit was decreed without any modification, and one of the reliefs claimed was that the court might hold that by virtue of the purchase made at auction sale the superior landlord had acquired no right but the share and interest of defendants 2—4 in respect of receiving the mukarrari rent. It would, therefore, appear that as between the mukarraridar and the defendants of that suit, he is obliged to pay rent, half to the auction purchaser and half to Musammat Shiva Kumari Kuer, so that the actual effect of the decree in the suit was that the right, title and interest of the actual defendants in the rent suit passed by the sale under section 208, subject to encumbrances created by the tenure-holders; and it cannot be said that the sale was completely annulled by the final decree in the suit. But that question, as I have said, did not come under consideration, because defendants 2 to 5 of the suit did not enter appearance; and if defendants 2 to 4 did not object to the plaintiffs' paying half the mukarrari rent to defendant no. 1, there was no reason why anybody else should object.

The question actually does not arise in the present appeal. It was necessary in order that Sudersan Bhagat should be entitled to prefer an objection under section 213 of the Chota Nagpur Tenancy Act that he should demonstrate that he was the person who owned the property sold immediately before the sale, and also that his application was not barred by limitation. The finding of the Judicial Commissioner is to some extent contradictory, because he finds that the half share was sold,

ignoring the appellant's reversionary right; but if his right in respect of this half share is merely that of a reversioner, then he could not be regarded as the owner in possession immediately before the sale. A right of succession as reversioner to the husband of a Hindu widow is merely a spes successionis, and the expectant reversioner has no vested interest so long as the widow lives, so that he could not be regarded as the owner of the half tenure in that capacity. When partition has been made by metes and bounds, whether by the civil court or by private arrangement, the owner of one separate patti is no longer the owner of the other, even though there may be a joint liability for rent; and in the present case the joint liability for rent continued only so long as the landlord refused under section 13 of the Chota Nagpur Tenancy Act to recognise the subdivision of the tenure between the families of the two brothers. That subdivision was recognised in 1933 and Sudersan Bhagat no longer had any present interest in Musammat Mankumari's patti. The view of the Deputy Collector was correct that the holders of the patti described in khewat no. 2/1 were not necessary parties in a suit for rent against the holder of the patti described in khewat no. 2/2 and the sale held under section 208 of the Act was valid.

Mr. Mahabir Prasad on behalf of the objector Sudersan Bhagat suggests that the sale under section 208 of the Chota Nagpur Tenancy Act cannot be held to be valid, because only part of the tenure was put up for sale, since the shamilat area contained in khewat no. 2/3 was omitted. In *Kumar Ramyad Singh* v. *Chhedia Barhi*(1) a part of the holding was illegally exempted from sale; but there objection was taken by the decreeholder that the court had no power arbitrarily to exempt from sale a portion of a tenure or holding. Sudersan Bhagat can hardly object to the sale of Musammat Mankumari Kuer's patti after

(1) (1922) I. L. R. 1 Pat. 750.

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JAMES, J.

subdivision of the tenure and apportionment of the rent on the ground that the property described in what would have been the *hawalgi lagan* khewat, if apportionment of rent had been made before the preparation of the record-of-rights, must also be brought to sale.

The appeal is allowed with costs, the order of the Judicial Commissioner is set aside and the order of the Deputy Collector is restored.

DHAVLE, J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CRIMINAL.

1937.

August, 24.

Before Varma and Rowland, JJ.

KUNJO CHAUDHARY

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 476 and 476B—appellate court, whether empowered to order a remand—provision of section 476B, whether exhaustive—failure to appeal against order resulting in complaint under section 476—accused, whether entitled to question the legality of complaint after conviction.

The provision of section 476B, Code of Criminal Procedure, 1898, as to the powers of the appellate court not being exhaustive, the appellate court has power to order a remand and to direct the trial court to make a preliminary enquiry to find out if there are sufficient materials to file a complaint.

* Criminal Revision no. 193 of 1937, against an order of H. Whittaker, Esq., I.C.S., Sessions Judge, Monghyr, dated the 3rd March, 1937, affirming that of K. M. Kunar, Esq., Assistant Sessions Judge, Bhagalpur, dated the 23rd December, 1936.

Nasaruddin Khan v. *Emperor*(1), *Surendranath Maiti* v. *Sushilkumar Chakrabarti*(2), *Baidyanath Giri* v. *King-Emperor*(3), *Krishnamachari* v. *Emperor*(4) and *Janardana Rao* v. *Prattipati Laksmi Narasamma*(5), followed.

Dhanpat Rai v. *Balak Ram*(6), *Mendi Lal* v. *Ram Adhin*(7), *Sami Vannia Nainar* v. *Penasami Naidu*(8) and *Manir Ahamed Chaudhury* v. *Jogesh Chandra Roy*(9), dissented from.

Muhammad Bayetulla v. *Emperor*(10), referred to.

A person who has not appealed against an order resulting in a complaint under section 476, Code of Criminal Procedure, 1898, cannot subsequently question the legality of the complaint after his conviction by the trial court and its confirmation by the appellate court.

Jabbar Ali v. *Emperor*(11) and *Jugeshwar Singh* v. *Emperor*(12), followed.

Ali Ahmad v. *Emperor*(13), referred to.

Application in revision by the accused.

The facts of the case material to this report are set out in the judgment of Varma, J.

Baldeva Sahay and *Harinandan Singh*, for the petitioner.

The Advocate-General, for the Crown.

VARMA, J.—This is an application on behalf of one Kunjo Chaudhry who has been convicted under sections 467/109 and 471 of the Indian Penal Code.

(1) (1926) I. L. R. 53 Cal. 827.
(2) (1931) I. L. R. 59 Cal. 68.
(3) (1930) 12 Pat. L. T. 336.
(4) (1933) A. I. R. (Mad.) 767.
(5) (1934) A. I. R. (Mad.) 52.
(6) (1931) I. L. R. 13 Lah. 342, F. B.
(7) (1934) I. L. R. 10 Luck. 335.
(8) (1927) I. L. R. 51 Mad. 603.
(9) (1928) I. L. R. 55 Cal. 1277.
(10) (1930) I. L. R. 58 Cal. 402.
(11) (1929) A. I. R. (Cal.) 203.
(12) (1936) A. I. R. (Pat.) 346.
(13) (1932) A. I. R. (Cal.) 545.

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He was sentenced to three years' rigorous imprisonment under each of the sections, the sentences to run concurrently, but on appeal it has been reduced to eighteen months under each count, and the sentences are to run concurrently.

VARMA, J.

It appears that on the 10th of Baisakh one Nathu Mandal executed a handnote in favour of the petitioner for Rs. 65-7-0. The case for the prosecution was that in Chait, 1337, Nathu Mandal paid Rs. 77-8-0 to the petitioner in full satisfaction of the debt but the petitioner refused to return the handnote because Nathu Mandal refused to pay an additional sum of Rs. 5. On the 27th of March, 1935, the petitioner instituted a suit (no. 208) in the Court of Small Causes at Bhagalpur, on the basis of the handnote in question, and he is alleged to have altered the date of the handnote from 10th of Baisakh 1337 to 10th of Baisakh 1339 so as to avoid the bar of limitation. The suit was later on dismissed for default and the petitioner took no steps for restoration of the case. On the 4th of October, 1935, Nathu Mandal filed an application before the Small Cause Court Judge, under section 476 of the Code of Criminal Procedure asking the Judge to file a complaint against the petitioner for having abetted commission of forgery with respect to the handnote in question and for dishonestly using the handnote as genuine knowing or having reason to believe it to be a forgery. That petition, it now appears, was rejected by the first court on the ground that the suit in question had been dismissed before the petition was filed. Then there was an appeal to the District Judge, who set aside the order of the Small Cause Court Judge, holding that he had erroneously refused to exercise the jurisdiction vested in him by law, and directed the Small Cause Court Judge to hold a preliminary inquiry to find out if there were sufficient materials to file a complaint against the petitioner. This order was passed on the 20th of March, 1936. The Small Cause Court Judge held

an inquiry and filed the complaint on the 11th of May, 1936. In due course the petitioner was committed to the Court of Session for trial and convicted and sentenced as already stated. The present application is directed against the conviction of the petitioner as the result of the trial.

The rule issued by this Court was of a limited character in the following terms:

"Let a rule be issued on the District Magistrate of Bhagalpur to show cause why the conviction of the petitioner should not be set aside on the ground that there was no proper sanction for his prosecution inasmuch as the complaint filed by the learned Munsif (Small Cause Court Judge) was after remand by the District Judge who had no power to order such a remand."

Mr. Baldeo Sahay, appearing on behalf of the petitioner, urges that section 476B of the Code of Criminal Procedure empowers the appellate court either to "direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the Subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly". He argues that the complaint made by the Small Cause Court Judge was illegal inasmuch as there is no power given to the appellate court to make an order of remand in a case under section 476.

In support of his contention Mr. Baldeo Sahay has cited various decisions. He refers to the Full Bench decision of the Lahore High Court in *Dhanpat Rai* v. *Balak Ram*(1), where in answer to the question "Can the Appellate Court order a remand and direct the trial Court to make a preliminary enquiry and come to a fresh decision on the question of making or not making a complaint?", it was held that the procedure on appeal under section 476B of the Criminal Procedure Code is procedure on an appeal under that Code, and as that Code provides for no remand the Appellate Court cannot make a remand

(1) (1931) I. L. R. 13 Lah. 342, F. B.

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to the trial Court, but the Appellate Court may itself make an enquiry in a case where it comes to the conclusion either that the trial Court has made no preliminary enquiry at all or has made a defective enquiry. That was a case in which the defendant in a suit filed a petition for prosecution of the plaintiff on the ground that a false affidavit had been sworn by the latter. The petition was rejected, and the defendant appealed to the Senior Subordinate Judge who held that the trial Court had given no notice to the other side and had given the defendant no opportunity of showing the falsity of the affidavit and had summarily dismissed the petition. He held that on the facts of the case a preliminary enquiry was necessary and the want of such enquiry was a material irregularity He, therefore, set aside the order of the Court dismissing the petition and remanded the case for passing a proper order after giving the petitioner an opportunity of establishing the allegations.

The next case referred to by Mr. Baldeo Sahay is the decision in *Mendi Lal* v. *Ram Adhin*(1) in which the decision in *Dhanpat Rai* v. *Balak Ram*(2) has been relied upon, and it was held that the order of an appellate Court remanding the case and directing further enquiry into the alleged commission of the offence under section 193, Indian Penal Code, was ultra vires and absolutely void. That was also a case in which an application for revision was filed against an order of the Sessions Judge who reversed the order of the Special Magistrate and remanded the case to the Special Magistrate with a direction to make further enquiry under section 476 of the Code of Criminal Procedure.

The next case referred to by the learned Advocate is a single Judge decision of the Madras High Court

(1) (1934) I. L. R. 10 Luck. 335.
(2) (1931) I. L. R. 13 Lah. 342, F. B.

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in *Sami Vannia Nainar* v. *Penasami Naidu*(1) where it was held that in an appeal under section 476B of the Code of Criminal Procedure, the appellate Court has no jurisdiction to take additional evidence for the disposal of the matter coming up before it under the section, whether or not there was any objection to the reception of that evidence, and that section 428 of the Code, which empowers the appellate Court to take evidence, has no application to proceedings under section 476B. There a petition was filed by the defendant against the plaintiff under section 476. The Court refused to file a complaint and the defendant then appealed to the District Court under section 476B of the Code. The appellate Court admitted an affidavit for the disposal of the matter, and relying on the affidavit finally dismissed the application. Against this order a petition was moved before the High Court which after expressing the views above stated, remanded the case to the District Judge for disposal in accordance with law.

The next case relied upon is that of *Manir Ahmed Chowdhury* v. *Jogesh Chandra Roy*(2) where it was held that in an appeal under section 476B, Criminal Procedure Code, the Appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself. In this case also the petitioner approached the High Court after the order of remand was made by the appellate Court under section 476B.

The next case referred to is *Muhammad Bayetulla* v. *Emperor*(3) where it was held that appeals under section 476B of the Code of Criminal Procedure are subject to all the provisions applicable to Criminal appeals as laid down in section 419 and the following sections, and it was therefore open to an appellate Court to dismiss the appeal summarily under

(1) (1927) I. L. R. 51 Mad. 603.
(2) (1928) I. L. R. 55 Cal. 1277.
(3) (1930) I. L. R. 58 Cal. 402.

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section 421. Their Lordships did not interfere in a case in which the appellate Court summarily dismissed an appeal against an order by a lower Court to file a complaint.

VARMA, J.

The learned Advocate-General has drawn my attention to various cases in which it has been held that the powers of the appellate Court mentioned in section 476B, Criminal Procedure Code, are not exhaustive. He has referred to the decision in *Nasaruddin Khan* v. *Emperor*(1). The point raised in that case was that the District Judge had no jurisdiction whatever to dismiss the appeal of the petitioner without looking into the record and considering the same. It appears that when an application was filed under section 476B an Advocate appeared on the first date and he was absent on the second date. The District Judge thinking that this was an abandonment of the appeal he dismissed the application. Their Lordships held that that was not a matter in which the High Court could interfere under section 115 of the Code of Civil Procedure. They held further that the procedure governing such cases is to be sought in the four corners of the Civil Procedure Code, and having come to that conclusion they held that the District Judge was fully competent to dismiss the appeal.

In *Baidyanath Giri* v. *The King-Emperor*(2) we have a single Judge decision which says that the provision of section 421, Criminal Procedure Code, applies to all appeals unless it is specifically provided otherwise. This decision is of importance as indicating that section 476B is not exhaustive.

The case reported in *Surendranath Maiti* v. *Sushilkumar Chakrabarti*(3) is another decision of the Calcutta High Court which following its previous decisions held that the provisions of section 115 of the Code of Civil Procedure apply to applications under

(1) (1926) I. L. R. 53 Cal. 827.
(2) (1930) 12 Pat. L. T. 336.
(3) (1931) I. L. R. 59 Cal. 68.

section 476A and 476B originating in civil courts. Here also the question was whether the lower appellate Court could order a remand. It was observed in that case that section 476B is not intended to be exhaustive. In this case also the petitioner moved against the order of the appellate Court sending back the case on remand for further inquiry.

In *Krishnamachari* v. *Emperor*(1) it was held that as section 476B is not exhaustive as to the powers of the appellate Court in the case of a complaint under section 476, it has power of remand and also of summary dismissal in such cases. But in this case the ground that was taken at the time of admission that the powers of an appellate court under section 476B were exhaustive was not pressed at the time of hearing. This application also was made against an order of the Sessions Judge refusing to direct the withdrawal of a complaint preferred by a Magistrate.

In *Janardana Rao* v. *Prattipati Laksmi Narasamma*(2) it was held that the provisions of chapter 31 can be applied to the hearing of an appeal under section 476B The calling for further evidence is not permissible under section 428, but a remand for proper disposal is competent under clauses (*c*) and (*d*), section 423, and that in an appeal under section 476B in a civil proceeding the appellate Court has power to remand the matter back to the lower court for disposal. In the course of the judgment it is said that as section 476B does not provide for dismissal of appeals and as that power is inherent in all appellate courts it must be held that powers under section 476B are not exhaustive.

From a review of these cases it is clear that opinion is divided as to whether an appellate court under section 476B has or has not the power to remand a case to the lower court for purposes of enquiry. The Lahore and Lucknow High Courts in some of the later

(1) (1933) A. I. R. (Mad.) 767.
(2) (1934) A. I. R. (Mad.) 52.

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decisions hold that the powers under section 476B are exhaustive, whereas most of the recent decisions of the Madras High Court are to the effect that the powers are not exhaustive. I would prefer to adopt the Madras High Court view and hold that the appellate court can exercise all the powers contemplated by the Criminal Procedure Code, except those which are expressly excluded.

But the matter does not end here. These are cases in which the petitioner went to the High Court in revision immediately after the order was passed. But in this case the Munsif filed a complaint on the 11th May, 1936: it is on that complaint and not on the District Judge's order, that the present prosecution started. Assuming the District Judge's order to be a nullity, was there any want of power in the Munsif to file the complaint? It is said he could not do so because he had previously declined to do so. No doubt it is a fundamental principle that a person once acquitted of an offence cannot again be tried for that offence (section 403, Criminal Procedure Code). But this is no such case. Dismissal of a complaint or discharge of an accused in a warrant case is no bar to his being thereafter tried on the same facts and Mr. Baldeo Sahay has not been able to show us any provision of law by which the filing of this complaint was barred.

Even if there had been a legal defect, no steps were taken against that complaint. No appeal was presented to the District Judge under section 476B. In the trial Court, so far as appears, no objection was made. There is nothing in the judgment to indicate that any special objection was raised against the validity of the complaint, nor was that matter agitated in the appeal before the Court of Session. The question is whether the validity of the complaint can now be questioned by the petitioner after his conviction by the trial court and its confirmation by the lower appellate court. In *Jabbar Ali* v.

Emperor(1) Rankin, C. J. held that a person who has not appealed against an order resulting in a complaint under section 476, cannot argue before the Magistrate whether the complaint is a good complaint or made by a proper officer or so forth. It was argued in that case that although there was an appeal against every order made under section 476, it is open to the person complained against not to exercise his right of appeal at all and to argue before the Magistrate or the Sessions Judge whether the complaint was a good complaint or made by a proper officer. His Lordship observed as follows: "In my opinion this contention cannot be too formally rejected. What the Criminal Procedure Code requires is that certain proceedings shall not be instituted unless there is a complaint. Whether there is a complaint or there is no complaint in my judgment is a question which can only be agitated in the manner provided". In our own High Court it has been held in *Jugeshwar Singh* v. *Emperor*(2) that an objection to initiation of proceedings must be taken at an early stage and where the case is triable by Sessions, and is initiated on the complaint by a Magistrate under section 476, once the commitment is made it is too late for the accused to take an objection against the initiation of the proceedings on the ground of want of jurisdiction in the Magistrate or the person functioning as such, and reliance was placed by their Lordships on the decision in *Jubbar Ali* v. *Emperor*(1) and on the decision in *Ali Ahmad* v. *Emperor*(3).

In this view of the matter, this application must be rejected. The petitioner must surrender to his bail to serve out the remainder of his sentence.

ROWLAND, J.—I agree.

S. A. K. *Rule discharged.*

(1) (1929) A. I. R. (Cal.) 203.
(2) (1936) A. I. R. (Pat.) 346.
(3) (1932) A. I. R. (Cal.) 545.

APPELLATE CIVIL.

Before James and Dhavle, JJ.

1937.

July, 28.

THAKUR PRASAD MARWARI

v.

CHAMAN RAM MARWARI.*

Registration Act, 1908 (*Act XVI of* 1908), *sections* 34, 36 *and* 77—*order extending time signed by District Sub-Registrar for District Registrar, legality of—failure of Sub-Registrar to take proper steps to procure attendance of defendant, whether bars a suit under section* 77.

Although it is more proper for the District Registrar, when he makes an order extending time under section 34(*1*) of the Registration Act, 1908, to sign the order himself, the order does not become invalid merely because the District Sub-Registrar signs it for him.

The fact that the Sub-Registrar, when he is moved to issue process under section 36 of the Registration Act, fails to take the proper steps to secure the attendance of the defendant cannot in any way prejudice the right of the plaintiff to institute a suit under section 77 of the Act when registration is refused.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of James, J.

Dr. P. K. Sen and *K. P. Sukul*, for the appellants.

G. N. Mukharji, for the respondents.

JAMES, J.—The suit out of which this appeal arises was instituted under section 77 of the Indian Registration Act, praying for an order for the registration of two documents which had been executed by the defendants. The suit has been decreed, and

* Appeal from Appellate Decree no. 981 of 1934, from a decision of Mr. S. C. Mukharji, District Judge of the Santal Parganas, dated the 24th August, 1934, affirming a decision of Babu Akhileswar Prasad, Deputy Magistrate Sub-Judge, Godda, dated the 2nd January, 1934.

the defendants' appeal has been dismissed by the District Judge of the Santal Parganas. It appears that the plaintiffs immediately after execution of the document applied for registration; but they could not secure the attendance of the defendants to admit execution. On the last day on which such an application could be made under section 34 of the Registration Act, the plaintiffs applied for extension of time in order to secure the attendance of the defendants and prayed also for issue of process to compel their attendance. The application was referred to the District Registrar who granted it after imposing a fine; but it appears that the notice which should have been served in the form of a summons under the Code of Civil Procedure was issued as a mere notice from the office of the Sub-Registrar. The defendants did not appear, and on the expiry of the second period of four months, the Sub-Registrar refused registration. The plaintiffs appealed to the District Registrar who dismissed their appeal, whereupon they instituted a suit under section 77 of the Indian Registration Act.

Dr. P. K. Sen on behalf of the appellants suggests that the plaintiffs could not properly prosecute a suit under section 77 of the Act because in the first place the original order extending time was not legal; and, in the second place, the refusal to register could not be properly regarded as in accordance with law, because the Sub-Registrar had not observed the proper procedure in the issue of process on the defendants. The learned District Judge has remarked that it may be questioned whether the District Sub-Registrar had power to issue an order extending time under section 34(*1*) of the Indian Registration Act; but from the form of the order it appears to be clear that it was issued by the District Registrar, but signed for him by the District Sub-Registrar. It might perhaps be more proper for the District Registrar when he makes an order of this kind to

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JAMES, J.

sign it himself; but the effect of this order cannot be regarded as invalid because the District Sub-Registrar signed it for him. The Sub-Registrar when he was moved to issue process under section 36 of the Act, ought to have applied to the prescribed local court for issue of a summons; but the fact that he did not take the proper steps to secure the attendance of the defendants cannot in any way prejudice the right of the plaintiffs to institute a suit under section 77 of the Registration Act, when registration was refused. The utmost which could have been claimed by the defendants would have been for them to be excluded from liability for costs, because they have had no proper notice of the execution proceedings; but it was hardly possible for them to plead in the present case that if proper notice had been served they would have attended and admitted execution, because they attempted in the present litigation to demonstrate that the documents had not been properly executed at all and that they therefore ought not to be registered.

There is no merit in this appeal, which must be dismissed with costs.

DHAVLE, J.—I agree.

S. A. K.

Appeal dismissed.

REVISIONAL CIVIL.

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July, 30.

Before James and Dhavle, JJ.

CHAIRMAN, ARRAH MUNICIPALITY

v.

RAMKUMAR CHOUDHURY.*

Ref. 28 Pat. 276.

Bihar and Orissa Municipal Act, 1922 (*B. & O. Act VII of* 1922) *sections* 99 *and* 119—*procedure prescribed by section*

* Civil Revision no. 617 of 1936, from an order of Babu R. A. Narain, Small Cause Court Judge of Arrah, dated the 21st August, 1936.

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99(b), when is to be followed—laying down of tests, whether is a condition precedent to an assessment—failure to apply for review of assessment or exemption on the ground of non-occupation or non-liability, whether debars assessee from raising such objections in a suit—section 119.

Section 99(*b*) of the Bihar and Orissa Municipal Act, 1922, comes into operation only when the question arises of how the words in clause (9) of section 3 " held under one title or agreement " are to be interpreted. Then the Commissioners are to decide at a meeting what tests shall be applied. The section does not require them to decide these questions before they may be raised by any person affected by the assessment.

If an assessee desires to dispute his occupation of any holding or his liability to be assessed, it is necessary, under section 116 of the Act, that he should apply to the Commissioners for review of the assessment or for exemption; his failure to do so debars his right, under section 119, to raise such an objection in a suit.

Application in revision, under section 25 of the Provincial Small Cause Courts Act, by the plaintiff.

The facts of the case material to this report are set out in the judgment of James, J.

Mahabir Prasad and *Harinandan Singh*, for the petitioner.

D. N. Verma, for the opposite party.

JAMES, J.—This is a proceeding under section 25 of the Provincial Small Cause Courts Act, arising out of a suit which was instituted by the municipality of Arrah for recovery of arrears of municipal taxes from the defendant. The defendant did not claim that he had paid the taxes; but he contested the suit on other grounds: that the assessment was invalid, because the Commissioners had failed to comply with the provisions of the Bihar and Orissa Municipal Act; that the assessment was excessive and that he was not himself the person in actual occupation of

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the holding. The Small Cause Court Judge dismissed the suit, finding that the assessment was invalid, because the Commissioners had not at a meeting before the assessment was made decided, in regard to holdings in general or to this class of holdings in particular, what tests should be applied for determining whether particular property should be treated as held under one title or agreement.

Mr. Mahabir Prasad on behalf of the petitioning municipality argues that the learned Small Cause Court Judge has misunderstood the effect of section 99 of the Municipal Act, that the provisions of sub-section (*b*) of the section are not mandatory and that it ought not to be considered that the laying down of any such tests as are described in the section should be a necessary condition precedent to the validity of a municipal assessment. Mr. D. N. Varma on behalf of the respondent contends that the word 'shall' in sub-section (*b*) implies that the direction is mandatory and that the failure to obey must be fatal to the legality of an assessment. The learned Small Cause Court Judge and the defendant appear to have been misled by some remarks made in a judgment of this Court which they misunderstood, and also by a report of the special inspecting officer of municipalities under the Local Government. In a suit which was instituted by other assessees, whose holdings had been assessed under similar circumstances, for the purpose of setting aside their assessments, the learned Judges of this Court remarked in their judgment that there was nothing in the evidence before them to show that the municipal commissioners had not observed the procedure laid down in section 99 (*b*) of the Act; and so it must be presumed that they had prescribed tests at a meeting in regular form. This remark appears to have been misunderstood in this way, that it was taken to mean that if there had been evidence to show that no meeting had been held for the purposes described in

section 99(*b*), the assessment would have been invalid. Nothing of the kind was actually said in the judgment of the High Court; and indeed it should be clear to anybody reading the decision of Mr. Justice Wort that he considers that it is only when the question actually arises, of what is to be treated as the meaning of the words " held under one title or agreement " in section 3(9) of the Act, that the procedure described in clause (*b*) of section 99 must be followed. The Inspector of Municipalities in a report of the 15th of February, 1936, gave some encouragement to this misunderstanding of the effect of the decision of this Court, when he criticised the municipality for having failed to prescribe formal tests for determining whether property within the municipality should be treated as held under one title or agreement, apparently regarding section 99(*b*) as prescribing a procedure which must necessarily be followed before an assessment could be made. The municipal commissioners actually had by that time formally at a meeting prescribed such tests on the 14th of September, 1935; but this was long after the assessment of the holding with which we are here concerned.

The question remains of whether the provisions of section 99(*b*) of the Act are to be regarded as mandatory in the strictest sense of the word; that is to say, whether assessment of municipal taxes cannot legally be made unless before assessment the commissioners at a meeting have decided that certain tests shall be applied for determining whether property is to be treated as held under one title or agreement. The clause says that the commissioners shall decide at a meeting what tests shall be applied; but it does not say that they must be decided in regard to holdings in general, nor does it say that they must decide in regard to any class of holdings in particular. They are to decide in regard to holdings in general or to any class of holdings in particular, so that strictly

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speaking if the clause were to be regarded as mandatory, the requirements would be satisfied by a decision as to the tests which should be applied to any single class of holdings without reference to any of the others. Section 99 does not prescribe the procedure which as a matter of course and on all occasions must be followed by municipalities before assessment is made. It comes into operation only when the question arises of how the words in clause (*9*) of section 3 "held under one title or agreement" are to be interpreted. Then the commissioners are to decide at a meeting what tests shall be applied. That is to say: the matter is not one which can be decided by the executive officers of the municipality, the Chairman or the Vice-Chairman or the assessment committee. It must, if the question arises, be decided by the commissioners at a meeting. The effect of section 99 is to vest in the commissioners the power to decide for holdings in general or particular holdings the meaning of the expression "held under one title or agreement" which might otherwise form the subject-matter of a suit in a civil court; but it cannot be held to require them to decide these questions before they may be raised by any persons affected by the assessment.

After the assessment has been completed, the defendant's partner objected to the assessment taking various grounds; but nothing in his objections raises the question of whether each of these parcels of land which was separately assessed properly constituted one holding, so that there was nothing in his objection which called for decision under section 99 of the Act. Mr. D. N. Varma on behalf of the defendant now objects that the defendant is actually not in possession of much of the property contained in these holdings assessed to municipal tax.

The learned Small Cause Court Judge disallowed this objection quite rightly; and it is manifest that there can be no basis for it in fact. If the assessee

disputed his occupation of any holding or his liability to be assessed, it was necessary under section 116 of the Act that he should apply to the commissioners for review of the assessment or for exemption; and section 119 of the Act provides that no objection shall be taken to any assessment in any other manner than provided by the Act. The objections taken were based on the ground that municipal taxes were not payable, because the land was assessed to cess; that the land was outside the municipal limits or that if the land was not outside the municipal limits, it should be treated as if it were. No objection was taken on the ground that the parcels separately assessed did not properly constitute holdings within the meaning of the Municipal Act; and no objection was taken on the ground that the objector was not in occupation of the land in respect of which he was assessed. These new grounds of objection cannot be taken here; and in any view of the matter, although we may have no right to interfere if the statement of facts now put forward were true, we feel assured that it is not true. If it had been true, it would certainly have been put forward in the petitions of objection. The objector has not claimed that he has paid these taxes; and since he is clearly liable to pay them the suit of the municipality should have been decreed.

The order of the learned Small Cause Court Judge is set aside. This application is allowed and the plaintiff's suit is decreed with costs throughout.

DHAVLE, J.—I agree.

S. A. K.

Rule made absolute.

REVISIONAL CRIMINAL.

Before Madan, J.

1937.

August, 6.

RIVERS STEAM NAVIGATION COMPANY, LTD.,

v.

KING-EMPEROR.*

Inland Steam-Vessels Act, 1917 (*Act I of* 1917), *section 58—mens rea, element of, whether necessary for conviction—certificate, whether required to be in force—contravention of certificate last issued—offence committed when certificate under renewal—conviction, whether bad.*

Section 58 of the Inland Steam-Vessels Act, 1917, provides :—

"If an inland steam-vessel has on board or in any part thereof a number of passengers which is greater than the number set forth in the certificate of survey as the number of passengers which the vessel or the part thereof is, in the judgment of the surveyor, fit to carry, the owner and the master shall each be punishable with fine which may extend to ten rupees for every passenger over and above that number."

Held, (*i*) that the language of the section gives no option to the Magistrate but to hold the owner and master liable if the section is contravened; the question of mens rea does not arise.

Williamson v. *Norris*(1), referred to.

(*ii*) that section 58 does not contemplate that the certificate must be in force; for the purpose of this section the certificate intended is the certificate last issued for the steamer, and it is immaterial that the certificate was under renewal at the time the offence was committed.

Applications in revision.

The facts of the case material to this report are set out in the judgment of Madan, J.

A. C. Chatterji, for the petitioners.

* Criminal Revision no. 225 of 1937 and no. 223 of 1937, against an order of S. K. Das, Esq., I.C.S., Sessions Judge of Saran, dated the 26th February, 1937, affirming an order of H. S. C. Martin, Esq., Subdivisional Magistrate of Siwan, dated the 7th October, 1936.

(1) (1899) 1 Q. B. 7.

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RIVERS STEAM NAVIGATION COMPANY, LIMITED v. KING-EMPEROR.

The Advocate-General, for the Crown.

MADAN, J.—These are applications by the Rivers Steam Navigation Company, Ltd., and by Irshad Ali, who have been fined the sum of Rs. 1,000 and Rs. 300, respectively, under section 58 of the Inland Steam-Vessels Act of 1917. On the 11th November, 1935, the S. S. Cherra belonging to the Company was plying on the river Gogra in charge of the other petitioner as master or sarang. There was a mela at a place called Bhagrasan on that date with the result that at Tikaulia or Maniar Ghat, a calling place of the steamer, a large number of persons crowded on board. The steamer crossed to Pattar Ghat and was on the way to Darauli, the next calling place, when it struck a submerged obstacle, probably the stump of a tree, and sank. Fortunately the upper deck remained above water, but some passengers were carried away in the stream and were drowned, while others managed to swim to shore. Both courts have found that the vessel was carrying more than 700 passengers, whereas according to the last issued certificate of survey it was licensed to carry a maximum of 328. The Company and the sarang have therefore been convicted under section 58 of the Act, which prohibits the carrying of a larger number of passengers than that entered in the certificate as being in the judgment of the official surveyor the number which the vessel is fit to carry. This Court is being asked to set aside the convictions of the petitioners under this section.

It was argued that the Company is not liable as it has not been shown to have been directly responsible for the overloading, or, in other words, on the ground that the element of mens rea, which is required for conviction under a criminal charge, has not been established. Mr. Chatterjee, who appeared for the Company, referred to *Williamson* v. *Norris*(1) where it is stated as a general rule of English law that no crime can be committed unless there is a mens rea.

(1) (1899) 1 Q. B. 7.

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MADAN, J.

The same authority allows that there are exceptional cases where a man is treated as guilty even though he had no guilty mind. We must therefore look to the wording of the section itself, which gives no option to the Magistrate but to hold the owner and master liable, if the section is contravened. The question of mens rea does not, therefore, arise; nor does it appear to be unjust that the Company should be made liable since it may be presumed that it has profited by reason of the passengers carried in excess.

It was next argued that the certificate of survey in this case was issued incomplete, and that it admits of the interpretation that not less than 656 passengers could have been carried. There are three schedules on the certificate showing the number of passengers allowed to be carried, namely schedules *A*, *B* and *C*. Schedule *A* shows 218 passengers and schedule *B*, which is said to apply to this case, shows 328. Schedule *C* is blank, but it is suggested that according to the usual calculation it should show double the number given in schedule *B*, namely 656. Schedule *C* applies to voyages of not more than six hours, and it is argued that in this case the passengers carried in excess were travelling for a shorter distance than six hours. For the purpose of the schedule the voyage of the steamer has to be considered and not that of the passengers, and it was not suggested, and could not be suggested, that the voyage of the steamer, plying in regular service on the river Gogra, did not exceed six hours. In such cases schedule *B* applied and the maximum number of passengers to be carried was 328, which number has been found to have been greatly exceeded.

The main argument for the petitioners was that section 58 itself does not apply to the case. According to section 3(*l*) of the Act an inland steam-vessel shall not proceed on any voyage, or be used for any service unless it has a certificate of survey in force and applicable to such voyage or service. Under section 55 the owner and the master of an inland steam-vessel proceeding on a voyage in contravention of section 3 are

liable to fine. In this case the certificate had expired on the 8th June, and thereafter a fresh survey was required by the Act to be made, and a fresh certificate to be issued. This certificate was not issued till the 15th December, whereas the accident took place on the 11th November. Section 3(*2*) of the Act provides that a steamer may ply without a certificate during such time as may reasonably be required for obtaining a new one. In the present case the petitioners were at first charged under section 55 for using the vessel without a proper certificate. The prosecution under this section was withdrawn presumably because the authorities concerned were satisfied that the petitioners were not responsible for the delay in issuing the certificate. It is now argued that section 58 can no longer apply to the case. This section runs as follows:—

> "If an inland steam-vessel has on board or in any part thereof a number of passengers which is greater than the number set forth in the certificate of survey as the number of passengers which the vessel or the part thereof is, in the judgment of the surveyor, fit to carry, the owner and the master shall each be punishable with fine which may extend to ten rupees for every passenger over and above that number."

It is argued that as no certificate was in force at the time of the accident there can be no conviction for carrying passengers in excess of the certificated number. Now it is obviously part of the scheme of the Act that a steamer shall not be allowed to carry a larger number of passengers than that which it has been certified as able to carry within the limits of safety. If, as the Act now stands, the petitioners are not liable to conviction under section 58 merely because their certificate was under renewal at that time, the Act ought forthwith to be amended. Section 58, however, does not say that the certificate must be in force, but that the steamer must not carry more than the number which, according to the judgment of the surveyor, as entered in the certificate, it is fit to carry. In my opinion for the purpose of this section the certificate intended is the certificate last issued for the steamer, and it is immaterial that that certificate

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was under renewal at the time, and the petitioners have been rightly convicted.

Lastly it was suggested that the sentences are excessive on the ground that the accident was not due to any fault of the sarang. The regulations, however, had been framed under the Act as a safeguard against accidents such as happened in this case. Had the steamer not been overloaded it is probable that most or all of the passengers would have been able to reach the upper deck, and the loss of life might have been avoided. I do not consider that the sentences on either petitioner are excessive, and I dismiss the applications.

MADAN, J.

S. A. K.

Rule discharged.

APPELLATE CIVIL.

1937.

August, 17.

Before Courtney Terrell, C.J., and Manohar Lal, J.

BENGAL AND NORTH-WESTERN RAILWAY CO., LTD.

v.

MATUKDHARI SINGH.*

Railway Company—suit for damages—negligence, what constitutes—duty to guard and shut gates at level crossing—contributory negligence—plaintiff, when entitled to damages.

Where there is a level-crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company, and if the Railway Company leave the gates open, it is an invitation on their part for passengers and traffic to approach the line.

* Appeal from Original Decree no. 133 of 1934, from a decision of Babu Gopal Chandra De, Subordinate Judge of Chapra, dated the 14th August, 1934.

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Notwithstanding the duty on the part of the Railway Company, it is the duty of passengers, who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the non-fulfilment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Company.

Mercer v. *South-Eastern and Chatham Railway*(1), followed.

Where, in a suit for damages against the Railway Company, the plaintiff alleged that his elephant was hit and killed by the train at the level-crossing and it was found as a fact that this level-crossing was not guarded by a gate-keeper and the gates had not been closed before the approach of the train and it was further found that there existed exceptional circumstances which did not make it an unreasonable act on the part of the *mahut* of the elephant to urge it forward on to the line and cross it, *held*, that the Railway Company had clearly neglected their duty so as to make them liable in damages.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

S. N. Bose, for the appellant.

B. P. Sinha, for the respondents.

COURTNEY TERRELL, C.J.—This is an appeal from a decision of the Subordinate Judge of 2nd Court, Chapra, decreeing the suit of the plaintiffs against the Bengal and North-Western Railway Company, Limited for damages in respect of their negligence in running into and killing the plaintiffs' elephant. The elephant was admittedly killed by a train running into it on the line and the only question is, whether the occurrence was due to negligence on the part of the Railway Company.

Now the line upon which the accident occurred is a single line by which trains pass east and west

(1) (1922) 2 K. B. D. 549.

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between Rajapatti on the east and Dighwa Dobauli station on the west, and from east to west between those two places the line is not fenced and traverses some level-crossings. The place of occurrence is in the vicinity of a level-crossing which traverses the line from south to north and immediately to the south of this level-crossing a mela is held twice in the week and large numbers of people attend this mela and pass from the mela to villages which lie to the north of the line by way of the level-crossing.

According to the story of the plaintiffs, the level-crossing is, it is true, provided with the usual gates but the gates are not supervised and it is admitted that there is no house by the level-crossing to accommodate any gate-keeper. The case of the defendant Company is that they had not appointed any permanent gate-keeper for that particular level-crossing but that they had temporarily appointed a person whose normal employment was that of a keyman to take charge of the gates and that this direction had been given about a fortnight before the incident in question. The story of the plaintiffs is that the elephant which had been taken to the mela to the south of the line was being taken across the level-crossing and in doing so it passed through the southern gate which had not been closed and on the train which was coming from the east along a stretch of line at least half of which is perfectly straight, the elephant took fright at the noise and bolted westwards along the line which runs on a slight embankment. But the train could not be pulled up or was not pulled up in time and struck the elephant in the rear and that it fell down the embankment and there died.

The negligence alleged is twofold. First of all there is that which is involved in not having a gate-keeper in charge of the level-crossing and in not closing the gates on the approach of a train. Furthermore, it was contended that the driver of the train was negligent in that he did not pull up on seeing the

elephant as he manifestly could have seen it for quite a long stretch of the line to the east of the level-crossing.

Now the accident occurred on the 1st November, 1932, and within a week or so of the accident, that is to say, on the 10th the plaintiffs wrote a letter to the Agent of the Company, stating their complaint that the elephant was passing through the level-crossing which had remained unclosed; that the passenger train reached the crossing without whistling and that it startled the elephant which moved towards the west, and that the driver had not stopped as he should have done but it followed the elephant and collided with it. Paragraph 3 of the letter is quite specific and is as follows:—

"That at the crossing there was no gate-keeper and my clients' elephant has been killed owing to the wilful negligence of your Company's Engine-driver as also owing to the unclosed state of the level-crossing and absence of any gate-keeper. The driver having full view of the elephant did not stop the train or take any step to avert the accident."

The plaint filed on the 17th June, 1933, set forth substantially the same allegations and the defence filed on the 31st August denies these allegations and sets up a story that the elephant did not pass over the level-crossing at all but it remained at a place a little over a hundred yards to the west of the level-crossing under a certain pipal tree and that there, not being properly attended to, it had been startled by the approach of the train, climbed up the embankment and on to the line and there met its death through no negligence of the defendant Company; and the written statement further denied that the death of the elephant was due to any rash, negligent or tortious act of the engine-driver and also denied that the level-crossing gate was open or that the gateman was absent.

The plaintiffs, with a view to test the allegation of the defendant Company that there was in fact a gateman on duty on this particular occasion, asked them to produce certain documents in their possession

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or power. The reply by the defendant Company was that they declined to produce the documents called for because they would not disclose the matter of the pay of the gateman or his presence, the gateman having been only appointed temporarily some fourteen days before, and secondly, that the erection of the hut, meaning the gate lodge took place long after the accident, hence no bill could be produced and that the fencing was erected by the servants of the Railway and hence there was no bill.

It is very clear that the seriousness of the plaintiffs' allegation that the defendant Company were negligent in not providing a gateman was thoroughly understood by the Company. Their explanation in court was that a person whose normal duty was that of a keyman had been put on duty to look after the gate under verbal orders a fortnight before but the person alleged to have given the verbal orders was not called and the utmost that the defendant Company could do to endeavour to establish their defence on this point of the case was to call an individual named Ambica Ojha who was the last witness called by them. He stated in his evidence that he was the gateman at the level-crossing on the day of the accident: that he was a keyman and had been deputed as watchman and he purported to describe the occurrence according to the story of the defendant Company that the elephant was left under the pipal tree and that when the engine arrived at the level-crossing the driver whistled and that the elephant was startled and had crossed the line, and he further stated that he had locked up the gates and stood there before the arrival of the train. To my mind it is manifest that this story of the elephant standing under the pipal tree has been invented for the purpose of getting over the story of the animal having approached the railway line through the level-crossing. It was manifest that if the elephant had approached the railway line by means of the level-crossing and had been killed by the passing train the story of the shutting of the gates for some considerable

period as would be necessary before the arrival of the train at the level-crossing, must be untrue; and it was for that reason that this story of the pipal tree was invented. The story of the elephant being under the pipal tree and having approached the line from that place at least a hundred yards away from the level-crossing is untrue is shewn by the evidence of a witness who attempted to support the tale. I forgot to say that one of the undisputed facts is that at the time of the collision between the train and the animal, a mahut was perched on the back of the elephant. If the defendant Company's story were true, the mahut must have been present under the pipal tree, but, Ambika Ojha, the person who is supposed to have been the gate-keeper, says that when under the pipal tree neither the mahut nor the malik was near the elephant; it was standing alone under the pipal tree and it was not tied down. The improbability of an elephant being left in such a position unfastened is manifest. The fact is that the unfortunate mahut, who was injured while actually riding on the elephant, is not accounted for, and I have not the slightest hesitation in saying that the story of Ambika Ojha is absolutely false and that the elephant approached the line by means of the level-crossing.

Now the case was conducted on both sides with the utmost extraordinary incompetence in that in a case like this the evidence of the witnesses could have been tested by simple cross-examination, notably of the individual witnesses who claimed to have witnessed the accident; but no real cross-examination took place on behalf of either side and the evidence of these witnesses can only be tested by what they stated in examination-in-chief without reference to any irrelevant evidence which they gave in answer to questions put in cross-examination.

The person who was in charge of the elephant states that the animal had been in the fair, that he had directed the mahut to take it by means of the

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level-crossing on to the other side of the line. Two mahuts support him in this statement, one was on foot and the other was riding on the elephant at the time.

The witnesses for the plaintiffs were evidently under the impression that the case they had to make out on behalf of the plaintiffs was the negligence of the engine-driver and therefore every one of them concentrated his attention on the alleged callous behaviour of the engine-driver who drove the engine on to an innocent elephant that was standing on the line and that he made no attempt to slow down the speed; and according to one of the witnesses for the plaintiffs the engine-driver actually accelerated the speed of his engine so that the elephant was run over and killed in a callous manner. That the engine-driver did all that lay in his power to avoid the accident is clear. He caught sight of the elephant very shortly before he arrived at the level-crossing which corroborates that part of the story given by the plaintiffs' witnesses that the gates were not closed, for at least half a mile eastward of the line the level-crossing would be in full view along a perfectly straight strip of road, and the fact that the driver did not see the elephant until shortly before the accident indicates to me that it came on the line through the level-crossing. Had the gates been closed as they should have been when the train was half a mile or a quarter of a mile away from the station, the accident could never have occurred.

Now the law of negligence is perfectly simple. Where there is a level-crossing and more particularly where there is a level-crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company and if the Railway Company leave the gates open, it is an invitation on the part

of the Railway Company for passengers and traffic to approach the line. In this country where slow moving traffic such as bullock carts and elephants is common, the gates should be closed and kept closed for a sufficient interval of time before the approach of a train and while the train is at a sufficient distance to prevent the possibility of any accident. It is hardly necessary to say that, notwithstanding the duty on the part of the Railway Company, it is the duty of passengers, who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the non-fulfilment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Railway Company. The law was thoroughly explained by Lush, J. in a wellknown case [*Mercer* v. *South-Eastern and Chatham Railway*(1)]. In that case a wicket-gate had been provided at a level-crossing by the Railway Company but on the occasion of the accident in question the wicket-gate had been left unlocked. A person coming to the gate of the level-crossing found it open and, as he was entitled in law, treated it as an invitation to come on to the railway line. The learned Judge then explained the law in this way:

"On the occasion in question, owing to the neglect of the signalman, the gate was unlocked at a time when a train was approaching. To those who knew of the practice this was a tacit invitation to cross the line."

Then at page 553 he said:

"I should certainly hesitate to hold that if in a case of this kind a person wishing to use the level-crossing were, merely because he found the gate unlocked, to omit to look and see whether the way was clear when there was nothing to prevent him from doing so, and were to walk on, reading a newspaper, for example, he could make the company liable if he

(1) (1922) 2 K. B. D. 549.

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were run down by a train that he could easily have seen or heard. The railway company may have tacitly invited him to cross the line, but they did not invite him to leave his common sense behind him. There are, however, special circumstances in this case, inasmuch as, owing to the position of the down train, the plaintiff could neither see nor hear the up train."

The same special circumstances are present in this particular case. To drive an elephant requires concentration on the behaviour of the animal and it takes all the driver's attention to see that the animal pursues the straight path in which he is guiding it and behaves reasonably towards wheel traffic and pedestrians, and seeing the level-crossing gate open it was not at all an unreasonable act on the part of the mahut of the elephant to urge it forward on the line and cross it and he could hardly be expected either to depute some one else to come down to the line and watch in case a train was coming, nor would it be reasonable for him to dismount and ascertain the fact for himself. He was justified in crossing the line having regard to the way being left open.

Now the Railway Company clearly neglected their duty in this case. The evidence produced by the defendant Company to try to establish that their gateman (or Ambika Ojha who was said to be that gateman) was on duty on the 1st November is of the feeblest character. They called a Mr. S. Ghosh, the Assistant Engineer to the Railway. He said that he had been told by his predecessor, a Mr. Hypher, that a gang-man had been deputed to act as gateman, but Mr. Hypher was not called. In cross-examination Mr. Ghosh stated that he took over charge in succession to Mr. Hypher but it was not until the 2nd November, that is to say, the day after the accident, that he went over the line and then Ambika Ojha, the temporary gateman was in office. This evidence leads to the impression in my mind that Ambika Ojha was really appointed on the day following the accident;

but whether he had been a temporary gateman or not, it is perfectly clear that he had not done the duty of a gateman in closing the level-crossing at a sufficient interval of time before the train was expected.

In these circumstances the allegation of negligence against the unfortunate driver or the guard of the train need hardly be considered. The learned Sub-ordinate Judge was of opinion that the driver was guilty of negligence but how he could have been expected to pull up his train suddenly or how he could have been expected to hear the alleged entreaties of bystanders that he should not pursue an innocent elephant in this cruel manner, I fail to see. The real negligence of the Company—and in respect of that there is, to my mind, no answer at all— is in leaving the gates open and so offering an invitation to the mahut of the elephant to take his animal across the line. The story about the elephant not having approached the line by means of the level-crossing but having got on to it from the pipal tree is, in my opinion, fantastic and was only invented for the purpose of getting over the danger constituted by the failure of the Railway Company to provide a watchman for properly closing the gates.

I would, therefore, dismiss this appeal with costs. The value of the elephant, namely, Rs. 5,000 is not disputed and therefore no question of the amount of damages arises.

MANOHAR LALL, J.—I entirely agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1937.

August, 25.

KABIR RAM

v.

GIRO MAHTO.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 46 *and* 139—" *trespasser* ". *meaning of, within section* 139(4*A*)—*suit to eject under-raiyat—lease before* 1908—*section* 46, *whether applicable—suit, whether one under the Act—section* 139(4).

Section 139 of the Chota Nagpur Tenancy Act, 1908, provides—

" The following suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other court, except as otherwise provided in this Act, namely:—

* * * * * *

(4) all suits and applications under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land;

(4*A*) all suits for ejectment of a trespasser where the plaintiff claims an alternative relief that the defendant be declared liable to pay for the land in his possession a fair rent;"

Plaintiffs brought a suit for the possession of a holding treating the defendants as under-raiyats, who were inducted on the land by virtue of a lease made in 1901. The defendants continued in possession even after the expiry of the lease, the plaintiffs having accepted rent during this period. The plaintiffs then gave notice to quit and on the failure of defendants to give up possession of the holding the suit in ejectment was brought.

Held, (i) that the defendants were not trespassers within the meaning of section 139(4*A*) of the Act; the class of persons contemplated by the section are those who have gone upon the land with no sort of right and were trespassers ab initio;

* Appeal from Appellate Decree no. 882 of 1934, from a decision of H. Whittaker, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 28th of July, 1934, affirming a decision of Babu Ramchandra Misra, Munsif of Giridih, dated the 26th of April, 1934.

(*ii*) that although the cause of action accrued to the plaintiffs after 1908, it was not in respect of a matter which was provided for by the Act, section 46; that being so, the action was not under the Act and was not therefore hit by section 139(*4*).

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Wort, J.

B. C. De and *S. C. Mazumdar*, for the appellants.

Bindeshwari Prasad, for the respondents.

WORT, J.—This is an appeal from the decision of the Judicial Commissioner of Chota Nagpur arising out of an action in which the plaintiffs claimed possession of a holding treating the defendants to be under-raiyats within the meaning of section 4 of the Chota Nagpur Tenancy Act (VI of 1908). I mention the definition in section 4, although it is one of the contentions of Mr. De, appearing on behalf of the appellants, that the Act of 1908 does not apply to the circumstances of this case.

There are two substantial points for determination. The first is whether the defendants, as they pleaded, were occupancy raiyats; and, secondly, whether the Civil Court had jurisdiction. The latter question was not raised in the Courts below but it is raised here. A decision of Das and Adami, JJ. [*Madhab Poddar* v. *Lall Singh*(1)] is relied upon for contending that the Civil Court had no jurisdiction. A further decision of this Court in *Musammat Jageshwar Kuer* v. *Tilakdhari Singh*(2) to the same effect is also relied upon. In this latter case the plaintiff sought to eject a non-occupancy raiyat and the learned Chief Justice in the course of his judgment said as follows: " The suit as framed was one to eject trespassers, but on the facts found the defendants were not trespassers but non-occupancy raiyats.

(1) (1926) I. L. R. 6 Pat. 69.
(2) (1923) 5 Pat. L. T. 422.

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As no suit to eject non-occupancy raiyats could be tried in the Civil Court the question of the plaintiffs' rights against them could not be determined in the present suit "; and he held accordingly.

Now the sections to be considered in this regard are section 46 and section 139 of the Chota Nagpur Tenancy Act. I should have mentioned also section 68 with section 139, which by clause (*4*) provides

> " all suits and applications under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land "

and by (*4A*)—

> " all suits for ejectment of a trespasser where the plaintiff claims as alternative relief that the defendant be declared liable to pay for the land in his possession a fair rent ".

These are two classes of cases which under the Act are excluded from the jurisdiction of the Civil Court. Then we come back to section 68 of the Act which provides—

> " No tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner passed under this Act."

Then comes section 46 and it is sought by the respondents to bring this case under clause (*4*) of that section which runs as follows :—

> " At any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner."

The question, therefore, to be determined is whether within the meaning of section 139 of the Chota Nagpur Tenancy Act, clauses (*4*) and (*4A*), it is a suit or application " under the Act ". There has been an argument addressed to us by the appellants which rather surprises me having regard to the provisions of section 139 (*4A*). It is contended that the defendants are mere trespassers. If the defendants are to be considered trespassers simpliciter then the plaintiffs

can bring an action for the ejectment of the trespassers coming within clause (*4A*) of section 139 of the Act. But I am confident that the legislature never intended this part of the Act to be construed in that way. If a plaintiff is entitled to eject a person, whether he has been a tenant or not, the mere fact that he is entitled to eject him and have a decree to that effect signifies that the defendant is a trespasser. Therefore in that sense all persons against whom such a claim arises are trespassers and will prima facie come under clause (*4A*) of section 139. But I am equally confident that what the legislature intended to provide for was the class of case in which the person whom it was sought to eject has gone upon the land with no sort of right and was a trespasser ab initio.

Then we come back to section 46. Mr. De contends that he does not come within the mischief of section 46, because at the time when he made the transfer in 1901 neither the present Act (VI of 1908) nor the Chota Nagpur Landlord and Tenant Procedure Act (I of 1879) had come into force. The Amending Act came into force in 1903 by the new section which was added to the original Act being 10B which by clause (*4*) provides:

> "At any time after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion."

Mr. De argues, and in my judgment correctly argues, that he does not come within that amendment: in other words, although the cause of action which he is now asserting arose after 1908 it was not a cause of action in respect of a matter which was provided for either by the Act of 1908 or that of 1903, and he is therefore not met with clause (*4*) of section 139 of the present Act in the suit, nor is he making a suit or application under the Chota Nagpur Tenancy Act. I should have stated that, as the basis of the argument with which I am dealing, Mr. De contended

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that the cause of action arose on the 4th of June, 1904, when the lease or kabuliyat to the defendants expired. That argument in my judgment is untenable. It is true that the moment after the lease had expired the plaintiffs could have ejected the defendants, but when they accepted rent that cause of action disappeared, and the present cause of action is one which is based upon the alleged notice to quit to the defendants.

Now, the other question is whether the defendants have occupancy rights. One of the last arguments addressed to us was an assertion of those rights by reason of occupation for a period of twelve years. That argument cannot be supported. The plaintiffs themselves are occupancy raiyats and the defendants cannot acquire occupancy rights, which properly belonged to their landlords, the plaintiffs, during the period for which they have recognized the landlords' title by payment of rent. That in my judgment is a sufficient answer to that point. But it is now contended that the judgment of the learned Judge in the Court below was correct because the Judge there said that the entry in the record-of-rights was correct and that although the settlement officer stated those rights to have arisen under the kabuliyat there might have been some other evidence. The matter will be clear by making one or two statements. First of all, the presumption of correctness attaches to the entry and to nothing else. The statement in that entry is rebuttable. In this case it was quite clearly held by the trial judge, and in that respect I am of the opinion that he was right, that no such rights arose under the kabuliyat. The suggestion that there might have been evidence other than the kabuliyat itself is precluded by the statement in the entry that the occupancy rights arose under the kabuliyat. When once, therefore, the kabuliyat is produced and the rights are shown not to come into existence by reason of that kabuliyat, it seems to me quite clear that the entry is rebutted. In my opinion whichever way one looks

at this case it is quite clear that the defendants had no occupancy rights. It is suggested that they were not possessed of full occupancy rights (to use the expression of the argument) but something short of them. If that is so, there is a clear authority of this Court that such rights of an original tenant are not heritable and it will be necessary for the defendant, who is the son of the original tenant, to acquire them by custom or otherwise: in other words, the son could not take advantage of such rights as his father possessed. There is no evidence of custom here as the learned Judge of the trial court pointed out and, therefore, on that footing also the defendants have failed to establish their rights. The learned Judge in the Court below is in error when he states that the onus was on the plaintiffs.

As to notice to quit, the trial Judge came to the conclusion that there was no notice or at least, if there was any, it was not proved. The appellate court is uncertain as to that matter and has not decided it. In my judgment reasonable notice is necessary and, therefore, there should be a decision on that question. The matter will, therefore, go back to the learned Judicial Commissioner to determine the question whether a notice to quit has been served on the defendants. If he finds that such a notice has been served, the plaintiffs will be entitled to judgment.

With these observations I would remand the case for the determination of that question and the costs of this case will abide the result of hearing in the court below.

VARMA, J.—I agree.

Appeal allowed.

Case remanded.

S. A. K.

APPELLATE CRIMINAL.

Before Varma and Rowland, JJ.

1937.

August, 25.

SUKHAMOY MAITRA

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 477*A*—"*fraudulent*" *falsification of accounts, what constitutes*—*deceitful act wilfully exposing anyone to risk of loss, whether amounts to fraud.*

The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practised to cause wrongful loss that is dishonesty, but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud.

The appellant was a sub-overseer in the Wards and Encumbered Estates Department and his duty was to prepare estimates of repair works to buildings, etc., of the estates under administration, to supervise the works, to measure and certify the amount of work done and calculate what was due to the contractor to whom payment was made on bills prepared by this sub-overseer. The appellant prepared a bill purporting to be based on measurements made on the 25th March, 1936. The bill contained a certificate that the work had been satisfactorily completed and had been measured by the appellant on that date, the measurements being entered in his measurement book. On the basis of the certificate the bill was passed and paid. The appellant, having been prosecuted on a charge under section 477A of the Penal Code, admitted that the entries in the measurement book were fictitious and that he had not in fact measured up the work. But the defence was that if the whole of the work done by the contractor had been measured up, it would have been found that the contractor in fact had not been overpaid but had done work in excess of the amount billed for.

Held, (i) that the appellant having wilfully falsified the measurement book and bill with the intent that the contractor's bill might be passed without actual measurement, he

*Criminal Appeal no. 152 of 1937, from a decision of T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 1st June, 1937.

thereby wilfully exposed the estate to risk of loss, and, therefore, that the act of the appellant amounted to a "fraudulent" falsification of account within the meaning of section 477A of the Penal Code, 1860;

(*ii*) that it was no answer to the charge for the appellant to say that he did not know that wrongful loss would be caused to Government or wrongful gain to the contractor when he certified the correctness of a claim which he believed was not exaggerated.

Dhunum Kazee, In the matter of(1), *Queen-Empress* v. *Haradhan*(2), *Queen-Empress* v. *Abbas Ali*(3), *Queen-Empress* v. *Muhammad Saeed Khan*(4), *Kottamraju Venkatrayadu* v. *Emperor*(5) and *Ramchand Gurwala* v. *Emperor*(6), reviewed.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Sir M. N. Mukharji (with him *S. N. Sahay*, *Raghosaran Lal* and *S. S. Rakshit*), for the appellant.

The Advocate-General, for the Crown.

ROWLAND, J.—The appellant Sukhamoy Maitra was put on his trial on charges under sections 420 and 477A of the Indian Penal Code along with Rajdular Singh who was charged as an abettor, and the trial ended in the conviction of the appellant, who was sentenced to three years' rigorous imprisonment, and the acquittal of the co-accused. Of the assessors with whose aid the trial was held three were of opinion that both accused were guilty and one thought that both should be given the benefit of doubt.

The facts have been stated in the clear and careful judgment of the trial court. I shall outline them as briefly as possible. Most of the facts are

(1) (1882) I. L. R. 9 Cal. 53.
(2) (1892) I. L. R. 19 Cal. 380.
(3) (1897) I. L. R. 25 Cal. 512, F. B.
(4) (1898) I. L. R. 21 All. 113.
(5) (1905) I. L. R. 28 Mad. 90, F. B.
(6) (1926) 27 Cr. L. J. 1383.

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Before Varma and Rowland, JJ.

1937.

August, 25.

SUKHAMOY MAITRA

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The appellant was a sub-overseer in the Wards and Encumbered Estates Department and his duty was to prepare estimates of repair works to buildings, etc., of the estates under administration, to supervise the works, to measure and certify the amount of work done and calculate what was due to the contractor to whom payment was made on bills prepared by this sub-overseer. The appellant prepared a bill purporting to be based on measurements made on the 25th March, 1936. The bill contained a certificate that the work had been satisfactorily completed and had been measured by the appellant on that date, the measurements being entered in his measurement book. On the basis of the certificate the bill was passed and paid. The appellant, having been prosecuted on a charge under section 477A of the Penal Code, admitted that the entries in the measurement book were fictitious and that he had not in fact measured up the work. But the defence was that if the whole of the work done by the contractor had been measured up, it would have been found that the contractor in fact had not been overpaid but had done work in excess of the amount billed for.

Held, (*i*) that the appellant having wilfully falsified the measurement book and bill with the intent that the contractor's bill might be passed without actual measurement, he

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Dhunum Kazee, In the matter of(1), *Queen-Empress* v. *Haradhan*(2), *Queen-Empress* v. *Abbas Ali*(3), *Queen-Empress* v. *Muhammad Saeed Khan*(4), *Kottamraju Venkatrayadu* v. *Emperor*(5) and *Ramchand Gurwala* v. *Emperor*(6), reviewed.

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ROWLAND, J.—The appellant Sukhamoy Maitra was put on his trial on charges under sections 420 and 477A of the Indian Penal Code along with Rajdular Singh who was charged as an abettor, and the trial ended in the conviction of the appellant, who was sentenced to three years' rigorous imprisonment, and the acquittal of the co-accused. Of the assessors with whose aid the trial was held three were of opinion that both accused were guilty and one thought that both should be given the benefit of doubt.

The facts have been stated in the clear and careful judgment of the trial court. I shall outline them as briefly as possible. Most of the facts are

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admitted and the points of controversy in the appeal have been fairly and fully placed before us in an able argument. The appellant was a sub-overseer in the Wards and Encumbered Estates Department in the district of Palamau and it was his duty to prepare estimates of repair works to buildings, etc., of the estates under administration, to supervise the works, to measure and certify the amount of work done and calculate what was due to the contractor to whom payment was made on bills prepared by this sub-overseer. One of the estates under management under the Encumbered Estates Act was Bisrampur, and the charges relate to special repairs to the buildings at Bisrampur where the proprietor and some relatives entitled to maintenance from the estate resided. The buildings had been damaged in the earthquake of January, 1934, and, after the preparation and loss of an earlier estimate, repairs were taken up in the financial year 1935-36 on an estimate prepared by the appellant, dated June the 25th, 1935. The estimate amounting to Rs. 2,382 was sanctioned in July, 1935, by the Deputy Commissioner and the work entrusted to Rajdular Singh for execution. Advances were made to the contractor from time to time, that is to say, Rs. 300 on the 26th June, 1935, Rs. 200 on the 9th August, 1935, Rs. 300 on the 24th August, 1935, and Rs. 250 on the 20th January, 1936. Bricks valued at Rs. 150 were supplied from a kiln belonging to the estate.

The rules of account required that the initial advance should be adjusted within six months. To meet this requirement the appellant in December, 1935, prepared a bill for work amounting to Rs. 801-11-0 which he certified to have been done as against the advances hitherto taken amounting to Rs. 800. The rules of account further required that the grant which had been sanctioned for the repairs during the year 1935-36 should be spent before the end of the financial year, otherwise the sanction would lapse and a fresh application for sanction would be necessary. The

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appellant prepared a bill purporting to be based on measurements made on the 25th March, 1936. The bill contained a certificate that the work had been satisfactorily completed and had been measured by the appellant on the 25th March, 1936, measurements being entered at pages 62—68 of his measurement book and a certificate given on the bill by the General Manager that he had inspected the work and satisfied himself to the best of his ability that it had been satisfactorily done. On these certificates the bill was passed and paid. The manager's inspection is said to have taken place on the 28th of March, 1936. The prosecution case is that the appellant on the 25th of March, 1936, did not make any measurement at all; he prepared fictitious entries in his measurement book based not on the work actually done but on the estimate. The work in fact done was much less than that billed for, and the false certificate of measurement enabled the contractor fraudulently to draw Rs. 704 in excess of what would have been found due to him had proper measurement been made. The appellant has admitted that the measurements in the measurement book were fictitious; that he had not in fact measured up the work; and that not all of the items specified in the measurement book had been done. But he says that, as the work progressed, the proprietor and the khorposhdars from time to time drew attention to repairs urgently needed and a good deal of work was done which had not been provided for in the estimate. That there was a quantity of work done which is not in the estimate, is admitted by the prosecution. Over Rs. 500 worth of such work was in fact measured up by the witness Kali Dayal. The appellant's case is that if the whole of the work done by the contractor had been measured up, it would have been found that the contractor in fact had not been overpaid but had done work in excess of the amount billed for. The defence of the other accused was on similar lines except that he disclaimed all responsibility for the preparation of the bill. He says

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that he had the manager's order to do urgent repairs which were not included in the estimate and he alleges that the cost exceeded the estimate, and that proper measurement of the works would show that some amount is still due to him. Thus the charge of cheating is founded on the allegation that the appellant wilfully certified completion of work to the value of Rs. 2,400 knowing that much less work had really been done, and intending to cause wrongful gain to the contractor and wrongful loss to the estate. The contractor was charged with abetment of the offence.

I may here explain that the buildings at Bisrampur for which estimate had been prepared are in three blocks standing on a Garh or mound. In these blocks the proprietor and members of the family resided. Outside and below the Garh were a number of out-buildings and the contractor asserted (*1*) that he had done extensive repairs to these out-buildings in addition to what he had done in the three blocks on the Garh, (*2*) that the work done in those three blocks themselves was more than what credit has been given for.

The repairs which had been done and paid for in the year 1935-36 were not sufficient to put the buildings in a thoroughly good state of repair and on the 13th July, 1936, the appellant wrote to the Assistant Manager asking him to come to Bisrampur and inspect the buildings and see the necessary repairs for which a further estimate would be needed. The Assistant Manager went there, and on the 20th June, 1936, submitted a report not to the General Manager but to the Deputy Commissioner in which he said that it appeared to him that very little repair was done in comparison with the amount of Rs. 2,400 spent, and requested that before estimates for further repairs were sanctioned the measurements might be checked and verified. The Deputy Commissioner who had previously impounded the appellant's measurement-[illegible] sent it on the 30th June to Babu Kali Dayal,

Sadar Overseer, District Board.—He asked that officer to check and verify the measurements in the presence of the sub-overseer and contractor concerned and some reliable khorposhdars and if necessary in the presence of the Sub-Inspector of Police of Bisrampur. Measurements were made on the 2nd and 3rd July by Babu Kali Dayal in presence of the Sub-Inspector of Police and of the appellant Sukhamoy Maitra, but not of the contractor. The Overseer on measuring the work shown to him prepared a comparative statement concluding that the contractor had been overpaid by Rs. 704. The Deputy Commissioner passed an order on the 7th July, 1936, directing the Wards Estates Deputy Collector to "scrutinize the papers and lodge information with the police". The Deputy Commissioner did not call for any explanation from the contractor nor did his order leave it open to the Wards Estates Deputy Collector to exercise any discretion or to call for explanation from the contractor or the appellant. The Deputy Collector did not spend long in scrutinizing the papers to see whether there was a prima facie case; he obeyed orders and lodged a first information the next day, the 8th July, 1936. The information is not sent to the Officer in charge of the police-station in the ordinary way, but direct to the Circle Inspector, Sadar Circle, whom the letter requests to "investigate the matter personally" and insists that "prompt steps are necessary." The Inspector thought fit to take the orders of his Police Superintendent before complying with this request; the necessary order was obtained the same day. The Inspector visited Bisrampur in presence of the District Board Overseer and of the proprietor and some khorposhdars of the estate, but in the absence of both the accused. Charge sheet was submitted by the Inspector on the 9th August, 1936, not only against the appellant and the contractor against whom the information had been laid but also against a third accused, namely, Rajen Hemendra Nath Gupta, the General Manager of the

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Wards and Encumbered Estates. It has been suggested for the appellant that the General Manager was made an accused because he was a person, who, if this had not been done, was a necessary witness in the case and his evidence would have demolished the prosecution case. It is suggested that the Assistant Manager and the Deputy Commissioner were anxious to secure the conviction of the appellant because he had incurred their displeasure. Hence criminal proceedings were launched without giving either him or the contractor an opportunity to explain.

The learned Judicial Commissioner finds that there had been some friction between the Assistant Manager and Sukhamoy Maitra. As regards the Deputy Commissioner he observes that the memorial (Exh. M) has no evidentiary value and that the papers such as exhibits N, O, P and Q have nothing to do with the case. I think it necessary, however, to examine these papers. It appears that before any controversy about the Bisrampur work arose, the Assistant Manager had charged the appellant with insubordination and the appellant had retorted by alleging some irregularities against the Assistant Manager. The appellant had an interview with the Deputy Commissioner on or about the 1st of May, 1936. At this interview according to the memorial (Exh. M, submitted by the appellant to the Commissioner on the 4th May, 1936) the appellant wished to say something against the Assistant Manager to the Deputy Commissioner, but the latter would not listen to him, spoke sharply to him, became angry and turned him out. The memorial had of course to be submitted through the official channels, the General Manager and the Deputy Commissioner, but the appellant took the liberty of sending a copy of it direct to the Commissioner in advance. The learned Judicial Commissioner has applied the epithet "amazing" to the allegations in this memorial regarding the Deputy Commissioner but allowing for possible exaggeration as to the language used by the

Deputy Commissioner and the emphasis of his manner, there is nothing incredible in the main facts stated in it. If there is anything amazing, it is the sequence of events that followed. On the 14th May, 1936, Mr. Thadani addressed an order (Exh. P) to the General Manager, asking him to direct Babu S. Maitra, sub-overseer, to resign immediately from the Municipal Board, Daltonganj, of which he was an elected Municipal Commissioner. It is further said

"These orders may be shown to Babu S. Maitra and his signature obtained thereon, but no copy of the same need be furnished to him. Refusal, delay or controversy will be regarded as disobedience of orders for which he will be liable to be discharged from service. A copy of the letter of resignation should be posted to me by 16th May, 1936."

This was on the 14th May. The order was shown to the sub-overseer who instead of signing applied for a copy of it. He was put under suspension with effect from the 19th of May. He was given a copy of the order on the 26th on which day the order putting him under suspension was cancelled and he was directed to submit his resignation from the Local Municipal Board by the 31st of May positively (Exh. O). Instead of resigning he sent an answer to this order representing with reasons his inability to submit resignation. The argument is that this recalcitrance brought vengeance on him. All the papers, such as estimates, completion certificates, measurement note books, etc., in his custody had already been impounded by the Deputy Commissioner (Exh. C) and the opportunity was awaited to detect an irregularity which could be given a criminal complexion. This it is suggested is the explanation why after some of the works had been inspected by the Assistant Manager with the appellant on the 13th June, 1936, one procedure was followed in one matter and another in another. The Assistant Manager reported regarding earthwork for certain reservoirs to the General Manager (Exh. D—Report dated the 18th June, 1936), and the General Manager called

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for the explanation of the appellant regarding matters arising out of that report; but as regards these Bisrampur building repairs the Assistant Manager reports (Exh. 2, dated the 20th June, 1936) to the Deputy Commissioner direct and the Deputy Commissioner instead of calling for explanation orders the measurement to be made by an Overseer who is not in the employ of the Wards and Encumbered Estates at all and whose Circle as an Overseer does not include Bisrampur. I have already pointed out that this Overseer made his measurements behind the back of the contractor in face of the direction that it should be done in the contractor's presence. His explanation is that he searched for Rajdular Singh, the contractor wishing to give him notice too but could not find him. In cross-examination it appears that he did not personally go to search for Rajdular and does not know where Rajdular lodges in Daltonganj except that it is in Belwatikar mahalla; he sent his man Mangla Tewari to look for him. Mangla Tewari has not been examined as a witness and there is no proof that he went to the house of Rajdular or made any serious attempt to find him. The overseer did not trouble to send any written message which could be left with a member of the contractor's family to be communicated to him, nor did he take any further instruction from the Deputy Commissioner as to whether he should make the measurements in the contractor's absence. The Overseer's report (Exh. 7) was submitted on the 5th July, 1936. It is to the effect that as a result of verifying the measurement of blocks 1, 2 and 3 he found that some of the works had not been done at all, that some works which had been done had not been measured by the sub-overseer, that it appeared that the sub-overseer had not measured the work on the spot and that the total value of work measured by him came to Rs. 1,527-14-6 as against Rs. 2,232 paid to the contractor for work supposed to be worth Rs. 2,404-2-9 less deductions of Rs. 150 and

Rs. 22-2-9. The report states the bare facts and makes no suggestion as to the procedure next to be followed; it does not suggest asking the sub-overseer to explain or the contractor to refund the excess money drawn; nor on the other hand does it suggest a prosecution. In this connection I may at this stage refer to an exhibit which may have a significance not observed by the learned Judicial Commissioner. This is exhibit H, a letter of the Superintending Engineer, Chota Nagpur Circle, to the Chairman, District Board, Palamau, dated the 4th of December, 1936, with a note of the District Board's Resolution thereon. The matter was that in connection with repairs to the residence of the Superintendent of Police at Daltonganj Sal ballas worth Rs. 54 had been used for propping up dangerous portions of the buildings. The contractor was paid this amount and at the conclusion of the work the ballas were apparently allowed to be removed by the contractor. The Overseer's explanation had been taken. The Superintending Engineer expressed dissatisfaction with it and suggested that a prosecution for cheating might be taken up against him. The order passed on this over the signature of Mr. Thadani as Chairman, District Board treats the matter as a case of bona fide mistake and merely requires the contractor to refund the price of the ballas. The Judicial Commissioner apparently thought that this document was being used by the defence merely to throw mud at the character of the Overseer and caused his service-book to be sent for and proved by a Court witness. Finding that the service-book contains no bad remarks, he dismissed this exhibit from consideration. To my mind the defence are entitled to contrast the procedure followed in dealing with the appellant and in dealing with Kali Dayal; and to point out that the appellant in June, 1936, was a subordinate whom Mr. Thadani had threatened with dismissal and who still proved not subservient enough to resign his seat in the Municipality; while Kali Dayal in December,

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1936, was an indispensable witness in the prosecution of the appellant, and a witness whose testimony must lose much of its value if he were, as the Superintending Engineer had suggested, put on his trial on a charge of cheating. Do these matters suggest an inference as to the motives by which the Deputy Commissioner was animated? I will only say here that if there is another explanation he has not chosen to go into the witness box and give it though his name is on the list of prosecution witnesses in the Police charge sheet. However, the main question of fact is whether the measurements made by Kali Dayal give a correct account of the whole of the repair work done by Rajdular Singh and whether this repair work was so far short of the estimated amount that to pass a bill for the amount of the estimate must be considered fraudulent and dishonest. The contractor in his written statement submitted:

> "that it was impossible for anybody even Babu S. Maitra to correctly point out all repair works executed by this accused in the absence of his man who was in charge of the repair works."

It appears to have been at one time suggested that the accused cheated by representing that he had made measurements, which he had not made, of work which he knew to be worth less than the amount of the bill. His reply to this was that there was no concealment about the fact that the bill was based not on actual measurements but on the estimate because if actual measurements had been given the bill not corresponding with the original estimate could not be passed without a fresh estimate being sanctioned. It is said that the work was inspected on the 28th March, 1936, by the General Manager, who on inspection was of opinion that the total amount of work done was not less than that to be billed for. No doubt until an actual measurement is made, estimates of value of work done may vary within very wide limits. The prosecution have not disproved the visit of the General Manager on the 28th March and the fact that on the 13th June the Assistant Manager

viewing the work with perhaps a less friendly eye guessed its value at so much less is not in itself conclusive that the General Manager could not in good faith have believed the value of the work to be not less than what was billed for, or that the appellant could not have thought the same.

Coming now to the question of the correctness and completeness of the measurement actually made by Kali Dayal, it appears from the evidence of the Sub-Inspector as well as the Overseer that measurements were not taken of anything done to the outbuildings below the mound. It was put to Babu Jugeshwar Bux Roy, one of the khorposhdars that Sukhamoy Maitra asked the Overseer to measure the works that had been done below the Garh; and the witness said that Kali Babu's reply was that he had no order to do so. Kali Dayal, however, says that he was not asked to inspect any buildings below the mound. There were such buildings, but he did not inspect them. For the contention that repair work was actually done in these outbuildings, the defence rely on the evidence of the khorposhdars Babu Sidhesar Bux Roy (P. W. 4) and his brother Jugeshwar Bux Roy (P. W. 5) and a certificate (Exh. E) signed by Sidhesar Bux Roy in the following terms:

"I certify that Babu Rajdular Singh, contractor has done the following works during this year (1935-36) and it may be accounted for in his account:

(1) New Sharishta and old both duly repaired.

(2) Lighthouse.

(3) Sati Asthan.

(4) Pachiara Thakurbari.

(5) Bhaudar, Verandah and house."

The certificate bears date the 30th March, 1936; but in his evidence the witness says that he granted it to the contractor after Kali Babu had made his measurements because the contractor told him that Kali Babu had not measured this work so he would not give a certificate about it. The certificate was

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apparently ante-dated. Questioned about it the witness has given some confused answers. The Judicial Commissioner has discounted the evidence of this witness and his brother; but they are the prosecution's own witnesses, they were not declared hostile and there is no reason to impute to them any motive for corruptly deposing on behalf of the defence that work had been done which had not in fact been done. It appears to have been suggested by the prosecution as an inference from the ante-dating of the certificate that the work had not been done before the end of the financial year but was done thereafter. But there is no definite evidence of this and I should take it that the work deposed to by these two witnesses was done within the financial year 1935-36. A fuller list of the repair works done at the foot of the Garh is in Exhibit F which is signed by khorposhdars Babu Raghunandan Bux Roy, Lokeshwar Bux Roy, Jugeshwar Bux Roy, Jagadishwar Bux Roy and Avedeshwar Bux Roy. The certificate is dated the 5th July, 1936, and is Exhibit F. That these additional works were borne in mind by the General Manager and the sub-overseer at the time of the inspection on the 28th March appears in the evidence of Babu Jugeshwar Bux Roy. He says that on the khorposhdars pointing out to the Manager that some necessary works had not been done, the Manager told the contractor to do whatever was necessary and that when the repairs were finished the Manager and the sub-overseer looked at the repairs but did not measure them. They looked at the Garh and also at the buildings below the Garh. As to the value of the work done to these outbuildings we have no opinion from the Overseer Kali Dayal or from the Sub-Inspector or from the Inspector. Sidhesar Babu estimates the works which are the subject-matter of his certificate (Exh. E) at about Rs. 100, but that is of course pure guess-work and in fact the amount of work done below the Garh is quite unknown and unascertained.

The other part of the defence contention is that with respect to the repairs done on the three blocks of buildings on the Garh itself Kali Dayal has failed to allow for several items. Of these items the most important is a charge of Rs. 404 for 65 new beams supplied to support the terraced roofing which was renewed in block no. 1. The overseer did not allow credit for these as he says that they were ballas used as beams and had been supplied by the estate. The overseer has not given the dimensions of the timbers thus failing to give the court any assistance in determining whether in fact they ought in the calculation to be treated as beams or as ballas. But in his rough notes of measurements and quantities he has referred to them as " new beams ". Sidheswar Bux Rai has said that the contractor renewed two roofs with fresh timber. The roofs were made with beams and rafters which were renewed where necessary. Some of the old beams had rotted and had to be replaced with new ones. This is consistent with the defence case that during the progress of work urgent items of repair came to notice which had to be done though not provided for in the estimate. The overseer allowed no credit for these beams on the ground that they were not beams, but ballas supplied by the estate. The only direct evidence as to where the timber came from is in the re-examination of Babu Jugeshwar Bux Roy who says:

" The wood for beams and rafters was brought from the jungle, S. Maitra sent for it."

But he corrected this statement and again said:

" Rajdular Singh, contractor supplied it."

The witness's recollection is hazy and uncertain as appears at many places in his evidence. It does not follow that he was willing to perjure himself for the benefit of the accused. As a matter of fact on inspection of Kali Dayal's calculations, it seems that in the case of large squared beams at any rate it was assumed that these would not be available in the

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jungle and must have been brought by the contractor. Some beams of this class have been allowed for in Block III. So the question really seems to turn on whether these are the 6″ × 4 square beams or merely ballas. It is admitted that from 6″ ballas 6″ × 4 square beams cannot be prepared. The prosecution argument has been that the claim of the contractor to have supplied 6″ × 4 square beams is discredited by the fact that such beams are not mentioned in the on-account measurements and bill prepared in December, 1935. The beams or ballas were required to support a terraced roofing about 1402 square feet which had to be renewed. In the December measurement this renewed terrace roofing over sal planks is mentioned as having been done and an item of hoisting 30 wooden beams at Re. 1 each also appears. But the measurement book says nothing about supply of new beams. The prosecution argument is that if new beams had been supplied before December, 1935, they must have been entered in these measurements. But the question arises whether the accounts department could accept a certificate in respect of a piece of work not mentioned in the estimate as being done towards the work of the sanctioned estimate. Having regard to the procedure followed in March, 1936, it would seem that in accounting for the advances only such work would be allowed credit for as had found place in the original sanctioned estimate. Work not so sanctioned would probably have been excluded from consideration. So the defence say, there was no reason to certify in December a piece of work for which, not being in the estimate, credit would not be given in the account. The argument, therefore, that because these beams were not mentioned in December, 1935, they are not beams supplied by the contractor, does not seem to be conclusive. I think the whole question of these beams remains in a state of considerable uncertainty, and it is unsafe to treat this as a fraudulent claim. If they are taken into account in the manner in which the defence contends they

make a difference of over Rs. 300 to the total. Over and above this, there is work done to the outbuildings below the Garh, the amount of which is unknown. There are a few small items in respect of which the measurements of the Overseer are questioned and one error of mathematical calculation has been found by the Judicial Commissioner to exist. I do not think it necessary to go into every detail of these items for the substance of the charge of cheating is that the appellant in order to cause wrongful gain to the contractor wilfully and fraudulently certified work known by him to be substantially less than the amount for which he drew the bill; and I have said enough I think to show that the evidence falls short of establishing this. As already stated, at no time were measurements taken in presence of the contractor, though the defence repeatedly asked for this during the commitment proceedings. A procedure certainly not fair to the contractor, was perhaps induced by over-anxiety to secure by all means the conviction of the appellant. So far as the conviction under section 420 is concerned, I would allow the appeal and acquit the appellant on this charge.

The second charge, that of an offence under section 477A, remains to be considered. Taking the view of the facts most favourable to the accused, that on inspection of the repairs he formed a genuine impression in his mind that work had been done of a value not less than that of the work estimated for, the fact remains both proved and admitted that he did not measure the work but entered in his book fictitious figures of measurements he had not made. The point to be seen is whether this wilful falsification of books and accounts was done fraudulently or with intent to defraud within the meaning of section 477A of the Indian Penal Code. A reference to section 25 of the Code shows that the expressions "fraudulently" and "with intent to defaud" are synonymous; but there is no further definition of their meaning in the Code. In the result, there have been

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different views expressed at different times as to acts which are or are not fraudulent. Most of the decisions are with reference to sections of the Code dealing with forgery and forged documents, but where the elements that go to make up fraud are discussed, we may get assistance from them. In the matter of *Dhunum Kazee*(1) Norris, J. said " Let a person's title to property be ever so good, yet if in the course of an action brought against him to gain possession of the property he uses by way of supporting his title, though there be no necessity for the use of it, a forged document, such as this, I am clearly of opinion that he uses it fraudulently ".

I do not find that any of the later cases go so far as this. In a later decision of the same court, *Queen-Empress* v. *Haradhan*(2) the extreme view on the other side is taken, namely, that making or using a false document will not be considered fraudulent unless there be intention to cause wrongful loss or wrongful gain. The document was a forged certificate or testimonial. This dictum which does not seem to accord with illustration (*k*) to section 464 of the Indian Penal Code, was overruled by a Full Bench of the same court in *Queen-Empress* v. *Abbas Ali*(3). It was there pointed out with reference to the use of the expressions " dishonestly " and " fraudulently " that one could hardly suppose the latter expression to be mere surplusage, as it would be if the element of deprivation of property was a necessary ingredient in fraud; and it was held that " it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property ". The document was a false certificate of competency as an Engine-room Tindal used to obtain admission to an examination. This view has been generally accepted. In *Queen-Empress* v. *Muhammad Saeed Khan*(4) the accused a

(1) (1882) I. L. R. 9 Cal. 53.
(2) (1892) I. L. R. 19 Cal. 380.
(3) (1897) I. L. R. 25 Cal. 512, F. B.
(4) (1898) I. L. R. 21 All. 113.

head constable had inserted false entries in his character roll, with the intention of securing advancement in the service for himself at the expense of others. This was held to be fraudulent. An extract was cited from Sir James Fitzjames Stephen's History of the Criminal Law of England which has since been used in several of the later decisions, and in which it is said that two elements are essential, namely "first deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy". It was added that when the author of the deceit seeks some advantage to himself it can generally be assumed that there is an equivalent in loss or risk of loss to some one else, and if so there was fraud.

The Full Bench decision of the Calcutta High Court in *Queen-Empress* v. *Abbas Ali*(1) and the view of Banerji, J. in *Queen-Empress* v. *Muhammad Saeed Khan*(2) were approved and followed by a Full Bench of the Madras High Court in *Kottamraju Venkatrayudu* v. *Emperor*(3). The accused had attempted by the use of a false document to obtain admission to a University examination. It was said, the University prescribed certain qualifications including a certificate of respectability. This, of course, is to protect the University against private candidates who are not respectable. If the candidate who fabricated the certificate did so with the intention that the University should take action on it, it must be taken that he did so with intent to cause loss or detriment to the University. The majority of the Full Bench took this view. Subrahmania Ayyar, J. differed, being "unable to gather what could be the loss or the risk of loss, in a case such as this". He does not appear to have questioned the principle that

(1) (1897) I. L. R. 25 Cal. 512, F. B.
(2) (1898) I. L. R. 21 All. 113.
(3) (1905) I. L. R. 28 Mad. 90, F. B.

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if loss or risk of loss was intended, that would amount to fraud.

It would seem that the difference between an act done dishonestly and an act done fraudulently is this. If there is the intention by the deceit practised to cause wrongful loss that is dishonesty; but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud.

A case is stated in illustration (*e*) to section 464.

"*A* draws a bill of exchange on himself in the name of *B* without *B*'s authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on maturity. Here as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B* and thereby to discount the bill *A* is guilty of forgery."

Evidently, the banker, though no loss was intended to be actually caused to him, is put to a risk of loss in consequence of the deceit; and that makes complete the ingredients of fraud.

In agreement with this principle, it has been held that the promulgation of false statements in a statutory report of a company, not intending thereby to cause loss to anyone but to induce members of the public to invest money in the company, that is to say, to take a risk of loss, is fraudulent [*Ram Chand Gurwala* v. *Emperor*(1)].

On this view of the law, it is no answer to the charge for the accused to say that accused did not know that wrongful loss would be caused to Government or wrongful gain to the contractor when he certified the correctness of a claim which accused believed, or shall we say hoped, was not exaggerated.

There are indications that accused at the time may not have regarded himself as doing a gravely criminal act.

(1) (1926) 27 Cr. L. J. 1383.

In his written statement he says that the procedure followed by him was known to the General Manager who though at first annoyed, acquiesced in order to avoid hardship to the contractor. The General Manager has not been examined: there is an order in his handwriting endorsed on the bill Exh. 18, in these terms: "Estimate should be correctly made with the deviations done" and a note in the writing of appellant as to there being some deviations from the estimate, on the last page of the bill. These are relied on by the defence as showing that the Manager was aware of the procedure followed by the appellant. The prosecution denounced them as forgeries subsequently interpolated by conspiracy between this accused and the Manager who is regarded as being equally guilty. The only witness who could have said whether these writings were or were not on the bill when it was passed for payment was the accountant, and he was not asked that question; this part of the prosecution case is left resting on inference. It is not necessary to decide it here; there are sufficient indications elsewhere that the accused admitted to the Manager that the entries in pages 62—68 of his measurement book were bogus entries.

Again, when Kali Dayal went to check the work on the 2nd and 3rd July, and found the accused's entries of measurement to be an almost exact reproduction of the quantities in the estimate, he asked S. Maitra and the latter then and there said that he had not measured the work on the spot.

It may be that the appellant when he falsified his measurement book did not realise that he was committing the serious crime for which section 477A of the Indian Penal Code provides the punishment: but it can hardly be that he was unaware that it is an offence punishable with six months' rigorous imprisonment under section 182 of that Code to give to any public servant any information which he knows

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or believes to be false, intending to cause such public servant to do anything which he ought not to do if he had full knowledge of the true facts.

It is suggested in the cross-examination of Kali Dayal that to avoid the lapsing of grants, and resulting delay and extra correspondence, it is no uncommon thing for bills to be prepared by copying the estimates without measuring the work done; in other words, that the consciences of many are as insensitive to scruples on such a matter as the conscience of accused. It was denied, and there is no evidence to prove the suggestion. If there is any such widespread laxity it is indeed deplorable. For on the principles which can be deduced from the relevant sections of the Penal Code and the decisions which I have examined, it is impossible not to hold that such acts as are proved against the accused are fraudulent and amount to the offence punishable under section 477A of the Code. He wilfully falsified the measurement book and bill with the intent that the contractor's bill might be passed without actual measurement. Proof by actual measurement is the safeguard against excess claim, over-payment and consequent loss to the Estate and the Department. When the accused made the entries indicating that the claim had been proved by measurement and the Estate's interests had been protected, he thereby wilfully exposed the Estate to risk of loss. This is fraud. All the elements necessary to constitute the offence of fraudulent falsification of accounts being thus established, I would maintain the conviction under section 477A of the Indian Penal Code, but in the circumstances would reduce the sentence to one of six months' rigorous imprisonment.

VARMA, J.—I agree.

Conviction upheld.

Sentence reduced.

S. A. K.

APPELLATE CIVIL.

Before Courtney Terrell, C. J. and Manohar Lal, J.

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August, 26.

GOBIND SARAN SINGH

v.

RAM AUTAR SINGH.*

Mortgage—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 89—*order absolute for sale—security and right of redemption, whether extinguished—suit on first mortgage —order absolute—puisne mortgagee not made party—purchaser in execution, right of, whether prevails against puisne mortgagee.*

On the making of the order absolute for sale under the old section 89 of the Transfer of Property Act, 1882, the security as well as the defendant's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

In cases governed by section 89, an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is not entitled to set up the first mortgage as a shield against a subsequent mortgagee who is not made a party to the action on the first mortgage and is not consequently bound by the sale or the decree on which it proceeded.

Held, therefore, that the purchaser in execution of the order for sale, under section 89 of the Act, on the basis of the first mortgage obtains no title whatsoever which can prevail against the second mortgagee (or purchaser in execution of the decree obtained on the second mortgage), who is not made a party to the suit of the first mortgagee.

Het Ram v. *Shadi Ram*(1), *Matru Lal* v. *Durga Kunwar*(2) and *Sukhi* v. *Ghulam Safdar Khan*(3), followed.

*Appeal from Original Decree no. 81 of 1933, from a decision of Babu Manindra Nath Mitra, Subordinate Judge of Muzaffarpur, dated the 30th July 1933.

(1) (1918) I. L. R. 40 All. 407; L. R. 45 Ind. Ap. 130.

(2) (1919) I. L. R. 42 All. 364; L. R. 47 Ind. Ap. 71.

(3) (1921) I. L. R. 43 All. 469; L. R. 48 Ind. Ap. 465.

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Ram Narain Sah v. *Sahdeo Singh*(1) and *Jageshwar Mandal* v. *Sridhar Lal Aditya Deb*(2), distinguished.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Manohar Lal, J.

S. M. Mullick and *A. C. Ray*, for the appellant.

Dr. D. N. Mitter (with him *Rai G. S. Prasad*, *B. C. De*, *A. K. Mitra* and *G. P. Shahi*), for the respondents.

MANOHAR LAL, J.—This is an appeal by the plaintiffs in a suit for declaration of title and recovery of possession against the defendants who resist his claim by setting up their own title in the following circumstances:

On the 4th October, 1896, one Lalit Narain Singh mortgaged the property in dispute to Babu Rameshwar Narain Mahta for Rs. 8,600 (by way of simple mortgage) who assigned his rights on the 7th June, 1900, to Musammat Narain Dei. On the 11th May, 1903, the mortgagor executed a second mortgage in favour of Langat Singh of the same properties covered by the earlier mortgage of 1896 (including some other properties). On the 19th September, 1903, Musammat Narain Dei instituted a mortgage suit against the mortgagor to enforce her mortgage rights but she omitted to implead the second mortgagee. This suit was decreed on the 28th January, 1904, and the decree was made final on the 3rd December, 1904. It will be noticed that this decree was passed when the Act of 1882 containing section 89 was in force. This decree was executed and on the 22nd September, 1910, Narain Dei purchased the property in dispute and obtained delivery of possession against the mortgagor on the 25th November, 1912. Thereafter on the 18th April,

(1) (1922) I. L. R. 1 Pat. 332.
(2) (1928) I. L. R. 8 Pat. 216.

1913, she sold the properties in dispute to the plaintiff for a sum of Rs. 7,000. The plaintiff as the purchaser from Narain Dei applied for mutation of names in the Land Registration department in place of the heirs of Lalit Narain Singh and succeeded. The name of the plaintiff so mutated stood on the records of the Collector till the 29th February, 1928. On the 27th June 1916, the plaintiff sold a portion of the property which he had purchased for a sum of Rs. 6,000 to one Sheo Prasad who got his name recorded in place of the plaintiff and who, it appears, has been in possession ever since. On the 13th November, 1923, the plaintiff filed an application before the Collector for a separate account so that the payment of revenue on his behalf may be safeguarded. This was allowed by the Collector. The title of the plaintiff to the properties in suit is therefore based upon his title derived from Narain Dei in 1913 after the title had vested in her on the 25th November, 1912, by virtue of the execution sale of her decree of the 3rd December, 1904.

It is now necessary to detail the transactions which constitute the title of the defendants. On the 30th March, 1910, the second mortgagee brought an action to enforce his mortgage of the 11th May, 1903, but omitted to implead either Rameshwar Narain Mahta or his assignee Narain Dei. He impleaded mortgagor and he also impleaded the plaintiff but in his capacity as a zarpeshgidar of one of the properties covered by that mortgage, but as the present title of the plaintiff was derived in 1913, it is unnecessary to consider the effect of his being impleaded as a party in this mortgage action. The second mortgagee having obtained a decree purchased the mortgaged properties (including the properties in dispute) on the 11th August, 1913, and obtained formal delivery of possession in the month of September following. It will be noticed that the order for sale on the second mortgage was made after the provisions of section 89

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of the Transfer of Property Act had been deleted. The defendants who resisted the action claimed that they were in possession from the date of their purchase in September, 1913, and their names were mutated in the books of the Collector on the 29th February, 1928.

MANOHAR LAL, J.

To determine the rival claims of either party long and elaborate arguments were advanced in this Court as to the effect of the non-inclusion of the second mortgagee in a suit brought by an earlier mortgagee when the provisions of section 89 of the Transfer of Property Act were in force and as to whether the title which was obtained by the first defendant in the later mortgage action prevails over the title acquired by Narain Dei (and later on by the plaintiff from her). A large number of cases of the Indian High Courts were also cited at the bar but in my opinion the matter is no longer open to controversy in view of the authoritative decisions of the Privy Council in three cases which are discussed below. The leading case upon this point is the case of *Het Ram* v. *Shadi Ram*(1). The identical point now before me was considered by Viscount Haldane in delivering the judgment of the Privy Council and his Lordship held that the concluding words of section 89 of the Transfer of Property Act of 1882 which provide that

> " the defendant's right to redeem and the security shall both be extinguished."

mean that " on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree ". His Lordship proceeds further and makes this very important observation :

(1) (1918) I. L. R. 40 All. 407; L. R. 45 Ind. Ap. 130.

"The second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and *in addition* the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption."

This case was again considered in *Matru Lal* v. *Durga Kunwar*(1) by Sir John Edge when delivering the judgment of the Privy Council and his Lordship observed:—

"That case [*Het Ram* v. *Shadi Ram*(2)] decided that an order made under section 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished."

The same question was again considered in the case of *Sukhi* v. *Ghulam Safdar Khan*(3) where Lord Dunedin in delivering the judgment of the Board has pointed out that "the decision in *Het Ram's* case(2) is based on two points which are, it must be admitted, alternative and not cumulative: (*1*) that the decree was useless in respect of limitation and (*2*) that the second mortgagee had not been impleaded. Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of section 89 of the Transfer of Property Act, etc. etc."

(1) (1919) I. L. R. 42 All. 364; L. R. 47 Ind. Ap. 71.
(2) (1918) I. L. R. 40 All. 407; L. R. 45 Ind. Ap. 130.
(3) (1921) I. L. R. 43 All. 469; L. R. 48 Ind. Ap. 465.

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In my opinion after these three authoritative decisions of their Lordships of the Privy Council it is not permissible for any Indian Court to say that the Judicial Committee did not mean what they have so expressly and clearly laid down in those cases or that the observations in *Het Ram's* case(1) must be treated as obiter. Our attention has been invited to two cases of this High Court where a contrary view is apparently taken. In the case of *Ram Narain Sah* v. *Sahdeo Singh*(2) Das, J. in delivering the judgment states thus

"If the decision of the Judicial Committee in *Het Ram* v. *Shadi Ram*(1) be the last word on the subject, then there can be very little doubt that the respondents will be entitled to succeed."

But he proceeded to observe that the consideration by the Judicial Committee of the case of *Het Ram*(1) in the case of *Sukhi* v. *Ghulam Safdar Khan*(3) has resulted in overruling this decision. With great respect I do not agree with this. In my opinion the decision in *Het Ram's* case(1) as expounded in the two later decisions of the Privy Council mentioned above remains unshaken. Moreover it appears that these observations were not at all necessary for the decision of the case before Das, J. The suit of Ramlagan was brought in 1912 and the order of sale was therefore necessarily passed when the provisions of section 89 of the Transfer of Property Act were repealed, although the mortgage sought to be enforced was of 1905 when these provisions were still in force. In the case of *Jageshwar Mandal* v. *Sridhar Lal Aditya Deb*(4) Kulwant Sahay, J. in delivering the judgment makes this observation with regard to the cases of *Het Ram*(1) and *Matru Lal*(5):

(1) (1918) I. L. R. 40 All. 407; L. R. 45 Ind. Ap. 130.
(2) (1922) I. L. R. 1 Pat. 332.
(3) (1921) I. L. R. 43 All. 469; L. R. 48 Ind. Ap. 465.
(4) (1928) I. L. R. 8 Pat. 216.
(5) (1919) I. L. R. 42 All. 364; L. R. 47 Ind. Ap. 71.

"These two decisions of the Privy Council proceeded on a construction of section 89 of the Transfer of Property Act under which on the making of the order absolute for sale the security as well as the defendant's right to redemption were held to be extinguished and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. In none of these two decisions the several rulings of the High Courts in India on the interpretation of section 89 of the Transfer of Property Act were brought to the notice of their Lordships. It was held under section 89 of the Transfer of Property Act that the right to redeem was not extinguished on the making of the order absolute for sale under section 89 of the Act but upon the actual sale and confirmation thereof by Court..... In *Sukhi* v. *Ghulam Sarfdar Khan*(1), Lord Dunedin referred to *Vanmikalinga Mudali* v. *Chidambara Chetty*(2) and observed that this case does not seem to have been brought to the notice of the Board in *Het Ram's* case(3). In *Ram Narain Sah* v. *Sahdeo Sinah*(4) Das, J. doubts that the decision of the Judicial Committee in *Het Ram* v. *Shadi Ram*(3) is the last word on the subject."

With the utmost respect to this learned Judge I think that it is not open to any High Court in India to say that the decision of their Lordships of the Privy Council would have been different if some other rulings of the Indian High Courts had been brought to their notice which laid down apparently a different interpretation of section 89. The learned Judge himself found at page 225 that in the case before him "it has not been shown when the final order for sale was passed in Guhi Ram's case...The sale actually took place in February, 1912, long after the Code of 1908

(1) (1921) I. L. R. 43 All. 469; L. R. 48 Ind. Ap. 465.
(2) (1906) I. L. R. 29 Mad. 37.
(3) (1918) I. L. R. 40 All. 407; L. R. 45 Ind. Ap. 130.
(4) (1922) I. L. R. 1 Pat. 832.

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had come into force, and it can reasonably be contended that the present case is governed by the provisions of the Code of 1908 and not by section 89 of the Transfer of Property Act." In view of this finding of fact as to the date when the order for sale was passed the remarks of Kulwant Sahay, J. must be treated as obiter and not at all necessary for the decision of the case before him.

It follows from the review of the authorities discussed above that Narain Dei by her purchase on the 22nd September, 1910, in execution of the order for sale of December, 1904, obtained no title whatsoever which could prevail against the second mortgagee or purchaser in execution of the decree obtained on the second mortgage. The plaintiff also as purchaser from Narain Dei acquired no valid title at any time against the defendants first party.

Turning to the question of possession, the learned Subordinate Judge has found that

> "although the evidence as to possession on the side of the defendants first party is not at all satisfactory, the plaintiff cannot take advantage of that. He has to succeed on the strength of his own evidence, and for the reasons given above, I am not satisfied that Narain Dei and the plaintiff were really in possession over the properties in suit for a period of 12 years after delivery of possession, and before the alleged dispossession.....I am also not satisfied that the plaintiff was ever really in possession over the disputed properties within 12 years of the suit."

Now the learned Subordinate Judge has not taken into consideration the undisputed circumstances of very convincing character which in my opinion would turn the scale in favour of the plaintiff. After the sale to the plaintiff on the 18th April, 1913, he applied for mutation of name in place of the heirs of the mortgagor within two months and this was allowed and his name continued as such for a large number of years. In June, 1916, the plaintiff as the purchaser from Narain Dei actually sold a valuable property (a portion of Schedule I property) for Rs. 5,990 to one Sheo Prasad and this purchaser

also obtained possession and got his name recorded in the books of the Collector in place of the plaintiff. Again in November, 1923, the plaintiff filed a petition for separate accounts to be opened in the Collector's records, so that he may be able to pay the Government revenue in his own name and thus avoid the danger of the property being put to sale for non-payment of Government demands by the co-sharers. Add to this that the plaintiff has been paying all along Government revenue and cesses for the properties in suit ever since his purchase in 1913. The defendants on the other hand have never even attempted to get their names recorded in the Collector's records from August, 1913, to 1927, that is to say, a period of fourteen years. Exhibit 16, order-sheet in the Land Registration case, discloses a curious state of affairs. The defendants applied on the 20th September, 1927, to get their names registered in the Land Registration department. On the 31st January, 1928, the Collector passed this order that no notice had yet been served on the recorded proprietor Govind Saran Singh and on the 14th February, 1928, he took ex parte evidence and ordered the case to be put up on the 28th February, 1928, after the expiry of time on which date he gave reasons in his order that the applicant was asking for registration on the basis of the civil court sale certificate and dakhal-dehani, dated the 27th September, 1913, but he found that one Musammat Janki Kuer was not a judgment-debtor at all and that the shares of several villages for which land registration was attempted were not even sold. The court thereupon suggested to the applicant to get a ladavi deed executed and filed by Musammat Janki Kuer and also to reconcile the discrepancies. On the same date the court ordered registration of the name of the applicant in place of Govind Saran Singh on the ground that he was a party in the civil suit in respect of the villages given in the sale certificate and in the application. When the plaintiff came to know

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of this ex parte order that it was based upon an erroneous view of the facts and of the sale and delivery of possession of 1913 he filed an application for review of this order on the 4th December, 1928. It is significant to note that the objector was absent although he was called upon several times, but the court rightly thought that he would not go into the nice and intricate questions of right and title in the Land Registration department and disallowed the application. There is force in the contention of Mr. Mullick that the ex parte order was obtained from the Land Registration Court on misrepresentation of facts because it was admitted before us that the plaintiff as purchaser from Narain Dei was no party to the suit or execution proceedings which resulted in a sale in favour of the defendant on the 11th August, 1913. Now, these admitted facts would be quite enough prima facie to establish the possession of the plaintiff. The plaintiff has also adduced oral evidence by examining two patwaris, three tenants as well as himself. The learned Subordinate Judge has criticised this evidence on the ground that there is material variance between the pleadings and proof. In my view this criticism is not sound. The plaintiff is not required in his plaint to state the evidence upon which he relies as to his possession in the relevant period. Indeed it seems that the learned Subordinate Judge looked at the oral evidence of the plaintiff from a wrong stand-point as if the plaintiff was establishing adverse possession. It is true that this claim was put forward in argument, but this was never the case in the plaint nor has Mr. Mullick advanced any such claim before this Court. The plaintiff also produced some documentary evidence at the trial which tends to support the oral evidence and the circumstances mentioned above. The oral evidence of the defendant was rightly rejected by the Subordinate Judge as unsatisfactory and no argument was advanced on behalf of the respondents to challenge this finding of the Subordinate Judge.

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Upon a careful consideration of the facts and circumstances which have been fully established in this case, I am of opinion that the plaintiff has established that Musammat Narain Dei and thereafter the plaintiff were in undoubted possession of the disputed lands from the 25th November, 1912, right up to March, 1928, and I would reverse the finding of the learned Subordinate Judge on this point.

The present suit, however, is a suit in ejectment and the plaintiff can only succeed upon the basis of his subsisting title within twelve years of the date of the institution of the present suit, that is to say, within twelve years of September, 1930. I have already held that the plaintiff acquired no title to the lands in suit by reason of his purchase in 1913. It necessarily follows that he had no subsisting title on the date when he raised the present action.

The result is that the appeal fails and must be dismissed. In view of the fact that the plaintiff was all along in possession (till he was dispossessed) under an erroneous view of law, there will be no order for costs to the successful respondents in this Court.

COURTNEY TERRELL, C. J.—I agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Wort and Varma, JJ.

GANESH PRASAD SINGH

v.

SHEOGOBIND SAHU.*

1937.

September, 3.

Hindu Law—legal necessity—money borrowed partly for paying up rent of a joint family business not being ancestral —part of the loan incurred for this purpose, whether binding on joint family estate.

* Appeal from Appellate Decree no. 9 of 1935, from a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 10th of May, 1934, affirming a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Muzaffarpur, dated the 31st of May, 1933.

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Where a loan was incurred on the security of the joint family property and it was found that a portion of the money was borrowed for paying up the rent of a joint family business of ferry-farming which was not ancestral and there was a minor member in the joint family, *held*, that the business not being ancestral, the payment of rent was not a justifying legal necessity qua the joint family estate, and, therefore, that the creditor was not entitled to a mortgage decree in respect of the amount which was borrowed for this purpose.

Ram Nath v. *Chiranji Lal*(1), *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(2) and *Benares Bank, Limited* v. *Hari Narain*(3), referred to.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Wort, J.

S. M. Mullick and *N. C. Ghosh*, for the appellants.

N. K. Prasad II, for the respondents.

WORT, J.—It is not disputed in this case that as regards Rs. 700 the plaintiff-respondent was entitled to a decree for sale against the properties mortgaged. But the question which we have to determine is as to the other part of the consideration, namely, Rs. 1,300.

Mr. Luby, the District Judge, has come to the conclusion that this sum was borrowed in connection with a joint family business which was that of ferry-farming, and that the debt was contracted for legal necessity, and that all the defendants were liable under the mortgage bond. Had it been a question of the adult members only, I think I should have come to the conclusion that the plaintiff would be entitled to a decree for sale as regards the whole of the consideration. But the difficulty arises by reason of the

(1) (1934) I. L. R. 57 All. 605, F. B.
(2) (1922) L. R. 49 Ind. Ap. 108.
(3) (1932) L. R. 59 Ind. Ap. 300.

existence of one minor member, and unless it can be held that the business was an ancestral business, or, being joint family business, it was indeed for legal necessity, that is to say, legal necessity in connection with the joint family estate, the plaintiff would be entitled only to a decree for money as regards Rs. 1,300. It is conceded that the finding of the learned District Judge on this question as to the nature of the business was ambiguous. He has not in terms found that it was an ancestral business, and it was suggested during the course of the argument that the matter should go back for the determination of that question. But on a perusal of the evidence of the plaintiff himself it is quite clear that the question whether it was an ancestral business or a business of the family not being ancestral was present to the mind of the parties and it was stated in the course of that evidence to which I have just made reference, that no document was looked to " for the purpose of seeing whether it was an ancestral business ". I gather that the learned Judge in the Court below was not prepared on that evidence to hold that it was an ancestral business, and indeed the finding that it was for legal necessity rather points to that conclusion. Now, assuming that it was not an ancestral business but a joint family business so called by the learned Judge, it would be necessary to determine that the borrowing of Rs. 1,300 was for legal necessity—but let it be remembered, not legal necessity of the business but legal necessity of the family property or the family estate; and, unless that be shown, the joint family estate cannot be bound by the mortgage which these parties have entered into.

The law on this question was carefully examined by a Full Bench of the Allahabad High Court in the case of *Ram Nath* v. *Chiranji Lal*[1] and without stating any detail it was decided by the Judges that the family property might be bound by a loan incurred

(1) (1934) I. L. R. 57 All. 605, F. B.

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by one member of the family who was carrying on a business where it was shown that it was for justifying legal necessity. At any rate, so far as the Allahabad High Court is concerned, it leaves the question open as to what class of case comes within the principle there laid down. I find myself in some difficulty in imagining a case in which the money borrowed for business not being an ancestral business can be held to be for justifying legal necessity as regards the family estate. We are saved from entering into a consideration of that matter in this case by the finding of the learned Judge in the Court below. From that finding it will be clearly seen that the justifying legal necessity, which has bound the estate according to the decision of the learned Judge, was the fact that the sum was borrowed for paying the rent of the ferry. It is quite clear in law that the decision arrived at by the Judge in this connection is erroneous. Necessity of the business is not only not necessarily necessity of the joint family, but in my judgment it cannot be so unless, as I have already indicated, the necessity was in connection with an ancestral business which, in my judgment, this has been held not to be. Sir Lawrence Jenkins in delivering the opinion of their Lordships of the Judicial Committee in the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(1) while dealing with the question whether it was an ancestral business made this statement with regard to the nature of an ancestral business—" The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations ". For the reasons which I have stated it appears that the Judge was unable to come to the conclusion that this

(1) (1922) I. L. R. 49 Cal. 560; L. R. 49 Ind. Ap. 108, 114.

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was an ancestral business. The matter has been further considered in the case of *Benares Bank, Limited* v. *Hari Narain*(1). There their Lordships of the Judicial Committee made this statement: " Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(2). The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him ". Their Lordships then go on to remark that there is no difference between Dayabhaga and Mitakshara. Having come to the conclusion, as I clearly do, that the borrowing of Rs. 1,300 for the purpose of paying rent cannot possibly be held in law to be for justifying legal necessity qua the joint family estate, there appears to be no other conclusion to arrive at than that the plaintiffs in the suit were entitled to a mortgage decree as regards Rs. 700 but merely a decree for money for the balance, namely, Rs. 1,300.

In these circumstances the appeal is allowed in part with costs in proportion to the success of the appellants.

VARMA, J.—I agree.

Appeal allowed in part.

S. A. K.

(1) (1932) I. L. R. 54 All. 564; L. R. 59 Ind. Ap. 300.
(2) (1922) I. L. R. 49 Cal. 560; L. R. 49 Ind. Ap. 108.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Manohar Lal, J.

1937.

August, 17.

MAHABIR PRASAD PODDAR

v.

RAM TAHAL MANDAR.*

Provincial Insolvency Act, 1920 (Act V of 1920), sections 7 and 75(3)—joint Hindu family, whether as such can be adjudicated insolvent—members, adjudication of—joint personal liability necessary—minors, whether must be excluded—one petition for adjudication against all the members, whether maintainable—leave to appeal, whether can be granted at the time of final hearing of the appeal.'

The members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test to be applied is whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable.

Bolisetty Mamayya v. *Kolla Kottayya Kommurri Rayya Rice Mill Company*(1), *Punniah* v. *Kesarmal Firm*(2), *Maung Kyi Oh* v. *S. M. A. L. Arunchallam Chetty*(3) and *Brojendra Nandan Saha* v. *Nikunja Behari Das*(4), followed.

Acts of insolvency as defined in section 6 of the Provincial Insolvency Act, 1920, are acts—things done or suffered to be done—creating personal liability. Although the manager of a joint Hindu family can act on behalf of the family, the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also.

*Appeal from Original Order no. 164 of 1936, from an order of P. C. Chaudhuri, Esq., I.C.S., District Judge of Darbhanga, dated the 9th April, 1936.

(1) (1921) I. L. R. 44 Mad. 810.
(2) (1926) I. L. R. 50 Mad. 256.
(3) (1924) I. L. R. 2 Rang. 309.
(4) (1934) 39 Cal. W. N. 104.

It follows that the joint Hindu family as such cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one petition of the creditor, in case the joint act of insolvency can be brought home to them.

Minors must, however, be excluded in any case from insolvency proceedings started at the instance either of debtors or creditors.

Bolisetti Mamayya v. *Kolla Kottayya, Kommurri Ramayya Rice Mill Company*(1) and *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(2), referred to.

Leave to appeal under section 75(3) of the Act can be granted at the time of the final hearing of the appeal.

Gopal Ram v. *Magni Ram*(3), followed.

Appeal by the creditors.

The facts of the case material to this report are set out in the judgment of Manohar Lal, J.

B. C. De and *R. Misra*, for the appellants.

Harihar Prasad Sinha, for the respondents.

MANOHAR LALL, J.—This is an appeal by the creditors against an order of the District Judge of Darbhanga, dated the 9th April, 1936, refusing on a preliminary ground their petition for an adjudication of the five respondents under the Provincial Insolvency Act.

The learned District Judge was apparently under the impression that the applicants had asked that the respondents' joint Hindu family may be adjudged insolvent and upon that view called upon the applicants to state specifically whom they wanted to be declared insolvent. The applicants on being called

(1) (1921) I. L. R. 44 Mad. 810.
(2) (1922) I. L. R. 49 Cal. 560, P. C.
(3) (1927) I. L. R. 7 Pat. 375, F. B.

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upon made it perfectly clear by a petition dated the 26th March, 1936, that

> "the adjudication prayed for on the allegations in the petition of insolvency is in respect of the five adult persons described therein as opposite party.....The debt is a joint debt of the family of the opposite party,"

MANOHAR LAL, J.

but still the court was not satisfied and under the impression that the application was made in order to harass and coerce the debtors rejected the application for adjudication. In my opinion the order of the learned District Judge was wholly erroneous. The court was bound to adjudicate upon the facts stated in the application and on the facts, if established, grant the proper relief to the applicants. The application could not be rejected *in limine* on the ground stated by the District Judge. It is only necessary to draw attention to the decision in *Bodisetti Mamayya* v. *Kolla Kottayya, Kommurri Ramayya Rice Mill Company*(1) which decides that the members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test to be applied is whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable. This case was followed in *Punniah* v. *Kesarmal Firm*(2) and to the similar effect is the case of *Maung Kyi Oh* v. *S. M. A. L. Arunchallam Chetty*(3). The Calcutta High Court has taken a similar view in *Brojendra Nandan Saha* v. *Nikunja Behari Das*(4).

There seems to be some misapprehension as to the legal status of a joint Hindu family in regard to

(1) (1921) I. L. R. 44 Mad. 810.
(2) (1926) I. L. R. 50 Mad. 256.
(3) (1924) I. L. R. 2 Rang. 309.
(4) (1934) 39 Cal. W. N. 104.

insolvency proceedings. A joint Hindu family as understood by the Mitakshara and Dayabhag schools of Hindu Law is a perfectly wellknown institution: It connotes that the ownership of the family property (in case when the family has a property) belongs to the individual members who are existing at that time, either in undefined shares (under the Mitakshara school) or in defined shares (under the Dayabhag school). If a creditor wants to enforce his claim against a joint family it is necessary to implead all the members of the family as defendants. As a rule, the father, or in his absence ordinarily the next senior male relation is entitled to manage the affairs of the family on behalf of the entire coparcenary inclusive of adult or minor members. The manager has power to affect or dispose of joint family property in respect of purposes denominated "necessary purposes". Where estate or family necessity exists that necessity rests upon the coparceners as a whole and in suits relating to such transactions the manager can represent the whole coparcenary, though there is no objection to joining the rest of the coparcenary with him. The manager cannot, however, by any act of his impose a personal liability upon the other coparceners. Adult members may incur such liability by actually joining him in transactions giving rise to such liability and this, whether there be any legal necessity or not, but minors cannot be thus made liable—as an instance *see* the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(1).

Acts of insolvency as defined in section 6 of the Provincial Insolvency Act, 1920, or in section 6 of the earlier Act of 1907 under which the case of *Bolisetti Mamayya* v. *Kolla Kottayya, Kommurri Ramayya Rice Mill Company*(2) was decided are acts—things done or suffered to be done—creating personal liability. The explanation to the section provides that the act of an agent may be the act of the

(1) (1922) I. L. R. 49 Cal. 560, P. C.
(2) (1921) I. L. R. 44 Mad. 810.

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principal. Although the manager of a joint Hindu family can act on behalf of the family, the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also. It follows that the joint Hindu family as such cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one creditor's petition in case the joint act of insolvency can be brought home to them. Minors must, however, be excluded in any case from insolvency proceedings started at the instance whether of debtors or of creditors. Some confusion has sometimes arisen on account of the powers of a receiver to sell the interest of the sons in the joint family estate where the karta being the father has been declared insolvent. This matter has now been clearly decided authoritatively by their Lordships of the Privy Council in *Sat Narain* v. *Rai Bahadur Sri Kishen Das*(1) where it has been pointed out that in cases where the father is adjudicated insolvent in a joint Hindu family the shares of the sons can be seized by the Receiver in insolvency on the ground of the sons' pious obligation to pay the debts of the father.

The respondents raised a preliminary objection that this appeal is incompetent inasmuch as the leave of the High Court was not obtained under section 75(*3*) of the Provincial Insolvency Act. There is no merit in this objection because the very fact that this appeal was admitted by this Court amounts to an indication that if leave had been asked for it would have been granted. To cure this irregularity it is

(1) (1936) I. L. R. 17 Lah. 644, P. C.

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enough to state that we think that this is a case in which leave ought to be granted and the same is granted at this stage as was done in the case of *Gopal Ram* v. *Magni Ram*(1).

The result is that the appeal is allowed with costs. The District Judge will now take the case back on his file and proceed to determine whether the opposite party (or which of them) should or should not be declared insolvent as prayed for by the applicants in their application of the 23rd March, 1936.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CIVIL.

Before Wort and Varma, JJ.

1937.

August, 17, 18.

PHULCHAND RAM MARWARI

v.

NAURANGI LAL MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151—*decree against judgment-debtor and his sons—property of both sold in execution and purchased by decree-holder—suit by sons for exemption of their share—sons exempted from operation of decree—court, whether competent to award compensation to auction-purchaser under section* 151—*substantial justice, what is meant by*—caveat emptor, *doctrine of, whether applicable.*

The decree-holder obtained a compromise decree against *P*, the judgment-debtor, and his sons and in execution put their property up for sale and purchased it himself. In due course the sale was confirmed and full satisfaction of the decree entered. Thereafter the minor sons brought an action

* Civil Revision no. 238 of 1937, from an order of Babu Khetra Mohan Kunar, Subordinate Judge of Bhagalpur, dated the 12th December, 1936.

(1) (1927) I. L. R. 7 Pat. 375, F. B.

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claiming that they were not bound by the compromise decree, and the claim having succeeded, their moiety share in the property sold was released. Thereupon the decree-holder took out fresh execution against the judgment-debtor, against whom the compromise decree remained intact, but the court dismissed it on the ground that the decree-holder was not entitled to take out further execution of the decree which had already been satisfied. Thereafter the decree-holder made an application to the court claiming compensation from the judgment-debtor and the court granted the relief under section 151 of the Code of Civil Procedure, 1908.

Held, in revision, (*i*) that the court had no jurisdiction to award compensation against the judgment-debtor;

(*ii*) that the maxim *caveat emptor* applied to the facts of the case, and that, apart from fraud and the provisions of rule 91 of Order XXI, Code of Civil Procedure, 1908, a purchaser at an auction sale must abide by the bargain.

Abinash Chandra Kar v. *Bhuban Chandra Maiti*(1), followed.

Amba Lal v. *Ramgopal Madhoprasad*(2), distinguished.

Observations on the tendency of the subordinate courts to interpret section 151 of the Code of Civil Procedure, 1908, as giving them power which under the general law they do not possess and to do what is sometimes called, and erroneously called, "substantial justice" though it often amounts to injustice.

Application in revision by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Wort, J.

A. B. Mukherji and *S. N. Banerjee*, for the petitioners.

Dr. Dwarkanath Mitter (with him *S. N. Sahay* and *K. P. Sukul*), for the opposite party.

WORT, J.—The subordinate courts of this province seem inclined from time to time to interpret

(1) (1921) 25 Cal. W. N. 756.
(2) (1932) I. L. R. 55 All. 221.

section 151 of the Code of Civil Procedure as giving them power which under the general law they do not possess: in other words, there is a tendency to do what is sometimes called, and erroneously called, 'substantial justice' though as a matter of fact it often amounts to injustice. In this case the learned Judge in the Court below has exercised what he believes to be his power under the section in giving compensation to the decree-holder under the following circumstances.

The decree-holder, i.e., the respondent to this application, obtained a decree against the father and sons. I should have stated that the decree was a compromise decree. The conditions of the compromise not having been complied with, the decree-holder exercised his rights by putting the decree into execution, and in pursuance of that put up for sale the joint property of the father and of the sons. In due course the property was sold, and the decree-holder respondent having had leave to bid purchased the property for upwards of Rs. 7,000. Then in due course, after the statutory period had elapsed, the sale was confirmed and full satisfaction was entered.

Then there started an action by the minors claiming that (for reasons which perhaps need not be gone into in this appeal) the compromise decree was not binding upon them. That action succeeded. The result of that was that their eight annas interest in the property which had been put up for sale was released. But the decree stood, that is to say, the decree stood against the father as a joint and several decree and the sale stood as a whole; the sale itself was not affected—I use the expression 'sale' in contradistinction to 'property'—although 8 annas of the property was necessarily released. Then this application was made by the decree-holder respondent for compensation to the extent of half of the property.

I should have stated, however, that before this application was made, an application had been made for execution which resulted in an appeal from the

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decision of the Subordinate Judge of Bhagalpur to this Court. The appeal came on for hearing before my Lord the Chief Justice and my learned brother Varma [*Phulchand Ram Marwari* v. *Naurangi Lal Marwari*(1)]. There it was decided, to use the words of the head-note, that " the decree-holder could not take out further execution of the decree which had already been satisfied. It was immaterial that in his capacity as auction-purchaser he had purchased the property of some one which was not liable under the decree." I would add to my statement that there was an observation in that case which fell from the learned Chief Justice to the effect " it would be for the decree-holder, if he had some other remedy, to pursue that remedy as he might be advised ". Some reliance has been placed upon those words as if deciding that the decree-holder has now a remedy which he has successfully pursued in the court of the Subordinate Judge.

I have already stated that after the hearing of that appeal in this Court this application under section 151 for compensation was made. I must say that I had some difficulty in coming to a conclusion in this case having regard to what I believed to be the decision of the Allahabad High Court in the case of *Amba Lal* v. *Ramgopal Madhoprasad*(2). Without referring at the moment to the facts, it was stated there that the decree-holder in circumstances not dissimilar from the present (although I shall point out in a moment that there were certain facts in that case which do not exist in the case before us) was entitled to compensation. Now I refer for the moment to the authority in the case of *Abinash Chandra Kar* v. *Bhuvan Chandra Maiti*(3) upon which Mr. Mukharji on behalf of the appellants strongly relies. A statement of facts of that case would disclose the position in this case, unless it can be shown that on the facts there is any

(1) (1935) 16 Pat. L. T. 906.
(2) (1932) I. L. R. 55 All. 221.
(3) (1921) 25 Cal. W. N. 756.

difference in principle between the cases, to put it more correctly, whether the facts of this case as compared with those of the case of *Abinash Chandra Kar* v. *Bhuvan Chandra Maiti*(1) in any way would modify the principle there laid down by the learned Judges. The action there which gave rise to the proceedings was a mortgage action. The property was put up for sale in execution of a mortgage decree. Certain persons claimed that certain property which was put up for sale in execution of the decree was not the property of the judgment-debtor, and it was so decided. The result was that the decree-holder who himself was the purchaser obtained, to state it briefly, less than what he thought he would obtain from the purchase which he had made. Richardson, J., in the course of his judgment, makes a statement of the case which I think is valuable for the purposes of considering the argument advanced in this case. The learned Judge says: "I apprehend, when a decree-holder has obtained leave to bid and has purchased the property of the judgment-debtor, he is, generally speaking, in the same position as any other auction-purchaser. He then refers to *Mahabir Pershad* v. *Macnaghten*(2): "For the present purpose his position seems to me not more favourable but less favourable than that of a third party because the sale was held at his instance and presumably it was he who supplied to the court the particulars of the property published in the sale proclamation. The principle, as I understand, is that, apart from the case provided by rule 91 and apart, of course, from fraud, a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment-debtor in the property. The court which sells the property does not guarantee the title and the maxim *caveat emptor* applies." Now it is not denied that if the facts of that case were the same as those in the case before us to-day there could be no dispute that the principle

(1) (1921) 25 Cal. W. N. 756.
(2) (1829) I. L. R. 16 Cal. 682; L. R. 16 Ind. Ap. 107.

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laid down by the learned Judge in that case would apply to this one. But it is contended that although generally speaking the principle *caveat emptor* does apply to court sales, the facts in this case are such as to make the principle inapplicable. Now the only fact which can be referred to as differentiating the case from *Abinash Chandra Kar's* case(1) is the fact that the property which has been released from sale is the property of the persons who were in the first instance parties to the action, and it is stated by Dr. Mitter and great reliance, as I understand his argument, is placed upon the statement that at the time of the sale there was a decree against these persons and therefore at that time it was right and proper that the property should have been put up for sale: to put it in other words, the property was the property of the judgment-debtors. Now I could appreciate the argument that if the statement of facts to which I have made reference is a statement of anything other than the mere history of the case it may be possible to hold that the principle *caveat emptor* does not apply. But we must look at the case from the point of view of the facts as they stand at the present moment.

It is contended by Mr. Mukharji on behalf of the appellants that the original decree stands. I am not sure that I am altogether in agreement with that contention. So far as Mr. Mukharji's client, the father, is concerned, there is no doubt that the decree does stand; but the effect of the judgment in the action which was brought by the minors is that the decree is not binding upon the minor defendants in that action. But it is quite clear, whether Mr. Mukharji's contention is valid or not, that at the present moment we must consider this case as if there had been no decree against the minor sons. And in my judgment, when that is stated, all that can be said about the facts relating to the action brought by the minors for

(1) (1921) 25 Cal. W. N. 756

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the purpose of having a declaration to the effect that the decree is not binding on them, is mere history, and does not affect the principle *caveat emptor*. That being so, it is perhaps wise to lay down one or two principles in dealing with the authority relied upon. It is quite clear in the first instance that had the decree-holder purchased property which eventually turned out to be of less value than he had anticipated, then, as Mr. Justice Richardson pointed out, in the absence of fraud there could be no claim for compensation. It is equally true that had the facts of the present case been similar to those in the case of *Abinash Chandra Kar* v. *Bhuvan Chandra Maiti*(1), and I understand Dr. Mitter to agree to the proposition, the principle laid down there would apply. Now having regard to that statement it seems to me that the only question one has to consider in this case is whether the fact that the minors were originally parties to the action in any way alters or modifies the principle which is to be applied. As I have already stated, that fact is nothing more than a part of the history of the case, and we are to deal, and indeed bound to deal, with the case as if no decree had ever been passed against the minors. If a decree is held not binding on a person, then it must be assumed that there is no such decree. That being so, the only question in my judgment to consider is the decision in *Amba Lal* v. *Ramgopal Madhoprasad*(2) to which I have already referred. Glancing at the judgment it would appear at the first sight that the learned Judges in that case in some way modified the principle which in that case had been held to be applicable to court sales, namely, the principle *caveat emptor*, and there is some discussion which would perhaps to some extent bear that statement out. But the learned Judges at page 230 of the Report make the statement: "We are not unaware of the fact that the rule that the doctrine of *caveat emptor* applies to court sales has been laid

(1) (1921) 25 Cal. W. N. 756.
(2) (1932) I. L. R. 55 All. 221.

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down in a series of cases, but we may point out that the application of that doctrine has undoubtedly the effect of negation of justice in many cases." With great respect to the learned Judges I fail to see how the application of the doctrine *caveat emptor* can do injustice. If a person purchases a property under circumstances in which the principle *caveat emptor* applies he does so at his own risk as the principle suggests and if he suffers loss he has himself alone to blame. But one need not go into a very detailed discussion of that case because on analysis it would be seen that the learned Judges there were dealing with a case which is almost entirely different from the case which we have before us to-day. Indeed if any inference is to be drawn from the facts of the case it is an inference against the respondent decree-holder rather than in his favour. I will endeavour to make myself clear on this point by stating the facts of that case. There the decree-holder had purchased certain properties which after various pieces of litigation were held to be the properties of persons other than the judgment-debtor. On the footing of the price which he paid for the whole of the property rateable distribution had been made between him and other decree-holders who had decrees against the same judgment-debtor. The result of the litigation being what it was, that is to say, that the person had successfully claimed certain of the properties which had been put up for sale, the decree-holder made a claim which was the subject-matter of the case against the other decree-holders on the footing that a larger sum than they were entitled to, having regard to the events which had happened, had been distributed to them, and a refund was claimed and the question which the learned Judges decided there was whether section 144 of the Code of Civil Procedure was exhaustive and whether compensation could be made under section 151.

I now come to the point which I stated before I referred to the facts of the case. The very fact that

the decree-holder who had purchased in the court sale was claiming against his fellow decree-holders is a suggestion that he could not have made the claim against the judgment-debtor. Now the case of *Ambalal* v. *Ramgopal Madhoprasad*(1) does not in any way affect the principle which is to be applied to the facts of this case. I have already stated and repeat that at first sight it did appear to be strongly in support of the respondent in this case. The learned Judges in that case made reference to an earlier decision of their own Court, namely, that in *Anand Krishna* v. *Kishan Devi*(2) which was in substance the application of the principle laid down in the case of *Abinash Chandra Kar* v. *Bhuvan Chandra Maiti*(3) to which I have already referred. It is sought of course in this case to apply section 144 of the Code of Civil Procedure by analogy. It is admitted that section 144 does not apply, but it is said it gives some indication that the court may in the exercise of its powers under section 151 of the Code of Civil Procedure give compensation in proper cases. But if section 144 is to be treated in any way as an analogy the compensation which the decree-holder would seek in this case should be against the sons and not against their father. On what principle, it may be asked, can the decree-holder be entitled against the judgment-debtors against whom he has already got a judgment and whose property he has sold. It seems very difficult to discover any principle upon which the decree-holder would be entitled to compensation against the present judgment-debtors. In no sense were the judgment-debtors at fault. They did not put the property up for sale. They had nothing to do with the sale proclamation, but the property had been sold by the court. They had the advantage which perhaps may work out in this case as an unjust advantage of the decree being entered as fully satisfied under the execution.

In my judgment neither on principle nor on authority is the decree-holder entitled to compensation

(1) (1932) I. L. R. 55 All. 221.
(2) (1930) I. L. R. 53 All. 496.
(3) (1921) 25 Cal. W. N. 756.

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against the judgment-debtors and, as has been already held, the decree-holder is not entitled to take further execution against them. For those reasons, in my judgment, the decision of the learned Judge was erroneous and must be set aside. I would add that the application was under section 115 of the Code of Civil Procedure and it was contended by Dr. Mitter, in the course of his argument, that what the learned Judge in this case has decided is a question of law. Speaking for myself, had I been satisfied that it was merely a question of law that the Judge had decided, certainly there would be one fate of this application, as the learned Judge had jurisdiction to decide a question of law rightly or wrongly. But the substantial question in this case is whether he had jurisdiction to make this order under section 151, and, as their Lordships of the Privy Council have pointed out, a decision on a point of law may be interfered with if in fact the question of jurisdiction does arise. The proper order, therefore, to make is that the rule nisi is made absolute, the judgment of the learned Judge in the court below is set aside with costs, and we allow hearing fee to the extent of five gold mohurs.

VARMA, J.—I agree.

Rule made absolute.

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September, 14.

APPELLATE CIVIL.

Before Wort and Manohar Lal, JJ.

RAI BAHADUR DALIP NARAYAN SINGH

v.

SRIMATI AMARBAS KUER.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151 *and Order XXXIX, rule* 1—*stay of execution by injunction, when can be granted—rule* 1, *applicability of—inherent power, when may be exercised.*

* Appeal from Original Order no. 21 of 1937, from an order of Babu Braj Bilas Prasad, Subordinate Judge of Gaya, dated the 19th of December, 1936.

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Order XXXIX, rule 1, Code of Civil Procedure, 1908, cannot be applied to a case where the decree-holder has a decree against his judgment-debtor which he is executing against that judgment-debtor in a proper proceeding and somebody else institutes a suit, after being defeated in his claim case, and claims that the property is his and not that of the judgment-debtor and then asks for a temporary injunction on the ground that his property is being wrongfully sold in execution of a decree.

T. S. Sankara Ayyar v. *Muhammad Ganni Rowther*(1), referred to.

Per MANOHAR LAL, J.—The court may invoke its inherent powers to stay the execution of the decree if the circumstances are so coercive that the balance of convenience is in favour of the appellant or that a stay is necessary to prevent an abuse of the process of the Court.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Wort, J.

Niamatulla and *J. C. Sinha*, for the appellants.

D. L. Nandkeolyar, for the respondents.

WORT, J.—This is an appeal against the decision of the Subordinate Judge granting an interim injunction in the following circumstances.

The present appellants obtained a decree against the husbands of the respondents in the year 1933 and in execution of that decree put up certain property to sale. That property a tone time undoubtedly was the property of the respondents they having inherited it under the will of their father, but in 1914 by a deed of gift made it over to their husbands. Their case now is that the deed was a fraudulent transaction; they were under the domination of their husbands; and they were not in a position, nor did they understand the quality of their act in executing the deed of gift. In 1932 a person who is not before the Court

(1) (1935) I. L. R. 59 Mad. 744.

9 I. L. R.

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obtained a mortgage decree with regard to this property as against both the husbands and their wives. After the property was attached and put up for sale in execution of the mortgage decree a claim case was lodged by the respondents; it failed and then the respondents brought an action in which this interlocutory injunction was granted. The learned Judge in the Court below, after having discussed all the facts and certain questions of law has stated his reasons for granting the injunction against the present appellants in the following words:

> "The balance of convenience also lies in their favour because if the properties be auction sold and happen to be purchased by a third person, the plaintiffs in case of their success in this suit, will have to fight with the purchaser. If the sale is postponed, defendants 1 and 2 do not suffer any loss because the decree under execution provided for payment of future interest at 6 p. c. p. a. till the date of realisation."

I fail to follow the reason of the learned Judge. The question that he had to determine was whether within the meaning of clause (*a*) of Order XXXIX, rule 1, the property which is the alleged property of the respondents has been wrongfully sold in execution of a decree. It seems to me to be impossible to answer a question put in that form in the affirmative. The property was alleged to be the property of the judgment-debtor, the appellants were selling it as the property of the judgment-debtor, and added to it a claim case made by the respondents failed. We cannot assume merely because the respondents had commenced an action that their action was going to succeed. It is only in the event of success, which as I have said we cannot anticipate, that it could be held that the appellants were wrongfully selling in execution. If we are to accept the argument presented to us by Mr. Nandkeolyar we should have read the words of the Code to which I have just referred as 'possibly wrongfully or probably wrongfully sold in execution' which it is impossible to do. It has to be remembered that this Court will not interfere in the exercise of a discretion by a Court in a matter of this kind so long as the discretion is exercised

judicially. But when one comes to examine the reasons of the learned Judge it will be seen in my opinion that the Judge at any rate has not exercised his discretion rightly.

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If it comes to a question of convenience there can be no doubt about the matter. If in fact the property sold belongs to the respondents, no title will be given to the auction-purchaser. If an injunction is granted prohibiting the present appellants from executing his decree by sale of this property he will be kept out of the fruits of the judgment so long as the claim case is proceeding through the trial and various appellate courts. That is what happens and in all probability will happen to this case. I do not think there can be any doubt that both on the question of law and on the balance of convenience the Judge is in error.

For those reasons I would allow the appeal and discharge the injunction with costs.

MANOHAR LAL, J.—I agree. The only difficulty which I have felt in this case is due to the observations in some Calcutta cases which have been considered in *T. S. Sankara Ayyar* v. *Muhammad Ganni*(1), which apparently lay down that the provisions of Order XXXIX, rule 1, of the Code of Civil Procedure can be invoked in circumstances such as the present. Without attempting to reconcile the various contradictory decisions which cluster round this question, it is enough to say that I do not find on a plain reading of the words used by the legislature in Order XXXIX, rule 1, which runs as follows (so far as it is relevant to the present case)—

> "Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted..... or wrongfully sold in execution of a decree"

that they can be applied to a case where the decree-holder has a good decree against his judgment-debtor which he is executing against that judgment-debtor

(1) (1935) I. L. R. 59 Mad. 744.

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in a proper proceeding and somebody else institutes a suit, after being defeated in his claim case, that the property is his and not that of the judgment-debtor and then asks for a temporary injunction on the ground that his property is being wrongfully sold in execution of a decree; it is difficult to see how the property is at the moment of his application to the Court in danger of being *wrongfully* sold in execution of the decree. It may be that the Court will invoke its inherent powers to stay the execution of the decree if the circumstances are so coercive that the balance of convenience is in favour of the appellant or that a stay is necessary to prevent an abuse of the process of the Court. Upon the facts which have been found in this case, as pointed out by my learned brother in his judgment just delivered, I do not see that the balance of convenience is at all in favour of the respondents. I therefore agree that the appeal should be allowed with costs.

Appeal allowed.

S. A. K.

REVISIONAL CIVIL.

Before Wort and Manohar Lal, JJ.

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September, 15, 16.

SATISH CHANDRA CHAKROVARTY

v.

P. N. DAS & CO.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II, paragraphs* 14, 20 *and* 21—*arbitration out of court—award in favour of unregistered company—objection to enforceability of award under section* 69(1) *of the Partnership Act*, 1932 (*Act IX of* 1932),—*illegality, whether apparent on the face of the award.*

* Civil Revision no. 314 of 1937, from an order of Babu K. K. Banerji, Additional Subordinate Judge of Darbhanga, dated the 30th of April, 1937, confirming an order of Maulavi Kabiruddin Ahmad, 2nd Munsif of Darbhanga, dated the 25th of May, 1936.

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A certain dispute arising out of a contract was referred to arbitration out of court and an award having been made in favour of *D. & Co.*, an unregistered company, they made an application under paragraph 20 of the second schedule to the Code of Civil Procedure, 1908, to file the award. The defendant objected to the award being filed on the ground that the unregistered company could not enforce their right under the award by reason of the bar imposed by section 69(*1*) of the Partnership Act, 1932;

Held, that there was no illegality apparent on the face of the award within clause (*c*) of paragraph 14 of the second Schedule.

Champsey Bhara & Co., v. *Jivraj Balloo Spinning and Weaving Co., Ltd.*(1), followed.

British Westinghouse Electric and Manufacturing Company, Limited, v. *Under-ground Electric Railways Company of London, Limited*(2) and *Landauer* v. *Asser*(3), referred to.

Application in revision by the defendant.

The facts of the case material to this report are set out in the judgment of Wort, J.

Sir Manmatho Nath Mukherjee (with him *Hareshwar Prasad Sinha* and *Ratikant Chaudhury*, for the petitioner.

Dr. Dwarka Nath Mitter (with him *B. N. Mitter* and *K. N. Moitra*), for the opposite party.

WORT, J.—This rule is directed against the order of the Additional Subordinate Judge confirming an order of the Munsif in an application under paragraphs 20 and 21 of the second schedule of the Code of Civil Procedure, in other words, an application to file an award.

The circumstances are as follows. In 1934 Satish Chandra Chakrovarty and P. N. Das & Co., submitted a dispute arising out of certain contracts

(1) (1923) I. L. R. 47 Bom. 578, P. C.
(2) (1912) A. C. 673.
(3) (1905) 2 K. B. 184.

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between them to the arbitration of certain persons. In due course an award was made, and it is with regard to this award that the application, to which I have referred, was made to the Munsif. Both the trial court and the lower appellate court have gone into the question whether section 69 of the Partnership Act applies to this case. Section 69(*1*) provides that

> "No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm."

The Courts below considered the question whether Das & Co., who are the respondents to this rule and who are represented by Dr. Mitter, were a joint family carrying on a joint family business or whether the members of that firm formed a partnership under the Partnership Act. This question was decided in favour of the petitioner. Then the question arose whether they were registered which clearly they were not. The third question that arose was whether this was a suit or proceeding within the meaning of sub-section (*3*) to section 69 which I have just read. On this last question the Judge found in favour of Das & Co., and therefore the award has been filed.

The first point argued before us on behalf of the petitioner is whether the High Court has jurisdiction under section 115 of the Code of Civil Procedure to revise or otherwise interfere with the order of the Additional Subordinate Judge. A large number of authorities have been quoted and I must confess that it is somewhat difficult to draw a distinct line between them, the real question in all the cases being—what is the meaning of the word 'jurisdiction'? I propose to say nothing more about the matter for fear of adding confusion to it rather than clarifying it, because in my opinion this case can be decided on an entirely different ground.

When one or two facts is stated, it will be seen how the matter stands. The Munsif had presented to him an award, and it is quite clear that according to the provisions of paragraph 20 of the second schedule of the Code of Civil Procedure a matter had been referred to arbitration, an award had been made thereon and the Munsif was dealing with an application to file that award and as a condition precedent he had jurisdiction of the subject-matter of the award. I pause here to deal with an argument advanced by Mr. Sinha who replied to the argument of Dr. Mitter, that the Munsif had no jurisdiction over the subject-matter of the award. Mr. Sinha is confusing the provisions relating to the prohibition as regards a suit or other proceeding under section 69 with the subject-matter of the award under paragraph 20. The subject-matter of the award was the contract for timber, and, always provided that the amount claimed by one party or the other was not beyond the pecuniary jurisdiction of the Munsif, there could be no doubt that the Munsif had jurisdiction over the subject-matter of the award.

We now come to paragraph 21 of the second schedule which makes provision with regard to matters which the Judge had to consider, apart from those dealt with under paragraph 20, in determining the question whether the award should be filed or not. This paragraph provides—

> "Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award."

Now, the only duty of the Munsif and the only duty therefore of the Additional Subordinate Judge in appeal was to consider those matters referred to in paragraph 21 and to see whether there were any grounds to refer to paragraphs 14 and 15. The second schedule of the Code of Civil Procedure is an exhaustive Code in this matter. As has been

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pointed out by their Lordships of the Judicial Committee of the Privy Council on more than one occasion, no Court has jurisdiction to go beyond the provisions of this schedule. The provisions of paragraphs 14 and 15 are clear. They refer to the remission of an award. Paragraphs 20 and 21 refer to an award outside Court, if I may use the expression, in contradistinction to an award made in pursuance of a submission in a suit. But the matters referred to in paragraphs 14 and 15 are common to both cases. Looking at paragraphs 14 and 15 it will be seen that if any of those facts or circumstances are present, then the Court before whom an application to file an award comes may reject the application. I might say for the purpose of saving time that the only argument addressed to us with regard to this matter is founded on clause (*c*) of paragraph 14 which says—

"Where an objection to the legality of the award is apparent upon the face of it."

It is not suggested that there is any other matter which can give jurisdiction to the Courts below to reject the application for filing an award. We are not left without authority with regard to this matter. I refer to the case of *Champsey Bhara and Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.*(1). The subject-matter of that appeal was an arbitration award relating to certain cotton contracts and one of the matters argued before their Lordships and before the Judges of the Bombay High Court was that the award given in that matter was bad in law on the face of it within the meaning of the clause to which I have just made reference. Lord Dunedin in delivering the opinion of their Lordships of the Judicial Committee referred to the well-known case of *Hodgkinson* v. *Fernie*(2) and quotes this passage from the judgment of Williams, J.: "The law has for many years been settled, and remains so at this

(1) (1923) I. L. R. 47 Bom. 578, P. C.
(2) (1857) 3 C. B. (N. S.) 189.

day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact..... The only exceptions to that rule, are, cases where the award is the result of corruption or fraud....." or " where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award ". The law there laid down is in conformity with the paragraphs of the second schedule of the Code to which I have made reference. The question which their Lordships addressed themselves was—" Does the error in law appear on the face of the award?" Reference was also made to the case of *British Vestinghouse Electric and Manufacturing Company, Limited*, v. *Underground Electric Railways Company of London, Limited*(1) where the arbitrator had stated a special case and got an opinion of the Divisional Court. In making his award he stated that opinion and founded his award upon it. The opinion was held to be erroneous and so there was an error in law on the face of the award. Their Lordships referred to the case of *Landauer* v. *Asser*(2) (the authority of which had been doubted as being wrongly decided) but stated that in their Lordships' opinion it was not necessary to consider that point for the present case differed from *Landauer* v. *Asser*(2) in essential particulars. In that case the legal proposition was stated in terms and on which the award proceeded whereas in the case before them no legal proposition is stated as a ground of the award. I might add that by the arguments in the case there was an attempt to incorporate the letters in the award but it was held that even had the letters been looked at they only contained the view of one party. The argument there endeavoured to incorporate both the letters and certain rules of the Cotton Association of Bombay but that argument was

(1) (1912) A. C. 673.
(2) (1905) 2 K. B. 184.

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rejected as their Lordships of the Judicial Committee decided that no such argument could be supported from the wording of the award. Therefore there was no error in law on the face of the award. When that question is put to us in this case it seems to be capable only of one answer—'there is nothing on the face of the award which is illegal, and it is only by reference to section 69 and by reference to the facts of the case that we could possibly hold that the applicants Das & Company in this case were not entitled to enforce the award which they had obtained'. There are no grounds upon which the Court below could reject the application of the plaintiffs, and therefore, although my reason in this matter is different, the decision at which the learned Judges in the Courts below have arrived is correct. On those grounds, and not on the grounds of jurisdiction of this Court under section 115 of the Code of Civil Procedure, I would dismiss this application and discharge the rule with costs: Hearing fee five gold mohars. The injunction stands discharged.

Let the record be sent down.

MANOHAR LAL, J.—I agree.

S. A. K.

Rule discharged.

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September, 20.

APPELLATE CIVIL.

Before Wort and Manohar Lal, JJ.

ABDUL HAMID KHAN

v.

DHANI DUSADH.*

Res Judicata—pre-decree agreement—decree-holder realizing decretal amount contrary to the agreement—suit by judgment-debtor for recovery of alleged over-payment, whether maintainable.

*Appeal from Appellate Decree no. 515 of 1934, from a decision of V. K. R. Menon, Esq., I.C.S., Deputy Commissioner of Palamau, dated the 3rd of May 1934, modifying a decision of Babu Gobind Saran, Munsif of Palamau, dated the 27th of July, 1933.

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Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action while the decree or judgment under which it was recovered remains in force.

A brought a suit for the recovery of arrears of rent against *D* who pleaded payment. It appeared that before the decree the parties came to an agreement in pursuance of which *A* promised to give full credit to the defendant for the amounts paid by him and not to execute the decree, and *D* on his part undertook not to press his defence. *D* accordingly suffered a decree to be passed against himself. Notwithstanding the agreement, *A* executed the decree and realized the entire decretal amount. *D* therefore brought the present suit for the recovery of the alleged overpayment on the basis of the pre-decree agreement;

Held, that the suit for the recovery of the overpayment was not maintainable, as the matter was res judicata.

Bommadevara Naganna Naidu v. *Ravi Venkatappayya*(1), followed.

Hassan Ali v. *Gauzi Ali Mir*(2), distinguished.

Skinner v. *Skinner*(3), referred to.

Appeal by the plaintiff.

Abdul Hamid, the defendant in the present action, had brought a suit for the recovery of arrears of rent against the plaintiff of the present suit, Dhani Dusadh, who pleaded payment. It appeared that during the pendency of the rent suit Abdul Hamid gave an assurance on oath that he would give credit for the alleged payment made by Dhani Dusadh and thus induced the defendant of that suit to admit payment in court. Dhani Dusadh thereupon made an application in the rent suit admitting the claim of the landlord and eventually suffered a decree to be passed in the suit. It was alleged by Dhani Dusadh that contrary to this agreement the landlord executed his decree and that he had to deposit the entire decretal amount to save his property. Dhani Dusadh,

(1) (1923) I. L. R. 46 Mad. 895, P. C.
(2) (1903) I. L. R. 31 Cal. 179.
(3) (1936) I. L. R. 18 Lah. 209.

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therefore, brought the present suit on the basis of the pre-decree agreement for the recovery of the over-payment made by him. Abdul Hamid denied the agreement and contended that the decree was for just dues and that Dhani Dusadh's plea of payment in the rent suit was false. The trial court, believing the agreement and the plea of payment raised in the previous suit, decreed the plaintiff's suit and an appeal from his decree was dismissed by the lower appellate court. The defendant, Abdul Hamid preferred this second appeal which was heard in the first instance by Wort, J. who referred the case to the Division Bench by the following judgment :—

WORT, J.—This appeal involves a question under section 47 of the Code of Civil Procedure. The appellant was a defendant in an action in which the plaintiff-respondent in this appeal claimed a sum of money which he had deposited for the purpose of saving his property from sale in an execution case. His case was that in that suit, out of which the execution proceedings arose, it had been agreed between the parties that although a decree should be passed against him that decree should not be executed by the decree-holder. The reasons for entering into this arrangement have been stated by the Judge in the Court below and I do not propose to repeat them. It is not suggested, I would add at this stage of my observations, that that agreement was without consideration. It is, therefore, clear that so long as it was not an agreement or contract contrary to public policy or for any other reason illegal, it was enforceable just as any other contract might be. In breach of that agreement, as I have already indicated, the present appellant executed the decree with the result which I have stated. It is under those circumstances that this action arose.

It is the contention of the appellant that this "pre-decree" arrangement between the parties was a matter which could have been raised in the executing court under section 47 of the Code of Civil Procedure. If that be the case, then this action did not lie. It is quite obvious that if that argument is to be supported, this action must fail and this appeal would be allowed.

Mr. Sarju Prasad, on the other hand, on behalf of the respondents contends that the agreement is an agreement which in effect is an attempt to go behind the decree and, therefore, cannot be raised under section 47 of the Code of Civil Procedure. This or a similar question has given rise to a divergent judicial opinion and although attempts have been made to reconcile the decisions, I must say that there appears to be a very considerable difference between the various cases.

The leading case in the matter is *Chidambaran Chettiar* v. *Krishna Vathiyar*(1). There Rahim, Officiating C.J. and Ayyar, J., Phillips, J. dissenting, held that the defendant agreeing not to press his defence

(1) (1916) I. L. R. 40 Mad. 233, F. B.

but allowing the decree to be passed for the full amount, he should make payment of the decree within a certain time, the plaintiff on his part undertaking not to execute the decree, such an agreement could be pleaded in the executing court under section 47 of the Code of Civil Procedure. A view to the contrary was expressed in the Calcutta High Court in *Hassan Ali* v. *Gauzi Ali Mir*(1). There, in an action in ejectment, according to the defendant's case, the plaintiff-decree-holder had agreed, prior to the decree under which he was entitled to eject the defendant, that he would not oust the defendant from the land in dispute. That was held to be an agreement the merits of which could not be entered into under the then section 244 of the Code of Civil Procedure, as it was an attempt to impugn the decree. Maclean, C.J. in the course of his judgment there stated: "In my opinion the cases can only be enquired into under section 244 when the existence of a decree which is susceptible and capable of execution is conceded". Pakenham Walsh, J., in *Butchiah Chetti's* case(2), has attempted to explain the authorities on the footing that where the cases are in effect an attack upon the decree itself, it is a matter that cannot be raised under section 47 as being an attempt to go behind the decree; but where, on the other hand the agreement does not question the decree, it can be gone into. But the case which has been dealt with by Pakenham Walsh, J., related to an agreement or an alleged agreement the subject-matter of which quite clearly was a matter which ought to have been raised by way of defence in the action. The argument before me has been put in various ways. It is suggested on the one hand that the matter cannot be gone into under section 47 of the Code of Civil Procedure, and therefore the present suit is maintainable, as this was not merely an attack (as I have stated) on the decree itself, but also an arrangement by which the decree was satisfied; and, unless that agreement could be certified under Order XXI, rule 2, it is a matter which in any event the executing court could not recognize and therefore could not be raised under section 47 of the Code of Civil Procedure. But the Madras cases point out, what I think must be obvious, that Order XXI, rule 2, applies only to those cases in which there has been an arrangement subsequent to the decree or perhaps, to put it more specifically, an arrangement by which the decree was satisfied. Order XXI, rule 2, uses the words "or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder". I am of the opinion that those words are used in contradistinction to the words of the first part of the rule "Where any money payable under a decree of any kind is paid out of Court". In other words, what is referred to by the rule is an adjustment other than payment by money, and the words were not intended to cover a case such as the present in which it was agreed not that the decree should be adjusted or satisfied, but that the decree should not be executed. I am fully aware that the decision of the Calcutta High Court is a decision which would appear to cover the case before me; but I should have the greatest possible difficulty in coming to the conclusion that an agreement of this kind set up in the executing court is not an agreement relating to execution. If I may say so, the argument relating to Order XXI, rule 2, is not of much

(1) (1903) I. L. R. 31 Cal. 179.
(2) (1930) I. L. R. 54 Mad. 184.

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value because of the words used in section 47 itself. There are three classes of case to which section 47 applies—execution, discharge or satisfaction—and the argument based on Order XXI, rule 2, would come under the third head. If in fact it was a satisfaction then of course I suppose it must comply with the rules of the Code relating to satisfaction or adjustment. But it does not decide the question whether apart from the merits of the particular case the case itself is maintainable under section 47.

WORT, J. The position therefore, in my opinion, is a very difficult one having regard to the diversity of judicial opinion and, speaking for myself, I rather fail to see that the distinction which the learned Judges of the Madras High Court have drawn between different cases really can be supported by an analysis of them. I propose, therefore, to refer the matter to the Chief Justice for placing the case before a Bench for decision.

On this reference.

Hareshwar Prasad Sinha and *Syed Ali Khan*, for the appellant.

Sarju Prasad and *Thakur A. D. Sinha*, for the respondents.

WORT, J.—Had I fully appreciated the facts in the first instance when this matter was referred to a Divisional Bench, I should have disposed of the appeal by the judgment I then pronounced.

In the circumstances of the case I think the appeal quite clearly succeeds. Mr. Sarju Prasad's client brought an action to recover an alleged over-payment in circumstances which are stated in the judgment of the trial court. They are best set out by the expression in the judgment to this effect:

"But in spite of all these assurances, defendant no. 1 did not give credit either for the sum paid before the decree or after it and the whole decree was executed against him by the execution case".

Now the arrangement which is clearly set out in that statement by the learned Judge is an arrangement by which the decree-holder undertook to give credit for certain payments, but in spite of that a decree was passed.

The short answer to the argument addressed to us by the respondent is that these matters should have been raised as a defence to the action; on failing to do it is res judicata. Now, it was suggested in

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the case to which I referred when making the order of reference to a Divisional Court, namely, *Hassan Ali* v. *Gauzi Ali Mir*(1) that in certain circumstances the plaintiff might bring an action claiming as a part of his relief an injunction to restrain the decree-holder from executing the decree. But it is perfectly obvious that that stage has long since passed as the decree-holder has executed a perfectly valid decree.

So far as regards the question whether he has a cause of action for money had and received, that is to say, for money overpaid, their Lordships of the Judicial Committee of the Privy Council dealt with the matter in the case of *Bommadevara Naganna Naidu* v. *Ravi Venkatappayya*(2). Lord Carson, in delivering the opinion of their Lordships of the Judicial Committee, makes this statement: "It is clear and settled law as stated in the former case, that 'money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests as their Lordships apprehend upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by ulterior proceeding'". The cause of action suggested in the case of *Hassan Ali* v. *Gauzi Ali Mir*(1), as I understand the judgment of Maclean C.J., is the cause of action which questions the validity of the decree. But the whole answer to the case is the decision of the Judicial Committee of the Privy Council in *Bommadevara Naganna Naidu* v. *Ravi Venkatappayya*(2) in which they clearly lay down that in circumstances of this kind, indeed stronger circumstances, no action lies.

Another case referred to in the argument was *Skinner* v. *Skinner*(3). It was a case in which an application was made under section 47 of the Code of

(1) (1903) I. L. R. 31 Cal. 179.
(2) (1923) I. L. R. 46 Mad. 895, P. C.
(3) (1936) I. L. R. 18 Lah. 209.

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Civil Procedure but it was held that that section dealt with only those matters which arose after the decree.

For those reasons the appeal succeeds and the plaintiff's claim is dismissed with costs throughout.

MANOHAR LAL, J.—I agree.

WORT, J.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Wort and Manohar Lal, JJ.

1937.

September, 22.

KHEMKARANDAS JOKHIRAM

v.

CHOUTHMAL BHAGIRATH.*

Provincial Insolvency Act, 1920 (Act V of 1920), section 50—court, whether has power to expunge or reduce debt after annulment of adjudication.

Section 50 of the Provincial Insolvency Act, 1920, is one of those sections which govern the procedure of the Court during the course of the administration of the debtor's assets in an insolvency. Therefore, where the insolvency comes to an end by the annulment of adjudication, the court has no power to expunge or reduce the debt of a creditor under section 50.

Moturi Veerayya v. *Rao Bahadur P. V. Sreenivasa Rao*(1), and *Annamalay Chettiar* v. *R. K. Banerjee*(2), followed.

Appeal by creditors nos. 2 and 3.

The facts of the case material to this report are set out in the judgment of Wort, J.

*Appeal from Original Order no. 174 of 1936 and Appeal from Original Order no. 175 of 1936, from the orders of W. T. Dalziel, Esq., I.C.S., District Judge of Manbhum, dated the 21st of May, 1936, and 3rd of July, 1936.

(1) (1934) I. L. R. 58 Mad. 908, F. B.

(2) (1936) I. L. R. 14 Rang. 254, F. B.

Dr. D. N. Mitter and *N. N. Roy*, for the appellants.

S. M. Mullick and *S. C. Mazumdar*, for the respondents.

WORT, J.—Creditors nos. 2 and 3, namely, Khemkarandas Jokhiram and Gouridut Ganesh Lal, made an application to the District Judge in certain insolvency proceedings that the debt of Chouthmal Bhagirath (Creditor no. 1) should be expunged or reduced. This application purported to be under section 50 of the Provincial Insolvency Act. The learned Judge in the Court below has dismissed the application not on its merits but on the ground that they had opportunities from time to time to question the debt of Creditor no. 1 and that, therefore, they had now lost their right. The learned Judge goes so far as to say—

"I consider, therefore, that the petitions are merely vexatious, being a belated attempt to destroy the effect of the High Court order".

There have been a number of orders passed by this Court in the insolvency proceedings but only one of those need I make any reference to. The matter did come before the Court, which consisted of Mr. Justice Adami and myself, on the 24th of April, 1930, but nothing arises from that judgment. But at a later stage it came before the learned Chief Justice and Mr. Justice Mohamad Noor. I refer to that judgment for the reason that a statement by Mohamad Noor, J., delivering the judgment of the Court, has been relied upon by Dr. Mitter appearing on behalf of the appellants for certain contentions to which I shall more particularly refer.

The argument in this appeal proceeded on the consideration of the events which had happened during the course of these proceedings and the question whether delay in making the application under section 50 of the Provincial Insolvency Act was an obstacle to the application made by Dr. Mitter's

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clients. Speaking for myself, I was not aware of an order which was made on the 14th of June, 1927, or to put it perhaps more accurately, it was not present to my mind in the earlier part of the argument although Dr. Mitter in the opening had given us that date as the date on which the adjudication was annulled. The moment we find that fact to exist, the questions which have been argued before us in my judgment become irrelevant. Reference was made in the course of the argument to the well-known decision of the English Courts in *Ex parte Harper*(1) which was relied upon by reason of the statement of the Master of the Rolls in that case to the effect that even after proof had been made and accepted an annulment under the equivalent provisions of the Bankruptcy Act could be made. But the real question that we have to decide is—what is the effect of the annulment under the order of the 14th of June, 1927. The statement in the judgment of the 5th of November, 1932, which was relied upon by Dr. Mitter in this connection was this: "Therefore, in my opinion, in spite of the annulment of adjudication the insolvency proceeding continues and it is still open to the receiver to proceed to realise the assets vested in him". I am of the opinion that we must read that statement by Mohamad Noor, J. as meaning that the insolvency proceedings continue for the purpose of section 37 of the Insolvency Act. Section 37 of the Act provides—

> "Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare".

The District Judge in this case has made an order under section 37 and it was referred to by the learned

(1) (1882) 21 Ch. Div. 537.

Judge in the judgment to which I have just referred. That learned Judge made the observation that the District Judge had made the order and there was no appeal against it and therefore it must be deemed to stand; and, as I understand the judgment of Mohamad Noor, J. the whole matter which was pending before him was determined on that footing. The question therefore arises in this case, assuming for the purpose of argument that there are merits in the case of the petitioner, whether we could expunge or reduce the debt of creditor no. 1 under or by reason of the provisions of section 50 of the Provincial Insolvency Act. I think it is perfectly clear and indeed it is obvious that section 50 is one of those sections which govern the procedure of the Court during the course of the administration of the debtor's assets in an insolvency. Section 50 speaks of the receiver considering that a debt has been improperly entered in the schedule. If we look back to section 33 of the Act we shall see that it is the duty of the Court in certain circumstances to prepare a schedule of debts and in a sense therefore section 50 gives a right to the receiver under sub-section (*1*), notice being given to the creditors, to ask the Court to expunge an objectionable debt. But I would repeat that section 50 is the procedure during the insolvency and it seems to me quite clear therefore that when the insolvency has come to an end by annulment the procedure provided by the Act in an insolvency can no longer apply, and it is on that short ground that I decide this appeal.

For the view which I have expressed as to the continuation of the insolvency after the annulment there is ample authority of the various High Courts of India. In *Moturi Veerayya* v. *Rao Bahadur P. V. Sreenivasa Rao*(1) the Full Bench of the Madras High Court held that the insolvency does not continue; it continues only for the purposes of section 37.

(1) (1934) I. L. R. 58 Mad. 908, F. B.

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A Full Bench of the Rangoon High Court in *Annamalay Chettiar* v. *R. K. Bannerjee*(1) has gone still further in saying that it continues merely for the purpose of section 37, but the distribution by the receiver of the assets of the debtor after the annulment, and when an order has been made under section 37, must be in accordance with civil law and not in accordance with the Insolvency Act.

Dr. Mitter, as I have already stated, placed reliance on the statement of Mohamad Noor, J. as to the continuation of the insolvency proceedings. My answer to that argument would be that in the first place the observation of the learned Judge must be read in the sense that it continues for the purpose of section 37 and, if the learned judge intended to say otherwise, then with great respect to the learned Judge it was mere obiter and quite unnecessary for the purpose of the judgment as the only question that had to be determined was as regards the debt which was owned by the Bengal Nagpur Railway to the debtor, which has been purchased by one of the creditors and an order had been made under section 37 of the Act. Therefore the order of the Court and the matter with which it was dealing was the question of whether the receiver should collect the proceeds of this debt. If I had come to any other conclusion with regard to the matter, I should have felt it my duty to refer this case to a Full Bench for the purpose of deciding the question whether in a sense other than what I understand the learned Judge to mean, the insolvency did continue after the annulment had been made. It seems to me quite clearly that it is otherwise.

For those reasons and perhaps for the reason that there has been very very considerable delay in making this application, I would hold that the learned Judge, although for different reasons from those he expressed,

(1) (1936) I. L. R. 14 Rang. 254, F. B.

was right and this appeal therefore fails and must be dismissed with costs. Miscellaneous appeal no. 175 of 1936 is not pressed and is dismissed.

MANOHAR LAL, J.—I agree. The facts necessary for the disposal of this appeal lie in a very narrow compass. The debtor was adjudicated an insolvent on the 8th of November, 1927, and, owing to his failure to comply with the conditions of applying for a discharge within a certain time, the order of adjudication was annulled on the 14th of June, 1928. But in the meantime notice was issued to the creditors to prove their debts by the 14th of January, 1928, when a schedule was ordered to be prepared. Some of the creditors did prove their debts, and the case was adjourned till the 4th of February for framing a schedule. On the 17th of August, 1929, a draft schedule was prepared and approved, all the creditors were parties to that proceeding including the appellants and the respondent no. 1. I should have added that on the 1st of August, 1928, at the instance of the petitioning creditor, i.e. creditor no. 1 the court proceeded to make an order under section 37 vesting the properties of the insolvent in the Receiver directing him to distribute the same among the creditors. In pursuance of this order, which was affirmed by the High Court on two occasions, the Receiver has realised the assets which were going to be distributed among the creditors when the appellants raised the contention on the 16th May, 1936, that they should be allowed under section 50 of the Act to proceed to show that the respondent no. 1 who was admitted to be a creditor up to the date of that application is not a genuine creditor and therefore his name should be expunged. The respondent objects that after the adjudication has been annulled it is not open to the court to take action under section 50. Now I would have no difficulty in deciding this case upon those facts were it not for certain observations made by a Bench of this Court when deciding this

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matter at an earlier stage of the proceedings. I am referring to the order passed on the 5th of November, 1932, which is to be found at pages 17 to 21 of the paper-book. While deciding that case the learned Judges observed that " in spite of the annulment of adjudication the insolvency proceeding continues and it is still open to the receiver to proceed to realise the assets vested in him ". With very great respect to the learned Judges, if they meant that the insolvency proceedings continued in full force, I think that their observation was incorrect in law and it would be necessary to refer the case to a Full Bench. But I think what the learned Judges did in fact lay down was that notwithstanding the annulment of adjudication the powers of the Court which are vested in it under section 37 will continue; that is to say, that the receiver will proceed to realize the particular sum which was in question, and whether this particular sum can be distributed by the receiver or not was not decided by that order. But by a subsequent order of the 25th of November, 1935, the learned Judges had given this direction " We direct that the learned District Judge should proceed to realise the amount of Rs. 5,750 from the respondents, the creditors 2 and 3, (appellants before us) and distribute it rateably among the creditors ". It is unnecessary to consider in this case whether this direction is valid in law because that is not the subject of the proceedings under investigation before us. It is contended by Dr. Mitter that after this observation by the learned Judges, on two occasions mentioned above in the presence of all parties, it is not open to the respondent to object that the appellants cannot proceed under section 50 of the Insolvency Act. In my opinion this argument is wholly untenable. Section 50 of the Provincial Insolvency Act will come into operation only if the insolvency proceedings are continuing in the real sense and not in a limited sense as in this case. A mere perusal of the second clause of the section shows that that must be so because in it I find

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clear reference that the debtor has a right to apply to expunge an entry or reduce the amount of a debt or a composition or scheme. Now, if the adjudication had been annulled it is obvious that the debtor can have no right whatsoever to make any application under section 50(*2*) of the Insolvency Act. For this reason alone it is clear to my mind that section 50 can have no application after the adjudication was annulled. It is enough to refer to two decisions. One is the decision of Rangoon Full Bench in *Annamalay Chettiar* v. *R. K. Bannerjee*(1) and the other a Full Bench decision of the Madras High Court in *Moturi Veerayya* v. *Rao Bahadur P. B. Sreenivasa Rao*(2). Although these decisions differ from each other upon the rights which can be imposed upon the receiver for the purposes of distributing the assets of the debtor, they are agreed upon this that section 37 of the Insolvency Act was only enacted in order to protect the debtor and the creditors for a limited purpose. I adopt respectfully the passage in the Rangoon decision at page 267: "Now, why was it that section 37 was enacted? It seems to me that it was enacted to achieve a plain and simple object. By reason of the insolvency proceedings to which the debtor had been subjected there might be in the hands of the receiver in insolvency assets belonging to the estate of the debtor. When the order of adjudication is annulled the debtor becomes a free man, and when the insolvency case comes to an end the title of the receiver to retain possession of the estate of the debtor in his hands as against the insolvent falls with it; the result being that when the order of annulment is made the debtor becomes forthwith entitled to obtain possession of his estate in the hands of the receiver. In such circumstances it might well happen that the ex-insolvent who had been deprived of his property during the course of the insolvency proceedings would be anxious to make up for lost time, and might be

(1) (1936) I. L. R. 14 Rang. 254, F. B.
(2) (1934) I. L. R. 58 Mad. 908, F. B.

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disposed to squander the assets which would come once more into his hands without regard to the interests of his creditors generally. It appears to me that the sole object and intention of the Legislature in enacting section 37 was to put a brake upon the ex-insolvent's activities by giving the Court a discretion, if it thought fit to do so, not to hand back to the debtor his property unconditionally or at once, but either to do so after imposing a condition upon him in a proper case which would give the creditors an opportunity to make good their claims in the ordinary course of law against the debtor, or to vest the debtor's estate in some person appointed by it presumably for a reasonable period, so that if the creditors thereafter acted with reasonable diligence they would be able by attachment or otherwise to liquidate any decrees that they might obtain against the debtor out of the assets in the hands of the appointee ".

In the case before me the High Court has ordered that the particular debt should be realized by proceedings under section 37 and therefore the powers of the Court are limited to that extent only. It follows in my opinion, that section 50 has no manner of application in this case and the appellants have no right whatsoever to challenge the amount of the debt due to the respondent which had been duly or may be even wrongly admitted up to the stage of the order under section 37.

I therefore agree that the appeal must be dismissed with costs. Appeal no. 175 is not pressed and it is dismissed.

S. A. K.

Appeals dismissed.

REVISIONAL CRIMINAL.

Before Varma and Madan, JJ.

1937.

September, 24.

JIOO MIAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 54 *and* 56—*issue of written order under section* 56, *whether limits the power of arrest under section* 54.

The issue of a written order under section 56 of the Code of Criminal Procedure, 1898, does not limit the power of arrest conferred by section 54 of the Code.

Kishun Mandar v. *King-Emperor*(1) and *Emperor* v. *Keshavlal Harilal*(2), followed.

Application in revision.

The facts of the case material to this report are set out in the judgment of Varma, J.

D. N. Varma, for the petitioners.

K. K. Banerji, for the Crown.

VARMA, J.—Originally there were nine petitioners who moved this Court but the application of three of them was rejected at the time of admission. The remaining petitioners, in whose favour the rule was issued, were convicted under section 147 of the Indian Penal Code and sentenced by the lower appellate Court to six months' rigorous imprisonment. There were charges under sections 353 and 225, I. P. C. against all the accused, and although no sentence was passed under any of these sections, the learned Sessions Judge on appeal set aside their conviction under these two sections.

*Criminal Revision no. 370 of 1937, against an order of Rai Bahadur Saudagar Singh, Sessions Judge of Shahabad, dated the 1st June, 1937, modifying a decision of Babu P. C. Roy Choudhury, Magistrate, First Class, Sasaram, dated the 26th February, 1937.

(1) (1926) I. L. R. 5 Pat. 533.

(2) (1936) 38 Bom. L. R. 971.

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The case for the prosecution was that the Sub-Inspector of Nasriganj thana went to Barnadihri the village of the accused Manrakhan, on the 16th October, 1936, in connection with a police case under section 148 of the Indian Penal Code against Manrakhan, and with him went a constable named Nathuni Khan. Nathuni Khan was given a command certificate to arrest Manrakhan Mian. The constable Nathuni Khan went with a number of dafadars and chaukidars to arrest Manrakhan and when he reached near the Baithak of Manrakhan he saw a man moving away. Nathuni Khan enquired who the man was and when the man gave his name as Manrakhan the constable asked him to go to the Sub-Inspector. Manrakhan tried to escape but Nathuni caught hold of him. Thereupon Manrakhan raised a cry upon which the other accused rushed to the place variously armed and rescued Manrakhan. Two of them, whose petition has already been refused, are said to have assaulted with lathis, and the rest took part in the scuffle which took place in rescuing Manrakhan from the constable. The defence advanced was a denial of the whole occurrence and they came out with a counter version, which has not been accepted by the Courts below, that the constable and his party wanted to enter the zanana of Manrakhan and that they beat the tiles and thatch of his house.

Now, so far as the occurrence is concerned, there can be no doubt on the evidence that the occurrence took place as alleged by the prosecution. In revision it has been urged before us that the arrest of Manrakhan was illegal because the provisions of section 56 of the Criminal Procedure Code were not complied with inasmuch as the substance of the command certificate was not given out to the accused before they were arrested. This line of argument was advanced before the lower appellate Court also and it seems that the lower appellate Court was impressed by the argument and accepted it with the result that it set

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aside the conviction under sections 353 and 225, I. P. C. The lower appellate Court relied on the decision in *Kartik Chandra Maity* v. *The King-Emperor*(1). That was a case in which a warrant was given to the constable to be executed, and it was held by one of the Judges constituting the Bench that that warrant was illegal and therefore the constable could not rely on his powers under section 54 to make the arrest. There reference was made to the provisions of section 54(*1*) of the Code of Criminal Procedure, and one of the learned Judges held that as the constable was acting under the warrant, and as the question of the powers given under section 54(*1*) was not gone into by the lower Courts, the case relied upon on behalf of the Crown, i.e. the case of *Kishun Mandar* v. *King-Emperor*(2) was distinguishable. We find no mention of clause (*9*) of section 54 of the Criminal Procedure Code in that judgment. Clause (*9*) of sub-section 1, runs as follows:

"Any police-officer may, without an order from a Magistrate and without a warrant, arrest any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made, and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition."

In the present case the facts are very similar to the case reported in *Kishun Mandar* v. *King-Emperor*(2), where it was held that the issue of a written order under section 56 does not limit the power conferred by section 54. I may mention that that decision has been relied upon in the Bombay High Court in *Emperor* v. *Keshavlal Harilal*(3). In my opinion the lower appellate Court was not justified in holding that the arrest of Manrakhan was illegal. The lower appellate Court, even after holding that the arrest of Manrakhan was illegal, came to the conclusion that the conviction of the petitioners under section 147 of the Indian Penal Code was correct inasmuch as the

(1) (1930) 13 Pat. L. T. 135.
(2) (1926) I. L. R. 5 Pat. 533.
(3) (1936) 38 Bom. L. R. 971.

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other common object mentioned in the charge did not fail, and all that the lower appellate Court did was to reduce the sentence of the present petitioners. This was the only law point urged and it has failed. I am of opinion that there is nothing illegal in the conviction of the present petitioners under section 147, Indian Penal Code.

The next question is the question of sentence. The present petitioners are not said to have assaulted the constable, but it cannot be doubted that they were members of an unlawful assembly. Most of the petitioners before us are members of the same family, and three of them are sons of Manrakhan whose petition has already been rejected. As they did not take a very prominent part in the assault on the constable, I think the ends of justice will be served if the sentence on the petitioners now before us, other than Zahoor Mian, is reduced to three months' rigorous imprisonment in each case. Petitioner Zahoor Mian is a boy of 17 and in his case I would reduce the sentence to the period already undergone.

MADAN, J.—I agree.

Conviction upheld.

Sentence reduced.

S. A. K.

FULL BENCH.

Before Courtney Terrell, C.J., James and Manohar Lal, JJ.

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v.

BIR SURENDRA SAHI.*

Court-fees Act, 1870 (*Act VII of* 1870), *section* 7, *clause* (*iv*)(*c*) *and clause* (*v*)—*suit for declaration and consequential relief—suit for possession, wrong decision as to*

*Civil Revision no. 106 of 1937 with Civil Revision no. 123 of 1937, from an order of Mr. A. N. Banerji, Subordinate Judge of Muzaffarpur, dated the 4th January, 1937.

category in which a case falls for the purpose of levying court-fee if revisable—powers of interference in revision—Code of Civil Procedure (Act V of 1908), section 115—obiter dictum, meaning of.

Where a lower court has jurisdiction to decide questions of law and fact, the superior court will not exercise revisional jurisdiction against the decision whether it be right or wrong; but the superior court will interfere in revision where the jurisdiction is derived from statute and the matter is one of the construction of the statute.

Brij Mohan Thakur v. *Rai Uma Nath Chowdhry*(1), *Balakrishna Udayar* v. *Vasudeva Aiyar*(2), *Lachmi Narain Marwari* v. *Balmakund Marwari*(3), *C. D. M. Hindley* v. *Joynarain Marwari*(4), *Vithal Krishna* v. *Balkrishna Janardan*(5), *Shailendranath Kundu* v. *Surendranath Sarkar*(6), *Secretary of State for India in Council* v. *Raghunathan*(7), *Rani Kulandaivelu Nachiar* v. *Indran Ramaswami Pandia Thalavan*(8), *Sudalimuthu Pillai* v. *Peria Sundaram Pillai*(9) and *Musammat Vaishno Ditti* v. *Musammat Rameshri*(10), relied on.

Kumar Ramkinkar Singh v. *Kumar Jogendra Nath Singh*(11), overruled.

Amir Hassan Khan v. *Sheo Baksh Singh*(12), explained.

It is a fundamental point of our jurisprudence that the Crown cannot levy taxation unless such taxation be authorised by law. The court is given power to levy taxes upon certain classes of cases only which are specified in the Act and upon each class at the rate specified in the Act.

In deciding the question of court-fee the court decides an issue not as between the plaintiff and the defendant, but

(1) (1892) I. L. R. 20 Cal. 8, P. C.
(2) (1917) L. R. 44 Ind. Ap. 261.
(3) (1924) I. L. R. 4 Pat. 61, P. C.
(4) (1919) I. L. R. 46 Cal. 962.
(5) (1886) I. L. R. 10 Bom. 610, F. B.
(6) (1934) I. L. R. 62 Cal. 417.
(7) (1933) I. L. R. 56 Mad. 744.
(8) (1927) I. L. R. 51 Mad. 664.
(9) (1924) 48 Mad. L. J. 514.
(10) (1937) 41 Cal. W. N. 814.
(11) (1935) 16 Pat. L. T. 158.
(12) (1884) I. L. R. 11 Cal. 6, P. C.

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decides an issue as between the plaintiff and the Crown. If the decision be adverse to the plaintiff it amounts to a decision to refuse to exercise its jurisdiction to try the issue and such decision is subject to the revisional jurisdiction of the High Court.

Where, however, the decision is in favour of the plaintiff it is not open to the defendant to apply to the court for revision.

Mahanth Raghunandan Gir v. *Gosain Dcoraj Gir*(1), followed.

The Court-fees Act in sub-section (*iv*) is dealing with claims which do not yield themselves readily to any statement of money value and in leaving the matter to the plaintiff's valuation, subject to sections 4 and 9 of the Suits Valuation Act, it proceeds just as much upon a considered policy as it does when, by Article 17 of Schedule II of the Act, it charges certain classes of suits with a fee which is irrespective of value.

Phul Kumari v. *Ghanshyam Misra*(2), followed.

Section 7, paragraph (*iv*)(*c*), has application to declarations properly so called, such for instance as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. Indeed declarations in the true sense are rarely required.

Therefore, the valuation of the suit for court-fee purposes is to be determined by the question of whether the suit is really one for a declaration in the true sense of the word, or whether it is a suit for possession; and, if there be a claim in the plaint for declaration the plaint should be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really a suit for possession.

A judgment does not become obiter dictum merely because the decisions on other points were sufficient to dispose of the case.

(1) (1935) 17 Pat. L. T. 9.
(2) (1907) I. L. R. 35 Cal. 202, P. C.

Applications in revision by the plaintiffs.

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The facts of the case material to this report are set out in the judgment of the Court.

The applications were heard by Courtney Terrell, C.J. and Manohar Lall, J. who referred them to a larger Bench.

On this reference

Dr. Dwarkanath Mitter (with him *P. B. Ganguly*), for the petitioner in Civil Revision no. 106 of 1937: Two points arise for decision; first, whether this court should properly exercise revisional jurisdiction in the matter and, secondly, whether my suit falls within section 7, clause (*iv*)(*c*) or clause (*v*) of the Court-Fees Act.

As regards the first point my submission is that it is a fit case in which the High Court should interfere in revision. The matter goes to the very root of jurisdiction in the sense that the lower court wrongly assumed jurisdiction on an erroneous view of law. If the lower court in determining the ambit of its jurisdiction misconstrues a legislative enactment it is always a matter for revision—*See Raja Bahadur Harihar Prasad Narain Singh* v. *Maharaj Kumar Gopal Saran Narain Singh*(1). In the case of *Mahant Ram Bhusan Das* v. *Bachu Rai*(2) it was pointed out that if the question was as to the particular category into which the suit fell, the decision of the subordinate court was subject to revision because the refusal to entertain the plaint, unless the deficit court-fee was paid, amounted to a refusal to exercise jurisdiction. In *Mahanth Raghunandan Gir* v. *Gosain Deoraj*

(1) (1935) I. L. R. 14 Pat. 488.

(2) (1934) I. L. R. 14 Pat. 220.

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Gir(1) the learned Judge refused to interfere on the ground that the decision was in favour of the plaintiff and the defendant could not come up in revision. The decision in *Kumar Ramkinkar Singh* v. *Kumar Jogendra Nath Singh*(2) is, I respectfully submit, manifestly wrong and proceeds on an erroneous view of the principles underlying the decisions of the Judicial Committee. [*Amir Hassan Khan* v. *Sheo Baksh Singh*(3) and *Balakrishna Udayar* v. *Vasudeva Aiyar*(4), referred to.]

The mere fact that another remedy is open is no ground for refusal to interfere in revision.—*Mahant Ram Bhusan Das* v. *Bachu Rai*(5).

[CHIEF JUSTICE.—The remedy open to the petitioner must be of the same kind and on the same materials.]

Yes. On the merits my submission is that the suit falls within section 7, clause (*v*), of the Court-Fees Act. In *Ram Sumran Prasad* v. *Gobind Das*(6) the suit was treated as one falling under clause (*v*). The same case is an authority for the proposition that if the declaration is redundant, the suit will not be treated as one falling under clause (*iv*)(*c*). In the present case I am not bound to pray for a declaration; certain statements have been made in the plaint in anticipation of the defence, but I need not have done so. In *Paluri Venkatasiva Rao* v. *Bodapati Venkatanarasimha Satyanarayanamurty*(7) the suit was treated as one falling under clause (*v*) although in that case the plaintiff had specifically asked for a declaration. In *Arunachalam Chetty* v. *Rangasawmy Pillai*(8) consequential relief had been asked for,

(1) (1935) 17 Pat. L. T. 9.
(2) (1935) 16 Pat. L. T. 158.
(3) (1884) I. L. R. 11 Cal. 6, P. C.
(4) (1917) L. R. 44 Ind. App. 261.
(5) (1934) I. L. R. 14 Pat. 220.
(6) (1922) I. L. R. 2 Pat. 125, F. B.
(7) (1932) I. L. R. 56 Mad. 212.
(8) (1914) I. L. R. 38 Mad. 922, F. B.

which is not the case in my suit. Clause (*iv*)(*c*) applies only when it is incumbent on the plaintiff to ask for a declaration and the relief cannot be granted without the declaration being obtained first. [Reliance was placed on *Maung Shein* v. *Ma Lon Ton*(1) and *Sellammal* v. *Jothimani Naddar*(2).]

[CHIEF JUSTICE.—By asking for a "declaration", loosely used, what the lawyer wants the court to do is to decide certain points for giving his client the relief prayed for.]

Yes. In *T. P. Petherpermal Chetty* v. *R. Muniandi Servai*(3) their Lordships pointed out that it was unnecessary for the plaintiff to have the deed set aside as a preliminary to his obtaining the relief he claimed.

The Court-Fees Act is not intended to arm the opponent but to safeguard the revenue—*Rachappa Subrao Jadhav* v. *Shidappa Venkatrao Jadhav*(4).

[MANOHAR LALL, J.—It is no business of a party defendant to agitate the matter. This was pointed out in *Baijnath Prasad Singh* v. *Umeshwar Singh*(5).]

Yes.

Sir Sultan Ahmad (with him *B. C. De*, *L. K. Jha*, *R. Chaudhury* and *Amireshwari Prasad Narain Singh*), for the petitioners in Civil Revision no. 123, followed: In the present case the court accepted the court-fee paid in the first instance by the plaintiff, and it was not open to the court to reopen it at the instance of the defendants. Much less was the successor Judge empowered to alter or revise the decision of his predecessor in office—*Harihar Prasad Narain Deo* v *Maheswari Prasad Narain Deo*(6). As regards the revisional powers of the High Court to

(1) (1931) I. L. R. 9 Rang. 401.
(2) (1936) A. I. R. (Mad.) 411.
(3) (1908) L. R. 35 Ind. App. 98.
(4) (1918) L. R. 46 Ind. App. 24, 32.
(5) (1937) I. L. R. 16 Pat. 600, S. B.
(6) (1924) I. L. R. 3 Pat. 654.

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interfere in such cases, I rely on *Brij Mohan Thakur* v. *Rai Uma Nath Chowdhury*(1), *Rani Kulandaivelu Nachiar* v. *Indran Ramaswami Pandia Thalavan*(2), *Secretary of State for India in Council* v. *Raghunathan*(3), *Vithal Krishna* v. *Balkrishna Janardan*(4) and *Shilendranath Kundu* v. *Surendranath Sarkar*(5). There is no authority for the proposition that where a *plaintiff* has been called upon to pay a sum far in excess of what he ought to pay under the statute, he cannot be heard in revision. On merits my case stands on a stronger footing. If the plaintiff in the other suit succeeds, I must a *fortiori* succeed.

Sushil Madhab Mullick (with him *Harnarayan Prasad*, *Sarjoo Prasad*, *Raj Kishore Prasad* and *Sambhu Barmeshwar Prasad*), for the opposite party: Under section 115, Code of Civil Procedure, the powers of the High Court are discretionary. On account of the use of the word "*may*" a practice has grown up not to interfere with interlocutory orders, when the aggrieved party has another remedy open to him. High Court may interfere if in any case it appears that irreparable injury might ensue from non-interference at the earliest stage.

The lower court has already assumed jurisdiction to try the suit and in the exercise of that jurisdiction it had powers to pass an order in the matter of the sufficiency or otherwise of the court-fee paid. This matter forms an issue in the suit itself.

[CHIEF JUSTICE.—But the effect of the order is that the court has refused to hear the suit until the deficit court-fee is paid.]

The Judge may have committed an error of law, but it does not follow from this that he had no jurisdiction to decide the question of law.

(1) (1892) I. L. R. 20 Cal. 8, P. C.
(2) (1927) I. L. R. 51 Mad. 664.
(3) (1933) I. L. R. 56 Mad. 744.
(4) (1886) I. L. R. 10 Bom. 610, F. B.
(5) (1934) I. L. R. 62 Cal. 417.

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[MANOHAR LALL, J.—But in deciding the question of law, he in effect refuses to proceed with the suit until payment of a certain sum which the plaintiff is not liable to pay.]

The defendant is entitled to say to the court, at any stage of the suit, that there is no proper plaint against him and that it would be rejected under Order VII, rule 11.

[CHIEF JUSTICE.—You may have the right to say to the court that the plaintiff has cheated the revenue, but that does not make the matter an issue between you and the plaintiff. This is a matter essentially between the plaintiff and the Crown.]

[Reliance was placed on *Amir Hassan Khan* v. *Sheo Baksh Singh*(1).]

In that case the question was whether the suit was barred by res judicata and their Lordships said that it was purely a question of law which the Court had jurisdiction to decide. [Reliance was placed on *Mani Lal* v. *Durga Prasad*(2), *Mahanth Raghunandan Gir* v. *Gosain Deoraj Gir*(3) and *Kumar Ramkinkar Singh* v. *Kumar Jogendra Singh*(4).]

In the present case there has been no *decision* as to the sufficiency of the court-fee paid, so as to bar the further consideration of the question by the successor Subordinate Judge. [Reliance was placed on *Padmanund Singh* v. *Anant Lal Misser*(5).] It is competent to a court to reject a plaint after it has been admitted and registered. The order accepting court-fee was not final: the court could revise or review it at any stage—*Amjad Ali* v. *Muhammad Israil*(6), followed in *Mani Lal* v *Durga Prasad*(2).

(1) (1884) I. L. R. 11 Cal. 6, P. C.
(2) (1924) 5 Pat. L. T. 425.
(3) (1935) 17 Pat. L. T. 9.
(4) (1935) 16 Pat. L. T. 158.
(5) (1906) I. L. R. 34 Cal. 20, F. B.
(6) (1897) I. L. R. 20 All. 11, F. B.

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As regards merit I submit that in the present case, having regard to the allegations made in the plaint itself, the court cannot give possession without first granting a declaration as to title.

[CHIEF JUSTICE.—" Deciding " but not " declaring " the matter.]

There is a distinction between cases where primary title is there and cases where it has to be proved before possession can be given. In the present case a declaration is necessary before any relief can be granted to the plaintiff. Although the plaintiff may not have asked for a declaration with regard to the deed in question, it is necessary for him to get rid of the document before he can succeed. I base my submission on *Ram Sumran Prasad* v. *Gobind Das*(1). In *Nokhe Lal Jha* v. *Srimati Rajeswari*(2) their Lordships held that the case fell within clause (*iv*)(*c*), although the plaintiff had not in terms asked for a declaration.

In *Kamla Prasad* v. *Jagarnath Prasad*(3) it was held that the plaintiff had in substance asked for the cancellation of the deed and a declaration and that the cancellation of the deed was a consequential relief.

[Reliance was also placed on *Mani Lal* v. *Durga Prasad*(4), *Raja Dhakeswar Prasad Singh* v. *Jivo Chaudhry*(5) and *Shama Pershad Sahi* v. *Sheopersan Singh*(6).]

Dr. Dwarka Nath Mitter, in reply: The deeds are inoperative and therefore it is not necessary for me to ask for a declaration to have it set aside. The case of *T. P. Petherpermal Chetty* v. *R. Muniandi Servai*(7), relied on by me, has not been met or touched by the other side.

(1) (1922) I. L. R. 2 Pat. 125, F. B.
(2) (1936) 17 Pat. L. T. 677.
(3) (1930) I. L. R. 10 Pat. 432.
(4) (1924) 5 Pat. L. T. 425.
(5) (1918) 3 Pat. L. J. 448.
(6) (1917) 5 Pat. L. J. 394.
(7) (1908) L. R. 35 Ind. App. 98.

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Sir Sultan Ahmed, in reply: The order of the Subordinate Judge accepting court-fee was final and could not be reopened—*S. L. Lakshmana Aiyar* v. *T. S. P. L. P. Palaniappa Chettiar*(1); *Sadasivam Pillai* v. *Varadaraja Odayar*(2).

S. A. K. *Cur. adv. vult.*

COURTNEY TERRELL, C. J., JAMES AND MANOHAR LALL, JJ.—These applications in revision have been heard together, because they involve the same point and have arisen out of litigation concerned with the same subject-matter. The question involved in each is as to whether the plaints should bear a court-fee computed under section 7, clause (*iv*)(*c*) of the Court-fees Act, or whether it should be computed under clause (*v*) of the same Act. There is in each the further question whether this is a proper matter for the exercise of the revisional jurisdiction of the Court under section 115 of the Code of Civil Procedure. The matter first came before a single Judge, who referred it to a Division Bench on account of certain differences of opinion manifested in the decisions of this Court and for the solution of these difficulties this larger Bench has been constituted.

On the preliminary question as to whether the revisional jurisdiction of the Court can be invoked the argument in opposition to the application is as follows. It is contended that the matter of the proper stamp fee lies solely within the jurisdiction of the trial court; that the first court is empowered to decide questions of law as well as questions of fact and that a revisional court should not interfere with the decision of the final court if it has exercised the powers within its jurisdiction. Furthermore, it is said that the plaintiff has a further remedy by way of appeal, because he may refuse to pay up the court-fee

(1) (1935) 69 Mad. L. J. 479.
(2) (1937) 1 Mad. L. J. 89.

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demanded of him and appeal against the decision rejecting the plaint. It has already been decided by this Court in the case of *Mahant Ram Bhusan Das* v. *Bachu Rai*(1) that where the question is as to the particular category into which the suit falls, that is to say, whether the duty is payable upon the suit as belonging to a particular class, or whether another rate of duty is payable on it as belonging to another class, the decision of the first court is subject to revision because the refusal to entertain the plaint and the suit, unless the duty demanded be paid, is a refusal to exercise jurisdiction. In *Raja Bahadur Harihar Prasad Narain Singh* v. *Maharaj Kumar Gopal Saran Narain Singh*(2) it was held that where jurisdiction originates in some special enactment, the construction of the enactment is always a matter for revision; as was said by Channell, J. in *Reg.* v. *Manchester Justices*(3)—

"It seems to me clear that a tribunal cannot give itself a jurisdiction which it has not got by taking an erroneous view of the law". *See* also *Raja Bahadur Harihar Prasad Narayan Singh* v. *Maharaj Kumar Gopal Saran Singh*(2)—

"We were given the benefit of a lengthy argument in support of the contention of the opposite party that we had no jurisdiction under section 115 of the Code of Civil Procedure to entertain the petition of the Raja of Amawan; but in my opinion this must fail. It amounts to a contention that a subordinate court is the sole and final judge of the ambit of its own jurisdiction. It is certainly true that the High Court will not interfere in revision with a decision on the merits even if the lower court should err both in law and in fact, provided always that such subordinate court had jurisdiction to entertain

(1) (1934) I. L. R. 14 Pat. 220.
(2) (1935) I. L. R. 14 Pat. 488.
(3) (1899) 1 Q. B. 571, 575.

the dispute between the parties. But if it be contended, as in this case, that the court had no jurisdiction whatever to entertain the matter, this Court must listen to the contention and if it should find that the lower court has made a mistake as to the extent of its jurisdiction, it may then interfere and this is particularly so when the lower court, in determining the ambit of its own jurisdiction, construes a legislative enactment."

It has also been pointed out by this Court that the civil courts are charged with two functions: (*a*) the decision of suits on their merits and (*b*) the collection of revenue on behalf of the Crown, and that the revisional jurisdiction of an appellate court can be invoked against the decision of the first court in either capacity provided the question of jurisdiction is involved. Indeed the application of revisional jurisdiction may well be more necessary in the case of decisions on matters of revenue. It is a fundamental point of our jurisprudence that the Crown cannot levy taxation unless such taxation be authorised by law. The court is given power to levy taxes upon certain classes of cases only which are specified in the Act and upon each class at the rate specified in the Act. If the decision of the first court is to be treated as final in any particular case, it might possibly happen that all the Munsifs might adopt a uniform but entirely erroneous view of the taxation authorised by the Act and the matter could never be remedied by the superior court, because on the principle that the first court had the privilege of deciding rightly or wrongly the matter, the matter could never be raised in any case. One would have thought that after the decisions we have cited the question would have been set at rest. In the case, however, of *Mahanth Raghunandan Gir* v. *Gosain Deoraj Gir*(1) the learned Judges were under the impression that the decision in *Ram Bhusan Das* v. *Bachu Rai*(2) above summarised

(1) (1935) 17 Pat. L. T. 9.
(2) (1934) I. L. R. 14 Pat. 220.

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was in the nature of an obiter dictum, because the plaintiff's petition was rejected on its merits. We fear that they did not clearly realise the meaning of the phrase 'obiter dictum', or the circumstances in which it is applicable. It frequently happens that the contentions raised by the plaintiff require two or more separate decisions in the same judgment. Thus, a plaintiff may allege (*a*) that he is the duly elected mayor of a town, (*b*) that by virtue of that office he is entitled to possession of certain property and (*c*) that the defendant is in fact in possession of the property claimed and he may ask for a decree for possession. The court may decide all the three points, holding (*a*) that the plaintiff is not the mayor of the town, (*b*) that the holding of the mayorship would not entitle him to the property claimed and (*c*) that the defendant is not in possession. The legal decision on the rights of the mayor (if decided after argument) does not become obiter dictum merely because the decision on the other two points was sufficient to decide the case. Much misuse has been made of the phrase that "a case is an authority only for what it decides", and we fear that that phrase quoted from the judgment of the House of Lords in *Quinn* v. *Leathem*(1) is often invoked to get rid of any authority which is thought to be inconvenient. The decision in the matter of the principle applicable in *Mahant Ram Bhusan Das* v. *Bachu Rai*(2) was arrived at after the fullest argument and is direct authority for the principle therein stated, and the decision on this point cannot be considered as obiter dictum. In *Kumar Ramkinkar Singh* v. *Kumar Jogendra Nath Singh*(3) decided shortly after *Mahanth Bhusan Das* v. *Bachu Rai*(2), a learned Judge of this Court sitting singly and examining an unofficial report of the case of *Mahant Ram Bhusan*

(1) (1901) A. C. 495.
(2) (1934) I. L. R. 14 Pat. 220.
(3) (1935) 16 Pat. L. T. 158.

Das v. *Bachu Rai*(1) appears to have thought that the decision as reported was so repugnant to the principle (as he understood them) to be derived from earlier Privy Council cases and decisions of this Court that the decision must have been misreported. On examining the unofficial report, however, this does not appear to be the case. The learned Judge moreover entertained an erroneous idea as to the earlier Privy Council case relied on by him and in our opinion his decision was wrong, and the decision in *Mahant Ram Bhusan Das* v. *Bachu Rai*(1) does not conflict with the decisions of the Judicial Committee. It is quite true that where a lower court has jurisdiction to decide questions of law and fact as between the parties, the superior court will not exercise revisional jurisdiction against the decision whether it be right or wrong: but the superior court will interfere in revision where the jurisdiction is derived from statute and the matter is one of the construction of the statute. There are numerous instances of the exercise by the Privy Council of this jurisdiction, see for example *Brij Mohun Thakur* v. *Rai Uma Nath Chowdhry*(2) in which they interfered with the misconstruction of Order XXI, rule 89—*Balakrishna Udayar* v. *Vasudeva Aiyar*(3) where they interfered with the construction of the section of Religious Endowments Act, *Lachmi Narain Marwari* v. *Balmakund Marwari*(4) where they interfered with the construction of Order XVII, rule 2, and in *C. D. M. Hindley* v. *Joynarain Marwari*(5) Sir George Rankin, J., as he then was, interfered with the construction of a section in the Provident Funds Act. The Courts in India have often interfered with decisions in Court-Fees Act matters: For example, in *Vithal Krishna* v. *Balkrishna Janardan*(6) a Full

(1) (1934) I. L. R. 14 Pat. 220; 16 Pat. L. T. 69.
(2) (1892) I. L. R. 20 Cal. 8 P. C.
(3) (1917) L. R. 44 Ind. App. 261.
(4) (1924) I. L. R. 4 Pat. 61, P. C.
(5) (1919) I. L. R. 46 Cal. 962.
(6) (1886) I. L. R. 10 Bom. 610, F. B.

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Bench of the Bombay High Court interfered with the decision of the subordinate court in the matter of the duty payable under the Court-Fees Act. The same course was taken by the Calcutta High Court in *Shailendranath Kundu* v. *Surendranath Sarkar*(1). In *Secretary of State for India in Council* v. *Raghunathan*(2), decided by a Full Bench, the decision of the Court is of great interest. The Judge had held that the court-fee paid on the plaint was sufficient. The Government presented a petition for revision, asking for a higher duty. The High Court approved an earlier decision in *Rani Kulandaivelu Nachiar* v. *Indran Ramaswami Pandia Thalavan*(3) to the effect that where a Judge on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, he fails to exercise the jurisdiction, as the party is entitled to have his case tried if he paid the court-fee, and a still earlier case decided by a single Judge in *Sudalimuthu Pillai* v. *Peria Sundaram Pillai*(4) where it was held that, where the trial court wrongly ordered payment of court-fee over and above what was paid on the plaint, it was the practice of the High Court to interfere with the order in revision without leaving the aggrieved party to the cumbrous remedy of filing an appeal after the plaint is rejected for non-payment of the amount directed to be paid, the question really being one of jurisdiction, as the plaint has to be rejected if the stamp duty is not paid (and it must be remembered that the duty would have to be deposited before an appeal to the High Court could be heard). But the Full Bench also decided that where the Judge held the court-fee to be sufficient, a revision did not lie, for the matter could be corrected by the appellate court under section 12 of the Court-Fees Act. It does not appear that any of these cases

(1) (1934) I. L. R. 62 Cal. 417.
(2) (1933) I. L. R. 56 Mad. 744, F. B.
(3) (1927) I. L. R. 51 Mad. 664.
(4) (1924) 48 M. L. J. 514.

was brought to the notice of Wort, J. when deciding the case of *Kumar Ramkinkar Singh* v. *Kumar Jogendra Nath Singh*(1). In a recent case decided by the Privy Council in *Musammat Vaishno Ditti* v. *Musammat Ramesri*(2) Sir George Rankin pointed out that the court has no jurisdiction to dismiss a suit for non-payment of court-fees acting under the second clause of section 11. As to the case of *Amir Hassan Khan* v. *Sheo Baksh Singh*(3) the Privy Council case cited by the learned Judge and supposed by him to be in conflict with the decision of this Court in *Mahant Ram Bhusan Das* v. *Bachu Rai*(4) the question before the trial court was as to whether the matter at issue between the parties had already been decided in an earlier case. The trial Court decided that the matter at issue had been decided in the earlier case and so refused to proceed further with the suit. Now, the question of res judicata is one of fact and is an issue between the parties to the suit, and it was held by the Privy Council that a superior court could not revise the decision; whereas in the case before Wort, J., as in the case before us, the matter was one of the court-fee payable and this is the question not between the parties but between the Crown and the plaintiff [*see Baijnath Prasad Singh* v. *Umeshwar Singh*(5)]. It is true that in the trial of a suit the Munsif commonly "frames an issue" as to whether the court-fee paid is sufficient, but the issue so framed is not one between the parties and has nothing whatever to do with the merits of the suits. The defendant may contend that the court-fee paid is insufficient with a view to preventing the suit from being tried, but in arguing his contentions the defendant is really acting as a common informer. The Crown may be

(1) (1935) 16 Pat. L. T. 158.
(2) (1937) 41 Cal. W. N. 814, P. C.
(3) (1884) I. L. R. 11 Cal. 6, P. C.
(4) (1935) I. L. R. 14 Pat. 220.
(5) (1937) I. L. R. 16 Pat. 600, S. B.

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grateful for his assistance, but it is not a matter which really concerns the defendant. The court is doing nothing wrong in hearing the contentions of the common informer, but in deciding the question of court-fee he is deciding an issue not as between the plaintiff and the defendant wherein his decision both on law and fact is not subject to revision, but is deciding an issue as between the Crown and the plaintiff; and should his decision be adverse to the plaintiff it amounts to a decision to refuse to exercise his jurisdiction to try the issues as between the plaintiff and the defendant. His decision in such a case is subject to the revisional jurisdiction of the High Court. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the court for revision [*see* the cases collected in *Mahanth Raghunandan Gir* v. *Gosain Deoraj Gir*(1)] for in the first place he is not a party to the dispute between the Crown and the plaintiff; secondly, he has a remedy, should the decision on merits be against him, in bringing the matter of the duty to the notice of the appellate court under section 12 of the Court-Fees Act; and, thirdly, and most important, as between the plaintiff and the defendant the trial court has not refused to exercise its jurisdiction to decide the case on the merits. It is useful here to call attention to the observation of the Privy Council in *Rachappa Subrao Jadhar* v. *Shidappa Venkatrao Jadar*(2)—

> " The Court-Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State.....".

It is not necessary to consider the other decisions cited by the learned Judge. We hold that his opinion that the High Court cannot interfere with an erroneous decision of the trial court adverse to the plaintiff

(1) (1935) 17 Pat. L. T. 9.
(2) (1918) L. R. 46 Ind. App. 24, 32.

in the matter of court-fee is erroneous and indeed contrary to the decisions of this Court.

We now approach the merits of the two cases respectively. The question in issue is whether the suit falls within section 7, paragraph (*iv*) (*c*), or within paragraph (*v*) of the Court-Fees Act.

Section 7, paragraph (*iv*), sets forth different classes of suits in which the duty is to be levied according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. Six classes of suits are included under this paragraph and they are as follows:—

(*a*) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

(*b*) to enforce the right to share in any property on the ground that it is joint family property,

(*c*) to obtain a declaratory decree or order, where consequential relief is prayed,

(*d*) to obtain an injunction,

(*e*) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(*f*) for accounts.

We agree with the opinion of Sir George Rankin, C. J. sitting as the Taxing Judge in *In re Kalipada Mukharji*(1)—

"The Act in sub-section (*iv*) is dealing with claims which do not yield themselves readily to any statement of money value and in leaving the matter to the plaintiff's valuation, subject to sections 4 and 9 of the Suits Valuation Act, it proceeds just as much upon a considered policy as it does when, by Article 17 of Schedule II of the Act, it charges certain classes of suits with a fee which is irrespective of value: *Phul Kumari* v. *Ghanshyam Misra*(2)."

It would seem that there is much misunderstanding in India as to the legal meaning of the word

(1) (1930) I. L. R. 58 Cal. 281, 284.
(2) (1907) I. L. R. 35 Cal. 202, P. C.

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"declaration" as applied to a remedy to be granted by a court. The habit has grown up of describing a suit for possession of property as being a suit "for a declaration of title together with a decree for possession of the property in suit", and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which he seeks is a decree for delivery of possession. The distinction between the remedy sought and the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the plaintiff obtaining an order for possession but having been refused a formal "declaration" in the decree could come to the appellate court with a complaint that he had not received the whole of the remedy for which he had asked. If the appellate court is in a position to tell the plaintiff that the remedy of possession is all that the plaintiff is entitled to ask and that the so called "declaration" claimed in the plaint is merely a finding of the court set forth in the judgment, as distinct from the decree, the justification for granting the remedy, then the so called "declaration" claimed in the plaint is not a declaration at all. If, on the other hand, the appellate court should find that the plaintiff is really making a claim to a declaration properly so called and that the decree for possession is merely consequential relief, it may under section 12 of the Act adjust the matter of the court-fee in accordance with section 7, paragraph (*iv*). It is this very difference which is at the basis of the practice under which the court will not ordinarily grant a mere declaration and the plaintiff must claim consequential relief also. Section 7, paragraph (*iv*) (*c*), has application to declarations properly so called, such, for instance, as declarations of public status, or a declaration that the plaintiff holds a public office, or

a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. Indeed declarations in the true sense are rarely required. The plaintiff should only allege the facts necessary to establish his title and that the defendant is wrongfully in possession. If he goes on to claim, in the manner so beloved of pleaders, a declaration of title in addition to an order for possession, the court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a "declaration of title". Suits for possession of land, houses and gardens are to bear a court-fee as provided by paragraph (*v*), that is to say, if the land forms an estate paying revenue to Government at a multiple of the revenue so payable. There are also provisions for valuing the suit where the land does not pay revenue to Government, and also for valuing the suit if the subject-mater is a house or garden. Therefore, the valuation of the suit for court-fee purposes is to be determined by the question of whether the suit is really one for a declaration in the true sense of the word, or whether it is a suit for possession; and, if there be a claim in the plaint for a declaration, the plaint should be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really a suit for possession. In the case we are now considering the plaint sets forth the facts alleged, and I abridge it by eliminating irrelevant statements and the customary verbosity:

(*a*) One Raja B. P. N. Singh died on the 13th of January, 1871, his first wife having predeceased him by some five years.

(*b*) That during the lifetime of the first wife the said Raja had married in *asura* form one Rani Rajbansi Kuer

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(*c*) That Rani Rajbansi Kuer bore to her husband a daughter by name Ramdutta Kuer.

(*d*) That Ramdutta Kuer married one Hira Sahi and died in 1893, before the death of Rani Rajbansi Kuer, leaving no issue.

(*e*) That the plaintiff is the heir of Ranjbansi Kuer.

(*f*) That certain properties set forth in the schedule were the absolute *stridhan* properties of Rani Rajbansi Kuer.

(*g*) That the defendants are in possession of the same properties claiming to be the issue of Ramdutta Kuer.

The plaintiff claims (*1*) possession of the scheduled properties, (*2*) costs and (*3*) any other relief to which the plaintiff may be entitled in the opinion of the court. It is true that the plaint attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely stated to have been made by Rani Rajbansi Kuer. But the essential facts are as I have summarised them above, and the claim is limited to a claim for possession. In these circumstances there cannot be any pretence that the claim is one for a declaration with consequential relief. It was, therefore, correctly stated by the plaintiff that the suit should be valued for court-fee purposes as provided by section 7, paragraph (*v*). In the case which has given rise to Civil Revision 123 of 1937 the plaintiff claims the same property on the allegation that Rani Rajbansi Kuer was the second wife of Raja B. P. N. Singh and that on his death she succeeded to the properties of the deceased as a limited owner of a Hindu widow's estate and that when she died the plaintiff was the nearest agnate and the heir of her husband. In this case again the plaint is very verbose and contains much irrelevant matter and it

proceeds to anticipate the defence and states that the defendants are claiming under an alleged gift in perpetuity in favour of certain idols and that they were the *shebaits* of the scheduled properties, and submits that the so called gift was invalid, and that the defendants had effected certain fraudulent registrations. The plaint winds up by praying for a decree for possession, a decree for mesne profits and a request that if the possession cannot be granted and that if the deed of dedication upon which it is anticipated that the defendants will rely be held valid. then the plaintiff is the legal *shebait* and that a decree for possession be granted in his favour. It is suggested that the plaintiff claims to set aside the deed of gift, but if, as the plaintiff avers, the deed was void, the defendants obtained nothing under it and it may be ignored and there need be no suit or claim to have it set aside: *see T. P. Petherpermal Chetty* v. *R. Muniandi Serrai*(1). In this case also the suit is really one for possession of property and no declaration is sought for or required. The plaintiff is simply claiming possession as the next reversionary heir of the deceased husband of Rani Rajbansi Kuer. The learned Subordinate Judge considers as to both of these cases that the plaintiff in neither case can claim possession until he has claimed a "declaration of title", because the defendants in both cases have challenged the title of the plaintiff. This view is quite erroneous, and we hold that the plaintiff in each case has rightly claimed that the court-fee must be assessed on a suit for possession.

The applications succeed and the respondents will in each case pay the costs: hearing fee in each case ten gold mohurs.

J. K.

Rule made absolute.

(1) (1908) L. R. 35 Ind. App. 98.

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The award sought to be made a rule of the court under schedule II of the Code of Civil Procedure directed the payment of a certain sum with interest by *D* to *A* and further declared that the ownership of *A* in certain immovable property should not cease until the said payment. It was contended by *D* that the award could not be enforced for want of registration.

Held, that section 17 of the Registration Act did not apply as the document merely acknowledged a pre-existing right. The word " operate " refers to the immediate intention of the instrument and not to its ultimate consequences or collateral effects. It is only when there is an immediate intention to create, declare or assign title that the document requires registration.

Held, also, that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. Het Lal v. *Upendra Nath Basu*, (1937) I. L. R. 16 Pat. 84

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BENGAL TENANCY ACT, 1885.—

1———*sections* 50, 104-*H and* 115—*suit for declaration that plaintiff was permanent tenure-holder—uniform payment of rent for more than* 60 *years—Record-of-rights, entry in—instamrari lekin mukarrari nahin—presumption of permanency of rent under section* 50, *whether can be raised in view of section* 115.

Where the plaintiff who was recorded in the record-of-rights as *istamrari lekin mukarrari nahin* brought a suit under section 104-H of the Bengal Tenancy Act for a declaration that he was a permanent tenure-holder at a fixed rate and it was found that the rent of the tenure had been paid at an unvarying rate for sixty years.

Held, that section 115 of the Bengal Tenancy Act had no application and the plaintiff was entitled to the benefit of the presumption mentioned in section 50 of the Act.

The presumption under section 50 applies to suits framed under Chapter X of the Bengal Tenancy Act whether they are suits under section 106 or under section 104-J of the Act.

Under section 104-J of the Act the presumption of correctness attaching to the record of rent settled under section 104 is expressly made subject to the provisions of section 104-H.

Section 111 merely prohibits for a certain period the institution of particular suits while the record-of-rights is under preparation. Prima facie it would appear that the provisions of section 115 would apply to suits of that nature instituted after the bar provided by section 111 has been removed: but it would not follow from this that the presumption would not apply to suits for which Chapter X of the Bengal Tenancy Act expressly provides, such as those under section 104-H, which are equivalent to applications under section 105 and suits under section 106. *Pratap Mandal* v. *Surpat Sinha*, (1937) I. L. R. 16 Pat. ... 877

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A suit for recovery of rent deposited under section 149 of the Bengal Tenancy Act is, in effect, as against a defendant in possession, a suit in ejectment and the plaintiff must prove his title.

The limits of a particular revenue mahal is not a matter of public right or public or general interest and a map made for the purpose of showing the limits in a previous suit is not admissible as evidence of the limits in a subsequent suit without proof of its accuracy.

In a suit for possession of land a judgment in a previous suit, though admissible as evidence of assertion of a right to the land, is not evidence of the right as against a stranger.

Observations on the probative value of entries in registers under the United Provinces Land Revenue Act.

Where a Subordinate Judge in a First Appeal from the decree of a Munsif does not, in coming to his finding of fact as to possession of land, direct himself accurately as to the purposes for which a map put in evidence can be used as such against a party, the High Court can in Second Appeal entertain a fresh question of parcels. *Maharaja Sir Kesho Prasad Singh* v. *Bahuria Musammat Bhagjogna Kuer*, (1937) I. L. R. 16 Pat. 258

BIHAR AND ORISSA MICA ACT, 1930—*sections* 17(2) (*a*) *and* 24—*conviction under section* 17(2) (*a*)—*excess amount of mica, whether can be confiscated—section* 24—*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 517, *whether applicable—mica, whether is property "regarding which any offence appears to have been committed"*.

Section 17 (2) (*a*) of the Bihar and Orissa Mica Act, 1930, provides—

"Any licensee or registered proprietor who fails to keep any account required to be kept by section 10 or keeps an account which does not contain the particulars required by the said section or which is false in any material particular shall on conviction by a magistrate of the first class be punishable with fine which may extend to five hundred rupees."

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BIHAR AND ORISSA MICA ACT, 1930—*concld.*

Held, that where the conviction of the accused is under section 17 (2) (*a*) of the Act for not keeping proper accounts and possessing crude mica not entered in the stock book, the excess mica cannot be confiscated under the provisions of section 24 of the Act which do not relate to an offence publishable under section 17 (2) (*a*).

Held, further, that the excess mica could not be confiscated under section 517, Code of Criminal Procedure, 1898, as it was not a property " regarding which any offence appears to have been committed " within the meaning of the section. *Mani Ram* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 823

BIHAR AND ORISSA MUNICIPAL ACT, 1922—*sections* 99 *and* 119—*procedure prescribed by section* 99(*b*), *when is to be followed—laying down of tests, whether is a condition precedent to an assessment—failure to apply for review of assessment or exemption on the ground of non-occupation or non-liability, whether debars assessee from raising such objections in a suit—section* 119.

Section 99(*b*) of the Bihar and Orissa Municipal Act, 1922, comes into operation only when the question arises of how the words in clause (9) of section 3 " held under one title or agreement " are to be interpreted. Then the Commissioners are to decide at a meeting what tests shall be applied. The section does not require them to decide these questions before they may be raised by any person affected by the assessment.

If an assessee desires to dispute his occupation of any holding or his liability to be assessed, it is necessary, under section 116 of the Act, that he should apply to the Commissioners for review of the assessment or for exemption: his failure to do so debars his right, under section 119, to raise such an objection in a suit. *Chairman, Arrah Municipality* v. *Ramkumar Choudhury*, (1937) I. L. R. 16 Pat. ... 662

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The Act does not itself impose a penalty for a breach of the terms of a license granted to a registered smoker nor does it expressly empower the rule-making authority to provide for such penalty.

Held, therefore, that rule 11 of the Bihar and Orissa Opium Smoking Rules is ultra vires. *King-Emperor* v. *Nemu Singh*, (1937) I. L. R. 16 Pat. 244

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BIHAR TENANCY ACT, 1885.—

1————*sections* 22(2) *and* 26N—*section* 26N *whether applies to purchases made by co-sharer landlord—amendment of* 1934, *whether retrospective—provisions of section* 26N, *whether overrides leases executed before the amendment—amount of rent payable by co-sharer purchaser.*

The plaintiff who held a six annas mukarrari interest in a mahal let it out to the defendants the mukarridar of the remaining ten annas interest. This lease expressly prohibited the grant of new rights either directly or indirectly. The defendant purchased certain non-transferable occupancy holdings and thereafter the plaintiff brought the present action for joint possession over the purchased holdings. The suit was decreed and during the pendency of the appeal in the High Court section 26N along with other sections was enacted.

Held (*i*) that section 26N was intended to be retrospective and applied also to holdings which at the date of the commencement of the Act were in question in a pending suit.

(*ii*) that the words of section 26N are very general and applied to transfers in favour of strangers as well as co-sharer landlords.

(*iii*) that after the amendment of the Bihar Tenancy Act the provisions of the lease were of no avail.

(*iv*) that the co-sharer purchaser was liable to pay rent of the original occupancy holding and not the rent payable in respect of the tenancies that might have been created by him.

Miss G. B. Solano v. *Maharaj Kumari Umeshwari Kuer*, (1937) I. L. R. 16 Pat. 500

2————*sections* 26-*E*, 26-*N and* 26-*O—landlord's transfer fee, deposit of, during pendency of second appeal in High Court, effect of—sections, whether retrospective.*

Where a landlord's suit in ejectment was decreed on the ground that the holding was non-transferable and during the pendency of the second appeal in the High Court the transferee deposited the landlord's transfer fee under section 26-E read with section 26-O of the Bihar Tenancy Act and the Collector granted the receipt.

Held, that the landlord shall be deemed to have given his consent to the transfer.

BIHAR TENANCY ACT, 1885—*concld.* PAGE.

Held, also, that as the second appeal was pending in the High Court the title of the transferee had not been extinguished and he had a subsisting title to deposit the landlord's transfer fee. *Musammat Walihan* v. *Parmeshwar Narain Patakh*, (1937) I. L. R. 16 Pat. 405

8——*section 26N, whether applies to purchases made by co-sharer landlords—amendment, whether retrospective. See* Bihar Tenancy Act, no. 1 500

4——*Section 26(O), whether applies to transfers of transferable occupancy holdings transferred before the commencement of the Act.*

Held, on a construction of the various section of the Bihar Tenancy Act, that section 26(O) applies only to those cases where the title of the transferee has not been perfected, or in other words to those transfers only which relate to non-transferable holdings.

Sections 26(*B*) to 26(*M*) have no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer. *Hargauri Prasad* v. *Raghunath Singh*, (1937) I. L. R. 16 Pat. 239

5——*section 53—rent, when falls due—rent, whether accrues from day to day. See* Rent 184

6——*Section 103B—record-of-rights—entry as to rent-free, if can be rebutted by showing that land was within plaintiff's zamindari.*

The plaintiff brought an action for a declaration that the entry in the record-of-rights that the land held by the defendant was rent-free was erroneous and for assessment of fair rent, and it was contended that the land being within the ambit of his zamindari the presumption of the correctness of entry in the record-of-rights was rebutted.

Held that such a broad proposition could not be accepted as it would be in contravention of the express terms of the Bengal Tenancy Act, section 103B. *Rashik Lal Sahu* v. *Sirpat Singh*, (1937) I. L. R. 16 Pat. ... 281

BOILERS ACT, 1923—*sections 2 and 23—"owner" meaning of.*

The definition of "owner" in section 23 of the Act is inclusive, that is to say, it extends the dictionary meaning of the word and does not restrict it. It says that the "owner" includes any person using a boiler as agent of the owner thereof and any person using the boiler which he has hired or obtained on loan from the owner thereof. The definition does not mean that an owner of a boiler who

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uses it through his agent is not its owner for the purposes of the Act. The only effect of this inclusive definition is that an agent who uses a boiler owned by his principal and who under the ordinary meaning of the term is not its owner, comes under the Act.

Held, therefore, that an absentee owner of a boiler, which is being used for his work comes within the purview of section 23 of the Indian Boilers Act, which makes the owner of a boiler liable for its use without a certificate.

Emperor v. *Jugal Kishore Teberawalla*, (1937) I. L. R. 16 Pat. 495

CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876—*sections* 3, 7 *and* 12—*estate released under the first clause of section* 12—*restoration, whether operates as a revivor of prior debts—scheme and object of the Act—section* 7, *effect of—previous execution null and void—further proceedings, whether can be said to be taken in continuation of it.*

The object of the Chota Nagpur Encumbered Estates Act, 1876, is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to notify the debt and get it paid by the Manager; failing recourse to this procedure not only all remedies are barred but the debt itself is barred.

The liabilities are only revived when the object of the statute itself has failed and the estate has been restored without payment of the notified claims.

The wording of section 12 of the Act, as it now stands, fully agrees with this view of the intention, and, therefore, there can be no revivor of any debt or of any proceeding when an estate is handed back under paragraph (*1*) of section 12 after satisfaction of all notified debts.

Per DHAVLE, J.—Section 7 does not merely, like the first clause of section 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate.

The first and the third clauses of section 12 imply not the mere approval of a scheme but the discharge of the debts in accordance with the approved scheme or the satisfaction of the creditors in accordance with the approved composition; the restoration of the estate under these clauses does not involve any cancellation of the vesting order and on such restoration the holder or his heir takes the estate free from any liability for prior debts.

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CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876—*concld.*

The intention of the Act does not seem to be different from its letter in the matter of debts not notified to the Manager of an estate released under the first or the third clause of section 12. *Beni Madhab Mahto* v. *Ganesh Singh Sardar*, (1937) I. L. R. 16 Pat. 459

CHOTA NAGPUR TENANCY ACT, 1908—

1———*sections* 46 *and* 139—"*trespasser*", *meaning of, within section* 139(4A)—*suit to eject under-raiyat—lease before* 1908—*section* 46, *whether applicable—suit, whether one under the Act—section* 139(4).

Section 139 of the Chota Nagpur Tenancy Act, 1908, provides:

"The following suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other court, except as otherwise provided in this Act, namely:—

.....

(4) all suits and applications under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land;

(4A) all suits for ejectment of a trespasser where the plaintiff claims an alternative relief that the defendant be declared liable to pay for the land in his possession a fair rent";

Plaintiffs brought a suit for the possession of a holding treating the defendants as under-raiyats, who were inducted on the land by virtue of a lease made in 1901. The defendants continued in possession even after the expiry of the lease, the plaintiffs having accepted rent during this period. The plaintiffs then gave notice to quit and on the failure of the defendants to give up possession of the holding the suit in ejectment was brought.

Held, (*i*) that the defendants were not trespassers within the meaning of section 139(4A) of the Act; the class of persons contemplated by the section are those who have gone upon the land with no sort of right and were trespassers ab initio.

(*ii*) that although the cause of action accrued to the plaintiffs after 1908, it was not in respect of a matter which was provided for by the Act, section 46; that being so, the action was not under the Act and was not therefore hit by section 139(4). *Kabir Ram* v. *Giro Mahto*, (1937) I. L. R. 18 Pat. 682

2———*section* 47—*homestead land not forming part of agricultural holding, whether exempt from sale. See* Execution no. 3 316

3———*sections* 190(1) *and* 213—*non-issue of notice under section* 190(1), *whether renders the sale void—section, whether applies to warrants issued against immovable property—section* 213, *whether applies to cases where court had no jurisdiction to sell—remand for rehearing of issues*

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CHOTA NAGPUR TENANCY ACT, 1908—*contd.*

not raised in the plaint, legality of—suit against minor—notice served on mother as guardian—absence of order of appointment and consent of guardian—decree, whether is a nullity.

An appellate court may remand a suit for rehearing on issues not raised in the plaint, if the remand is on questions of jurisdiction such as can be raised at any time.

The failure to issue notice under section 190(1) of the Chota Nagpur Tenancy Act, 1908, is a matter of jurisdiction and renders the subsequent sale in execution void.

There is nothing in section 190(1) of the Act to limit its operation to warrants to be issued against the person or movables of the judgment-debtor; it applies to all warrants issued in execution proceedings under the Act.

Section 213 of the Act applies to cases of irregularity or fraud in conducting the sale, and does not apply to cases where the court had no jurisdiction to sell.

Therefore, the dismissal of an application under section 213 does not bar a subsequent suit under section 214 to set aside the sale.

In the case of minor defendants the court must see not merely that a guardian is appointed, but that the guardian has consented to act.

Where, therefore, in a suit the defendants were minors and notices were served on them through their mothers as guardians, but no appearance was made on their behalf, and there was no order of the court appointing the mothers as their guardians or showing that the guardians consented to act on their behalf.

Held, that the decree passed in the suit was a nullity. *Baraik Ramgobind Singh* v. *Choura Uraon*, (1937) I. L. R. 16 Pat. 632

4————*sections* 208 *and* 213—*reversioner to the husband of a Hindu widow, whether entitled to maintain an application under section* 213—*applicant, duty of, to show that he was owner in possession immediately before sale and that application was not barred by limitation—sale under section* 208 *void—right, title and interest of parties to proceedings, whether passes by the sale.*

In order that a person should be entitled to prefer an objection under section 213 of the Chota Nagpur Tenancy Act, 1908, the applicant must demonstrate that he was the person who owned the property sold immediately before the sale, and also that his application was not barred by limitation.

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A right of succession as reversioner to the husband of a Hindu widow is merely a spes successionis, and the expectant reversioner has no vested interest so long as the widow lives, so that he cannot be regarded as the owner in possession immediately before the sale, within the meaning of section 213.

When partition has been made by metes and bounds, whether by the Civil Court or by private arrangement, the owner of one separate patti is no longer the owner of the other, even though there may be a joint liability for rent.

Quaere: Whether upon the sale of a tenure under section 208 of the Chota Nagpur Tenancy Act, 1908, the right, title and interest of the parties to the proceeding passes by the sale when the sale itself is ultra vires by reason of the fact that the whole of the interests in the tenure were not represented before the Court? *Bhagwat Prasad* v. *Sudarsan Bhagat*, (1937) I. L. R. 16 Pat. ... 643

5———*section* 213—*reversioner to the husband of a Hindu widow, whether entitled to maintain an application under section* 213. *See* no. 4, *supra* 643

6———*section* 213, *whether applies to cases where Court had no jurisdiction to sell. See* no. 3, *supra* 682

CODE OF CIVIL PROCEDURE, 1908.—

1———*section* 91—*public nuisance—obstructing villagers from taking water from a well, whether amounts to public nuisance—suit by some of the villagers without proof of special damage, whether maintainable. See* Public Nuisance 190

2———*section* 99—*misjoinder as ground of appeal. See* no. 8, *infra* 149

3———*section* 100—*finding of fact—map wrongly used in arriving at finding of fact—jurisdiction in second appeal to enter into fact. See* Bengal Tenancy Act, 1885, no. 5, *supra* 258

4———*section* 115, *wrong decision as to category in which a suit falls for the purpose of levying court-fee, if revisable. See* Court-Fees Act, 1870, no. 3 766

5———*section* 149 *and Order VII, Rule* 11—*plaint insufficiently stamped—power of court to grant time for filing the deficit court-fee—validity of order granting time, whether can be challenged in appeal from the decree—power of High Court to interfere—power of superintendence—Court-fees Act*, 1870, *section* 6—*fiscal statutes, interpretation of.*

Where a plaint filed on the last date of limitation was insufficiently stamped and the court granted time to the plaintiffs to make good the deficiency and ultimately

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

the plaintiff's suit was decreed, *held* that the order of the court granting time to the plaintiffs could not be questioned in appeal from the decree.

Held, also, that in view of the provisions of section 149 and Order VII, rule 11, the court had the power to grant time to the plaintiffs to make good the deficiency in the court-fees and on such payment the plaint should be taken to have been filed on the date on which it was actually filed.

The court has a double function, it has its judicial function to hear and decide cases, it also acts as a collector of revenue, and its duty is to collect the revenue for the government in the shape of court-fees according to the statutes provided and in exercising that function it has a discretion granted it to allow time. In exercise of both these functions subordinate courts are under the direction of the High Court. Although the defendant is no proper party to questions of revenue as between the plaintiff and the Government, it is open to him to move the High Court if the discretion to grant adjournment has been improperly exercised to his detriment at an earlier stage of the proceedings and the High Court might in appropriate cases interfere.

Per KHAJA MOHAMAD NOOR, J.—Order VII, rule 11, of the Code of Civil Procedure, 1908, makes it compulsory for the courts before rejecting the plaint to give some time to the plaintiff to make up the deficiency.

Per MANOHAR LAL, J.—On a fair construction of Order VII, rule 11, clause (c), it is clear that the two conditions which are conjunctive and not disjunctive must be satisfied before a plaint can be rejected. Therefore, courts before whom plaints are presented insufficiently stamped are required to determine judicially the extent of time which must be given to make good the deficiency. *Baijnath Prasad Singh* v. *Umeshwar Singh*, (1937) I. L. R. 16 Pat. 600

6——————*section* 151—*decree against judgment-debtor and his sons—property of both sold in execution and purchased by decree-holder—suit by sons for exemption of their share—sons exempted from operation of decree—court, whether competent to award compensation to auction-purchaser under section* 151—"*substantial justice*", *what is meant by*—caveat emptor, *doctrine of, whether applicable.*

The decree-holder obtained a compromise decree against P, the judgment-debtor, and his sons and in execution put their property up for sale and purchased it himself. In due

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

course the sale was confirmed and full satisfaction of the decree entered. Thereafter the minor sons brought an action claiming that they were not bound by the compromise decree, and the claim having succeeded, their moiety share in the property sold was released. Thereupon the decree-holder took out fresh execution against the judgment-debtor, against whom the compromise decree remained intact, but the court dismissed it on the ground that the decree-holder was not entitled to take out further execution of the decree which had already been satisfied. Thereafter the decree-holder made an application to the court claiming compensation from the judgment-debtor and the court granted the relief under section 151 of the Code of Civil Procedure, 1908.

Held, in revision, (*i*) that the court had no jurisdiction to award compensation against the judgment-debtor;

(*ii*) that the maxim *caveat emptor* applied to the facts of the case, and that apart from fraud and the provisions of rule 91 of Order XXI, a purchaser at an auction sale must abide by the bargain.

Observations on the tendency of the subordinate courts to interpret section 151 of the Code of Civil Procedure, 1908, as giving them power which under the general law they do not possess and to do what is sometimes called, and erroneously called "substantial justice" though it often amounts to injustice. *Phulchand Ram Marwari* v. *Naurang Lal Marwari*, (1937) I. L. R. 16 Pat. 729

7———*section 151 and Order XXXIX, rule 1—stay of execution, when can be granted—rule 1, applicability of—inherent power, when may be exercised.*

Order XXXIX, rule 1, Code of Civil Procedure, 1908, cannot be applied to a case where the decree-holder has a decree against his judgment-debtor which he is executing against that judgment-debtor in a proper proceeding and somebody else institutes a suit, after being defeated in his claim case, and claims that the property is his and not that of the judgment-debtor and then asks for a temporary injunction on the ground that his property is being wrongfully sold in execution of a decree.

Per MANOHAR LAL, J.—The court may invoke its inherent powers to stay the execution of the decree if the circumstances are so coercive that the balance of convenience is in favour of the appellant or that a stay is necessary to prevent an abuse of the process of the Court. *Rai Bahadur Dalip Narayan Singh* v. *Srimati Amarbas Kuer*, (1937) I. L. R. 16 Pat. 738

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CODE OF CIVIL PROCEDURE, 1908—*contd.*

8———*Order I, rule 3 and Order II, rule 3 and section 99—misjoinder—right to have parties or causes of action struck out—effect of misjoinder—misjoinder as ground of appeal.*

Under the present rules the mere fact of misjoinder is not by itself sufficient to entitle a defendant to have proceedings set aside or an action dismissed.

Section 99 is in plain words. Joinder of parties and joinder of causes of action are discretionary in the Court and there is no absolute right to have them struck out.

Effect will not be given in appeal to the objection of misjoinder where the merits of the case have been satisfactorily disposed of in spite of the complication of the proceedings. *Mahanth Ramdhan Puri* v. *Chaudhury Lachmi Narain*, (1937) I. L. R. 16 Pat. 149

9———*Order I, rule 8—obstructing villagers from taking water from a well, whether amounts to public nuisance—suit by some of the villagers without proof of special damage, whether maintainable—section 91. See* Public Nuisance ... 190

10———*Order II, rule 3—misjoinder of causes of action—right to have causes of action struck out. See* no. 8, *supra* 149

11———*Order VII, Rule 11—Court, whether bound to give time to plaintiff to make up the deficiency in court-fee. See* no. 5, *supra* 600

12———*Order XXI, rules 18, 19 and 20—Set off—Decree for sale, when may be set off against decree for mesne profits—Decree in favour of number of persons, whether it may be set off against decree against some of the number.*

Where it is found that a person is entitled to a personal judgment and a charge on property and that neither of these rights are barred by limitation and the final decree directs a specific sum to be realized by the sale of the property charged this decree may be set off against a decree for mesne profits.

Where a number of persons have a decree and their judgment-debtor has a decree against some of them, the holders of the former decree are entitled on a joint application to set off the latter decree against their decree. *Hazariram Marwari* v. *Rai Bahadur Bansidhar Dhandhania*, (1937) I. L. R. 16 Pat. 127

13———*Order XXI, rule 57 and Order XXXVIII, rule 11—"attached in execution", whether covers "attachment before judgment"—attachment before judgment, whether comes to an end upon the dismissal of application for execution under rule 57.*

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Order XXI, rule 57, Code of Civil Procedure, 1908, lays down :—

"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."

Held, that the phrase "attached in execution" occurring in rule 57 does not cover an attachment before judgment, and the words "the attachment shall cease" refer to an attachment in execution of the decree.

Therefore, an attachment before judgment does not come to an end upon the dismissal of an application for execution under that rule. *Moti Jha* v. *Jowala Prasad Marwari*, (1937) I. L. R. 16 Pat. 589

14————*Order XXI, rules* 58, 63 *and* 100—*claim under rule* 58 *by usufructuary mortgagee dismissed for default—claim not maintainable—failure to bring suit under rule* 68, *whether bars application under rule* 100.

It is not necessary for a usufructuary mortgagee in possession to object, under Order XXI, rule 58, Code of Civil Procedure, 1908, to an attachment of the mortgaged property (which means an attachment of the equity of redemption, being the right, title and interest of the judgment-debtor) at the instance of a person who holds a money decree against the mortgagor, and, therefore, when such an objection is made and dismissed for default, and the mortgagee does not thereupon bring a suit, rule 63 of Order XXI does not debar the objector from subsequently making an application under rule 100.

Sunder Prasad Singh v. *Deodhari Singh*, (1937) I. L. R. 16 Pat. 54

15————*Order XXI, rule* 69—*sale included in the sale list but held on the following date—sale, whether illegal—General Rules and Circular Orders, Volume I, Part I, Chapter VI—rules* 14 *and* 15.

The sale of the holding of the judgment-debtor was advertised to be held on the 4th January 1935 and was included in the sale list of that day, but the sale could not be held on the date for want of time and it was actually held on the 5th January, 1935. The Munsif set aside the sale holding that it contravened the provisions of Order XXI, rule 69.

Held, in revision, that the procedure was in accordance with rules 14 and 15 of the High Court General Rules and Circular Orders, Volume I, Part I, Chapter VI, and that rule 69 of Order XXI does not refer to a case where sales on the same list held in accordance with the rules of the court continue beyond the first day.

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CODE OF CIVIL PROCEDURE, 1908—*contd.*
Raja Bahadur Sir Rajendra Narain Bhunj Deo v. *Debi Choudhary*, (1937) I. L. R. 16 Pat. 408

16———*Order XXI, rule 89—deposit of decretal amount and compensation—part-payment of decretal amount and agreement to pay the balance on a fixed date—time, if can be extended—order refusing to set aside sale if appealable—revision.*

On the 18th of September, 1935, certain properties were sold in execution of a decree and on the same date the judgment-debtors paid a portion of the decretal amount to the decree-holder and a joint petition was filed in court by the decree-holder auction-purchaser and the judgment-debtors to the effect that if the balance of the decretal amount was paid by the 10th of November the sale would be set aside and in case of default the sale would be confirmed. The court was closed on the 10th of November and re-opened on the 13th. On the 14th of November the judgment-debtors applied for a chalan to deposit the amount and the deposit was actually made on the 20th of November and accepted at the risk of the judgment-debtors. The court after hearing the parties held that it had no power to extend the time of payment as agreed to between the parties and confirmed the sale. The judgment-debtors appealed.

Held, that the time fixed for payment was, under the circumstances, of the essence of a contract and on default the sale became automatically confirmed and time could not be extended.

Held, that the application filed on the date of sale jointly by the parties might be treated as an application under Order XXI, rule 89, of the Code and as such the order was appealable.

Held, also that if the order refusing to set aside the sale was held to be wrong, it would have been set aside on the ground of refusal to exercise jurisdiction or of material irregularity in the exercise of jurisdiction. *Rai Saheb Bhagwat Narain Singh* v. *Srinivas*, (1937) I. L. R. 16 Pat. 202

17———*Order XXI, rules 91, 92 and 93—auction-purchaser, if can maintain action for damages on the ground of fraud.*

Plaintiff, a purchaser in execution of a rent decree, having been dispossessed as a result of proceedings under Order XXI, rule 100, of the Code of Civil Procedure, brought an action for damages on the ground that the defendants' servants who acted for him had committed a deliberate fraud.

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Held, that the action was maintainable and that Order XXI, rules 91 to 93 of the Code of Civil Procedure did not bar such an action. When the auction-purchaser has suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which he has thereby sustained.

Order XXI, rule 92, in so far as it bars a suit to set aside a sale must be strictly construed and can have application only to those cases where the matter which is sought to be agitated by means of the suit could be agitated under Order XXI, rules 89 to 91. *Maharajdhiraj Kameshwar Singh Bahadur* v. *Bansidhar Marwari*, (1937) I. L. R. 16 Pat. 196

18————*Order XXI, rule* 100. *See no.* 14, *supra* ... 54

19————*Order XXXVIII, rule* 11. *See* no. 13, *supra* ... 589

20————*Order XXXIX, rule* 1—*stay of execution, when can be granted—rule* 1, *applicability of. See no.* 7, *supra* ... 788

21————*Order XLI, rules* 20 *and* 33—*necessary parties—contribution suit. See* Contribution 557

22————*Order XLI, rule* 21—*application for restoration, whether is an application for review within Article* 182(3) *of the Limitation Act—appeal from order made on such application, whether covered by the clause "when there has been an appeal" within Article* 182(2). *See* Limitation Act, 1908, no. 8 806

23————*Order XLI, rule* 27—*additional evidence, appellate court's power to receive—discretion— additional evidence taken, whether can be left out of account in deciding the case on the merits—principles governing reception of additional evidence.*

Held, that paragraph (*b*) of rule 27 of Order XLI of the Code of Civil Procedure does not lay down that additional evidence should not be received by the appellate court, except on the definite requirement of the court itself and that if the new and additional evidence is produced by one of the parties it should be ignored. There is nothing in the said paragraph which suggests that unless the appellate court finds some good reason for filling up some lacuna in the evidence, the parties have no right to produce such further evidence.

The word "requires" means that it is necessary.

A party is entitled to adduce additional evidence at the appellate stage if the evidence proposed to be offered

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was not available to him at the trial and has since become available to him.

If additional evidence has been admitted and is admissible as relevant the additional evidence must be considered upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds.

Per JAMES, J.—The grounds which would justify the original court if no appeal has been preferred, to review its judgment should always be regarded as substantial cause justifying the admission of additional evidence by the appellate court. *Durga Tewary* v. *Ramrati Kuer*, (1937) I. L. R. 16 Pat. 371

24———*Order XLI, rule 33—appellate court, power of, to interfere with part of decree not appealed against. See* Hindu Law, no. 6 45

25———*Schedule II, paragraphs 14 and 20—reference to arbitration without the intervention of Court—award, when requires registration. See* Arbitration, no. 1 34

26———*Schedule II, paragraphs 14, 20 and 21—arbitration out of court—award in favour of unregistered company objection to enforceability of award under section 69(1) of the Partnership Act, 1932 (Act IX of 1932)—illegality, whether apparent on the face of the award.*

A certain dispute arising out of a contract was referred to arbitration out of court and an award having been made in favour of *D & Co.*, an unregistered company, they made an application under paragraph 20 of the second schedule to the Code of Civil Procedure, 1908, to file the award. The defendant objected to the award being filed on the ground that the unregistered company could not enforce their right under the award by reason of the bar imposed by section 69(*1*) of the Partnership Act, 1932;

Held, that there was no illegality apparent on the face of the award within clause (*c*) of paragraph 14 of the second schedule. *Satish Chandra Chakravarty* v. *P. N. Das & Co.*, (1937), I. L. R. 16 Pat. 742

CODE OF CRIMINAL PROCEDURE, 1898—
1———*sections 54 and 56—issue of written order under section 56, whether limits the power of arrest under section 54.*

The issue of a written order under section 56 of the Code of Criminal Procedure, 1898, does not limit the power of arrest conferred by section 54 of the Code. *Jioo Mian* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 763

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2———*section* 195—*false charge against a Subordinate Judge before District Judge—petition addressed to Governor in Council through District Judge—sanction by local Government—complaint by District Judge, whether necessary under section* 195(*1*) (*b*)—*District Magistrate, whether can take cognizance under section* 190(*c*). *See Penal Code,* 1860, no. 4 571

3———*sections* 242 *and* 342—*summons case—non-examination of accused under section* 242, *when vitiates the trial—non-examination of accused under section* 342, *effect of—prejudice* ... ...

It is not a universal rule that omission to comply with an express provision of the Code of Criminal Procedure must always vitiate the trial.

When in a criminal trial the accused has been examined, the conviction will not be set aside because the examination ought to have been made at a different stage in the proceedings unless it is shown that the accused has been prejudiced.

Magistrates should take care that the record on the face of it establishes that the provisions of section 242 have been complied with. But the omission to explain the particulars of an offence and to ask the accused to show cause, if he is defended and pleads not guilty, does not vitiate the trial, provided no prejudice has been caused and he has been examined under section 342 of the Code. *Sukhdeo Prasad Tiwari* v. *King-Emperor,* (1937) I. L. R. 16 Pat. 97

4———*sections* 282 *and* 283—*Sessions Judge, inherent power of, to discharge a jury. See* Trial by Jury, no. 1 ... 8

5———*section* 307—*Judge, when should refer a case—High Court, whether can direct the Judge to refer the case. See* Trial by Jury, no. 2 413

6———*section* 438—*High Court's power of interference on an incompetent reference under section* 438. *See* Trial by Jury, no. 2 413

7———*sections* 476 *and* 476-*B—appellate court, whether empowered to order a remand—provision of section* 476-*B, whether exhaustive—failure to appeal against order resulting in complaint under section* 476—*accused, whether entitled to question the legality of complaint after conviction.*

The provision of section 476-B, Code of Criminal Procedure, 1898, as to the powers of the appellate court not being exhaustive, the appellate court has power to order a

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remand and to direct the trial court to make a preliminary enquiry to find out if there are sufficient materials to file a complaint.

A person who has not appealed against an order resulting in a complaint under section 476, Code of Criminal Procedure, 1898, cannot subsequently question the legality of the complaint after his conviction by the trial court and its confirmation by the appellate court. *Kunjo Chaudhury* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 650

8————*section 512—evidence recorded at the trial when admissible against absconding accused—separate proceeding, if necessary—procedure.*

When an accused person is tried and other accused persons are absconding proper steps ought to be taken at the time of the trial of the first accused in accordance with section 512 of the Code of Criminal Procedure to prevent necessary evidence from being lost by death of the witnesses or otherwise.

It is not necessary to start separate proceeding under section 512 of the Code. It will suffice if at the commencement of the inquiry or trial the prosecutor proves that a certain person is absconding and gets an order from the court that the evidence about to be taken is being taken for the purpose of being used against the absconder. *King-Emperor* v. *Baharuddin*, (1937) I. L. R. 16 Pat. ... 116

9————*section 517—conviction under section 17(2) (a) of the Bihar and Orissa Mica Act (Bihar and Orissa Act 1 of 1930)—excess amount of mica, whether can be confiscated—"mica", whether is property "regarding which any offence appears to have been committed". See* Bihar and Orissa Mica Act, 1930 323

COMPROMISE—*sale in execution—deposit of decretal amount and compensation—part-payment of decretal amount and agreement to pay the balance on a fixed date—time, whether can be extended—time, whether is of the essence of the contract. See* Code of Civil Procedure, 1908, no. 16 ... 202

CONFESSION—*retracted confession of an accused, whether admissible against co-accused—rule of prudence. See* Criminal Trial, no. 2 612

CONSTRUCTION OF STATUTE—*fiscal statute, interpretation of. See* Code of Civil Procedure, 1908, no. 5 600

CONTEMPT OF COURT—*injunction, disobedience of—persons acting under authority derived from defendant, if bound, although not parties to the suit—lease or contract under mutual*

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CONTEMPT OF COURT—*contd.*

mistake, effect of—party in doubt as to effect of Court's order, if can move the court for directions—nature of possession of third party in execution under the Code of Civil Procedure.

The Government leased the mineral rights to the plaintiff Company for quarrying of lime-stones in the Murli Hill in the district of Shahabad. Subsequently the Company went into liquidation and entered into an agreement with Bose for the sale of their rights to him which required the sanction of Government. Bose entered upon the property but was stopped by the order of the Government who authorised Kalyanpur Company to carry on quarrying operations. The plaintiff Company brought a suit against the Government and prayed for an injunction restraining them from granting a lease to Kalyanpur Company, or from authorising them to carry on operations and otherwise interfering with their rights and possession.

The plaintiff Company did not admit dispossession but complained against interference. The suit was dismissed and they appealed to the High Court and obtained an order for temporary injunction which was made permanent after the decision of the appeal in favour of the plaintiff Company.

The temporary injunction was served upon the Government who informed the Kalyanpur Company about it and also warned them that they could disobey it at their own risk.

After the decree of the High Court the plaintiff Company was obstructed by the Kalyanpur Company and representations to the Government and the Kalyanpur Company were of no avail. The plaintiff Company thereafter moved the High Court for an order of committal for contempt of Court.

Held, (*i*) that although the Government in granting and the Kalyanpur Company in accepting a lease or a contract for lease were under the impression that the Government had a title to grant such a lease or contract, the agreement had no binding effect for they were under a mutual mistake of fact as to the plaintiff's title and it was the duty of the Government after the judgment to repudiate the contract and withdraw any license or authority given by them to the Kalyanpur Company;

(*ii*) that if the Government had any doubt as to their position after the injunction in the matter of abiding by the contract with the Kalyanpur Company they should have asked for direction from the Court;

(*iii*) that the injunction order was binding on the Kalyanpur Company for they were thoroughly aware of the

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CONTEMPT OF COURT—*concld.*

injunction and were thoroughly aware that their presence upon the quarry with the permission of the Government was setting at naught the order of the Court;

(*iv*) that the possession of the Kalyanpur Company under the circumstances could not be treated as that of a third party under the Civil Procedure Code in execution proceedings. *Kuchwar Lime and Stone Company, Limited* v. *Secretary of State for India in Council*, (1937) I. L. R. 16 Pat. 159

CONTRACT—

1———*contract made under mutual mistake, effect of.* *See* Contempt of Court 159

2———*judgment-debtor, failure of, to pay sum agreed within certain time—time, whether is of the essence of the contract—forfeiture, whether court can relieve against.* *See* Forfeiture 395

3———*time, when is of the essence of the contract.* *See* Code of Civil Procedure, 1908, no. 16 202

CONTRIBUTION.—*Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 82—*sale of mortgaged properties—consideration left with vendee and mortgagee—purchaser taking free from encumbrance, if liable to contribute—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XLI, rules* 20 *and* 33—*necessary parties in a contribution suit—"contract to the contrary", whether includes a contract between the mortgagee and purchasers from mortgagor—interest pendente lite, whether in the discretion of the court.*

B mortgaged villages *T* and *L* along with other properties to *S* and subsequently sold them to *G* and also executed a mortgage in his favour, but left the consideration for payment to *S* and other mortgagees. *G* from whom the two villages ultimately passed to the plaintiff under an *ekrarnama* of his heirs and other transactions did not pay the mortgagees who obtained decrees and the plaintiff had to pay. The plaintiff thereafter sued for contribution and impleaded as defendants the persons who were in possession of the other mortgaged properties and persons liable under the *ekrarnama*. The Subordinate Judge decreed the suit but exempted the purchasers who had purchased free from encumbrances.

Held, that as *G* had enough money in hand to pay off the mortgagees the defendants who had purchased free from encumbrance were not liable to contribute.

The words "contract to the contrary" in section 82 of the Transfer of Property Act does not necessarily refer to a contract between the mortgagor and mortgagee, but may include a purchaser from the mortgagor.

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CONTRIBUTION—*concld.*

In a contribution suit it is necessary that all the parties should be before the court, and in such a suit the powers of the appellate court under rule 33, read with rule 20, of Order XLI will be used without any hesitation although the suit was based on more than one cause of action, namely, liability arising under section 82 of the Transfer of Property Act and under the *ekrarnama*.

Interest *pendente lite* is a matter in the discretion of the court. *Isri Prasad Singh* v. *Jagat Prasad Singh*, (1937) I. L. R. 16 Pat. 557

CO-SHARER—*mortgage by co-sharer of undivided share in property jointly held by co-sharers—partition—other co-sharers take mortgaged property free from mortgage—mortgagee's right to proceed against the property allotted to his mortgagor. See* Mortgage, no. 1 622

CO-SHARER LANDLORD—*whether entitled to benefit of section 26N of the Bihar Tenancy Act. See* Bihar Tenancy Act, no. 1 500

COURT-FEES ACT, 1870.—

1———*section 6—plaint insufficiently stamped—court, whether has power to grant time for filing deficit court-fee—payment of deficit fee, effect of. See* Code of Civil Procedure, 1908, no. 5 600

2———*section 7 (iv) (c) and 7(v)—suit for partition—averment in plaint, whether the sole guide for ascertainment of court-fee leviable—ad valorem court-fee, whether can be demanded if the defendant pleads adverse possession—practice.*

It has not ordinarily been the practice of the Patna High Court to depend exclusively on the averment in the plaint for the ascertainment of what should be the proper court-fee payable, which should be determined on an appreciation of what the plaintiff really sought.

The plaintiff cannot be required to pay ad valorem court-fee in a partition suit merely because the defendant pleaded adverse possession.

But the court should be astute to see that plaintiff should not avoid liability to pay court-fee under section 7(*iv*) (*c*) or section 7(*v*) of the Act merely by omitting to assert a prayer for possession in what was essentially a title suit in the guise of a partition suit. *Nand Kishor Kumar* v. *Achambit Kumer*, (1937) I. L. R. 16 Pat. ... 491

3———*section 7, clauses (iv), (c) and (v)—suit for declaration and consequential relief—suit for possession, wrong decision as to category in which a case falls for the purpose of levying court-fee, if revisable—High Court powers*

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COURT-FEES ACT, 1870—*contd.*

of interference in revision—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 115—*obiter dictum, meaning of.*

Where a lower court has jurisdiction to decide question of law and fact, the superior court will not exercise revisional jurisdiction against the decision whether it be right or wrong, but the superior court will interfere in revision where the jurisdiction is derived from statute and the matter is one of the construction of the statute.

It is a fundamental point of our jurisprudence that the Crown cannot levy taxation unless such taxation be authorised by law. The court is given power to levy taxes upon certain classes of cases only which are specified in the Act and upon each class at the rate specified in the Act.

In deciding the question of court-fee the court decides an issue not as between the plaintiff and the defendant, but decides an issue as between the plaintiff and the Crown. If the decision be adverse to the plaintiff it amounts to a decision to refuse to exercise its jurisdiction to try the issue and such decision is subject to the revisional jurisdiction of the High Court.

Where, however, the decision is in favour of the plaintiff it is not open to the defendant to apply to the court for revision.

The Court-fees Act in sub-section (*iv*) is dealing with claims which do not yield themselves readily to any statement of money value and in leaving the matter to the plaintiff's valuation, subject to sections 4 and 9 of the Suits Valuation Act, it proceeds just as much upon a considered policy as it does when, by Article 17 of Schedule II of the Act, it charges certain classes of suits with a fee which is irrespective of value.

Section 7, paragraph (*iv*)(*c*), has application to declaration properly so called, such for instance as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. Indeed declarations in the true sense are rarely required.

Therefore, the valuation of the suit for court-fee purposes is to be determined by the question of whether the suit is really one for a declaration in the true sense of the word, or whether it is a suit for possession; and, if there be a claim in the plaint for declaration the plaint should be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really a suit for possession.

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COURT-FEES ACT, 1870—*concld.*

A judgment does not become obiter dictum merely because the decisions on other points were sufficient to dispose of the case. *Ramkhelawan Sahu* v. *Bir Surendra Sahi*, (1937) I. L. R. 16 Pat. 766

CRIMINAL TRIAL.—

1———*omission to comply with express provision of Code, whether vitiates trial—examination of accused at a different stage—no prejudice—conviction, whether should be set aside. See* Code of Criminal Procedure, 1898, no. 3 ... 97

2———*retracted confession of an accused, whether admissible against co-accused—corroboration—rule of prudence.*

A retracted confession by an accused person is admissible against a co-accused but the rule of prudence is to seek corroboration before the conviction of the co-accused is based thereon; the question as to what the nature of the corroboration should be depends upon the facts of each particular case. *King-Emperor* v. *Mangru Kisan*, (1937) I. L. R. 16 Pat. 612

DAMAGES.—

1———*Railway Company—suit for damages—negligence, what constitutes—contributory negligence—plaintiff, when entitled to succeed. See* Railway Company 672

2———*Tort—subsidence of mines—right of owner of surface rights to damages caused to buildings and machinery—joint Hindu family—liability of members in possession of the mines for subsidence due to working of the mines in the life-time of the father—personal liability. See* Tort ... 542

EVIDENCE ACT, 1872.—

1———*section 32—statement as to motive in dying declaration, admissibility of—written record of statement made by deceased—mode of proof required.*

Where in the dying declaration the deceased stated that the accused had assaulted him " on account of enmity caused by my acting as a wizard ", *held*, that the statement made by the deceased was a statement " as to the circumstances of the transaction which resulted in his death " so as to be admissible under section 32(1) of the Evidence Act, 1872.

The law is not that the written record of a statement made by a deceased person cannot be used at all but that it is not to be used without first examining as a witness the person who heard the statement made.

The case against the accused persons was instituted on the first information laid by the deceased himself and recorded by a police officer. Subsequently a Magistrate

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EVIDENCE ACT, 1872—*concld.*
took his statement as a dying declaration. The statement to the police was sought to be proved by the evidence of the police officer who deposed that the information was recorded by him on the statement of the deceased in presence of attesting witnesses who also signed the first information and that he took down the first information report " in the own words of the injured ". The Magistrate who had recorded the dying declaration proved the statement and deposed that the deceased was in his senses and that he read over the statement to him and he admitted it to be correct.

Held, that there was sufficient proof of the statements to make them admissible under section 32 of the Evidence Act, 1872. *King-Emperor* v. *Somra Bhuian*, (1937) I. L. R. 16 Pat. 593

2————*sections* 32(4) *and* 83—*judgments, relevancy of, as evidence of title against third parties. See* Bengal Tenancy Act, 1885, no. 5 258

EXECUTING COURT—*amendment of decree after it is dead—executing court, whether can go behind the order of amendment. See* Limitation Act, 1908, no. 7 ... 290

EXECUTION.—

1————*amendment made after execution of decree becomes time-barred—amendment, whether serves limitation. See* Limitation Act, 1908, no. 9 453

2————*order for transfer of decree, whether is a step-in-aid of execution. See* Limitation Act, 1908, no. 10 ... 288

3————*minor judgment-debtor—described as major in execution petition—guardian ad litem appointed after expiry of limitation—execution, whether barred—Order-in-Council passed against a dead person, whether is a nullity—order for execution after issue of notice—execution proceeded against all the judgment-debtors—no separate order against minor judgment-debtor—decree, whether revives against all—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 183—*homestead land not forming part of agricultural holding, whether exempt from sale—Chota Nagpur Tenancy Act*, 1908 (*Beng. Act VI of* 1908), *section* 47.

An Order-in-Council does not become a nullity merely because it is passed against a dead person.

An execution is not necessarily barred merely because one of the judgment-debtors is not described as a minor in the execution petition and the guardian ad litem is not appointed till after the period of limitation. The subsequent appointment of a guardian ad litem does not amount to the addition of a new party to the suit or proceeding which must be deemed to have been instituted against the minor on the date on which it was filed.

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EXECUTION—*concld.*

Where there was an order for execution after the issue of notice under Order XXI, rule 22, Code of Civil Procedure, 1908, and the execution did in fact proceed against all the judgment-debtors named in the execution petition and a portion of the decretal amount was realised, *held*, that there was a revivor of the decree against all the judgment-debtors named in the petition, within the meaning of Article 183 of the Limitation Act, 1908, although the court had not passed a separate order dealing with the case of the minor judgment-debtor.

Parcels of land which do not form part of an agricultural holding but are either homestead land or form part of the compound of a house do not come within the purview of section 47 of the Chota Nagpur Tenancy Act, 1908. *Ghasiram Marwari* v. *Raja Shiba Prasad Singh*, (1937) I. L. R. 16 Pat. 316

4————*stay of execution by injunction, when can be granted. See* Code of Civil Procedure, 1908, no. 7 ... 738

EXECUTION SALE—*decree against judgment-debtor and his sons —property of both sold in execution and purchased by decree-holder—suit by sons for exemption of their share—sons exempted from operation of decree—court, whether competent to award compensation to auction-purchaser—* caveat emptor, *doctrine of, whether applicable. See* Code of Civil Procedure, 1908, no. 6 729

FORFEITURE—*execution—judgment-debtor, failure of, to pay sum agreed within certain time—time, if of the essence of the contract—forfeiture, whether court can relieve against—court, whether can extend time—equity.*

Equity only intervenes to do complete justice between the parties. A Court of Equity will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence.

Where during the pendency of execution proceedings the decree-holder agreed to accept a smaller sum in full satisfaction of the entire decree if payment was made in two months and, in case of default, he was to proceed with the execution without the judgment-debtor being competent to raise any objection, *held*, that time was of the essence of the contract and this was not a case of forfeiture of the kind where equity would relieve the judgment-debtor.

An executing court cannot extend the time of payment agreed upon by the parties without the consent of the decree-holder. *Kissen Gopal Ganwariwala v. Madan Lal*, (1937) I. L. R. 16 Pat. 395

FRAUD—

1————*auction-purchaser dispossessed as a result of proceedings under Order XXI, rule* 100, *Code of Civil Procedure*

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FRAUD—*concld.*
(*Act V of* 1908)—*action for damages, if maintainable. See* Code of Civil Procedure, 1908, no. 17 196

2———*deceitful act wilfully exposing anyone to risk of loss, whether amounts to fraud. See* Penal Code, 1860, no. 5 688

GENERAL CLAUSES ACT, 1897—*section 25—rules framed under the Sugar-cane Act, 1934—conviction for breach of rules—sentence of imprisonment, whether can be awarded in default of fine—Penal Code,* 1860 (*Act XLV of* 1860), *sections 64 and 67. See* Sugar-cane Act, 1934, no. 1 ... 92

GENERAL RULES AND CIRCULAR ORDERS—*rules 14 and 15, Chapter VI, Part 1 of Voume 1—sale included in the sale list but held on the following date—sale, whether illegal. See* Code of Civil Procedure, 1908, no. 15 408

GHAIRMAZRUA-AM.—
1———*landlord, whether can settle.*

A landlord has no right to settle ghairmazrua am land even if the settlement does not interfere with the right of the public. *Sheikh Amiruddin* v. *Sonelal Jha*, (1937) I. L. R. 16 Pat. 484

2———*meaning of—zamindar, whether has any right of control over such lands. See* Record-of-rights, no. 1 ... 889

HANDNOTE—*suit on handnote found to be forged—decree, whether can be passed to the extent of the amount admitted.*

The plaintiff instituted a suit for the recovery of Rs. 1,950 on the basis of a handnote alleged to have been executed by the defendant. It was not the case of the plaintiff that there was a previous debt independent of the handnote. The defendant admitted that he had borrowed Rs. 950 only and that the handnote had been tampered with.

Held, that the handnote having been found to be forged no decree could be passed in plaintiff's favour *Laddu Ram Marwari* v. *Bansidhar Marwari*, (1937) I. L. R. 16 Pat. 527

HINDU LAW.—
1———*Hindu father adjudicated insolvent—Court or Receiver, whether empowered to sell son's interest in family property for the proper debts of the father. See* Provincial Insolvency Act, 1920, no. 1 60

2———*Impartible Estate—Incorporation of property with Estate—Khorposh—Purchase of Khorposhdar's interest by holder of estate—Effect of purchase.*

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HINDU LAW—*contd.*

The interest of a khorposhdar in the land granted to him for maintenance by the holder of an impartible estate is not an impartible estate and the purchaser of that estate steps into the shoes of the khorposhdar and holds it as partible property subject to the ordinary rule of succession. The mere fact of the purchase of the khorposhdar's interest by the holder of the ancestral impartible estate does not cause a merger of the estate purchased in the ancestral estate. *Someshwari Prasad* v. *Maheshwari Prasad*, (1937) I. L. R. 16 Pat. 1

3———*Joint family—mortgage by one member of undivided share, if void ab initio—mortgagor representing that he was separate—transferee for value without notice—Transfer of Property Act*, 1882 (*Act IV of* 1882), *sections* 3, 43—*Transfer of Property* (*Amendment*) *Act*, 1929 (*Act XX of* 1929), *section* 4.

G, a member of a joint Hindu family, mortgaged his 1/6th share in certain properties alleging that he was separate from the other members of the family to *J* in 1918. In 1928 there was a formal partition and in 1929 *G* mortgaged a part of the property which had fallen to him on partition to *K* and also sold a portion to *L*. *J* instituted a suit on the basis of the mortgage aforesaid and impleaded the sons of *G* and *K* and *L* as defendants. The defendants pleaded inter alia that since *G* was a member of the joint family when the mortgage was executed nothing was conveyed by the transaction. The Subordinate Judge held that as the mortgagor represented to the mortgagee that he was separate the provisions of section 43 of the Transfer of Property Act applied, and the subsequent transferees although for value were not protected as they had failed to prove want of notice. *K* and *L*, the subsequent transferees, appealed.

Held, that a mortgage by a member of a joint Hindu family is not void but voidable at the option of the other members of the family or any one of them.

Section 43 of the Transfer of Property Act provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Therefore the mortgage lien was transferred on that portion of the property which the mortgagor had obtained on partition. *Rai Bahadur Kharag Narain* v. *Janki Rai*, (1937) I. L. R. 16 Pat. 280

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HINDU LAW—*contd.*

4————*joint Hindu family—subsidence of mines—liability of members in possession of the mines for subsidence due to working of the mines in the life-time of the father—personal liability. See* Tort 545

5————*joint Hindu family, whether as such can be adjudicated insolvent—members, adjudication of—joint personal liability necessary—minors, whether must be excluded. See* Provincial Insolvency Act, 1920, no. 2 ... 724

6————*" Legal necessity ", meaning and significance of—female owner, whether entitled to alienate property for payment of time-barred debt incurred for legal necessity—karta, power of, whether differs, from that of limited owner—appellate court, power of to interfere with part of decree not appealed against—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order XLI, rule* 33.

In deciding the question of what constitutes " legal necessity " under the Hindu law, the court must include all those " necessities " which the Hindu law-givers have recognised as legal, justifying an alienation of property by a limited owner.

Hindu law does not recognise law of limitation.

Held, therefore, that a female owner, having a limited interest, is entitled to alienate the property in her possession for the payment of a debt, incurred by her for legal necessity, although the debt may have become time-barred.

The power of a karta of a joint family differs from that of a limited owner; the former acts under an implied authority of the co-parceners which authority does not extend to his paying a barred debt, but the latter, within certain limits, is an owner and there is nothing to debar her from paying up a debt which she has legally incurred.

Obiter: Although the power of the appellate court is wide, the cases in which it should interfere with the decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed against that justice cannot be done unless the portion against which no appeal has been preferred is also interfered with.

Where, therefore, there are two distinct decrees against two different persons on two separate causes of action, although in form there is only one decree, the appellate court should not interfere with that part of the decree against which there has been no appeal. *Daroga Rai* v. *Basdeo Mahto*, (1937) I. L. R. 16 Pat. 45

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HINDU LAW—*contd.*

7————*legal necessity—money borrowed partly for paying up rent of a joint family business not being ancestral—part of the loan incurred for this purpose, whether binding on joint family estate.*

Where a loan was incurred on the security of the joint family property and it was found that a portion of the money was borrowed for paying up the rent of a joint family business of ferry-farming which was not ancestral and there was a minor member in the joint family, *held*, that the business not being ancestral, the payment of rent was not a justifying legal necessity qua the joint family estate, and, therefore, that the creditor was not entitled to a mortgage decree in respect of the amount which was borrowed for this purpose.

Ganesh Prasad Singh v. *Sheogobind Sahu*, (1937) I. L. R. 16 Pat. 719

8————*Math—Mahanth, power of, to alienate* math *property—unavoidable necessity—alienation by compromise, whether permissible—suit by succeeding mahanth to set aside compromise decree, whether barred.*

Under Hindu law a mahanth is in no sense a trustee in the English sense of the term, but he is a mere manager or custodian of the *math* property on behalf of the deity who is a juristic entity. The property is not vested in the mahanth who is in the position of a life-tenant.

Therefore, the power of a mahanth to create an interest in *math* property so as to enure beyond his own term of office is limited to cases of unavoidable necessity.

Even if a lease created by a mahanth and valid for his life-time be adopted by his successor, the effect will be the creation of a new lease valid only during the successor's term of office.

Likewise, a mahanth cannot by compromise alienate lands for debts not incurred for legal necessity and merely to avoid the expense and trouble of proceeding with a suit which had been brought for setting aside the alienation.

While in such cases the actual pressure on the estate at the time of the loan is a matter to be considered, the case where the danger arises from misconduct to which the lender himself has been a party, is to be excluded.

A suit by the succeeding mahanth to set aside such a compromise, embodied in a decree of the court, and for recovery of the *math* property brought within twelve years of his succession to the *math*, is not, therefore, barred. *Mahanth Ramdhan Puri* v. *Musammat Parbati Kuar*, (1937) I. L. R. 16 Pat. 476

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HINDU LAW—*concld.*

9———*joint Hindu family consisting of brothers—alienation by guardian—elder brother and manager, whether competent to give up right to sue without the concurrence of the other—suit for setting aside alienation more than three years after elder's majority but within three years of the younger attaining majority—limitation. See* Limitation Act, 1908, no. 1 422

10———*promissory note executed by manager—suit—other co-parceners, whether liable—Negotiable Instruments Act,* 1881 (*XXVI of* 1881), *section* 28—*manager, whether personally liable—co-parceners, extent of the liability of.*

Under the Hindu law all that is necessary to make every member of the family liable for the debt is that it should have been contracted for legal necessity or for the benefit of the family. Where, therefore, the benefit is proved the court will not be justified in refusing to grant the appropriate relief to the creditor unless it is compelled to do so by something to be found in the Negotiable Instruments Act or the principles underlying it.

Under the law of negotiable instruments it is necessary that the name of the person to be charged should be disclosed in the document in such a way that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand.

But when the karta of a joint Hindu family, which is an institution peculiar to this country, borrows money for the family purposes he is not acting as an agent for an undisclosed principal or principals but may well be regarded as the principal. At any rate, when he acts as a karta, he acts in a capacity which is so well-known that there can be no misapprehension as to the identity of the person or persons whom he purports to bind by his act.

The rule laid down in *Sadasuk Janki Das* v. *Sir Kishan Prasad*(1) is not, therefore, applicable to a Hindu family.

A manager of joint Hindu family who has contracted the debt is liable not only to the extent of his share in the joint family assets, but, being a party to the contract, he is liable personally; other co-parceners, however, are liable only to the extent of their interest in the family property, unless in the case of adult co-parceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified. *Sirikant Lal* v. *Sidheshwari Prasad Narain Singh*, (1937) I. L. R. 16 Pat. 441

(1) (1918) I. L. R. 46 Cal. 668, P. C.

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HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.—*Act, whether applies to succession opening after the Act came into force—"Hindu male dying intestate", meaning of—presumption of intention in case of person dying intestate.*

Where a Hindu male dies intestate leaving his widow or other limited owner, who dies after the enforcement of the Hindu Law of Inheritance (Amendment) Act, the succession to his estate is governed by the said Act.

The date of the death of the male owner is not material as the question as to who would be entitled to succeed to his estate as a reversioner cannot be determined until the death of the female owner.

The words "Hindu male dying intestate" do not mean a Hindu male who will hereafter die intestate. The words "dying intestate" which qualify the preceding words "Hindu male" are merely descriptive and limit the operation of the Act to those Hindu males who answer the description.

It being impossible to predicate as to who would succeed to the estate until the succession opens, it is difficult to say that a person who dies intestate had contemplated at the time of his death that he would be succeeded by any particular person or persons. There will be still less justification for presuming that if he had known that a change was going to be effected in the existing law he would have disposed of his property by means of a Will. *Pokhan Dusadh* v. *Musammat Manoa*, (1937) I. L. R. 16 Pat. ... 215

IMPARTIBLE ESTATE—*Hindu Law—Incorporation of property with Estate—Khorposh—Purchase of khorposhdar's interest by holder of estate—Effect of purchase. See* Hindu Law, no. 2 1

INJUNCTON.—

1———*disobedience of—persons not party to suit but acting under authority derived from a party, whether bound by order. See* Contempt of Court 159

2———*stay of execution by injunction, when can be granted. See* Code of Civil Procedure, 1908, no. 7 ... 738

INLAND STEAM-VESSELS ACT, 1917—*section 58—mens rea, element of, whether necessary for conviction—certificate, whether required to be in force—contravention of certificate last issued—offence committed when certificate under renewal—conviction, whether bad.*

Section 58 of the Inland Steam-Vessels Act, 1917, provides:—

"If an inland steam-vessel has on board or in any part thereof a number of passengers which is greater than the number set forth in the certificate of survey as the number of passengers which the vessel or the part thereof is, in the judgment of the surveyor, fit to carry, the owner and the master shall each be punishable with fine which may extend to ten rupees for every passenger over and above that number."

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INLAND STEAM-VESSELS ACT, 1917—*concld.*

Held, (*i*) that the language of the section gives no option to the Magistrate but to hold the owner and master liable if the section is contravened; the question of mens rea does not arise.

(*ii*) that section 58 does not contemplate that the certificate must be in force; for the purpose of this section the certificate intended is the certificate last issued for the steamer, and it is immaterial that the certificate was under renewal at the time the offence was committed. *Rivers Steam Navigation Company, Ltd.* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 668

INTEREST.—

1———*interest pendente lite, whether in the discretion of the court. See* Contribution 557

2———*rate of interest on mesne profits, what should be. See* Mesne Profits 882

KHORPOSH—*Hindu Law—Purchase of khorposhdar's interest by holder of impartible estate—Incorporation of property with estate—Effect of purchase. See* Hindu Law, no. 2 ... 1

LEGAL PRACTITIONER.—

1———*Mukhtarnama or Vakalatnama to withdraw money—responsibility of Vakils and Mukhtars in accepting.*

A mukhtar accepted a mukhtarnama, authorising him to withdraw money from court, offered to him by the karta of a joint Hindu family who was known to him from before and who was accompanied by two other members of the family, but it subsequently transpired that the thumb impression of one other member and the signature of two others was false;

Held that although the money had not been withdrawn and the conduct of the mukhtar was honest throughout, but he neglected the precaution which the court has laid down in the public interest as regards the acceptance of mukhtarnama and was warned.

The rules of the High Court in regard to the acceptance of vakalatnama or mukhtarnama are very strict and still more strict in the case of mukhtarnama and vakalatnama for the purpose of withdrawing money. The responsibility for the genuineness of the authorization of mukhtars or vakils are of a wholesome character and for the protection of the public. *Deobansh Singh, In the matter of*, (1937) I. L. R. 16 Pat. 123

2———*identification by professional mukhtars, whether should be accepted. See* Mukhtar 121

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LIMITATION—*minor judgment-debtor described as major in execution petition—guardian ad litem appointed after expiry of limitation—execution, whether barred. See* Execution, no. 3 816

LIMITATION ACT, 1908.—

1———*section 7—"discharge", significance of—Joint Hindu family consisting of brothers—alienation by guardian—elder brother and manager, whether competent to give up right to sue without the concurrence of the other—suit for setting aside alienation more than three years after elder's majority but within three years of the younger attaining majority—limitation.*

In an undivided Hindu family governed by the law of Mitakshara an elder brother who has attained majority and is the manager of the family can, without the concurrence of his minor brother or brothers, give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors.

Held, therefore, that under section 7 of the Limitation Act, 1908, a suit brought by two brothers to set aside an alienation by their guardian more than three years after the elder brother, who was the karta of the brothers' family, attained majority is barred by limitation not only as regards the elder brother's share but also in respect of the share of the younger brother in the family property, though the latter attained majority within three years prior to the institution of the suit.

The term "discharge" in section 7 of the Limitation Act, 1908, does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immovable property, such as the equity of redemption or a release of other rights, as for instance, a right to institute a suit. *Karan Singh* v. *Musammat Tetar Kuer*, (1937) I. L. R. 16 Pat. ... 422

2———*section 20—Limitation (Amendment) Act, 1927 (Act I of 1927)—Payment made after 1928—"as such," whether redundant.*

Held, that as to payment made before the first day of January, 1928, the words "as such" have some significance because they make it clear that in the case of a payment towards interest which is not required to be evidenced by writing it should be clear that the payment was in fact towards interest and not left as a matter of doubt. But as to payment made after the first day of January, 1928, the words "as such" have no significance. *Bankanidhi Tantra* v. *Godipatna Co-operative Society*, (1937) I. L. R. 16 Pat. 294

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LIMITATION ACT, 1908—*contd.*

8———*section* 20—*payment by debtor without specification—appropriation by creditor must be taken as payment out of interest " as such "—payment " as such ", whether applies to payment towards interest or towards principal.*

Held, that under section 20 of the Limitation Act if the creditor relies upon a payment of interest it must be a payment of interest " as such ", but as regards a payment towards principal no such specification is necessary.

Where the creditor relied on a certain payment as an acknowledgment of payment within the meaning of section 20 of the Limitation Act, 1908, and the debtor contended that the payment having been made without specifying whether it was towards principal or interest, the payment could not save limitation;

Held, that the creditor having appropriated the payment towards interest and the debtor having consented, it must be assumed that the amount was paid on account of interest " as such " within the meaning of section 20 of the Limitation Act. *Liquidator, Bagha Co-operative Society* v. *Devi Mangal Prasad Sinha*, (1937) I. L. R. 16 Pat. 27

4———*articles* 62, 109 *and* 120—*plaintiff entitled to recover rent from tenant from 20th July—defendant receiving rent from tenant in advance for September kist—suit by plaintiff to recover amount received by defendant—proper article applicable. See* Rent 184

5———*Articles* 115 *and* 120—*suit by Municipality against person authorised to collect tolls, if governed by Article* 115 *or* 120.

A suit by the Municipality to recover the balance of the sum agreed to be paid by the farmer, with whom the right to collect tolls in a market is settled at a specified sum, is governed by Article 115 of the Limitation Act. *Chairman and Commissioners of the Chaibasa Municipality* v. *Govind Sao*, (1937) I. L. R. 16 Pat. 302

6———*article* 120—*suit by Municipality to recover sum agreed to be paid by farmer for his right to collect tolls, whether governed by Article* 120: *See* no. 5, *supra* ... 302

7———*Article* 182—*limitation runs from date of amendment—amendment made after the decree was dead—executing court, if can go behind the order of amendment—res judicata.*

Where a decree was amended more than three years after it was passed and the judgment-debtor objected to the execution of the amended decree on the ground that the order of amendment was bad in law.

LIMITATION ACT, 1908—*contd.* PAGE.

Held that it was not open to the executing court to go behind the order of amendment and to enquire if the decree was really barred on the date of amendment or not. The question was res judicata. *Magan Lal Marwari* v. *Sitaram Panna Lal*, (1937) I. L. R. 16 Pat. 290

8——————*article* 182, *clauses* (2) *and* (3)—" *when there has been an appeal* ", *meaning of—appeal from order made on an application for restoration under Order XLI, rule* 21, *Code of Civil Procedure, whether covered by Article* 182(2) *—application for restoration, whether is an application for review within the meaning of Article* 182(3).

Article 182 of the Limitation Act, 1908, provides a period of three years for the execution of a decree, the starting point being ... ...

"(2) where there has been an appeal, the date of the final decree or order of the appellate Court, or (3) where there has been a review of judgment, the date of the decision passed on the review."

Held, (*i*) that the words " where there has been an appeal " in clause (*2*) do not mean, in their strict grammatical construction, that the appeal must be against the decree in the suit; they include an appeal against an order made on an application for re-hearing under Order XLI, rule 21, Code of Civil Procedure, 1908;

(*ii*) that all cases in which the Court reconsiders its own judgment are cases of review *within the meaning of* clause (*3*) of Article 182, and, therefore, that an order made on an application for restoration under Order XLI, rule 21, Code of Civil Procedure, is an order passed on review within clause (*3*).

A suit for money was dismissed by the trial court on the 8th January, 1931. The plaintiff appealed and on the 7th of August, 1931, the appeal was allowed and the suit decreed ex parte. The defendant made an application for restoration under Order XLI, rule 21, Code of Civil Procedure, but this was dismissed by the Subordinate Judge on the 19th November, 1931. Thereupon the defendant appealed from the order of dismissal to the High Court but the appeal was dismissed on the 1st September, 1933. The application for execution was made on the 15th November, 1934.

Held, (*i*) that the application for execution was within time;

(*ii*) that if no appeal had been preferred from the order on the application for restoration, the date of the order of the Subordinate Judge (19th November, 1931) would have been the starting point for limitation under clause (*3*) of Article 182, but as an appeal from this order had been

LIMITATION ACT, 1908—*concld.* PAGE.

preferred the case came within clause (*2*) and the starting point for limitation was the date of the final order of the High Court dismissing the appeal. *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*, (1931) I. L. R. 10 Pat. ... 806

9———*article* 182, *clause* (*4*)—*nature of amendment contemplated—amendment made after execution of decree is barred, whether saves limitation.*

Where an application for the amendment of decree was made more than three years after the decree was passed and without notice to the judgment-debtor and the amendment which was of a trifling nature was allowed, *held*, that the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term and not merely the correction of clerical error or trifling arithmetical mistakes such as the court might at any time correct of its own motion and therefore Article 182 (*4*) had no application and the application for execution was barred by limitation.

If clause (*4*) of Article 182 is to be literally construed there can be no escape from the conclusion that the amendment of a decree provides a fresh starting point for limitation and it is immaterial whether application for amendment was made within three years of the date of the decree or more than three years after it. But reading Article 182 as a whole it appears doubtful whether it was contemplated by the legislature that a decree, execution of which is barred under clause (*1*), should be revived by mere amendment.

Clauses (*2*) *and* (*4*) have been somewhat unhappily drafted and should be suitably amended. *Rameshwar Narain Misra* v. *Raghunandan Purbey*, (1937) I. L. R. 16 Pat. 453

10———*Article* 182(*5*)—*step-in-aid of execution—order for transfer of decree, whether is.*

An order for the transfer of a decree for execution is a step-in-aid of execution within the meaning of Article 182, clause (*5*) of the Limitation Act. *Bhagwat Sahay* v. *Ram Sukrit Ram*, (1931) I. L. R. 16 Pat. 288

11———*Article* 183—*Order-in-Council, execution of—issue of notice—execution proceeded against all the judgment-debtors—no separate order against minor judgment-debtor—decree, whether revives against all. See* Execution, no. 3 316

LIMITATION (AMENDMENT) ACT, 1927—*Limitation Act*, 1908 (*Act IX of* 1908), *section* 20—*payment made after* 1928—" *as such* ", *significance of. See* Limitation Act, 1908, no. 2 ... 294

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MAHANTH.—*Hindu Law—mahanth, power of, to alienate math property—unavoidable necessity—alienation by compromise, whether permissible—suit by succeeding mahanth to set aside compromise decree, whether barred. See* Hindu Law, no. 8 476

MATH.—*Mahanth, power of, to alienate math property—unavoidable necessity—alienation by compromise, whether permissible—suit by succeeding mahanth to set aside compromise decree, whether barred. See* Hindu Law, no. 8 476

MESNE PROFITS—*interest—rate after delivery of possession.*

The rate of interest on mesne profits depends on a variety of circumstances. The court should award a fair rate. A distinction cannot be made between the rate payable up to the date of delivery of possession and that awarded thereafter on the amount which represents the profits found to be due on that date. *Kedarnath Goenka* v. *Maharaj Kumar Bageshwari Prasad Singh*, (1937) I. L. R. 16 Pat. 882

MINOR—*suit against minor—notice served on mother as guardian—absence of order of appointment and consent of guardian—decree, whether is a nullity. See* Chota Nagpur Tenancy Act, 1908, no. 3 632

MORTGAGE.—

1———*co-sharer, mortgage by, of undivided share in property jointly held by co-sharers—partition—other co-sharers take mortgaged property free from mortgage—mortgagee's right to proceed against the property allotted to his mortgagor—onus of proof, when shifts from one side to the other.*

In order to shift the onus from one side to the other, the evidence adduced by the party on whom the onus lies must be held to be sufficient to establish a prima facie case.

Where a co-sharer mortgages his undivided share in a property held jointly by all the co-sharers and the mortgage is followed by a partition and the mortgaged property is allotted to the other co-sharers, they take the property, in the absence of fraud or collusion, free from the mortgage and the mortgagee is entitled to seize only that property which after the partition has fallen to the share of the mortgagor. *Nirmal Kumar Nawlakha* v. *Sant Lal Mahto*, (1937) I. L. R. 16 Pat. 622

2———*Joint Hindu family—mortgage by one member of undivided share, if void ab initio—mortgagor making representation as to separation—transferee for value without notice—mortgage lien, whether transferred on specific*

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MORTGAGE—*concld.*

property allotted to mortgagor—Transfer of Property Act, 1882 (*Act IV of* 1832), *sections* 3 and 43. *See* Hindu Law, no. 3 230

2———*Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 89—*order absolute for sale—security and right of redemption, whether extinguished—suit on first mortgage —order absolute—puisne mortgagee not made party—purchaser in execution, right of, whether prevails against puisne mortgagee.*

On the making of the order absolute for sale under the old section 89 of the Transfer of Property Act, 1882, the security as well as the defendant's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

In cases governed by section 89, an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is not entitled to set up the first mortgage as a shield against a subsequent mortgagee who is not made a party to the action on the first mortgage and is not consequently bound by the sale or the decree on which it proceeded.

Held, therefore, that the purchaser in execution of the order for sale under section 89 of the Act, on the basis of the first mortgage obtains no title whatsoever which can prevail against the second mortgagee (or purchaser in execution of the decree obtained on the second mortgage), who is not made a party to the suit of the first mortgagee.

Gobind Saran Singh v. *Ram Autar Singh*, (1937) I. L. R. 16 Pat. 709

MUHAMMADAN LAW—*Shias—Wakf—conditions necessary to effect Wakf—proof.*

Under Shia law actual delivery of possession by or by direction of the Wakif is a condition precedent to the wakf having validity and effect.

Where the Wakif by the Wakfnama appointed himself the first mutawali and by the deed itself indicated that by mutation he would fulfil the condition requiring transfer of possession and where in fact mutation was effected in respect of the great bulk of the settled property by registering the properties, formerly in the settlor's name, in the names of himself and another as mutawalis and an account was begun in the name of the Wakf and there was no suggestion or suspicion that he had any motive or desire to withhold any item of property.

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MUHAMMADAN LAW—concld.

Held, that the settlor had done what was necessary to change the character of his possession, to give possession to the mutawalis and to discontinue his own possession as proprietor. *Syed Ali Zamin* v. *Syed Akbar Ali Khan*, (1937) I. L. R. 16 Pat. 844

MUKHTAR—*identification by, who has become professional identifier, should not be accepted.*

It is not expedient in the public interest that the profession of professional identifiers should be allowed to continue. Identification by mukhtars who have made identification their profession should not be accepted by courts and officers as a matter of course. *Rai Babban Lal Mukhtar, In the matter of*, (1937) I. L. R. 16 Pat. ... 121

NEGOTIABLE INSTRUMENTS ACT, 1881—

1————*section* 28—*Hindu Law—manager, promissory note executed by—suit—other co-parceners, whether liable—manager, whether personally liable—co-parceners, extent of the liability of. See* Hindu Law, no. 10 441

2————*section* 48—*promissory note, assignment of, by registered instrument, whether valid—negotiable instrument, transfer of, whether can be effected otherwise than by endorsement and delivery—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 137, *effect of.*

A negotiable instrument can be transferred otherwise than by endorsement and delivery.

Section 137 of the Transfer of Property Act, 1882, does not prohibit the transfer of a negotiable instrument by means of a separate written instrument.

Held, therefore, that an assignment of a promissory note by a registered instrument is valid and the assignee has the right to sue upon it in his own name.

Per COURTNEY TERRELL, C. J.—The transfer of a negotiable instrument is not, by section 48 of the Negotiable Instruments Act, restricted to the operation of endorsement.

Ghanshyam Das Marwari v. *Ragho Sahu*, (1937) I. L. R. 16 Pat. 74

ONUS OF PROOF—*burden, when shifts from one side to the other. See* Mortgage no. 1 622

PARTITION SUIT—*mode of levying court-fee. See* Court-fee, no. 2 491

PARTNERSHIP ACT, 1932—*section* 69(1)—*arbitration out of court—award in favour of unregistered company—objection to the enforceability of award under section* 69(1)—*illegality, whether apparent on the face of the award. See* Code of Civil Procedure, 1908, no. 25 742

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PENAL CODE, 1860—

1————*sections* 40, 41, 42, 64 *and* 67—*offence, meaning of—rules framed under Sugar-cane Act,* 1934—*conviction for breach of rules—sentence of imprisonment, whether can be awarded in default of fine—General Clauses Act,* 1897 (*Act X of* 1897), *section* 25. *See* Sugar-cane Act, 1934, no. 1 92

2————*section* 84—*unsoundness of mind, nature of—accused, when exempted from criminal responsibility—test—presumption of criminality arising out of consciousness of the nature of act done.*

It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility within section 84, Penal Code, 1860, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.

A person is not entitled to exemption from criminal liability in cases in which it is only shown that he is subject to insane impulses while the cognitive faculties remain, so far as can be judged from his acts and words, unimpaired.

Where the Judge drew an inference of " derangement of the brain " from the very nature of the act done by the accused, *held*, that the test applied by the Judge was inadequate; one must look outside the act itself for the evidence as to how much the accused knew about it.

A person is presumed to be responsible for his action unless the kind of insanity referred to in section 84 is affirmatively proved; likewise, if he is conscious of the nature of his act, he is presumed to have been conscious of its criminality.

Where it was proved that the accused had committed multiple murders while suffering from mental derangement of some sort and it was found that there was (*i*) absence of any motive, (*ii*) absence of secrecy, (*iii*) want of pre-arrangement and (*iv*) want of accomplices, *held*, that the circumstances were insufficient to support the inference that the accused suffered from unsoundness of mind of the kind referred to in section 84. *King-Emperor* v. *Gedka Goala*, (1937) I. L. R. 16 Pat. 833

3————*sections* 196, 197 *and* 198—*knowingly using false certificate as true—certificate granted by Chairman of Municipality based on Death Register, if a certificate contemplated by sections* 197 *and* 198—*prosecution, if can be based on evidence not shown to be in existence under section* 196.

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PENAL CODE, 1860—*contd.*

The petitioner in support of his defence produced a certificate granted by the Chairman of the Cuttack Municipality which was based on an entry in the Death Register and also summoned the family astrologer to produce an almanac to prove the date of his father's death. The Small Cause Court Judge found the date of death in the certificate to be incorrect and the petitioner was tried and convicted.

Held—(*i*) that the certificate in question was not a certificate contemplated by sections 197 and 198 of the Penal Code as it was a certificate not required by law to be given or signed.

(*ii*) in order to convict a person of an offence under section 196 of the Penal Code it was necessary to show that the evidence which he used or attempted to use as true or genuine was in existence at the time and the almanac not having been shown to be in existence the charge was untenable. *Kumar Choudhri* v. *The King-Emperor*, (1937) I. L. R. 16 Pat. 21

———*sections* 196 *and* 211—*making false charge against Subordinate Judge before District Judge—sanction by local Government—complaint by District Judge, whether necessary under section* 195(*1*) (*b*) *of the Code of Criminal Procedure*, 1898 *District Magistrate, whether can take cognizance under section* 190(*c*).

K filed an application for permission to sue as a pauper before the Subordinate Judge who rejected the same and thereafter he sent a petition to Mr. Chaudhury, the District Judge, addressed to the Governor in Council for permission to prosecute the Subordinate Judge for an offence under section 196 of the Penal Code. Mr. Chaudhury enquired into the allegations and found them to be false and forwarded the petition to the Governor in Council. The Governor in Council declined to sanction the prosecution and directed the Public Prosecutor to move the District Judge to make a complaint in writing against *K* under section 195(*1*) (*b*) for having committed an offence under section 211 of the Penal Code and in case the District Judge was of opinion that no complaint was necessary to make the complaint himself. The Public Prosecutor moved the District Judge and Mr. Mukherjee the successor in office of Mr. Chaudhury made a complaint in writing to the District Magistrate who took cognizance of the case, and transferred it to a Deputy Magistrate for trial and *K* was convicted, but acquitted on appeal by the Sessions Judge.

No criminal court can take cognizance of an offence under section 196 of the Penal Code against a Subordinate Judge without the sanction of the local Government under

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PENAL CODE, 1860—*contd.*
section 197 of the Code of Criminal Procedure and without a complaint in writing by the District Judge under section 195(1) (b).

Held, that making false allegations against the Subordinate Judge to the District Judge who had statutory authority over him with the intention of setting the criminal law in motion amounted to the making of a false charge within the meaning of section 211 of the Penal Code, 1860.

But as the false statement was not made in or in relation to any proceeding in court the complaint by the District Judge was invalid.

Held, that as section 476 of the Code was inapplicable, there was nothing to prevent the District Magistrate from taking cognizance of the offence under section 190(c) of the Code and the trial was not without jurisdiction.

Government Advocate, Bihar v. *Kumar Singh*, (1937) I. L. R. 16 Pat. 571

5 ——— *section 477A—"fraudulent" falsification of accounts, what constitutes—deceitful act wilfully exposing anyone to risk of loss whether amounts to fraud.*

The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practised to cause wrongful loss that is dishonesty, but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud.

The appellant was a sub-overseer in the Wards and Encumbered Estates Department and his duty was to prepare estimates of repair works to buildings, etc., of the estates under administration, to supervise the works, to measure and certify the amount of work done and calculate what was due to the contractor to whom payment was made on bills prepared by this sub-overseer. The appellant prepared a bill purporting to be based on measurements made on the 25th March, 1936. The bill contained a certificate that the work had been satisfactorily completed and had been measured by the appellant on that date, the measurements being entered in his measurement book. On the basis of the certificate the bill was passed and paid. The appellant having been prosecuted on a charge under section 477A of the Penal Code, admitted that the entries in the measurement book were fictitious and that he had not in fact measured up the work. But the defence was that if the whole of the work done by the contractor had been measured up, it would have been found that the contractor in fact had not been overpaid but had done work in excess of the amount billed for.

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PENAL CODE, 1860— *concld.*

Held, (i) that the appellant having wilfully falsified the measurement book and bill with the intent that the contractor's bill might be passed without actual measurement, he thereby wilfully exposed the estate to risk of loss, and, therefore, that the act of the appellant amounted to a "fraudulent" falsification of account within the meaning of section 477A of the Penal Code, 1860;

(ii) that it was no answer to the charge for the appellant to say that he did not know that wrongful loss would be caused to Government or wrongful gain to the contractor when he certified the correctness of claim which he believed was not exaggerated. *Sukhamoy Maitra* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 688

PRE-EMPTION—

1———*mukarrari and raiyati land, whether can be subject of pre-emption, maintainability of suit.*

Held, that there could not be any right of pre-emption with regard to mukarrari or raiyati interest.

Phul Mohammad Khan v. *Quazi Kutubuddin*, (1937) I. L. R. 16 Pat. 519

2———*pre-emptor depositing entire price in favour of vendee—vendee not paying mortgagee—pre-emptor if can recover from vendee—vendee, whether becomes a trustee for the pre-emptor.*

A pre-emption decree directed the pre-emptor to deposit the entire purchase price in favour of the vendee. The purchase price included a certain sum which was to be paid to a zarpeshgidar of the vendor and which had not been paid by the vendee. The pre-emptor deposited the entire sum and the vendee withdrew the same.

Held, (i) that the vendee was under no obligation to pay to the pre-emptor the amount which he had not paid to the zarpeshgidar. Cases of trust, quasi contract or near relationship, where, in certain circumstances, agreement may be enforced by strangers, stand on a different footing;

(ii) that the plaintiff could and should have obtained relief in respect of the zarpeshgi money in the pre-emption suit, if necessary by amending the plaint;

(iii) that the vendee could not be regarded as a trustee for the pre-emptor. *Sital Prasad Sukul* v. *Ram Saran Missir*, (1937) I. L. R. 16 Pat. 860

PRIVY COUNCIL PRACTICE—*Order-in-Council passed against a dead person, whether is a nullity. See* Execution, no. 8 ... 816

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PROMISSORY NOTE—

1————*assignment of promissory note by registered instrument, whether valid—transfer, whether can be effected otherwise than by endorsement and delivery. See* Negotiable Instruments Act, no. 2 74

2————*Hindu Law—manager, promissory note executed by—suit—other co-parceners, whether liable—Negotiable Instruments Act*, 1881 (*Act XXVI of* 1881), *section* 28—*manager, whether personally liable—co-parceners, extent of the liability of. See* Hindu Law, no. 10 441

PROVINCIAL INSOLVENCY ACT, 1920—

1————*sections* 2(*d*), 28(2) *and* 59—" *property* " *meaning of—Hindu father adjudicated insolvent—Court or Receiver, whether empowered to sell son's interest in family property for the proper debts of the father.*

When a Hindu father is adjudicated insolvent, the interest of his son or sons in the family property does not vest in the Court or the Receiver but the Court or the Receiver has power to sell the joint family property, including the interest of the minor son or sons of the insolvent, for the payment of his antecedent debts not incurred for immoral or illegal purposes.

The power or the right, which the father has under the Hindu Law, to sell his son's interest for the payment of his proper debts is " property " within the meaning of sections 28 (2) and 59 of the Provincial Insolvency Act, 1920. *Bishwanath Sao* v. *The Official Receivers*, (1937) I. L. R. 16 Pat. 60

2————*sections* 7 *and* 75(3)—*joint Hindu family, whether as such can be adjudicated insolvent—members, adjudication of—joint personal liability necessary—minors, whether must be excluded—one petition for adjudication against all the members, whether maintainable—leave to appeal, whether can be granted at the time of final hearing of the appeal.*

The members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test to be applied is whether, if the application was treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable.

Acts of insolvency as defined in section 6 of the Provincial Insolvency Act, 1920, are acts—things done or

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PROVINCIAL INSOLVENCY ACT, 1920—*concld.*

suffered to be done—creating personal liability. Although the manager of a joint Hindu family can act on behalf of the family, the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family, speaking generally, as an act committed by other members of the family also. It follows that the joint Hindu family as such cannot be adjudicated insolvent but that two or more members of such a family who have incurred a joint personal liability may present a joint petition in insolvency (itself an act of insolvency) or may be proceeded against on one petition of the creditor, in case the joint act of insolvency can be brought home to them.

Minors must, however, be excluded in any case from insolvency proceedings started at the instance either of debtors or creditors.

Leave to appeal under section 75(3) of the Act can be granted at the time of the final hearing of the appeal. *Mahabir Prasad Poddar* v. *Ram Tahal Mandar*, (1937) I. L. R. 16 Pat. 724

3———*section 50—court, whether has power to expunge or reduce debt after annulment of adjudication.*

Section 50 of the Provincial Insolvency Act, 1920, is one of those sections which govern the procedure of the Court during the course of the administration of the debtor's assets in an insolvency. Therefore, where the insolvency comes to an end by the annulment of adjudication, the court has no power to expunge or reduce the debt of a creditor under section 50. *Khemkarandas Jokhiram* v. *Chouthmal Bhagirath*, (1937) I. L. R. 16 Pat. 754

4———*section 75(3)—leave to appeal, whether can be granted at the time of final hearing of the appeal. See* no. 2, *supra*. 724

PUBLIC NUISANCE—*obstructing villagers from taking water from a well, if amounts to—suit by some of the villagers without proof of special damage, if maintainable—Code of Civil Procedure*, 1908 (Act V of 1908), *section* 91 *and Order I, rule* 8—*suit, if maintainable without recourse to proceedings under rule* 8.

Order I, rule 8, is an enabling section which entitles one party to represent many who have a common cause of action, but it does not force one to represent many if his action is maintainable without the joinder of other persons.

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PUBLIC NUISANCE—*concld.*

A single member of the public cannot maintain an action in respect of a public nuisance without establishing special damage or without the consent of the Advocate-General under section 91 of the Code of Civil Procedure. The law in this respect is the same in India as in England.

But the right of the resident of a village to sue for removal of an obstruction to a village path or to a well does not amount to a public nuisance.

Where the plaintiff instituted a suit for a declaration that they had a right along with other members of the public to take water from a certain well and to remove certain obstruction and did not allege or prove any special damage or had recourse to the provisions of Order I, rule 8, of the Code of Civil Procedure, *held* that the action was maintainable. *Ramghulam Khatik* v. *Ramkhelawan Ram*, (1937) I. L. R. 16 Pat. 190

RAILWAY COMPANY—*suit for damages—negligence, what constitutes—duty to guard and shut gates at level crossing—contributory negligence—plaintiff, when entitled to damages.*

Where there is a level-crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level-crossing by means of gates and the duty of closing gates in sufficient time before the approach of a train is cast on the Railway Company, and if the Railway Company leave the gates open, it is an invitation on their part for passengers and traffic to approach the line.

Notwithstanding the duty on the part of the Railway Company, it is the duty of passengers, who use the level-crossing, to conduct themselves as reasonable beings and if they are guilty, notwithstanding the non-fulfilment of the duty by the Railway Company, of stupid and unreasonable conduct, the negligence of bringing about an accident is theirs and not of the Company.

Where, in a suit for damages against the Railway Company, the plaintiff alleged that his elephant was hit and killed by the train at the level-crossing and it was found as a fact that this level-crossing was not guarded by a gate-keeper and the gates had not been closed before the approach of the train and it was further found that there existed exceptional circumstances which did not make it an unreasonable act on the part of the *mahut* of the elephant to urge it forward on to the line and cross it, *held*, that the Railway Company had clearly neglected their duty so as to make them liable in damages. *Bengal and North-Western Railway Company, Ltd.* v. *Matukdhari Singh*, (1937) I. L. R. 16 Pat. 672

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RECORD-OF-RIGHTS—

1————*ghairmazurua-am, meaning of—zamindar, whether has any right of control over lands recorded as ghairmazrua-am.*

The Muhammadans brought a suit for a declaration that they had a right to bathe in the Saptadhara *kund* (pool) at Rajgir which was recorded in the record-of-rights as *ghairmazrua-am* and it was found as a fact that the *kund* in question was a place of religious sanctity to the Hindus and the control of the *kund* was in the hands of Brahmin priests who received offering from Hindu pilgrims,

Held, that the entry *ghairmazrua-am* in the record-of-rights meant that it was public waste or uncultivated land over which the zamindar had no right of control and further that the entry in question referred to the Hindu public only. *Muhammad Walilul Haq* v. *Ludpud Upadhya*, (1937) I. L. R. 16 Pat. 889

2————*presumption of correctness of entry in—Bihar Tenancy Act*, 1885 (*Act VIII of* 1885), *section* 103*B—entry as to rent free, if rebutted by showing that land was within a permanently settled revenue paying estate—onus.*

The plaintiffs instituted suits for declaration of title and recovery of possession on the allegation that the suit lands were mal lands and not rent free. The defendants relied on the entry in the record-of-rights finally published under section 103B of the Bihar Tenancy Act. In second appeal it was contended that the onus had been wrongly placed and the entry in the record-of-rights had been rebutted by the plaintiffs showing that the land was within their permanently settled estate.

Held (*i*) that the question of onus did not arise in the case as both parties had adduced evidence and the decision was based on balance of evidence.

(*ii*) it cannot be laid down as a general proposition of law that the presumption as to correctness of the entry in the record-of-rights of a particular land being rent free is in every case rebutted by the proof that the land is within the permanently settled village of the landlord and is assessed to revenue.

Whether the presumption of the correctness of an entry had been proved to be rebutted was a question of fact and had to be decided on the facts of each particular case. *Surpat Singh* v. *Kumar Bhupendra Narayan Singh*, (1937) I. L. R. 16 Pat. 105

REGISTRATION ACT, 1908—

1————*section* 17—*reference to arbitration without the intervention of Court—award, when requires registration—"operate", meaning of. See* Arbitration, no. 1 ... 34

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REGISTRATION ACT, 1908—*concld.*

2——————*sections 34, 36 and 77—order extending time signed by District Sub-Registrar for District Registrar, legality of—failure of Sub-Registrar to take proper steps to procure attendance of defendant, whether bars a suit under section 77.*

Although it is more proper for the District Registrar, when he makes an order extending time under section 34(*1*) of the Registration Act, 1908, to sign the order himself, the order does not become invalid merely because the District Sub-Registrar signs it for him.

The fact that the Sub-Registrar, when he is moved to issue process under section 36 of the Registration Act, fails to take the proper steps to secure the attendance of the defendant cannot in any way prejudice the right of the plaintiff to institute a suit under section 77 of the Act when registration is refused. *Thakur Prasad Marwari* v. *Chaman Ram Marwari*, (1937) I. L. R. 16 Pat. ... 660

8——————*section 77. See* no. 2, *supra* 660

REMAND—*remand for rehearing of issues not raised in the plaint, legality of. See* Chota Nagpur Tenancy Act, 1908, no. 8 ... 632

RENT—*" rents and profits accruing ", meaning of—rent received in advance, if can be said to be rent accruing—rent, when falls due—rent, if accrues from day to day—Bihar Tenancy Act, 1885 (Act VIII of 1885), section 53—Transfer of Property Act, 1882 (Act IV of 1882), section 36—suit to recover rent received in advance by defendant—Limitation Act, 1908 (Act IX of 1908), articles 62, 109 and 120—proper article applicable.*

By a compromise the plaintiff was entitled to " all rents and profits accruing from 20th July 1928 " of certain properties. The defendants had as a matter of fact received the rent of September kist in advance from the tenants. The plaintiff sued to recover this amount from the defendants and it was contended that rent of September kist had accrued after the 20th July, 1928, and they were entitled to it.

Section 53 of the Bihar Tenancy Act, which applies to the case, provides that

" money rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year".

and therefore the words " accruing after the 20th of July, 1928 " referred to the September kist, that is to say, the rent which accrued after that date. The payment of rent by the tenants was an advance to the landlord with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent.

RENT—*concld.* PAGE.

That in India, apart from the provisions of section 36 of the Transfer of Property Act, which did not apply to the case, rent does not accrue from day to day.

Held, that the sums received by the defendant could not be said to have been wrongfully received and therefore Article 109 of the Limitation Act had no application. The case was governed by Article 62 or Article 120 of the Act; and in view of the meaning of the expression "accruing" the action was within time. *Maharaj Kumar Ram Ranbijaya Prasad Singh* v. *Rai Bahadur Harihar Prasad Singh*, (1937) I. L. R. 16 Pat. 184

RES JUDICATA—

1———*amendment of decree after it is dead—executing court, whether can go behind the order of amendment. See* Limitation Act, 1908, no. 7 290

2———*pre-decree agreement—decree-holder realizing decretal amount contrary to the agreement—suit by judgment-debtor for recovery of alleged over payment, whether maintainable.*

Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action while the decree or judgment under which it was recovered remains in force.

A brought a suit for the recovery of arrears of rent against *D* who pleaded payment. It appeared that before the decree the parties came to an agreement in pursuance of which *A* promised to give full credit to the defendant for the amounts paid by him and not to execute the decree, and *D* on his part undertook not to press his defence. *D* accordingly suffered a decree to be passed against himself. Notwithstanding the agreement, *A* executed the decree and realized the entire decretal amount. *D* therefore brought the present suit for the recovery of the alleged over payment on the basis of the pre-decree agreement.

Held, that the suit for the recovery of the overpayment was not maintainable, as the matter was res judicata. *Abdul Hamid Khan* v. *Dhani Dusadh*, (1937) I. L. R. 16 Pat. 748

RULES—*framed under Sugar-cane Act, 1934—District Magistrate's order for prosecution for breach of rules 9 to 11—conviction for breach of rule 13, whether legal—rules 11 and 13, whether ultra vires—imprisonment in default of fine, whether can be awarded for breach of the rules. See* Sugar-cane Act, 1934, no. 1 92

SET OFF—*decree for sale, when may be set off against decree for mesne profits—decree in favour of a number of persons,*

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SET OFF—*concld.*
whether may be set off against decree against some of the number. See Code of Civil Procedure, 1908, no. 12 ... 127

STAMP ACT, 1899—*sections* 12, 36, 61 *and* 63—*cancellation of adhesive stamp, if necessary at the time of execution of handnote—cancellation, meaning of—document not properly stamped once received in evidence, whether can be rejected at a later stage.*

A handnote bearing adhesive stamps was admitted in evidence but subsequently it transpired that only one of the stamps had been cancelled at the time of execution. The trial court held that the handnote was not properly stamped and hence inadmissible in evidence under section 36 of the Stamp Act.

Held, (*i*) that the document having once been admitted in evidence it could not be called in question at any subsequent stage of the same suit.

(*ii*) it is not necessary that an adhesive stamp should be cancelled at the time of execution of the handnote. It is sufficient compliance with the provision of sub-section 2 of section 12 that the stamp is cancelled before the court looks at it. *Krishna Kumar Chatterji* v. *Musammat Jagpati Kuer*, (1937) I. L. R. 16 Pat. ... 84

SUGAR-CANE ACT, 1934.—

1————*sections* 3, *clauses* (2) *and* (3) *and* 7—*Sugar-cane Rules* 11, 13, 15 *and* 20—*District Magistrate's order for prosecution for breach of Rules* 9 *to* 11—*conviction for breach of Rule* 13, *whether legal—Sugar-cane Rules* 11 *and* 13, *if* ultra vires—*Penal Code*, 1860 (*Act XLV of* 1860), *sections* 40, 64 *and* 67—*General Clauses Act* (*Act X of* 1897), *section* 25—*imprisonment in default of fine, if can be awarded for breach of Sugar-cane Rules*—" *offence* ", *meaning of.*

The District Magistrate ordered the prosecution of the petitioner, a licensed purchasing agent, under rule 15 of the Sugar-cane Rules for breach of rules 9 to 11 of the said rules but the petitioner was convicted for breach of rule 13, i.e., purchasing sugar-cane without proper weighment.

Held (i) that the conviction was not illegal. When a prosecution has been instituted of a kind requiring the previous complaint, sanction or order of a particular authority, then once the proceedings are on foot they will take their course in respect of any offence which the facts disclose.

Section 7 of the Sugar-cane Act gives very wide powers to Local Government to make rules for the regulation of

SUGAR-CANE ACT, 1934—*concld.* PAGE.

the purchase and sale of sugar-cane by and to licensed purchasing agent and therefore rules 11 and 13 are not *ultra vires*.

The breach of Sugar-cane Rules is an offence within the meaning of section 40 of the Penal Code.

Section 25 of the General Clauses Act makes sections 64 and 67 of the Penal Code applicable to offences under the Sugar-cane Rules and therefore the order passing the sentence of imprisonment in default of fine was not illegal. *Sakaldeo Singh* v. *King-Emperor*, (1937) I. L. R. 16 Pat. ... 92

2————*sections 5 and 7—Sugar-cane Rules*, 1934, *rule* 18 *—whether confined to purchaser only.*

As is indicated by the preamble, the object of the Act is to secure to sugar-cane growers a fair price for their produce. Rule 18 was enacted to prevent the objects of the Act being frustrated. The opening words of the rule "Whoever" is not in any way restricted to the purchaser of sugar-cane and there is no reason why the generality of the expression should be so restricted.

Held, therefore, that the petitioner, whose duty it was to grant *purjis* to sugar-cane growers enabling them to get their sugar-cane weighed, having extracted money from them before granting the *purjis*, was rightly convicted under rule 18 of the Sugar-cane Rules. *Ram Saran Jha* v. *King-Emperor*, (1937) I. L. R. 16 Pat. 251

SUGAR-CANE RULES, 1934.—*Rule* 18, *whether confined to purchaser only. See* Sugar-cane Act, 1934, no. 2 ... 251

TORT—*subsidence of mines—right of owner of surface rights to damages caused to buildings and machinery—joint Hindu family—liability of members in possession of the mines for subsidence due to working of the mines in the life-time of the father—personal liability—damages.*

The father of the defendants who died in a state of jointness with them in 1923 had mining rights in certain plots and he worked the mines. The mines subsided in 1930 and the plaintiff who had surface rights sued for damages caused by the subsidence. The trial court found that the subsidence was due to the working before 1923 and held that it was not a case of tort but the defendants were under a contractual obligation to support the surface.

Held, (*i*) that the action was in tort. The owner of the surface has a right in law of support, or, in other words, in truth his right is a right to the ordinary enjoyment of his land and the infringement of that right is tortious.

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TORT—*concld.*

The question whether the action died with the father or not did not arise in this case. There was no right of action against the father at the time of his death as nothing happened which gave rise to any. The working did not become actionable until after his death, i.e., when the subsidence took place in 1930.

(*ii*) that the defendants who were members of a joint family with their father and who continued to work the mines on the authority of the lease in the name of their father, although the business was not ancestral, were liable for damages to the plaintiff in common law, but the liability of the defendant was confined to the assets of the joint family.

(*iii*) that the fact that the subsidence took place while the defendants were in possession would not make them personally liable.

(*iv*) that as it was not shown that the subsidence was caused by the erection of the buildings the damages may include their value. *Ambalal Khora* v. *The Bihar Hosiery Mills, Ltd.*, (1937) I. L. R. 16 Pat. 545

TRANSFER OF PROPERTY ACT, 1882.—

1———*sections 3 and 43—joint Hindu family—mortgage by one member of undivided share, if void—mortgagor making representation as to separation—mortgage lien, whether transferred on specific property allotted to mortgagor. See* Hindu Law, no. 3 230

2———*section 36—rent, whether accrues from day to day in cases not governed by the Act. See* Rent ... 184

3———*section 73—Transfer of Property (Amendment) Act, 1929 (Act XX of 1929)—right of mortgagee to surplus sale proceeds—Revenue sale, subject to incumbrance, whether entitles mortgagee to proceed under section 73.*

Where a residuary share which included the mortgaged properties was sold for arrears of revenue, *held*, that section 73 of the Transfer of Property Act had no application as the mortgagee had not been deprived of his security and the security had not been diminished.

Section 73 of the Transfer of Property Act creates no new law, but merely gives effect to the old law of substitution. The amendment of the Act, however, extended the section, so that it dealt not only with the sale of the mortgaged property at a revenue sale but also to the sale of any part thereof or any interest therein. *Krushna Chandra Dhar* v. *Bepin Behari Padhi*, (1937) I. L. R. 16 Pat. 299

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TRANSFER OF PROPERTY ACT, 1882—*concld.*

4————*section 82—sale of mortgaged property—consideration left with vendee and mortgagee—purchaser taking free from encumbrance, whether liable to contribute—" contract to the contrary ", whether includes a contract between the mortgagee and purchasers from mortgagor. See* Contribution 557

5————*section 89—order absolute for sale—security and right of redemption, whether extinguished—suit on first mortgage—order absolute—puisne mortgagee not made party—purchaser in execution, right of, whether prevails against puisne mortgagee. See* Mortgage, no. 3 709

6————*section 137—negotiable instrument, transfer of, whether can be effected otherwise than by endorsement and delivery—section 137, effect of. See* Negotiable Instruments Act, 1881, no. 2 74

TRANSFER OF PROPERTY (AMENDMENT) ACT, 1929—*section 78 of the Transfer of Property Act, scope of, whether extended. See* Transfer of Property Act, 1882, no. 3 299

TRIAL BY JURY.—

1————*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections 282 and 283—Sessions Judge, inherent power of, to discharge a jury.*

The Sessions Judge discharged the jury, after the trial had proceeded for five days as he considered that absolute impartiality might not be evinced by them, and empannelled a fresh jury.

Held that the power of the Sessions Judge to discharge a jury was not confined to cases of misconduct or to provisions of sections 282 and 283 but he had inherent power to discharge a jury and empannel another.

Even if the High Court considered the order unjustified, the only relief the High Court could give was to order a fresh trial, which had already been done in the case.

Bipat Gope v. *The King-Emperor*, (1937) I. L. R. 16 Pat. 8

2————*Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections 307 and 438—Judge, when should refer a case to the High Court—High Court, whether can direct the judge to refer the case—High Court's power of interference on an incompetent reference under section* 438.

The case for the prosecution was that a girl was induced to go with the accused by deceitful means and the deceitful means were the subject-matter of the charge of cheating. The offence under section 366 was tried by a jury and that under section 417 with the aid of the same

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TRIAL BY JURY—*concld.*

gentlemen acting as assessors. The charge to the jury was mostly in favour of the accused. The Assistant Sessions Judge acquitted the accused of the offence of cheating but agreeing with the verdit convicted him of abduction. The Additional Sessions Judge on appeal referred the case under section 438 of the Criminal Procedure Code so that the High Court may direct the Assistant Sessions Judge to refer the case under section 307 of the Code.

Held, that the High Court had no power to direct the Assistant Sessions Judge to refer the case under section 307 of the Code. The Legislature has made him the sole Judge to decide whether a reference should or should not be made. The decision whether a reference should or should not be made depends upon the extent of disagreement which the Judge alone can feel.

It is highly undesirable that in every case in which the Judge finds himself in disagreement with the jury a reference should be made. This will practically make him a Judge of fact which in cases triable by a jury he is not, and will minimise the responsibility of the jury. In order to make a reference there should be disagreement of such a nature that the Judge holds that for the ends of justice the verdict of jury should be superseded.

Held, also, that although the reference by the Sessions Judge may be incompetent the High Court could interfere if a case for interference had been made out. *Rameshwar Singh* v. *King-Emperor*, (1937) I. L. R. 16 Pat. ... 413

VAKALATNAMA—*responsibility in accepting—withdrawal of money.*

It is extremely necessary that advocates having to withdraw money or to accept serious responsibility of the kind from and on behalf of client should, even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the vakalatnama and furthermore they should not accept a vakalatnama unless they have satisfied themselves of the bona fides of the person who offers it to them.

In the matter of an Advocate, (1937) I. L. R. 16 Pat. 488

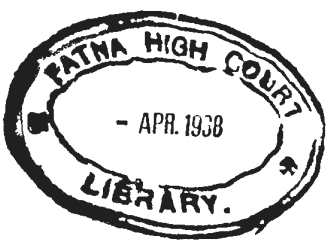
WAKF—*Shia law—conditions necessary to effect Wakf—Proof.* *See* Muhammadan Law 344

WORDS AND PHRASES—

1———*obiter dictum*, *meaning of*. *See* Court-Fees Act, 1870, no. 3 766

2———" *substantial justice* ", *meaning of*. *See* Code of Civil Procedure, 1908, no. 6 729

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